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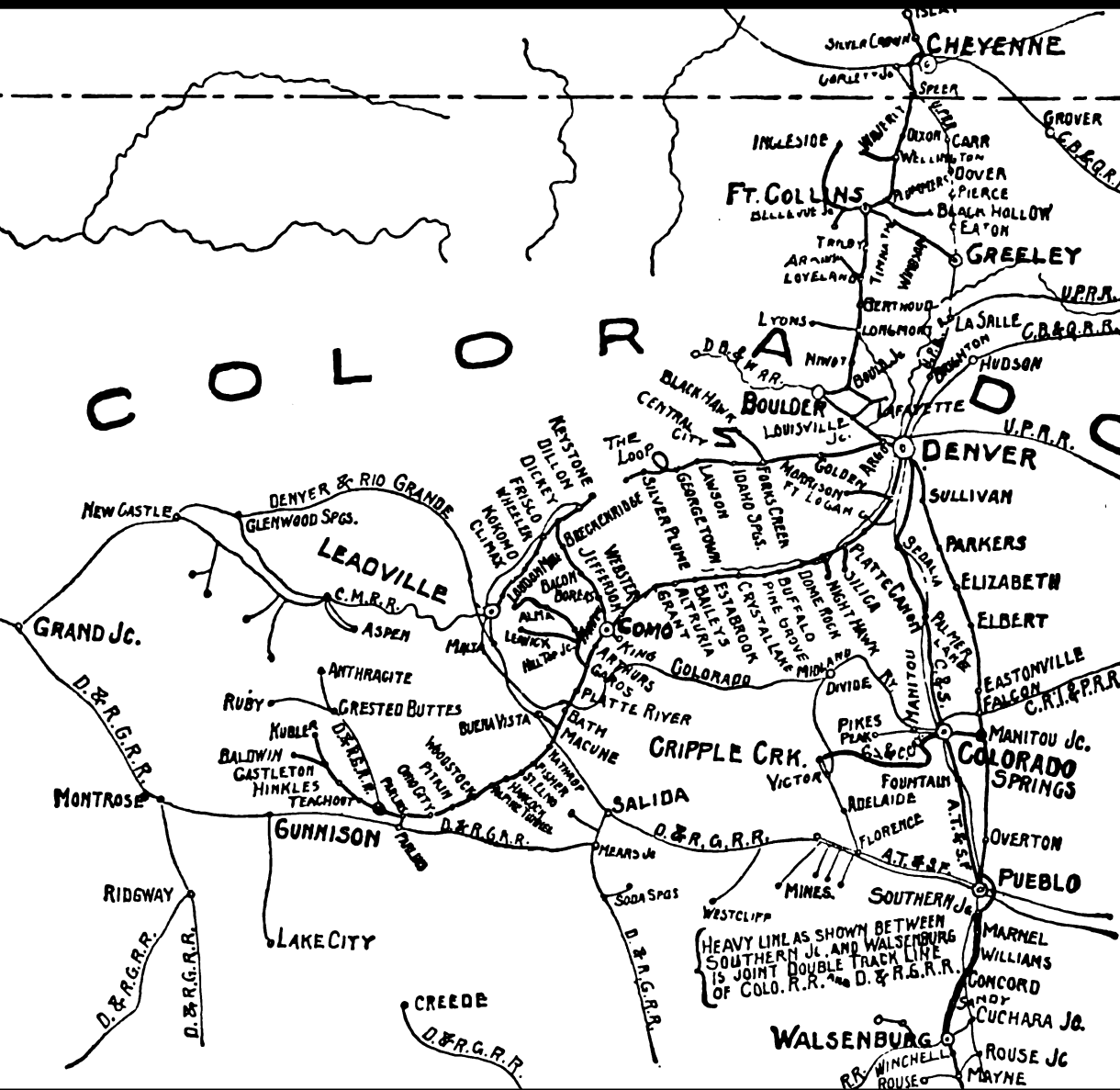
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# *The Pacific Reporter*

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# THE PACIFIC REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 129  
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON  
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING  
UTAH, NEW MEXICO, OKLAHOMA, COURTS OF APPEAL  
OF CALIFORNIA AND COLORADO, AND CRIMINAL  
COURT OF APPEALS OF OKLAHOMA

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS  
HAVE BEEN DENIED  
AND  
TABLE OF STATUTES CONSTRUED

FEBRUARY 10 — MARCH 10, 1913

ST. PAUL  
WEST PUBLISHING CO.  
1913



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TO THE  
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---

# JUDGES

OF THE

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<sup>2</sup> Term expired January 14, 1912.

<sup>3</sup> Became Chief Justice January 14, 1912.

<sup>4</sup> Elected to Supreme Court from Court of Appeals January 14, 1912.

<sup>5</sup> Became Presiding Judge to succeed Tully Scott.

<sup>6</sup> Appointed February 15, 1912.

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 CYRUS BEARD.<sup>24</sup>

<sup>16</sup> Term expired as Presiding Judge and re-elected Associate Judge.

<sup>17</sup> Elected Presiding Judge January 14, 1913.

<sup>18</sup> Ceased to be Chief Justice and became Associate Justice January 6, 1913.

<sup>19</sup> Became Chief Justice January 6, 1913.

<sup>20</sup> Ceased to be Chief Justice and became Justice January 4, 1913.

<sup>21</sup> Became Chief Justice January 4, 1913.

<sup>22</sup> Assigned to Department 1 January 13, 1913.

<sup>23</sup> Became Chief Justice January 13, 1913.

<sup>24</sup> Ceased to be Chief Justice and became Associate Justice January 6, 1913.

<sup>25</sup> Became Chief Justice January 6, 1913.



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THE  
PACIFIC REPORTER  
VOLUME 129

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**BROWN-BEANE CO. et al. v. RUCKER**  
et al.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 100\*)—APPEALABLE ORDER—REFUSAL TO VACATE—INJUNCTION.**

An order denying a motion to vacate a temporary injunction during the pendency of the suit is not an appealable order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.\*]

**2. APPEAL AND ERROR (§ 520\*)—REVIEW—SUFFICIENCY OF RECORD.**

Motions presented in the trial court, rulings thereon, and exceptions thereto, are not a part of the record proper, and to be reviewed on appeal must be brought to the attention of the Supreme Court by bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2359-2366; Dec. Dig. § 520.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by J. G. Rucker and others against the Brown-Beane Company and another. From an order refusing to vacate a temporary injunction, defendants bring error. Dismissed on rehearing.

Biddison & Campbell, of Tulsa, for plaintiffs in error. John Q. Adams, of Claremore, and Randolph & Haver, of Tulsa, for defendants in error.

**BREWER, C.** This case was dismissed by this court in an opinion filed July 18, 1912, on motion of the defendants in error, because said case-made was not served upon the defendants in error within the time fixed by law, or an extension thereof ordered for cause shown, by the court. A petition for rehearing was filed later, in which it is claimed that the cause ought not to have been dismissed on the ground that the case-made was void for want of legal service, for the reason that the main controversy was that the petition filed in the district court did not state facts sufficient to authorize the granting

of a temporary injunction; and that this court can consider that question without a case-made or bill of exceptions, because the purported case-made has also been properly certified by the district clerk, and is therefore a transcript of the record.

We have again examined the record presented and find that the proceedings in this case, and the refusal of the court to vacate its temporary injunction were based upon evidence taken upon a motion filed by the plaintiffs in error, as defendants below, to vacate and set aside the preliminary injunction. The only issue heard by the court was on this motion to vacate the temporary injunction during the pendency of the suit. The court heard considerable evidence on the motion and refused to grant same and continued the temporary injunction in force.

There are two reasons why this contention of appellant cannot be sustained:

[1] First, the order refusing to vacate or modify the temporary injunction during the pendency of the suit was not an appealable order under the authority of *School District No. 8 et al. v. Eakin*, 23 Okl. 321, 100 Pac. 528; following *Herren v. Merrilees*, 7 Okl. 261, 54 Pac. 487; *Herring et al. v. Wiggins*, 7 Okl. 312, 54 Pac. 483.

[2] Second, because motions presented in the trial court, the rulings thereon, and exceptions thereto, are not a part of the record proper, and to be reviewed on appeal must be brought to the attention of the Supreme Court by bill of exceptions or case-made, on the authority of a long line of cases. *Craig v. Greer, Sheriff*, 124 Pac. 1096, not officially reported; *Green et al. v. Incorporated Town of Yeager*, 23 Okl. 128, 99 Pac. 906; *Lamb et al. v. Young et al.*, 24 Okl. 614, 104 Pac. 335; *Nelson et al. v. Glenn et al.*, 28 Okl. 575, 115 Pac. 471; *Tribal Development Co. v. White Bros. et al.*, 28 Okl. 525, 114 Pac. 736; *Richardson v. Beidleman*, 126 Pac. 816, 818, not officially reported.

The appeal was properly dismissed, and the petition for rehearing is denied.

PER CURIAM. Adopted in whole.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—1

## VAN EMAN v. MOSING.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

*(Syllabus by the Court.)*

## 1. MORTGAGES (§ 277\*)—SALE OF LAND—MORTGAGE DEBT—LIABILITY OF PURCHASER.

The mere purchase of the equity of redemption in mortgaged land does not make such purchaser liable personally for the payment of the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 726, 727; Dec. Dig. § 277.\*]

## 2. MORTGAGES (§ 277\*)—SALE OF LAND—MORTGAGE DEBT—LIABILITY OF PURCHASER.

No personal obligation rests upon the purchaser of mortgaged land to pay the mortgaged debt, unless by agreement he assumes its payment, or, by retaining the amount out of the purchase price, or otherwise, he clearly makes the debt his own.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 726, 727; Dec. Dig. § 277.\*]

## 3. MORTGAGES (§ 559\*)—FORECLOSURE—SALE OF LAND—DEFICIENCY JUDGMENT.

Where the purchaser of mortgaged land has not assumed the payment of the mortgage debt, nor otherwise clearly made the debt his own, a personal or deficiency judgment cannot, ordinarily, be rendered against him in a suit on the debt, or to foreclose the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by William Mosing against G. S. Van Eman. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Eagleton, Biddison & Merritt and Orton & McNeill, all of Pawnee, for plaintiff in error. Victor O. Johnson, of Shoshone, Idaho, and L. S. Wilson, of Raton, N. M., for defendant in error.

BREWER, C. In January, 1907, Van Eman and Mosing each owned an undivided one-half interest in the S. E.  $\frac{1}{4}$  of section 20, township 20 N., range 7 E., in Pawnee county. Several years prior, a grantor in the chain of title had incumbered the quarter section with a mortgage for \$800. January 5, 1907, the two owners by mutual agreement partitioned the land; Van Eman quitclaiming to Mosing the W.  $\frac{1}{2}$  and Mosing to Van Eman the E.  $\frac{1}{2}$  of the quarter section. Van Eman received the improved 80 and paid Mosing \$200 as boot to equalize the values. It was understood that the incumbrance should hold in equal parts as a lien upon each man's land. The two, prior to the division, had paid interest on the mortgage share and share alike. In August, 1908, Van Eman refused to pay any more interest, claiming that because the estate of one of their former grantors had not been probated the title was defective. When the

mortgage note became due in February, 1908, Van Eman refused to pay any part of the debt and suggested foreclosure as a means of cleaning up the title. Mosing then, without the knowledge of Van Eman, so far as the record discloses, paid off the mortgage debt, amounting with interest to \$845.20, received the note and mortgage, but the release was sent by the mortgagee direct to the register of deeds and was recorded. After the recording of the release, Van Eman sold and conveyed, by quitclaim deed, his interest in law and equity in the land, and this deed was on February 20, 1908, also placed on record. This suit was brought March 7, 1908, by Mosing against Van Eman and his grantee, a man named Hinton, on the ground that they had conspired together to defraud plaintiff, and to defeat his right to a lien on the other half of the land, and to subrogation to the lien thereon, and for judgment against Van Eman for a contribution to the amount of one-half the mortgage debt. The case was by agreement tried by the court, which found that "the allegation of conspiracy to defraud plaintiff is wholly unsupported by any evidence in the case," and further that "the defendant Hinton is an innocent purchaser for value and without notice," etc. The court, however, held, as a matter of law, that the plaintiff was entitled to a personal judgment against Van Eman for one-half of the indebtedness paid off, on the theory that he had received the benefits of the payment, and therefore that equity will raise an implied promise to pay by the beneficiary for the benefits received.

We have read the evidence carefully, and it is nowhere shown in it that, when Van Eman sold by quitclaim deed all his right, title, and interest in the land, he had any knowledge that the mortgage had been paid off and that the land was clear; nor is there a suggestion that he sold it as clear land, and received its full value, thereby receiving the benefits of plaintiffs paying off the incumbrance. We cannot assume facts upon which to predicate a judgment of a court. The evidence introduced is to our minds more favorable to the assumption that Van Eman was dissatisfied with the land and the conditions surrounding it, and, without knowledge that the mortgage had been paid, found a purchaser, and sold to him his interest, consisting of an equity in the land, not in any way taking into account, or getting the benefit of, the unknown discharge of the mortgage. We say this, because the conveyance to Hinton was merely by quitclaim deed of all his interest in law and equity in the premises. This fact is somewhat significant. If Van Eman knew the mortgage had been paid, and was selling, and receiving the price for, unincumbered land, the ordinary course would have been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the purchaser to demand, and the seller to freely give, an ordinary deed or conveyance with warranties.

But, however, it is futile to here speculate on the matter. The judgment must stand, if stand it can, upon the record as made; and this fails to show the slightest fact proving, or from which legitimate inference may be drawn, that Van Eman did other than sell, for what he could get for it, his equity in land incumbered by a mortgage he had not assumed and for the payment of which, therefore, he was not personally liable.

If it had been shown that Van Eman was aware of the payment, and that the land was clear, and with this knowledge sold it as such, receiving its full price as clear land, thus knowingly taking to himself the benefit of plaintiff's payment, a very different question would be presented, and we would feel like going to the uttermost frontier of equitable rules to affirm the case. As it stands it cannot be done.

[1-3] It is the law that the mere purchase of the equity of redemption in mortgaged lands does not make the purchaser liable for the payment of the mortgage debt. No personal obligation rests upon him to pay it unless by agreement he assumes the debt, or makes the debt his own, by retaining the amount of it out of the purchase price or otherwise. 27 Cyc. 1340 et seq., and cases cited; Jones on Mortgages, vol. 2, § 1712; Nelson v. Rogers et al., 47 Minn. 103, 49 N. W. 526; Searing v. Benton, 41 Kan. 758, 21 Pac. 800; Hull v. Young, 29 S. C. 64, 6 S. E. 938; Tichenor v. Dodd, 4 N. J. Eq. 454; Mueller v. Renkes, 31 Mont. 100, 77 Pac. 512; National H. B. & L. Co. v. Scudder-Gale Gro. Co., 82 Mo. App. 245; Ritchie v. McDuffie et al., 62 Iowa, 46, 17 N. W. 167; Scholten v. Barber, 217 Ill. 148, 75 N. E. 460; Crebbin v. Shinn et al., 19 Colo. App. 302, 74 Pac. 795. Unless such a purchaser has so assumed the debt, he is not liable in a suit to foreclose to have a personal, or deficiency judgment, rendered against him. Jones on Mortgages, vol. 2, § 1712.

In the case at bar neither of the parties to this suit were personally liable for the payment of the mortgage debt, not having assumed or agreed to pay it; they could have abandoned the property, or let it be sold under foreclosure. Either of them could sell his equity in the land and wash his hands of the entire matter; were it not so, it would be extremely hazardous to have anything to do with incumbered estates. The incumbrance being against the land of both these parties, when plaintiff paid it off, he was entitled to be subrogated to the rights of the mortgagee, and to proceed against defendant's lands for the proper contribution, unless by his own management of the matter he has lost this right, through the coming into the case of the rights of an

innocent purchaser who took the title discharged of the incumbrance.

The facts disclosed by the record do not call for an application of the equitable doctrines so interestingly discussed in the briefs filed.

The cause should be reversed and remanded.

PER CURIAM. Adopted in whole

### GOLDIE v. CORDER.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 104\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—ADMISSIONS BY PARTY.

In a suit on account for \$25 per week, or in all \$900, for work done pursuant to a parol contract, and on quantum meruit for a like amount for the same services, where plaintiff recovered the full amount, and where defendant had shown due diligence in his defense, which was a denial of said contract and a set-off, held, that a motion for a new trial on the ground of newly discovered evidence, supported by affidavit that plaintiff during his term of service had admitted that he "was drawing \$20 per week," was properly sustained; the same being a distinct fact coming to defendant's knowledge after the trial, and material, and not cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by Wallace R. Goldie against W. T. Corder. From an order granting a new trial after verdict for plaintiff, he brings error. Affirmed.

Bolen & Adkins, of Oklahoma City, for plaintiff in error. Taylor, Pruitt & Sniggs, of Oklahoma City, for defendant in error.

TURNER, C. J. On November 6, 1909, Wallace R. Goldie, plaintiff in error, sued W. T. Corder, defendant in error, in the superior court of Oklahoma county on account for \$900 for work and labor done as a salesman in his shoe store from April 15, 1907, to June 15, 1909, at \$25 a week, pursuant to an alleged parol contract between the parties. For a second cause of action he sued in quantum meruit for work and labor done, as a shoe salesman, between those dates, alleging said services to be reasonably worth \$25 a week, or in all \$900. For answer defendant, after pleading a general denial, alleged by way of set-off that he had paid plaintiff certain sums set forth in his answer; that plaintiff had purchased merchandise from defendant to the amount of \$8.40, and alleged that plaintiff was absent from the store certain days during the year 1907. He denied that plaintiff was to receive for his services \$25 per week, but admitted that he was indebted to plaintiff in the sum of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



\$201.60 only, which he tendered. Upon the issues thus joined there was trial to a jury and judgment for plaintiff for the full amount claimed. On November 11, 1909, defendant filed a motion for new trial. On December 30, 1909, defendant filed a second motion for a new trial upon the additional ground of newly discovered evidence, basing it upon the affidavit of C. L. James, which substantially states that on May 7, 1907, plaintiff, in a conversation with affiant, stated that he had refused to consider a proposition to purchase an interest in the shoe store of defendant, and that he was doing well and was drawing \$20 per week; that on April 18, 1908, he had another conversation with plaintiff, in which he made the same statements; that affiant is a traveling salesman visiting Oklahoma City four times a year, and that upon these visits the conversations occurred; that he was well acquainted with plaintiff, having known him for about 12 years in Kansas City, Iowa, and Nebraska; "that he knows his reputation in said vicinity of the various places of residence for truth and veracity among the people he has associated with, and that his reputation is bad." Also in support of the motion defendant filed his own affidavit in substance that it was some two weeks after the trial when he first discovered that he could prove by the affiant James the matters and things set forth in his affidavit; that he first learned of the witness and the things he would testify as stated when he, on November 22, 1909, came into affiant's store in Oklahoma City; that prior to the trial he had made diligent search to find witnesses who would prove those facts, and had talked to various persons with a view to procuring said testimony; that said James has assured affiant that in case a new trial was granted he would attend and testify as set forth in his affidavit, and "that said newly discovered evidence is not merely cumulative, corroborative, or impeaching, but is new and important; that it would be likely, as affiant verily believes and charges, to change the result of a new trial." On January 1, 1910, said motion for a new trial was heard, and later sustained, and the verdict set aside and a new trial granted. Plaintiff brings the case here, and assigns for error that the court in so doing abused its discretion.

Of course, where discretion is exercised by the trial court, this court will reverse where the same has been abused. But this motion did not invoke the discretion of that court. It presented a simple and unmixed question of law, and we will not interfere, unless we can see that the court erred with reference thereto. Or, as stated in the syllabus of *J. Ten Cate v. M. El. Sharp*, 8 Okl. 300, 57 Pac. 645: "This court will not reverse the ruling of the trial court granting a new trial, un-

less it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial."

In *Clifford v. Denver, etc., Ry. Co.*, 12 Colo. at page 130, 20 Pac. at page 335, the court said: "Counsel for the appellee insist that the order of the court granting a new trial will not be as readily reversed on appeal as when the motion has been denied. That such is the general rule there is no doubt, but it should be, and always in its application has been, limited to cases where there is a discretion reposed in the court below, or when the new trial is granted on the ground that the verdict is against the evidence, or because injustice has been done. Where the court grants a new trial on a ground not discretionary, and errs in the application of a legal principle in so doing, such action will be corrected on appeal just as readily as if the motion had been overruled." *Stapleton et al. v. Ohara*, 124 Pac. 55.

But the test in these cases is as stated in *Shepherd v. Brenton*, 15 Iowa at page 90, which was an application for a new trial on the ground of newly discovered evidence. There the court said: "It is conceded that if the court, in ordering a new trial, misapplies or mistakes a legal proposition, such ruling will be reviewed with the same freedom as if made at any other stage of the trial. In such a case this court does not supervise the discretion of the court below, but determines whether the view taken of the law was correct. And therefore, if it appeared in this case that a new trial was granted to enable defendant to obtain testimony impeaching or cumulative merely, or to introduce testimony to obtain which no sufficient diligence had been used, we should have no hesitation in reversing such order; for in such a case the court would have no discretion. The law settles the rights of the parties, and it was simply the duty of the court to declare it." But such the court did not do, as contended. The newly discovered evidence was material and not cumulative. The evidence is all before us. The principal issue in the case was whether plaintiff was entitled to recover of defendant a salary of \$25 a week as a salesman, either on a parol contract or on quantum meruit. The jury found that he was, but upon which does not appear. The plaintiff testified that he was so entitled on a parol contract; the defendant testified that he was not, and that no

such contract ever existed. The newly discovered evidence is to the effect that prior to the suit and during his term of service plaintiff made to James an admission against his interest and in effect that he "was drawing a salary of \$20 a week." This was a distinct fact, and, if admitted in evidence, might change the result.

Klopp v. Jill, 4 Kan. 482, was a suit for quantum meruit, in which plaintiff recovered. The defense was that certain plastering in dispute was agreed to be done at the same price for which plaintiff plastered defendant's saloon. On a motion for a new trial on the ground of newly discovered evidence, supported by affidavit showing due diligence, and that plaintiff had admitted "he was to plaster for the same price that he did the saloon," the court held the same to be a distinct fact coming to defendant's knowledge after the trial, and material and not cumulative, and that the motion should have been sustained. In support of this, after citing Waller v. Graves, 20 Conn. 305, and Guyot v. Butts, 4 Wend. (N. Y.) 579, the court said: "The affidavit of Stockman, offered in support of the motion for a new trial, states that Jill admitted to him (Stockman) in conversation that he was to plaster for the same price per yard that he did the saloon. Jill swore very differently on the trial. The case seems to be exactly similar to that of Kane v. Burrus, 2 Smedes & M. [Miss.] 313, cited in Graham & Waterman on New Trials, where, in an action on a promissory note against the maker in favor of plaintiff's intestate, after verdict for plaintiff, defendant produced the affidavit of witnesses that they had heard the intestate acknowledge the payment of \$900 on the note, and also his own affidavit showing that the evidence had come to his knowledge since the trial, and that he had used due diligence to discover it. Held, that the maker was entitled to a new trial. So, also, in Gardner v. Mitchell, 6 Pick. [Mass.] 114 [17 Am. Dec. 349], which was an action for a breach of warranty in the sale of oil, the evidence alleged to have been newly discovered was confessions of the plaintiff, and the question was whether it was new or only cumulative. The confession was that the oil was as good as he expected. The court held this to be a new fact, not before in the case, and awarded a new trial. I am unable to perceive any essential point of difference between these cases and that of the newly discovered evidence of Adolph Stockman, as stated in his affidavit. I think the cause of justice will be likely to be subserved by a new trial."

We are therefore of opinion that the court did not err in granting the motion for a new trial.

Affirmed. All the Justices concur.

TUCKER v. McLAUGHLIN-FARRAR CO.  
(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 196\*)—RIGHTS OF PARTIES—RENTS.

Where a sale of property is evidenced by a written contract, under the terms of which the use and possession of the property is reserved to the vendor until all the purchase price is paid, in the absence of a stipulation in the contract, or proof of a subsequent agreement as to the rents, the vendee is not entitled thereto until he has fulfilled his contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 404-406; Dec. Dig. § 196;\* Landlord and Tenant, Cent. Dig. § 808.]

Commissioners' Opinion. Division No. 2. Error from District Court, Osage County; John J. Shea, Judge.

Action by W. C. Tucker, administrator of David Fronkier, against the McLaughlin-Farrar Company for rent. Judgment for defendant, and plaintiff brings error. Affirmed.

Boone, Leahy & MacDonald, of Pawhuska, for plaintiff in error. Grinstead, Mason & Scott, of Pawhuska, for defendant in error.

HARRISON, C. This action was begun in the district court of Osage county, April 5, 1909, by W. C. Tucker, administrator of the estate of David Fronkier, deceased, against the McLaughlin-Farrar Company, for rent, alleged to be due to the estate of David Fronkier, on the ground that David Fronkier was the owner of certain lots in the town of Pawhuska, and the owner of certain buildings on said lots, which buildings had a rental value of \$30 per month, and which had been used by the McLaughlin-Farrar Company, without payments of rent, until the rent due amounted to \$1,200. Wherefore they ask judgment for said amount. Defendant answered by general denial, and, as a further defense, pleaded a contract entered into December 18, 1905, by and between McLaughlin & Farrar, a partnership, which was succeeded by McLaughlin-Farrar Company, a corporation, and David Fronkier, during his lifetime, whereby defendants attempted to show that prior to the time which title to lots in the town of Pawhuska had been conveyed to any one by the town-site commission defendants had possession of the lots in question, and owned the buildings thereon; that they sold said buildings to David Fronkier, conveying same by written contract, signed by McLaughlin & Farrar and David Fronkier, by the terms of which Fronkier paid \$100 in cash, the balance to be paid October, 1906, the contract further providing that the title in and possession of said buildings should remain with McLaughlin & Farrar until the balance of the purchase price was fully paid, and that they should have 60 days after payment of purchase money in which to give possession of the buildings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to Fronkier. The cause was tried in October, 1910, and judgment rendered in favor of defendant. From this judgment plaintiff appealed to this court.

All the assignments of error grow out of the one decisive question involved, viz., whether the judgment of the court was sustained by sufficient evidence, and whether the court as a matter of law, under the evidence before it, misconstrued the contract in question.

The contract is as follows: "Contract for sale of building. This agreement made and entered into this the 18th day of December, 1905, by and between David Fronkier, party of the first part, heirs and assigns, and McLaughlin & Farrar, parties of the second part, witnesseth: That in consideration of one thousand dollars (\$1,000.00) to be paid as hereinafter stated, said parties of the second part hereby bargain, sell and deliver all buildings and improvements erected by them on lot 15, and ten feet off of the west side of lot ten in block 81, Pawhuska, as shown by the official plat of the town-site board, payments to be made as follows: Cash in hand one hundred dollars, receipt of which is hereby acknowledged, and nine hundred dollars on October, 1906. It is further agreed and understood that the title to the ownership of said buildings and improvement does not pass from the said McLaughlin & Farrar until the payment has been made in full, and that said McLaughlin & Farrar shall have possession of all buildings and improvements on said lot until payment has been made in full, and shall have sixty days' time in which to vacate and give possession after the final payment has been made. Dated at Pawhuska, Okla., this the 19th day of December, 1905."

In addition to the contract the court heard oral testimony from both plaintiff and defendant, and, upon the contract, the oral testimony, and an agreed state of facts, the court rendered judgment for defendant; the facts agreed upon being as follows: "It is admitted by the parties, plaintiff and defendant: That prior to the 18th day of December, 1905, the defendants, McLaughlin-Farrar Company, were the owners of certain improvements consisting of a one-room store building with a shed attached thereto, and that they were located on lot 15, and 10 feet off of the west side of lot 16, in block 81 of the city of Pawhuska, Okla. On the said 18th day of December, 1905, McLaughlin-Farrar Company contracted with David Fronkier, deceased, with relation to said improvements. That said contract was in writing, and such writing is offered in evidence as 'Exhibit A.' That thereafter the town-site commission awarded to the said David Fronkier, deceased, the preference right to purchase said described real property. That he also purchased the same, and received the deed from the said commission on or about the 1st day of June, 1906, and has at all

times since that time been the owner of such real property. That at the time of the entering into the written contract offered in evidence as 'Exhibit A' the said David Fronkier paid to said McLaughlin-Farrar Company the sum of \$100 in cash, and that no other sum has been paid by the said David Fronkier, deceased, or his representatives, to the said McLaughlin & Farrar, or their assigns. That the said McLaughlin-Farrar Company have been in the possession and occupied said improvements since the 18th day of December, 1905, and have not paid any rent for the same. That the said improvements mentioned in said contract have at all times mentioned been situated upon said lots, and that the said property has not been transferred from David Fronkier or his estate. That David Fronkier was a Kaw Indian and could not read or write. That F. W. Farrar, a white man, drew the contract, Exhibit A. That the claim of \$900 was presented to plaintiff and refused unless defendant would account for rent."

From the record before us we cannot say that as a matter of law the court misconstrued the contract and rendered an erroneous judgment, for, under the issues presented by the pleadings, plaintiff's title to the building was obtained through, and evidenced by, the foregoing contract, and, under the agreed state of facts, the contract had not been complied with by plaintiff; he having made default in payment of the purchase price, thereby failing to do the very thing which would have given him the right of possession. The contract plainly provides that McLaughlin & Farrar expressly reserved possession of the property, until the contract price was paid. And it is agreed that the \$900, balance due, had not been paid. Under this state of facts we do not feel justified in holding that the court erred in its finding of fact. Nor can we say that upon such finding of fact the court erred in its conclusions of law; the material feature of the conclusions of law being that a contract of sale, which reserves possession of the property to the vendor until the contract price is paid, is valid. In *Masoner v. Bell*, 20 Okl. 618, 95 Pac. 239, 18 L. R. A. (N. S.) 166, in an opinion by Mr. Justice Turner, this court held: "The payment of the purchase price becomes a condition precedent by legal implication, and, except in the event of waiver by the vendor, title does not vest in the buyer until after performance of such condition. Those principles are upheld and asserted by an unbroken line of decisions of the appellate courts of this state, as well as by the treatises of the most eminent writers upon the subject. *Fiedeman, Sales*, § 93; 1 *Benjamin, Sales* (4th Ed.) 313, 345; *Southwestern, etc., Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Hall et al. v. Railroad*, 50 Mo. App. 179; *Stresovich v. Kesting*, 63 Mo. App. 57." The principle involved in the case supra is the identical principle involved

in the case at bar, viz., the right to reserve possession until the contract price is paid.

The judgment of the court below is therefore affirmed.

PER CURIAM. Adopted in whole.

# HANSON et al. v. KENT & PURDY PAINT CO.

(Supreme Court of Oklahoma. Nov. 19, 1912.)

(Syllabus by the Court.)

## 1. APPEAL AND ERROR (§ 758\*)—BRIEFS—SETTING OUT EVIDENCE.

Where a party alleges error on account of the admission or rejection of evidence, but fails to set out in his brief the full substance of such evidence to the admission or rejection of which he objects, stating specifically his objection thereto, the same will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.\*]

## 2. TRIAL (§ 202\*)—"INSTRUCTIONS."

"Instructions" are directions in reference to the law of the case, enabling the jury to better understand their duty, and prevent them from arriving at an erroneous and wrong conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 474, 482, 483, 486; Dec. Dig. § 202.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3663, 3664.]

## 3. TRIAL (§ 228\*)—INSTRUCTIONS—REQUISITES IN GENERAL.

Instructions covering 20 pages of the record, in a case where the issues are few and simple, are open to serious criticism, as being too long, tedious, vague, and indefinite. Instructions should be plain, simple, concise, unambiguous, and consistent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 500-512, 526; Dec. Dig. § 228.\*]

## 4. INSTRUCTIONS OF COURT.

Instructions examined, and held to be open to criticism, but not to such extent as would warrant an interference with the judgment.

Commissioners' Opinion. Division No. 1. Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by the Kent & Purdy Paint Company against S. E. Hanson and another for a money judgment on account. Judgment for plaintiff, and defendants bring error. Affirmed.

W. K. Snyder, of Oklahoma City, for plaintiffs in error. Oliver C. Black, of Oklahoma City, for defendant in error.

ROBERTSON, C. [1] Counsel for plaintiffs in error urge four assignments of error as grounds for reversal in this case; the first being error of the trial court in excluding testimony offered by plaintiffs in error relative to an alleged collateral agreement between plaintiff in error S. E. Hanson and defendant in error, the same being a part of the entire transaction between said plaintiff in error, S. E. Hanson, and defendant in error, and to the effect that said S. E. Hanson, under his contract with defendant

in error, could make sales on credit and make due report of said sales on credit, the manner of reporting said sales on credit to defendant in error being prescribed by said defendant in error, its agent or employé. Objection is made by defendant in error to the consideration of this assignment of error by the court, for that it is not saved and presented in the manner and form required by the rules of this court. This objection is well taken and should be sustained. It has been repeatedly held by this court that where a party alleges error on account of the admission or rejection of evidence, but fails to set out in his brief the full substance of such evidence to the admission or rejection of which he objects, stating specifically his objection thereto, the same will not be reviewed on appeal. Ward v. Richards, 28 Okl. 629, 115 Pac. 791; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931; Lynn v. Jackson, 26 Okl. 852, 110 Pac. 727; Great Western Mfg. Co. v. Davidson Mill & Elev. Co., 26 Okl. 626, 110 Pac. 1096.

Consideration of the second and third assignments of error has been waived by plaintiff in error, and the same will not receive further consideration at our hands.

[2, 3] The only question presented by this record is that found in the fourth assignment of error, and deals with the instructions given by the court to the jury in this case. Counsel for plaintiffs in error charge that the trial court in this case has "violated every known canon governing the instructing of juries; that the instructions are not plain; that they are not clear; that they are not simple; that they are not concise; that they are ambiguous; that they are contradictory; and that they are inconsistent, misleading, and mutually exclusive and destructive to such a degree that not even a Philadelphia lawyer, much less the ordinary man who sits on a jury, could tell from these instructions what the law was governing this case."

The above, it must be admitted, is a pretty severe criticism of the instructions given in this case. An investigation of the record discloses that this is an action to recover the sum of \$1,400 alleged to be due, for merchandise, from plaintiffs in error to defendant in error. The case was not overly complicated or difficult; the issues being few and simple. There was considerable conflict in the testimony. The instructions, however, cover 20 pages of the record, and, to our mind, are unnecessarily long and tedious, and while they are not complex, and do not cover any issue not in the case, yet we cannot refrain from saying that the charge should have covered less than half the space actually consumed. "Instructions" are directions with reference to the law of the case, enabling the jury to better understand their duty, and prevent them from arriving at erroneous and wrong conclusions. Leavitt

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

v. Deichmann, 80 Okl. 423, 120 Pac. 983. They should be plain, simple, concise, unambiguous, and consistent. However, we are not unmindful of the reasons for the failure of some trial courts to be more concise and definite in matters such as the one under discussion. Owing to the congested condition of the dockets of many of the trial courts in this new state, court work, as in many other lines, is prosecuted under a full head of steam, so to speak, with a commendable notion on the part of trial judges to dispatch quickly the public business. Lawyers, in their proper effort to protect their client's interests, frequently lose sight of the manifold and exacting duties imposed upon the overworked trial judge, and in some cases forget to prepare careful and concise instructions covering the issues which they know will be presented at the trial. Quite frequently they offer none at all, and the trial court very often is compelled hurriedly to prepare instructions covering the issues of the case in hand with complicated facts, and frequently under new laws and under conditions such as exist nowhere else than in this new state. Hence it is not difficult for one to understand that in cases, especially where attorneys are contentious and technical, a trial court may, even in some instances, in a vain attempt to save time, give to juries long drawn out, obscure and indefinite, and complex instructions, which under different conditions doubtless would be boiled down and clarified, which would not be open to the indictment laid against the instructions under consideration.

[4] The instructions complained of in this case are too long, they are obscure, and are vague and complicated to a degree, yet, with all their faults, we cannot say that they do not substantially state the law of the case, or that they are so misleading that the jury found a wrong verdict by reason thereof. The only specific objection urged against them is that the one given on page 304 of the record is in conflict with a former one found on page 293. As is pointed out by counsel for defendant in error, the last instruction, above referred to, with exception of the following words, "provided you further find by a preponderance of the evidence that there was an arrangement made and entered into between plaintiff and defendant, by which it was agreed that defendant might sell goods on credit belonging to plaintiff," is, word for word, identical with plaintiff in error's requested instruction No. 3, found on page 284 of the record. In our opinion the proviso above quoted saves this instruction from the objection lodged against it, and makes it state the law of the case applicable to the issue considered.

After a careful consideration of all the evidence in the case, we are fully satisfied that the jury reached the right conclusions, and that substantial justice has been done

in the premises, even though the instructions are open to the above general criticism.

The judgment of the district court of Oklahoma county should therefore be affirmed.

PER CURIAM. Adopted in whole.

#### GILLILAND v. JAYNES.

(Supreme Court of Oklahoma. Oct. 15, 1912.)

(Syllabus by the Court.)

#### 1. BROKERS (§ 65\*)—COMPENSATION — PERFORMANCE OF CONTRACT.

When a real estate agent has property listed with him for sale, and finds a purchaser ready, willing, and able to buy on the terms on which the property is listed, the fact that he has an agreement with the purchaser that, after the purchase is completed, he may subdivide the property and sell it as town lots for a contingent commission will not defeat his right to recover a commission against his original client, which has been earned.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

#### 2. BROKERS (§ 48\*)—COMPENSATION — PERFORMANCE OF CONTRACT.

In order for a real estate agent to recover his commission for making a sale which has not been completed, it is necessary for him to find a purchaser who is ready, willing, and able to buy, and to procure a written agreement to buy from the purchaser, which will be enforceable against him, if accepted and signed by the seller, provided the seller and purchaser have not come together, and an oral agreement to buy accepted by the seller.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; F. L. McCain, Judge.

Action by John T. Jaynes against J. W. Gilliland for a commission for the sale of real estate. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

N. A. Gibson and H. C. Thurman, both of Muskogee, for plaintiff in error. De Roos Bailey, J. E. Wyand, and Charles A. Moon, all of Muskogee, for defendant in error.

AMES, C. The first error assigned and discussed is the action of the court in refusing a peremptory instruction, and the position of the plaintiff in error, hereinafter referred to as defendant, is thus stated in his brief: "We maintain, first, that a binding contract whereby the plaintiff was to sell property of the defendant as the defendant's agent was not proven at the trial; second, that, if the plaintiff was acting as the agent of the defendant in the sale of defendant's property, the interest which he would have acquired in the purchased property was antagonistic to the interest of his principal, and he is not entitled to any commission; third, that, if the plaintiff was in fact acting as the defendant's agent, he did not so consummate a sale of defendant's property to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

earn any commission because he never brought together the owner and a purchaser who was ready, willing, and able to buy on the terms named by the owner." Of these in their order.

Upon the first proposition, it is sufficient to say that there was testimony reasonably tending to support the plaintiff's averment of employment, and this was submitted to the jury for determination, under proper instructions, and their verdict will not therefore be disturbed.

[1] Upon the second proposition, the testimony tended to show that the plaintiff was the agent of the defendant for the sale of land; that he was authorized to sell it for a net price to the defendant of \$6,500; that the land was close to the city of Muskogee; that the plaintiff negotiated a sale to certain purchasers for \$7,500; that he told the purchaser that this was the net price at which he had the land listed, and that he was making no commission on the sale; that he had an understanding with the purchasers that, after they bought, the land should be platted and sold as an addition to the city of Muskogee; that out of the proceeds of the sale the first \$9,000 was to be paid to the purchasers, and the excess to be divided between the plaintiff and the purchasers, provided he sold it out within a certain time. It is contended by the defendant that this is such a relation to the purchasers as to make the agent's interest antagonistic to that of the principal, and therefore to defeat his right to recover a commission. The law does not permit the agent of a vendor to become interested as the purchaser, or as the agent of the purchaser, in the subject-matter of the agency, but requires of the agent the exercise of good faith toward the principal. *Plotner v. Chillson*, 21 Okl. 224, 95 Pac. 775, 129 Am. St. Rep. 776. In the case at bar, however, the property involved was listed for sale with the plaintiff at a fixed price, and he was permitted to retain as his commission all that he might receive in excess of that price, and we do not think under the facts of this case there was any such relation between the parties as to defeat a right which the plaintiff would otherwise have to recover his commission. The plaintiff was not the purchaser; he was not investing his money in the land, or in any way becoming liable for it. His only relation to the purchase was an understanding with the purchasers that he would put it on the market for them for a contingent commission, to be taken out of the proceeds after they had been reimbursed in full and allowed an agreed profit.

[2] The next question presented is one which presents difficulty. Under the facts in this case, is the plaintiff entitled to recover? The verdict of the jury resolves all the disputed questions in favor of the plaintiff, and under this rule the facts are as follows: The defendant listed his land for sale with

the plaintiff at \$6,500 net, the plaintiff to have as his commission all that the land might sell for in excess of \$6,500. The plaintiff resided in Muskogee and the defendant in Holdenville. Once or twice prior to this transaction the plaintiff requested the defendant to come to Muskogee to close a sale which he had made. The defendant came, and the purchasers failed to buy. The plaintiff then negotiated this deal with the purchasers, and the testimony tended to show that they were ready, willing, and able to buy the land on the terms by which it was listed with the plaintiff. No written agreement was made and signed by the proposed purchasers, nor did they pay any part of the purchase money to the plaintiff or defendant. The plaintiff telephoned the defendant at Holdenville that he had purchasers, and for him to come to Muskogee, bringing the necessary papers to close the deal. The defendant said he was busy at the time, but would come over in a day or two. The next day he wrote the plaintiff that he had concluded not to sell for less than \$7,000 net. The plaintiff again tried to reach him on the telephone, but, when the defendant discovered that the calling party was Muskogee, he declined to talk. Nothing further was done until several months afterwards, when the defendant was in Muskogee and this suit was filed against him. Upon this exact point there is a sharp conflict in the authorities, and the question is not settled in this state. Some of the cases hold that the broker is entitled to his commission for the sale of real estate, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, he is willing to comply with the oral contract and the owner declines to do so, and that the agent's duty is ended when he produces a purchaser ready, willing, and able to buy. *Holden v. Starks*, 159 Mass. 503, 84 N. E. 1069, 38 Am. St. Rep. 451; *Carlin v. Lifur*, 2 Cal. App. 590, 84 Pac. 292. Other cases cited as supporting this position are *Stauffer v. Linenthal*, 29 Ind. App. 305, 64 N. E. 643; *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234; *Ford v. Easley*, 88 Iowa, 603, 55 N. W. 336. But a close examination discloses that these cases are not exactly in point. In the first one the owner and the purchaser entered into a written contract. In the second one the owner and the purchaser met in person, and the owner accepted him as a purchaser without requiring a written contract; while in the third the exact facts on this proposition are not disclosed by the opinion.

On the other hand, there is likewise eminent authority holding that it is necessary for the broker either to effectuate a sale, or where the seller declines to proceed, to present him with a written agreement, signed by the purchasers, which would become enforceable when signed by the seller and take the negotiations for sale out of the

statute of frauds. *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Grindstaff v. Merchants' Investment & Trust Co.*, 122 Pac. 46; *Bolton v. Coburn*, 78 Neb. 731, 111 N. W. 780. Other cases tending to support this rule, but not exactly in point, are *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109; *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572. In *Wilson v. Mason*, supra, it is said: "Some of the cases go so far as to hold that the broker is not entitled to his commissions, unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding, and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale, and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of the sale, or purchase. *Parker v. Walker*, 86 Tenn. 566 [8 S. W. 391]; *Coleman v. Meade*, 13 Bush [Ky.] 358; *Francis v. Baker*, 45 Minn. 83 [47 N. W. 452]; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Veazie v. Parker*, 72 Me. 443; *Wilkes v. Smith*, 77 Wis. 81 [45 N. W. 666]; *Rice v. Mayo*, 107 Mass. 550; *Christensen v. Wooley*, 41 Mo. App. 53; *Love v. Owens*, 31 Mo. App. 501; *Greene v. Hollingshead*, 40 Ill. App. 195; *Short v. Millard*, 68 Ill. 292; *Kerfoot v. Steele*, 113 Ill. 610; *Ward v. Cobb*, 148 Mass. 518 [20 N. E. 174] 12 Am. St. Rep. 587." The question is of great practical importance, and, there being eminent authority supporting both rules, we find some difficulty in reaching a conclusion. Our own cases only go to the extent of hold-

ing that "a real estate agent, authorized to sell the land of another for a certain price for a certain compensation, or send the seller a buyer, has not earned his commission until he produces a purchaser ready, willing, and financially able to purchase the land upon the terms agreed upon." *Cruchfield v. Webster*, 31 Okl. 142, 120 Pac. 615; *Birch v. McNaught*, 23 Okl. 634, 101 Pac. 1049. But this question was not involved in either of those cases. We are inclined to believe that the weight of authority, as well as the better reason, supports the rule that, in order to recover his commission, the real estate agent must produce a purchaser who is ready, willing, and able to buy, and that the evidence of this fact must be such as would be recognized in a court of justice. The sale of real estate is an important step, which the law requires to be taken in writing, and it is explicitly provided that no contract or agreement for the sale of real estate shall be valid unless it is in writing. These safeguards are designed to prevent fraud, and we are inclined to believe that the rule we adopt will have a tendency to prevent fraud, and will not work any hardship in a just case. If the real estate agent has a purchaser who is ready, willing, and able to buy, it will not be difficult for him to have such purchaser sign an agreement to buy, which will become a valid, binding, and enforceable contract as against the purchaser. On the other hand, if the real estate agent merely procures a man who says he is willing to buy, his statement does not bind him, and within legal contemplation he has done nothing which the law recognizes. The best evidence of his being willing to buy is his written agreement to do so. In fact, his written agreement is the only thing which can be enforced against him, and his mere word of mouth that he is willing to buy would not be recognized in an action against him to compel specific performance. It would not even be competent evidence as tending to show that he had agreed to buy. In the case at bar the defendant had made one or two trips to Muskogee on previous occasions upon the plaintiff's advice that he had a purchaser for his property, and, when he got there, the purchaser refused to proceed further, and the defendant was helpless, whereas, if the plaintiff had required of the proposed purchaser his signature to an agreement which would be binding upon him, the purchaser would either have refused to sign, and thereby saved the defendant the expense of the trip, or he would have taken the property when the defendant appeared. In the case at bar the plaintiff testified that the defendant was still willing to sell, but wanted to raise his price from \$6,500 to \$7,000, and that the purchaser had agreed to buy for \$7,500, and that he had an agreement with them by which he was to plat the land as a town-site addition and sell it off on a basis by

which he expected to realize further profit. He therefore on the defendant's new offer had a commission of \$500 for making the sale, and the prospect of profit by platting the land as an addition, and yet he did not secure from the purchasers any part payment of the purchase price, or any written agreement to buy the land, nor did he seek out the defendant for the purpose of urging the sale, but let the whole matter drop, and waited some months until he saw the defendant in Muskogee, at which time he sued him.

We believe the rule which we adopt will have a tendency to require greater care and system in the transaction of the real estate business, will have a tendency to prevent frauds, and will not often prevent the recovery of a commission which is really earned.

The case should be reversed and remanded, with instructions to proceed further in accordance with this opinion.

PER CURIAM. Adopted in whole.

#### HUDSON v. ELY et al.

(Supreme Court of Oklahoma. Nov. 19, 1912.)

##### *(Syllabus by the Court.)*

#### 1. STATUTES (§ 167\*)—IMPLIED REPEAL—STATUTES COVERING SUBJECT-MATTER.

A statute revising the whole subject-matter of former acts, containing in the main the provisions of the former acts, and evidently intended as a substitute for them, although it contains no express words to that effect, operates to repeal the former acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 242, 243; Dec. Dig. § 167.\*]

#### 2. JUDGMENT (§ 753\*)—LIEN—STATUTORY PROVISIONS.

The act entitled "An act regulating liens of judgments rendered in probate courts," passed March 7, 1893, found in the addenda to the Statutes of Oklahoma 1893, at page 1191, was repealed by substitution by section 432 of the Civil Procedure Act (St. 1893, § 4310), adopted by the same legislative assembly, and by the subsequent amendments thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1312; Dec. Dig. § 753.\*]

#### 3. JUDGMENT (§ 385\*)—VACATION—AUTHORITY OF COURT.

Section 432 of the Code of Civil Procedure (St. 1893, § 4310), as amended by section 5941, Comp. Laws 1909, considered in connection with section 540, Comp. Laws 1909, giving to judgment creditors the right to have transcripts of judgments filed in counties other than wherein rendered, does not give to the district court of such other county jurisdiction upon motion to vacate and annul the judgment so rendered; the judgment being regular upon its face, and the court rendering it having jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 726; Dec. Dig. § 385.\*]

#### 4. JUDGMENT (§ 292\*)—FILING TRANSCRIPT IN OTHER COUNTY—EFFECT.

A transcript of a judgment of a county court, filed with the clerk of the district court of another county, renders it a judgment of the latter court only for the purposes of enforcement, and does not forbid the court rendering the judgment from controlling it in respect to other matters authorized by law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. § 292.\*]

#### 5. EXECUTION (§ 66\*)—AUTHORITY TO ISSUE—CLERK OF COURT.

The clerk of the district court of a county with whom a transcript of a judgment of a county court of another county is filed is without authority to issue execution on said judgment. In such cases execution shall issue only from the court in which the judgment is rendered.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 152; Dec. Dig. § 66.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Noble County; Wm. M. Bowles, Judge.

On January 26, 1909, Frank Hudson, in the county court of Pawnee county, obtained a judgment against Mathew M. Ely, the Arkansas Valley & Western Railway Company, the Arkansas Valley Townsite Company, and H. C. Hanna. A transcript of this judgment was filed with the district clerk of Noble county, March 19, 1909, and on the 13th day of November thereafter execution was issued by the district clerk of said county. On the 9th day of December of said year, the judgment debtor, Mathew M. Ely, filed in the district court of Noble county a motion seeking to have said judgment vacated and set aside on the ground that the judgment rendered was void because no sufficient service of summons had been had upon him. Afterwards and on the 21st day of December of said year, said defendant filed a motion to recall the execution for the reasons set forth and assigned in the motion to vacate the judgment. Upon the hearing of said motion the court set aside and vacated the judgment, from which order an appeal has been regularly prosecuted to this court. Reversed and remanded, with instructions.

Eagleton & Biddison, of Pawnee, for plaintiff in error. H. A. Johnson, of Perry, for defendants in error.

SHARP, C. (after stating the facts as above). The only question necessary for a determination of this case is: Did the district court of Noble county have jurisdiction, on motion, to vacate and set aside the judgment of the county court of Pawnee county? The judgment, a transcript of which was filed in the district court of the former county, upon its face shows that personal service of summons was had upon each of the defendants, and that the county court had both jurisdiction of the subject-



matter and of the several defendants. No complaint is made of the regularity of the transcript, or that it was not properly filed in the office of the clerk of the district court of Noble county.

Counsel for defendant in error cites and relies upon section 1877, Wilson's Rev. & Ann. St. 1903. This section of the statute, carried forward by the annotator, is paragraph 3 of an act regulating liens of judgments rendered in probate courts, found in the addenda to the statutes of 1893, p. 1191. This statute in part provides that a judgment of a probate court, a transcript of which is filed in the office of the clerk of the district court in another county, shall be a judgment of the district court with like force and effect as if it had been rendered by the district court on the day that it was filed with the clerk of the latter court, and shall thereafter be enforced as a judgment of the district court, and that, after the filing of such abstract in the district court, no execution shall be issued from the probate court on such judgment. This act was passed by the Legislature March 7, 1893, and the purpose of its passage is explained in the introductory section at page 1187, where it is said: "Towards the closing days of the last session of the Legislature the opinion prevailed that a new Code of Civil Procedure would not be adopted. An act was therefore passed 'to regulate appeals and writs of error,' also an act 'in relation to liens of judgment rendered in probate court.' Afterward an entire Code on 'Civil Procedure' was enacted. It specifically provides for appeals and writs of error; also, regulates liens in courts of record. The codifying committee have concluded to publish both acts in this addenda, together with the act providing additional officers for the Legislature—which latter act the Supreme Court held to be illegal and void." However, the Code of Civil Procedure Act did pass at the same session of the Legislature, and afterwards became a law. By section 432 of the Civil Procedure Act, the subject of the creation of judgment liens, both in the county in which the judgment was rendered, and other counties, was provided for. This latter section was afterwards amended. S. L. 1905, pp. 320, 321. Section 1 of this act is section 5941, Comp. Laws 1909. A further provision covering the same subject, in part, is found in section 5 of article 3, c. 16, S. L. 1907-08, which is section 540, Comp. Laws 1909.

[1, 2] It is therefore necessary to consider whether section 3 of the act of March 7, 1893 (Addenda, p. 1191, Stats. 1893), has been superseded by one or either of the acts, attention to which has been called. We are of the opinion that the various provisions of the addenda were repealed by the subsequent adoption of the Code of Civil Procedure, and the amendments thereof, and statutes thereafter enacted. Spencer et al.

v. Rippe, 7 Okl. 608, 56 Pac. 1070. Section 432, supra, as amended by the act of March 15, 1905, considered in connection with the act of March 12, 1908 (S. L. 1907-08, p. 212), deals with the same general subject-matter, and seeks to accomplish the same general purpose, and, being complete within itself, worked a repeal by substitution of the provisions of the addenda. Particularly is this true when we consider the occasion and object of the passage of the legislation contained in the several sections of the latter act of the addenda. Various other subsequent acts, to which we have not directed particular attention, are in direct conflict with many of the provisions of the addenda. Particularly is this true in the latter clause of section 3, which provides that, after the filing of an abstract of a judgment of a probate court in the district court, no execution shall be issued from the probate court on such judgment, which is in conflict with the latter part of section 5941, Comp. Laws 1909, which provides that executions shall only be issued from the court in which the judgment is rendered. A statute revising the whole subject-matter of former acts, containing in the main the provisions of said act, and evidently intended as a substitute for them, although it contains no express words to that effect, operates to repeal the former acts. *Fritz v. Brown*, 20 Okl. 263, 95 Pac. 437; *Smock v. Farmers' State Bank*, 22 Okl. 825, 93 Pac. 945.

In *J. W. Rippey & Son v. Art Wall Paper Co.*, 27 Okl. 600, 112 Pac. 1119, the court had under consideration the first act of the addenda, found at pages 1187-1189, Stat. 1893, passed at the same time as the latter act of the addenda, under consideration, and it was held that said former act was repealed by substitution by the subsequent adoption by the same legislative assembly of the Code of Civil Procedure; that the Code, thus adopted, was comprehensive and covered practically all of the subjects comprehended by said act. We have no hesitation therefore in arriving at the conclusion that section 3 of the addenda was repealed by subsequent legislation, and that we must look to the latter, and not the former, acts, to determine the question presented.

[3, 4] What authority therefore is given a district court of one county to set aside the judgment of a county court of another county? Section 6094, Comp. Laws 1909, provides that the district court shall have power to vacate or modify its own judgments or orders at or after the term at which said judgments or orders are made, upon the grounds and for the reasons therein set forth, or to which reference is made. But this is not a case of a court setting aside its own judgment, but, instead, one where a judgment of another court of competent, and in some respects concurrent, jurisdiction, is vacated and annulled without the institution of an action or suit, and upon a mere mo-

tion, and where the judgment was regular upon its face; thus permitting the judgment debtor to collaterally attack the judgment of another court. The filing of the transcript of the judgment in the district court of Noble county had to do with the matter of the enforcement of the judgment. The judgment thereby became a judgment of the district court for such purpose, and such only as is clearly shown by the fact that the execution could only issue out of the court in which the judgment was rendered. Section 5941, *supra*. It was held by this court in *Ray v. Harrison et al.*, 32 Okl. 17, 121 Pac. 633, that when a transcript of a judgment of a justice of the peace had been filed in the office of the clerk of the district court, under section 6044, Comp. Laws 1909, such judgment remained a judgment of the justice's court and did not become a judgment of the district court, so as to give that court power to inquire into its validity. It was never intended by the statutes thus providing for a manner of enforcement of the judgment to forbid the court rendering it from controlling it in respect to other matters authorized by law. Upon timely application and proper showing the county court of Pawnee county could have granted relief to defendant in error Ely. The filing of the transcript in another county did not deprive him of his right. Whatever may be his rights, he has appealed to the wrong court for relief. It had jurisdiction only to enforce, not to impair or destroy, the judgment. *Klepper v. City of Keokuk*, 126 Iowa, 592, 102 N. W. 515; *Lindgren v. Gates et al.*, 26 Kan. 135; *Hinman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 85, 110 Pac. 102, 21 Ann. Cas. 1152; *Land v. Booth*, 33 Utah, 341, 93 Pac. 987; *Garlock v. Calkins et al.*, 14 S. D. 90, 84 N. W. 393; *McConnell et al. v. Rowe et al.*, 8 Ky. Law Rep. 343, 1 S. W. 582; *Carey et al. v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. In *King v. Nimick et al.*, 34 Pa. 297, it was said: "A judgment that is transferred from one county to another, under the act of 16th April, 1840, bears a very strong analogy to a *testatum* execution. It is transferred only to facilitate its enforcement, but with a right to all the writs of *scire facias* that may be needed for that purpose. The primary judgment is still the principal one, and the court where that is can alone take any action operating on the judgment itself, in any other way than by satisfaction, in the proper sense of the term. The court, having the certified and secondary judgment, cannot inquire into its merits at all. And because it is a secondary judgment, it can stand only for its own costs, at the most, if the primary judgment be satisfied or set aside. And if the court having the primary

judgment order it to be satisfied, or set aside, the further process on the secondary judgment is peremptorily to be arrested, except for its own costs, in a proper case. Among equal courts, that which has the primary control of a question has the absolute control, and it alone, or its superiors, can correct its errors."

The district court of Noble county had no appellate jurisdiction over, or supervisory control upon, or right to review, the judgment rendered in the county court of Pawnee county. The effect, however, of its judgment, was to review said county court judgment. Upon evidence aliunde it heard testimony and determined and adjudged that the county court was without jurisdiction as against the defendant Ely, and that in rendering judgment the county court committed error. Neither statutory authority is given nor inherent power possessed by a district court to vacate and set aside the judgment of a county court of another county, upon motion charging that the court rendering judgment did not acquire jurisdiction over the person of a defendant, where the judgment by its own terms recites the necessary jurisdictional facts, and where jurisdiction of the subject-matter exists. This power must be exercised by the court which rendered the judgment, and to that court, and to no other, the application to set aside the judgment should be made. *Black on Judgments* (2d Ed.) § 297; 23 Cyc. 890, 891.

[5] The court having vacated the judgment, it is unnecessary to pass specifically upon the second motion filed, i. e., that to recall the execution. While the grounds urged for the recall of the execution were not well taken, in view of the further proceedings in this case, we may call attention to the fact that the district court of Noble county was without jurisdiction to issue an execution. That power and authority is not taken from the county court, where the judgment was rendered, but, on the contrary, is by express statute reserved to that court. Comp. Laws 1909, § 5941.

For the reasons stated, the judgment vacating and setting aside the judgment of the county court of Pawnee county should be reversed and remanded.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. HILL.  
(Supreme Court of Oklahoma. Nov. 19, 1912.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 136\*)—ACTION—QUESTION FOR JURY.

Section 6 of article 23 of the Constitution (Williams' Constitution and Enabling Act, § 355), which provides that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury,"

<sup>1</sup> Reported in full in the *Southwestern Reporter*; reported as a memorandum decision without opinion in the *Kentucky Law Reports*.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

constitutes the jury the tribunal to determine these defenses.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—ACTION—QUESTION FOR JURY.**

Where the evidence tends to show negligence on the part of the employer, and also shows that the work in which the plaintiff was engaged was work which should be done by two men, and that the employer had furnished an assistant, within reach of the plaintiff, and the plaintiff undertook to do the work alone, without calling or using the assistant, this testimony tends to establish the defense of contributory negligence, and should be submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**3. WITNESSES (§ 268\*)—CROSS-EXAMINATION—PHYSICAL EXAMINATION.**

In the trial of a personal injury case, upon the cross-examination of the plaintiff he should be required to answer the question whether he is willing to submit to a physical examination of the injuries by reputable physicians of the community, acting under the appointment of the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Latimer County; Malcolm E. Rosser, Judge.

Action by J. F. Hill against the Chicago, Rock Island & Pacific Railway Company for personal injuries: Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, and Wright & Boyd, of McAlester, for plaintiff in error. H. H. Smith and M. L. McKenzie, both of Shawnee, for defendant in error.

AMES, C. The plaintiff alleged that he was employed by the defendant as a scratch boss in the shops at Shawnee; that his duties included designing, shaping, and repairing timbers for railway cars; that he was injured while handling a timber about 18 feet in length and about 6 inches thick and 8 inches wide; that the floor of the room in which he was at work was rotten, and broke with him as he was handling the timber, causing him to fall against a carpenter's horse, the timber falling upon him and producing the injuries complained of; that the defendant was negligent in failing to furnish him with a safe place in which to work, on account of the condition of the floor. The petition also alleged that the defendant was negligent in failing to furnish him with competent and sufficient assistants to perform the work in which he was engaged, and in failing to warn him of the dangerous conditions surrounding his work. The answer denied the injuries, denied any negligence, and pleaded assumption of risk and contributory negligence. The court instructed the jury

that there was no proof of contributory negligence and withdrew that issue from its consideration. The defendant excepted to this instruction and now assigns it as error. There was evidence tending to show that the work in which the plaintiff was engaged at the time of the injury was what was called a "two-man job"; that the defendant had furnished assistants, who could be secured by the plaintiff by calling for them whenever he desired, and that assistants had never been denied him when requested; that he did not call for assistants at this time, but did the work alone. There was other evidence tending to show that he could do the work alone in safety, and did not need assistants.

[1] The defendant claims that his failure to call assistants was negligence which contributed to the injury, and that under section 6 of article 23 of the Constitution this defense should have been submitted to the jury. Section 6 of article 23 (Williams' Constitution and Enabling Act, § 355) is as follows: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." In *C., R. I. & P. Ry. Co. v. Baroni*, 32 Okl. 540, 545, 122 Pac. 926, 928, we said: " \* \* \* But this argument tends to establish negligence on the part of the plaintiff contributing to his injury, and the (defense) of contributory negligence, under our Constitution, is to be submitted to the jury. The lawmaking power of the state has the right to provide that the jury shall be the tribunal to determine this question; and it has done so."

[2] The plaintiff in this case, however, contends that the defense of contributory negligence was properly taken from the jury, because there was no evidence to sustain it, and that the constitutional provision does not require the defense of contributory negligence to be submitted to the jury, except when there is evidence tending to support it. In response to this argument we might inquire how much evidence is necessary. Shall it be evidence reasonably tending to support the defense? If so, the Constitution has not changed the law previously in existence, and the courts would have the same right as before to give peremptory instructions to juries upon the subject. Does it mean that the defense shall be submitted to the jury if there is any evidence tending to support it, whether it reasonably does so or not? Who is to determine whether there is any evidence tending to support the defense? Shall the court say that there is no evidence upon the subject, or is it meant by the Constitution that this defense, whenever presented, shall be submitted to the jury, and that the jury shall determine whether there is any evidence upon the subject, and also whether this evidence reasonably establishes the defense? It is unnecessary, however, in this particular

case, to decide this exact question, as there was some evidence tending to show negligence on the part of the plaintiff which should have been submitted to the jury for its consideration.

The plaintiff alleged that the defendant was negligent in failing to furnish him with sufficient assistants, and that the defendant knew that the plaintiff did not have sufficient assistants. There was evidence by the plaintiff and his own witnesses showing that assistants were furnished by the defendant, who could be procured by the plaintiff whenever he needed them, upon request; that the work in which he was engaged was work described by some of the witnesses as a "two-man job," meaning that it was work in which the plaintiff should have had assistants. The testimony is uncontradicted that the plaintiff did not call for assistants, but undertook to do the work alone. It is axiomatic that if it would be negligence for the defendant not to furnish assistants that it would likewise be negligence for the plaintiff not to use the assistants when they were furnished, and argument cannot make the proposition plainer. The failure of the plaintiff, therefore, to use the assistants who were provided by the defendant, and undertaking to perform alone work which was a two-man job, might be regarded by the jury as evidence reasonably supporting the defense of contributory negligence. At all events, it was some evidence on the subject; and as this was one of the defenses, and as there was some evidence upon the subject, the defense should not have been taken from the jury. The court has just as much right to instruct the jury that the defense of contributory negligence has been made out, and that its verdict should be for the defendant, as it has to instruct the jury that the defense of contributory negligence has not been made out. To hold, therefore, that in this case the court properly instructed the jury would be to establish a precedent by which the court in future cases would be bound to instruct the jury to return a verdict for the defendant, where the evidence clearly established the defense of contributory negligence or assumption of the risk. The argument of the plaintiff does not convince us that this is the meaning of the Constitution, but on the contrary we adhere to the rule previously adopted in the *Baroni Case*, supra, and in *C. & P. Ry. Co. v. Beatty*, 27 Okl. 844, 116 Pac. 171, to the effect that this provision of the Constitution means that these defenses must be submitted to the jury just as it says, subject, of course, to proper instructions by the court as to the law governing the subject.

[3] While the case must be reversed and remanded for the reasons stated, it is proper to notice another assignment of error which may arise upon the new trial. Upon cross-examination of the plaintiff, he was asked the following question: "Are you will-

ing to submit to an examination made by any reputable physician in this community, to be appointed by the court, in regard to the injury which you are claiming?" The court declined to permit this question to be asked or answered. This ruling is based upon the decision of the Supreme Court of the territory of Oklahoma, in *City of Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107, holding that "the courts of this territory cannot order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of or during the trial of the cause." That case was correctly decided because it followed a decision of the Supreme Court of the United States on the same subject (*Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734), and at that time the decisions of the Supreme Court of the United States were controlling upon the territorial court. *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 465, 94 Pac. 676, 129 Am. St. Rep. 761; *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325; *Phoenix Ins. Co. v. Ceaphus*, 29 Okl. 608, 119 Pac. 583. In a case arising, however, since the admission of the state, the decisions of the Supreme Court of the United States, while highly persuasive, would not be binding, and this court would be free to follow a different rule if it was supported by the great weight of authority and the better reasoning. *Western National Ins. Co. v. Marsh*, 125 Pac. 1094; *Merchants' & Planters' Ins. Co. v. Marsh*, 125 Pac. 1100. And while the question as to whether that rule would be followed now is not before us, it may be observed in passing that the courts of the following states permit such a physical examination: Alabama, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania, Ohio, Texas, Washington, and Wisconsin; while in Florida, New York, and New Jersey such an examination is provided for by statute. See, also, 3 Wigmore on Evidence, § 2220. In the federal courts and those of Utah, Massachusetts, Montana, and South Carolina, an examination is denied. *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Larson v. Salt Lake City*, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 463, note; *May v. Northern Pacific Ry. Co.*, 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, 4 Ann. Cas. 605; *McQuigan v. Delaware, Lackawanna & Western R. Co.*, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 460, 26 Am. St. Rep. 507, and the cases cited in those decisions, and the notes.

The question before us is, not whether a physical examination may be ordered by the court, but whether the plaintiff, on cross-examination, may be asked the question whether he is willing to submit to a physical examination, conducted by impartial phy-

sicians appointed by the court. The purpose of a cross-examination, amongst other things, is to test the truthfulness of the witness, and, if he is the plaintiff, his good faith, the righteousness of his case. In an action for personal injuries, it is manifest that the jurors are entitled to all the information which can be produced, not only upon the cause of the injuries, but also the extent of the injuries, in order to determine whether the plaintiff should recover at all, and, if so, the amount of his recovery. Would an examination of the injuries by competent and disinterested physicians, appointed by the court and acting under his supervision, aid the jury in ascertaining these facts? Manifestly it would, and the jury would doubtless rely more upon the testimony of such a physician than they would upon one employed as an expert by one of the interested parties. Would the plaintiff be prejudiced by such an examination? Manifestly he would not, if his case was a bona fide one; and if it was not bona fide the law should not exert itself to assist him in concealing the bad faith. Such an examination, it is manifest, would be in the interest of truth and justice. If the plaintiff declined to submit to it for good reason, he, of course, could explain his reason to the jury. If he declined to submit to it without reason, that fact would doubtless have its influence as affecting his good faith; and it seems to us that such a question would tend to assist the court and jury in arriving at the truth, and would result in no harm to any party asserting a bona fide claim.

Indeed, the very case of *City of Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107, relied on by the plaintiff, recognizes the principle we announce, as does also the case of *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, which is followed in the *Altizer* Case. On page 124 of 13 Okl., on page 108 of 74 Pac., the following is quoted from the *Botsford* Case: "Any one may expose his body, if he chooses, with due regard to decency and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power." It is true that this quotation deals with a refusal to expose his injuries upon request, while the particular point before us deals with a request for a nonpartisan medical examination. But there is no difference in principle between the two.

On the authority, therefore, of the very cases which deny the right to a physical examination, we hold that the unreasonable refusal of the plaintiff to submit to one may

be considered by the jury as affecting his good faith.

The case should be reversed and remanded.

PER CURIAM. Adopted in whole.

# CONTINENTAL CASUALTY CO. v. WYNNE.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

## 1. INSURANCE (§ 634\*)—ACTION ON POLICIES—PLEADING.

The court did not err in permitting plaintiff to introduce evidence under the pleadings, over defendant's objection.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1593, 1605, 1606, 1608; Dec. Dig. § 634.\*]

## 2. EVIDENCE (§ 188\*)—DEMONSTRATIVE EVIDENCE—PERSONAL INJURIES.

Ordinarily, where the question of a physical injury, its extent or permanency, is in issue, it is not error to permit the plaintiff to exhibit the injured part of the body to the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 676; Dec. Dig. § 188.\*]

## 3. INSURANCE (§ 659\*)—ACTION ON POLICIES—ADMISSIBILITY OF EVIDENCE.

In an action on a policy of insurance against accidents, where total and continuous inability to perform work for a period of 52 weeks was alleged as resulting from a broken shoulder, plaintiff was permitted to testify regarding the continued pain and suffering caused by the wound and resulting operations made necessary by it; and, further, that at the end of the period of indemnity his arm had not recovered so as to be of use, etc. *Held*, not error, as this evidence was competent on the question of continuous disability to work.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1691, 1692; Dec. Dig. § 659.\*]

## 4. INSURANCE (§ 665\*)—NOTICE OF ACCIDENT—EVIDENCE.

Where an accident policy provided that in case of accident the insured should, within 15 days thereafter, give notice of the same to the insurance company at its office issuing the policy, *held*, that evidence that insured, within four or five days after the accident, wrote a letter to the company, at its issuing office, advising it of his injury, and that the company, on the nineteenth day after the injury, replied thereto, inclosing blanks and requests for detailed information, without mentioning the date it had received insured's notice, and making no claim that it was not received within 15 days, was sufficient evidence to warrant the jury in finding that notice had been given as required by the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1707-1728; Dec. Dig. § 665.\*]

## 5. INSURANCE (§ 665\*)—ACTION ON POLICIES—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* to show that plaintiff had furnished the insurance company sufficient "affirmative proofs of loss of time" within 30 days after the termination of the period of its liability, as required by the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1707-1728; Dec. Dig. § 665.\*]

## 6. TRIAL (§ 252\*)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

In an action on an accident insurance policy, brought to recover for "continuous inability

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to engage in any occupation or labor," an instruction was given wherein, after advising the jury that before plaintiff could recover it must be shown that the injury caused total and continuous disability to engage in any labor or occupation, the court qualified this language by adding "that, even though during the time he claimed to be totally and continuously disabled he did perform some trivial services," such fact should not, of itself, be so construed "as to prevent plaintiff from recovering for all of said time, if you find from the evidence that he was at the time of said trivial services unable to have performed them. The test is, not whether the plaintiff did perform any services of any character, but whether the plaintiff was able to perform services of any sort or character." Held, that the instruction was justified under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.\*]

#### 7. INSURANCE (§ 524\*)—ACCIDENT INSURANCE —"TOTAL DISABILITY."

"Total disability," under the provisions of an accident insurance policy, does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It exists, although the insured may be able to perform a few occasional or trivial acts relating thereto, if he is not able to do any substantial portion of the work connected with his occupation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 524.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7010-7012.]

(Additional Syllabus by Editorial Staff.)

#### 8. INSURANCE (§ 645\*)—ACTION ON POLICIES —ISSUES AND PROOF.

Where the petition on an accident policy alleged that affirmative proofs of loss of time had been furnished, evidence that plaintiff wrote to the company, claiming indemnity and asking for blanks if additional proof was required, and that the company answered, denying all liability and refusing blanks on which to make a mere formal proof, was not within the issues.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1632-1644; Dec. Dig. § 645.\*]

#### 9. TRIAL (§ 84\*)—EVIDENCE—OBJECTIONS.

In an action on an accident policy, a general objection to the admission of testimony as to a claim by the insured and response denying all liability were not sufficient to raise the point that such evidence was not within the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Cleveland County; R. McMillan, Judge.

Action by Frank E. Wynne against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Hocker and Geo. W. Welsh, both of Purcell, for plaintiff in error. B. F. Williams, Jr., of Norman, and Lydick & Eggerman, of Shawnee, for defendant in error.

BREWER, C. This is a suit on an accident insurance policy, and was brought by Frank E. Wynne, as plaintiff, against the Continental Casualty Company, a corporation, as defendant, in the district court of Cleveland county, September 19, 1908. We shall

refer to the parties as they were known in the trial court.

The material allegations of plaintiff's petition, briefly summarized, are: That the defendant, on the 10th day of May, 1906, in consideration of the premiums then and there paid, delivered its policy of insurance to plaintiff, wherein it agreed to pay him a weekly indemnity for total loss of time necessarily resulting from personal injury he might receive, which was effected independently of all other causes, through ordinarily violent and accidental means, and which caused at once total and continuous inability to engage in any occupation or labor, and agreed to pay a weekly indemnity of \$10 per week for total loss of time resulting from such injury, not to exceed, however, a period of 52 consecutive weeks, and did by said policy insure plaintiff for a period of one year, beginning at noon on May 10, 1906. That plaintiff was employed as a deputy sheriff, and his duties, as specified in the policy, were to make arrests. That on the 25th day of December, 1906, plaintiff, while in the performance of his duties as a deputy sheriff in attempting to quiet a disturbance in an opera house at Lexington, accidentally fell down a flight of steps, dislocating his shoulder and totally disabling him from engaging in any business and performing his duties since the time of such injury, and for the full period of 52 weeks.

Plaintiff further alleged that he had given due written notice of his injury to the defendant within 15 days after it occurred, and that he had given due and affirmative proof of the duration of the said loss of time and during which he was totally disabled. The defendant answered, admitting its corporate character, the nature of its business, the issuance of the policy in suit, and that it was in full force and effect at the time of the alleged accident. Defendant further alleged for defense that plaintiff was not injured while in the performance of his duties as deputy sheriff, but while he was unlawfully engaged in pulling off a fight between a bulldog and a badger, and that plaintiff was intoxicated at the time of the injury, all of which are in direct violation of the provisions of the policy.

Defendant further denied that plaintiff was permanently injured, or that he was totally disabled for 52 consecutive weeks. Defendant further denied that due notice of the injury had been given to the company, or that plaintiff had given it affirmative proof of the duration of the time of his total disability, as required by the policy.

The plaintiff filed a reply, and the cause was tried to a jury on February 5, 1910, resulting in a verdict for plaintiff for \$520, with interest thereon as prayed for in the petition. The defendant, as plaintiff in error here, urges 17 separate assignments of error: (1)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Refusal to sustain defendant's objection to the introduction of any evidence. (2) In allowing the plaintiff, while on the witness stand, to exhibit to the jury the shoulder alleged to have been injured. The third, fourth, fifth, sixth, seventh, and eighth assignments of error are based upon the admission of evidence alleged to be incompetent. The ninth, tenth, eleventh, twelfth, and thirteenth assignments challenge certain instructions given to the jury. The fourteenth, fifteenth, and sixteenth assignments go to certain instructions asked by defendant and refused. The seventeenth assignment goes to the action of the court in allowing an amendment of the petition, after the closing of the case, to conform to the proof.

[1] (1) The contention made by defendant, that the court erred in permitting evidence to be introduced under the pleading, cannot be sustained. This assignment is based upon the theory that the petition did not sufficiently allege a compliance with the terms of the policy in the matter of giving notice within 15 days of the injury, and in furnishing affirmative proof of the duration of total disability within 30 days after termination of the period for which the company is liable. Part 6 of the policy provides: "Affirmative proof must be furnished to the company at its office on its forms, in case of loss of time, within thirty days after the termination of the period for which the company is liable." The policy also provides that notice of the accident must be given the company within 15 days after it occurred, etc. The allegations of the petition, while they may have been open to a motion to make more definite and certain, yet without such attack they were entirely sufficient. The petition states a cause of action, and the plaintiff was entitled to introduce his evidence thereunder.

[2] (2) The next objection (i. e., that it was error to permit plaintiff to show the jury the parts of his person—that is, his shoulder and collar bone—alleged to have been injured and broken) is likewise without merit. We think ordinarily, where the question of an injury, or its extent or permanency, is in issue, that this would be proper. *City of Kingfisher v. Sparel Altizer*, 13 Okl. 121, 74 Pac. 107; *Wigmore on Evidence*, vol. 3, § 222, and note; *Jones on Evidence* (2d Ed.) 396-398. For a discussion of the principle involved, see *C. & P. Ry. Co. v. Hill*, 129 Pac. 13, not yet officially reported. But it was peculiarly proper in this case because of a provision of the policy sued on. In part 3 numerous things are mentioned, the happening of any one of which, it is stipulated, shall reduce the amount payable to one tenth of the amount which would otherwise be payable under the policy. One of the things causing such reduction is: "Where the accidental injury makes no visible contusion or wound on the exterior of the body of insured." Therefore, regardless of whether this testimony

would have been otherwise competent, it certainly was both competent and material in this case to show that the injury had left its visible mark on the body of the insured; and we can think of no proof so satisfactory in showing the same as the exposure of the part alleged to have been seriously wounded and injured.

[3] (3) The errors alleged as to the admission of evidence divide themselves into two groups: (1) Assignments 3, 4, 5, and 8 go to the admission of evidence of pain and continued suffering, and inability to labor occasioned thereby, from the date the injury was received up to the expiration of the full period of 52 weeks. The plaintiff was allowed to testify that at the expiration of this period his shoulder was still not in a condition to be of use, and that he still had no use of a portion of one arm. The witness was permitted to demonstrate how far he could move this arm, and that it was painful to move it at all.

The objection to this testimony was put upon the ground that the policy did not provide for indemnity for pain and suffering. This is true it does not; nor was the plaintiff allowed to recover for pain and suffering. This evidence was introduced on the question of "continuous disability." This was one of the most material and stubbornly contested points in the case. For the insured to recover it was necessary, not only to show the injury, but that it was of such a nature and of such a character and extent that the injury, coupled with the effect and results flowing solely from it, created a condition under which the plaintiff was "continuously disabled from performing work." The pain and suffering produced solely by an injury to the body, if severe enough, would, of itself, incapacitate a person from doing work. The fact that at the end of the period for which he was indemnified the shoulder and arm were still useless, and would not perform their respective functions, where it was shown that no other injury had been received, tended to prove disability through the period immediately preceding, and through which he was indemnified.

[4] The sixth and seventh assignments go to the proof of the contents of certain letters, claimed to have been written the company. The policy provides: "Written notice of claims must be given by the insured or his beneficiary to the company at its office from which the policy is issued and be received there within fifteen days from the date of the accident causing the loss for which claim is made," etc. And also: "Affirmative proof must be furnished to the company at its said office on its forms, in case of lost time, within thirty days after the termination of the period for which the company is liable," etc.

The first of these provisions relates to notice of the accident; the second to the duration of the disability. Prior to the trial no-

tice was served upon defendant to have and produce at the trial the letters and correspondence between the parties relative to the claim. At the trial plaintiff was permitted to testify that within four or five days after the accident his brother wrote for him, and he signed and forwarded to the company a letter, stating that he had been injured in an accident, etc. The witness also testified he had written the local agent of the company, advising him that he had notified the company of his injury, but had not received a reply. It is pointed out that this was error, as the policy provided that notice be given the company at the issuing office. A letter from the company's home office is introduced, which shows clearly that the notice had been received by it. It does not show that it was received within 15 days, but it makes no complaint or claim that it was not so received. This letter is dated January 14, 1907, which is only about 19 days after the injury, and incloses a blank to be filled out by plaintiff and his physician, so that we "may properly understand the nature and extent of your disability." Numerous other letters from the company, relative to the claim and the progress of plaintiff's recovery from his injuries, were introduced. The plaintiff was induced to take and pay for a renewal of the policy for another year while he was still incapacitated, as the various letters show. The plaintiff having testified he sent the notice four or five days after the injury, the acknowledgment of receipt of same by the company, and its negotiations and actions in sending blanks and requiring medical examinations and certificates relative to the extent and progress of the wounds, with no claim that the notice was not received in time, were sufficient to warrant the jury in finding that it was in fact given within the time, as was found by them. Besides, if it had not been given in time, the conduct of the company showed clearly that it had elected to waive the provision (St. L. & S. F. Ry. Co. v. Ladd, 124 Pac. 461; St. L. & S. F. R. Co. v. James et al., 128 Pac. 279, not officially reported); and, besides, this provision of notice has been held to be a condition subsequent, and substantial compliance with it sufficient. Pacific Mutual L. Ins. Co. v. Adams, 27 Okl. 496, 112 Pac. 1026.

Under this state of facts, the company really having notice, as is so abundantly shown, evidence that some other notice was given, not authorized by the policy, becomes clearly immaterial, and could have had no injurious effect on the rights of defendant.

[8] The next point arose in this way: Plaintiff testified that at the expiration of the period the policy covered that he wrote and mailed to the company a letter, in which he made a claim for the full indemnity, stating that his total inability to work had covered the full period of 52 weeks, and asking for blank forms if additional proof should

be required. This evidence was to support the allegation of final notice contained in the petition, but it seems to have been urged at the trial that this was not a sufficient compliance with the requirements of the policy. The plaintiff was then permitted to testify that in reply to this letter of notice he received a letter from the company, which had been destroyed, and that it contained a positive denial of all liability, and refused to send plaintiff blanks upon which to make more formal proof.

The objection urged is that, as the petition pleaded that "affirmative proofs of loss of time" had been furnished, and as this letter from the company tended to prove a waiver of such affirmative proof of loss of time, it was incompetent, because not within the issues raised by the pleading. There is no doubt but that evidence, to be relevant, must tend to prove or disprove some issue in the case, and the issues are determinable from the pleading. Jones on Evidence, §§ 135, 136; Roberson v. Hubler, 11 Okl. 297, 87 Pac. 477; Graham v. Heinrich, 13 Okl. 107, 74 Pac. 328; Lockwood Bros. v. Frisco Lbr. Co., 22 Okl. 31, 97 Pac. 562.

[5, 9] The objection made to this evidence, however, was simply, "We object." This did not advise the court of the grounds of the objection; and, while proof of the contents of the letter was irrelevant upon the grounds urged in the brief, yet it was competent to show that such a letter had been received from the company, acknowledging receipt by it of the final claim for loss of time. If the objection had been made at the time that this evidence was not within the issues, doubtless the plaintiff would have then and there asked and been permitted to amend the petition, so as to bring the evidence fairly within the issues, as was done at the end of the trial. But from an examination of the requirements of the policy we think the plaintiff had already proved the giving of a sufficient "affirmative proof of loss of time." The policy, unlike many other policies of insurance, is very indefinite as to what this final notice, or proof, shall be. Naturally this final proof would not need to be so formal and detailed as under fire policies. The insured was required to give prompt notice of the injury, and through the entire course of his recovery the company required certificates, medical examinations, and minute and detailed information from time to time, and at the end of the period of disability was fully advised, or had the opportunity for full advice, both as to the injury and the duration and extent of the "continuous disability" resulting from the injury. Under this condition it is shown that at the end of the 52 weeks, the total time covered by the policy, the plaintiff made written demand on the company for payment of the \$10 per week for the full 52 weeks, stating that his disability had continued for that time, and



that the company acknowledged receipt of this claim. In view of the other notices, reports, examinations, and certificates furnished the company from time to time during the disability, and the further fact that no claim is made that the company demanded, or would have been benefited by, a fuller or more detailed statement by the insured, it is clear that the evidence, independent of any waiver, shows a substantial compliance by the plaintiff with the terms of the policy in this regard. A substantial compliance is sufficient. *St. Paul Fire & Marine Ins. Co. v. Mittendorf et al.*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651, and cases cited.

The conclusions reached on this point render it unnecessary to consider the action of the court in permitting the plaintiff to amend his petition, showing a waiver of final proofs, to conform to the evidence. The remaining points urged relate to the giving and the refusal to give certain instructions.

[6] We gather from the briefs that the several instructions, the giving of which is complained of, are objected to on account of the statements they contain regarding the term "total disability." The policy indemnifies against "injury which causes at once total and continuous inability to engage in any occupation."

The court, after instructing that before plaintiff could recover it must be shown that the injury caused total and continuous disability to engage in any labor or occupation, then qualified the language by adding "that, even though during the time he claimed to be totally and continuously disabled he did perform some trivial services," such fact should not, of itself, be so construed "as to prevent plaintiff from recovering for all of said time, if you find from the evidence that he was at the time of said trivial services unable to have performed them. The test is, not whether the plaintiff did perform any services of any character, but whether the plaintiff was able to perform services of any sort or character," etc. This instruction was given to cover evidence that, while wounded and unable to work or perform the duties of his office, or do other labor, plaintiff had handed to some witnesses or jurors a few subpoenas upon an occasion.

The business of plaintiff named in the policy is "deputy sheriff, engaged in making arrests." We believe the instruction substantially stated the law applicable to the facts of the case. In *Joyce on Insurance*, § 3031, it is said: "The general purpose of such clauses is to furnish an indemnity to assured for the loss of time by reason of accident or injury which prevents him from prosecuting his business, and it would seem that this ought to refer to his inability to perform substantially the duties which are necessary to be done in the business to which the contract refers—an absolute physical inability

to perform substantially the duties which are necessary to be done in the business to which the contract refers. An absolute physical inability ought not to be meant in all cases; for the injury might be of such a character as that common care and prudence would preclude the prosecution of said business."

[7] *Kerr on Insurance*, at page 886, announces the same general rule: "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform a few occasional acts, if he is not able to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure."

And *May on Insurance* (4th Ed.) 522, says: "Total disability from the prosecution of one's usual employment means inability to follow his usual occupation, business, or pursuits in the usual way. Though he may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he cannot to some extent do all parts and engage in all such employments." *Commercial Travelers', etc., Ass'n v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973; *Pacific Mut. L. Ins. Co. v. Branham*, 34 Ind. App. 243, 70 N. E. 174.

We have read the other instructions complained of, and find no substantial error in any of them; and all the instructions asked by defendant and refused were covered in the general charge of the court, in so far as they should have been given.

While it is true, as has been pointed out, there were some immaterial errors at the trial, yet in none of them has a substantial right of the defendant been prejudiced. The whole case, as we view it, shows beyond any question a liability upon the part of the company to pay the full sum recovered, and that the proceedings have been in all substantial matters correct.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

ATCHISON, T. & S. F. RY. CO. v.  
ROBINSON.

(Supreme Court of Oklahoma. Oct. 23, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 347\*)—JUDGMENT ON PLEADINGS—CARRIAGE OF LIVE STOCK—ACTIONS FOR INJURIES.

Plaintiff sued for damages done to a shipment of race horses, alleging shipment to have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

been made under a definite verbal contract, charging gross negligence and praying for full amount of damages. Defendant answered by general denial and by pleading a written contract which limited its liability to the value therein named, and by the further allegation that the written contract was the only one made between the parties. Plaintiff's reply was in effect an unverified general denial of new matter. *Held*, the overruling of defendant's motion for judgment on the pleadings because of the unverified reply was not error.

The issues whether the shipment was made under a verbal agreement and whether defendant was guilty of gross negligence were joined by defendant's general denial, and plaintiff had the right to have such issues determined and was entitled to any evidence relevant, competent, and material to a determination of same, regardless of the written contract, and regardless of the fact that a determination of such issues had the effect of rendering the provisions of the written contract not binding.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1052; Dec. Dig. § 347.\*]

## 2. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

Where a shipment of live stock consists of race horses shipped for the purpose of being entered in certain races, and the carrier has notice of the class to which the stock belongs and the purpose for which it is shipped, and the agent of the carrier at the destination of the shipment is notified that some of the stock had been injured, and such agent goes to the stables where such injured stock is kept and sees same and has ample opportunities to ascertain the extent of the injuries, *held*, this is a substantial compliance with the provisions of the shipping contract requiring notice of injury to be given before the stock is removed or slaughtered or mingled with other stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.\*]

## 3. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

Where a shipment of live stock is made under a verbal contract, and where every move made, every step taken toward a shipment, up to and including a complete consignment and surrender of control by the shipper, the starting in transit of the shipment and the assumption of liability for negligence by the carrier, is all under and pursuant to such parol agreement, and after this a printed shipping contract is presented to the shipper to sign, he has the right to assume that it embodies the terms of the verbal agreement, and the carrier will not be permitted to escape liabilities accruing to the shipper under the verbal agreement by reason of certain provisions in the written contract at variance with the parol contract, unless the shipper's attention has been called to such provisions and fair opportunity given him to assent to same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Lincoln County; John J. Carney, Judge.

Action by C. E. Robinson against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 29 Okl. 706, 119 Pac. 238.

This action was begun June 29, 1908, in the district court of Lincoln county, by C. E.

Robinson against the Atchison, Topeka & Santa Fé Railway Company for damages done to a certain race mare, Nancy Alden, shipped with some other race horses from Kansas City, Mo., to Lawrence, Kan., in September, 1907. The substance of plaintiff's petition is: In September, 1907, plaintiff had the horses in question in Kansas City, and on said day called up the agent of the railway company at Kansas City and by phone informed him that he (Robinson) had some race horses which he desired to ship to Lawrence, Kan., in time for the races on the next day. The agent informed him that such shipment could be made and that, if the horses could be loaded between 4 and 6 o'clock of that afternoon, they would be taken by a fast freight, the "Red Ball," which made no stops for local freight on the way and would reach Lawrence about 12 o'clock that night. This being satisfactory to Robinson, it was agreed between him and the agent that the shipment should be made by that train. Whereupon the agent instructed him where to bring the horses and informed him that a car would be placed there to receive them. Pursuant to this agreement, the horses were taken to the place designated by the agent and loaded into the car between 5 and 6 o'clock of that afternoon. After being loaded, the car was closed and tagged "Red Ball" to designate to the crew that it should go with the Red Ball train on that evening. Some time thereafter it was pulled into the company's yards, but was overlooked or neglected by the Red Ball crew and left in the yards for the night. The excuse given by the crew was that they had forgotten it. During the night it was carelessly switched and bumped around in the yards by the local freight in making up its train, and some time on the following morning was started with the local freight to Lawrence, Kan., arriving there about 2 p. m. of the next day, too late for the races on that day, and with the mare Nancy Alden badly damaged and permanently injured from the careless and grossly negligent manner in which the car had been handled. The railway company answered by general denial and by pleading a written contract alleged to have been fairly and for a valid consideration entered into, and to have been the *only* contract made between the shipper and the carrier. Plaintiff replied, denying the allegations of new matter in the answer; denying that the written contract was entered into in good faith, and that it was the *only* contract made between the parties, and in effect reaffirming that the verbal contract made between the parties was the one under which the shipment was made. The trial resulted in a verdict in favor of Robinson for \$1,500, upon which judgment was rendered, and from which judgment the railway company appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Cottingham & Bledsoe, Charles H. Woods, and George M. Green, all of Oklahoma City, for plaintiff in error. H. H. Smith, of Shawnee, and Rittenhouse & Rittenhouse, of Chandler, for defendant in error.

HARRISON, C. (after stating the facts as above). Numerous errors are assigned by appellant, but all are disposed of under the two general propositions, viz.: First, whether the railway company was entitled to judgment on the pleadings, having set up a written contract the execution of which was not denied under oath; second, were the provisions in the written contract valid and were they binding on the shipper?

[1] As to the first proposition, the plaintiff did not rely on a written contract of any character, nor did he sue for violations of the terms of a written contract, but alleged the shipment to have been made under a definite verbal contract in which no reference was made to the freight rate or limitation of liabilities, and sought recovery on the grounds of the gross negligence of the company in the manner of handling the shipment. This presented the material issues to be tried, a determination of which in favor of plaintiff would entitle him to recover and which were joined by defendant in its general denial of the allegations in the petition. The plaintiff therefore was entitled to have these issues tried and determined, and in the trial of same was entitled to all the competent, material evidence at his command in support of his view of such issues. Therefore the setting up of a written contract by defendant did not preclude the plaintiff from his right to have such issues determined, nor entitle defendant to judgment on the pleadings, notwithstanding plaintiff had failed to deny the execution of the contract under oath. If plaintiff had stated a cause of action, which in our opinion was done, he had a right to have same determined upon the theory he had chosen—upon the grounds of his own choice. And, not relying on a written contract, not suing on a written contract, but claiming the shipment to have been made under a verbal agreement, and relying for recovery on the carrier's common-law liability for negligence, he should not be required to abandon his chosen grounds and to try his case upon a different theory by the setting up of a written contract, unless such contract constituted a *prima facie* defense to his action. Whether it did or not depended upon the question that it was the *only* contract, which question was one of fact and was completely answered by a determination of the issues tendered in the petition, "that the shipment was made under a *verbal* contract." Hence, the decisive issues tendered by both the petition and the written contract being disposed of by a determination of the issues presented by the petition, it is immaterial whether the execution of the

written contract be denied under oath or not, or whether or not plaintiff's reply was verified. It was held by this court in *Flesher v. Callahan*, 32 Okl. 283, 122 Pac. 489, that section 5648, Comp. Laws 1909, "providing that allegations of the execution of written instruments and indorsements thereon shall be taken as true unless the denial thereof be verified by affidavit, requires the verification of the denial of the execution only." The execution of the instrument in question here was not in issue. Therefore it was not error to overrule defendant's motion for judgment on the pleadings.

This case is clearly distinguishable from *St. L. & S. F. Ry. Co. v. Cake*, 25 Okl. 227, 105 Pac. 322, and *St. L. & S. F. Ry. Co. v. Phillips*, 17 Okl. 264, 87 Pac. 470. In those cases a wholly different fundamental principle of pleading was involved. In each of those cases the plaintiff sued for a violation of a written contract and relied on the contract for recovery, and in each case the contract relied upon showed that plaintiff had not complied with the conditions precedent to recovery, and that, in the absence of a verified denial or plea of waiver of such conditions, plaintiff was not entitled to recover. The case at bar rests on a different principle of pleading for the reasons herein stated.

The same question of pleading was decided in the case of *C. & R. I. & P. Ry. Co. v. Spears*, 31 Okl. 469, 122 Pac. 228, wherein this court, speaking through Justice Williams, says: "The defendants having pleaded the contracts, and the same being admitted because no reply was filed, still they were not entitled to have judgment rendered in their favor upon the pleadings, because of the issue joined by the general issue as to the death of the four head of cattle and the value thereof."

[2] In the second proposition two material provisions of the written contract are involved, viz., the provision that notice of the damage be given by the shipper to the carrier within a prescribed time after the damage is discovered, and the provision which limits the carrier's liability to the valuation placed on the stock in the contract. The contract provided that written notice of any damage sustained by the stock should be given to the company before the stock should be slaughtered or intermingled with other stock, and the further provision that the company should not be liable in any amount in excess of the values printed in the contract, which are as follows: "Each horse or pony (gelding, mare or stallion), mule or jack, \$100.00. Each ox, bull or steer, \$50.00. Each cow, \$30.00. Each calf, \$10.00. Each hog, \$10.00. Each sheep or goat, \$3.00." The record shows that the provisions for notice were substantially complied with. The injured animal was not intended for slaughter nor to be intermingled with and put on the

market in bulk with other stock. She was a racing animal, shipped for that specific purpose, and the railroad had notice of the class to which she belonged and the purpose for which she was shipped; and when the shipment reached its destination and it was discovered that the animal, Nancy Alden, was injured, the company was notified of same, and the agent of the company went to the stable where she was kept and saw her and had ample opportunity to examine her. The evidence, however, showed that it was impossible at the time to ascertain the extent of her injuries. Later, it was ascertained that she was rendered useless for racing purposes. The company, having actual notice of the injury, had ample opportunity to examine the extent thereof, and, under the circumstances of this case, we think the notice which the company had was a substantial compliance with the "notice provisions" of the contract.

[3] The record in this case clearly shows negligence on the part of the railway company. Hence the remaining question is: Was the liability of the company limited to the value fixed in the written contract? A determination of this question depends upon whether the value was fixed by the shipper and whether such value was fairly agreed upon between the shipper and the agent of the carrier. This question may properly be determined without the necessity of construing the federal statute, known as the "Hepburn Act."

The question here is not a question of law as to whether the carrier had authority to limit its common-law liability to a value fixed by the shipper and fairly agreed upon between the shipper and carrier, but is a question of fact whether such value was fixed by the shipper and whether it was fairly agreed upon between the parties. If, as a matter of fact, such value was not fixed by the shipper and was not fairly agreed upon by the parties, but was arbitrarily printed in the contract by the carrier without the knowledge or even the implied assent of the shipper, then the carrier's liability is not limited to such value and there is no necessity for a construction of the federal act. Therefore the issue, being one of fact, was properly determinable by the jury, from the evidence, and we think the verdict was fairly and reasonably supported by the testimony submitted. But it is contended by the company that the court erred in admitting testimony which tended to vary the terms of the written contract. If there had been no other issue to be tried, except the validity of the written contract, the contention might be well taken. But there were other issues independent of the written contract and decisive of plaintiff's right of recovery, on which plaintiff relied and had a right to have determined and a right to introduce any testimony relevant, competent, and material to a correct determination of such issues. And if

the evidence offered was competent and material to a determination of such issues, and was offered for such purpose, it was not error to admit same although it may have had the consequent effect of varying the terms of the written contract; for, as stated in the discussion of the first proposition, plaintiff had tendered the issue "that the shipment was made under a verbal agreement and that the company was guilty of gross negligence" and relied on these grounds for recovery. The defendant, by general denial, joined these issues, thereby giving plaintiff the right to have them determined, although the conclusion may have followed, as a logical sequence, that the terms of the written contract were not fairly entered into. *C., R. I. & P. Ry. Co. v. Spears*, supra, is in point on the question of admission of evidence.

As to whether the printed contract superseded all others, or whether the verbal agreement was merged in the printed contract, the evidence was conclusive that a definite and complete agreement in reference to the shipment was made over the phone by the shipper and the agent of the carrier without any mention or reference to the rate, the value of the stock, further than that it was racing stock, or to any limitation of liability or any mention of the fact that a written or printed contract would be required. The testimony offered by defendant substantiates this view and corroborates the testimony of plaintiff on those points. It also shows clearly that the stock was loaded, the car closed and tagged "Red Ball," the shipment fully delivered to the carrier and control of same completely surrendered by the shipper and that after the car had been moved from the place of loading and started in transit all pursuant to the verbal agreement, some two hours thereafter, the agent of the company presented to the shipper the printed contract, without calling his attention to its special provisions and without informing him that it contained provisions directly at variance with the terms of the verbal agreement, and without giving him an opportunity to examine its contents and exercise his right of choice.

Under these circumstances, having made a definite and complete agreement as to the shipment, without mention of rate or limitation of liability, having surrendered certain of his rights, and certain rights having accrued to him under such agreement, it was reasonable for him to assume that the printed contract presented to him under such circumstances contained no provisions which would take away the rights already accrued. *A., T. & S. F. Ry. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *K. P. Ry. Co. v. Reynolds*, 17 Kan. 251; *Railway Co. v. Lockwood*, 17 Wall. 367, 21 L. Ed. 627; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Bostwick v. Baltimore & Ohio Ry. Co.*, 45 N. Y. 712; *Swift v. Pacific Mail & Steamship Co.*, 106 N. Y. 208, 12 N. E. 583; *M., K. & T. Ry. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S.

W. 1073; *S. L. & S. F. Ry. Co. v. Gorman*, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637; *Louisville, etc., R. Co. v. Craycraft*, 12 Ind. App. 203, 39 N. E. 523; *Gulf Ry. Co. v. Wood* (Tex. Civ. App.) 30 S. W. 715; *Louisville, etc., Ry. Co. v. Meyer*, 78 Ala. 597; *Strohn v. Detroit, etc., Ry. Co.*, 21 Wis. 554, 94 Am. Dec. 564.

In *Louisville, etc., Ry. Co. v. Craycraft*, supra, it was held: "Where the shipper loads his goods under a parol contract, it will govern, and his right of recovery will not be limited by a written contract handed to him just as they are being carried away."

In *Strohn v. Detroit Ry. Co.*, supra, it was held: "Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it and procuring his assent. It is no answer for the company, in such a case, to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received."

In *Bostwick v. Baltimore & Ohio Ry. Co.*, supra, the court held: "The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this. If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped."

In *M., K. & T. Ry. Co. v. Withers*, supra, in the syllabus the court said: "After plaintiff's cattle had been loaded on defendant's cars for shipment under a verbal contract, and the cars closed and sealed, defendant's agent presented a written contract, binding plaintiff to do certain acts, not required by the oral agreement, as a condition precedent to recovery in case of damage. Plaintiff had not time to read the contract before the train started but, supposing it was a pass for a man to go with the cattle, signed it. Held,

that the verbal contract controlled the shipment."

Now, in the case at bar, up to and including a complete consignment and surrender of control of stock by the shipper, the starting of the shipment in transit and the assumption of liability for negligence by the carrier, every move made, every step taken toward the shipment, was under and pursuant to a parol contract. Under these circumstances the shipper had the right to assume that his stock would not be grossly misused and to act on the faith thus inspired and rely on the rights thereby accrued to him, and the carrier will not be permitted to take away those rights and relieve itself of the liability thus incurred, without having given him a fair opportunity to assent thereto.

The record discloses that such opportunity was not given. Therefore the verbal contract must control. There being no agreement in the verbal contract as to the extent or limitations of liability, the carrier is held to its common-law liability for negligence. There is no controversy as to the value of the animal, the extent of the injuries, nor the damage thereby sustained. The allegation of negligence being fairly sustained by the evidence, we see no reason why the verdict should be set aside.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

ATCHISON, T. & S. F. RY. CO. v.  
MOORE et al.

(Supreme Court of Oklahoma. Oct. 23, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 347\*)—JUDGMENT ON PLEADINGS—CARRIAGE OF LIVE STOCK—ACTIONS FOR INJURIES.

Plaintiff sued for damages done to a shipment of race horses, alleging shipment to have been made under a definite verbal contract, charging gross negligence and praying for full amount of damages. Defendant answered by general denial and by pleading a written contract which limited its liability to the value therein named, and by the further allegation that the written contract was the only one made between the parties. Plaintiff's reply was in effect an unverified general denial of new matter. Held, the overruling of defendant's motion for judgment on the pleadings because of the unverified reply was not error.

The issues whether the shipment was made under a verbal agreement and whether defendant was guilty of gross negligence were joined by defendant's general denial, and plaintiff had the right to have such issues determined and was entitled to any evidence relevant, competent, and material to a determination of same, regardless of the written contract, and regardless of the fact that a determination of such issues had the effect of rendering the provisions of the written contract not binding.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1052; Dec. Dig. § 347.\*]

2. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

Where a shipment of live stock consists of race horses shipped for the purpose of being

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entered in certain races, and the carrier has notice of the class to which the stock belongs and the purpose for which it is shipped, and the agent of the carrier at the destination of the shipment is notified that some of the stock had been injured, and such agent goes to the stables where such injured stock is kept and sees same and has ample opportunities to ascertain the extent of the injuries, *held*, this is a substantial compliance with the provisions of the shipping contract requiring notice of injury to be given before the stock is removed or slaughtered or mingled with other stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.\*]

### 3. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

Where a shipment of live stock is made under a verbal contract, and where every move made, every step taken toward a shipment, up to and including a complete consignment and surrender of control by the shipper, the starting in transit of the shipment, and the assumption of liability for negligence by the carrier, is all under and pursuant to such parol agreement, and after this a printed shipping contract is presented to the shipper to sign, he has the right to assume that it embodies the terms of the verbal agreement, and the carrier will not be permitted to escape liabilities accruing to the shipper under the verbal agreement by reason of certain provisions in the written contract at variance with the parol contract, unless the shipper's attention has been called to such provisions and fair opportunity given him to assent to same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Lincoln County; John J. Carney, Judge.

Action by H. F. Moore and others against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cottingham & Bledsoe, Charles H. Woods, and George M. Green, all of Oklahoma City, for plaintiff in error. H. H. Smith, of Shawnee, and Rittenhouse & Rittenhouse, of Chandler, for defendants in error.

**HARRISON, C.** This action was begun in the district court of Lincoln county June 20, 1908, by H. F. Moore, C. E. Robinson, and S. H. Smith, against the Atchison, Topeka & Santa Fé Railway Company for damages in the sum of \$1,990, resulting from injuries alleged to have been done to one Sousa Mc, a trotting mare, shipped with some other race horses over said railroad from Kansas City, Mo., to Lawrence, Kan., in September, 1907. The case was tried in April, 1910, resulting in a verdict and judgment in favor of plaintiff in the sum of \$1,400, from which judgment the defendant, the railway company, appeals.

[1-3] The shipment in which the animal, Sousa Mc, is alleged here to have been injured, was the same shipment in which the racing mare, Nancy Alden, was injured and recovery had for such injuries in a judgment which was affirmed by this court in case No.

2,015, entitled, *A. T. & S. F. Ry. Co. v. C. E. Robinson*, 129 Pac. 20. The two cases are identical, both in points of law and questions of fact, and in every material feature except as to the value of the animal, the extent of the injuries, and the amount of damages resulting therefrom. The question of the value of the animal, the extent of the injuries done to her, and the amount of damage resulting therefrom were fairly submitted to the jury, and a verdict returned in favor of plaintiff for the sum of \$1,400.

The verdict being fairly supported by the evidence, and the questions of law involved in this case being identical with those involved in said case No. 2,015, and finding no material errors committed in the trial of this cause, following the decision in the case No. 2,015, the judgment of the court below is affirmed.

PER CURIAM. Adopted in whole.

## NATIONAL SURETY CO. v. BOARD OF EDUCATION OF CITY OF HUGO.

(Supreme Court of Oklahoma. Oct. 15, 1912.)

(Syllabus by the Court.)

### 1. BONDS (§ 128\*)—ACTIONS — FAILURE OF PROOF.

Plaintiff sued defendant to recover on a builder's bond for damages on alleged broken conditions of a builder's contract. The petition charged that the building had not been constructed according to the terms of the contract, nor in conformity with the plans and specifications attached to and made a part of said contract. The contract was not pleaded, nor was it charged that the same was lost or beyond the reach of plaintiff; neither were its contents proved, nor was there any attempt to prove same, or to excuse failure so to do. *Held*, that plaintiff could not recover, for the reason that, in the absence of the contract, or failure to prove its contents, neither the court nor jury could determine whether or not there had been any breach thereof, without which no judgment could be had.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 205-217; Dec. Dig. § 128.\*]

### 2. CONTRACTS (§ 350\*)—ACTIONS FOR BREACH — BURDEN OF PROOF.

The party who alleges a contract, either as a cause of action or a defense, has the burden of proving it, if the existence of the contract is put in issue; and he has the burden of proving every fact essential to the cause of action or defense. The rule applies to implied as well as express contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819-1823; Dec. Dig. § 350.\*]

### 3. CONTRACTS (§ 350\*)—ACTIONS FOR BREACH — BURDEN OF PROOF.

Upon the plaintiff is thrown the burden of proving what the terms of the contract were, what the plans and specifications were, where the building was to be performed according to the plans and specifications, and a compliance with them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819-1823; Dec. Dig. § 350.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Choctaw County; James R. Armstrong, Judge.

Action by the Board of Education of the City of Hugo against the National Surety Company for breach of a contractor's bond. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

I. L. Strange, of Hugo, for plaintiff in error. E. H. Foster, of Oklahoma City, and R. E. Stephenson, of Hugo, for defendant in error.

ROBERTSON, C. This is a suit by the school district upon a contractor's bond to recover damages for breach thereof by the contractor in failing to construct a school building in the city of Hugo according to the contract, plans, and specifications, and for a failure to install in said building a heating apparatus according to the contract, plans, and specifications, to the full and complete satisfaction of Henry T. Phelps, the architect and superintendent of said building. The action was against R. O. Langworthy, contractor, and the National Surety Company, as surety on the bond. No service of summons was had on Langworthy, and the suit proceeded against the Surety Company alone, and resulted in a judgment in favor of the school district in the sum of \$1,800. A motion for new trial was presented and overruled, and the Surety Company appeals.

Many errors are assigned and relied upon by the Surety Company, but it will be unnecessary to consider any but the first and second, which read as follows: "The verdict is not sustained by sufficient evidence, and is contrary to law." And: "The court erred in refusing to give the jury, at the close of the evidence, a peremptory instruction in favor of the plaintiff in error."

The petition charges, among other things, that: "The plaintiff above named, the successor to the school district of Hugo, Indian Territory, for amended complaint, complains of the defendant R. O. Langworthy and the National Surety Company of New York, a corporation, organized under the laws of the state of New York, for that on the 1st day of September, A. D. 1905, the defendant R. O. Langworthy made and entered into a contract with the plaintiff, and agreed to build and complete a certain two-story brick and stone schoolhouse building according to plans and specifications and drawings, which were made a part of said agreement, a copy of which said contract is herewith filed and marked 'Exhibit A,' which said plans and specifications were drawn by one Henry T. Phelps, as architect for plaintiff, in a good, substantial, workmanlike manner, to the satisfaction and under the supervision of the said Henry T. Phelps, superintendent for the construction of said building; and the said R. O. Langworthy did also agree to find, provide, and furnish such material of such kind and quality and description as should be fit, proper, and sufficient for completing

all works mentioned, and, provided possession be given to the contractor, on or before 135 working days from date of contract."

[1] The answer of the Surety Company was a general denial, and also an affirmative defense. The answer was verified. The contract, which was in writing, was not pleaded, neither were the plans or specifications; nor was there any attempt on the part of the school district to prove the same in any wise, nor was it shown that they had been destroyed or lost, or that they were not within reach or under the control of the said school district. There is not a word of competent evidence in the record to show that the building was not constructed according to the contract, plans, or specifications. There is plenty of evidence tending to show that the building was defectively constructed, and also to show that the heating plant was unsatisfactory; but nowhere is there anything to show in what particular or in what manner the construction differed from the terms of the contract, or of the plans and specifications, all of which were in writing, but for some reason unknown to us were not pleaded or proved.

It is asking too much of an appellate court to say, under the facts of the case as disclosed by the record, that the work was not done in conformity to the terms and conditions of the contract and plans and specifications, without enabling the court to see and examine the contract, etc., or without proving the contents of the same.

True it is that witnesses testified that the walls were defective, and that the heating plant was insufficient; but these things may have resulted from poor judgment of the parties in making the contract, or in a mistake of judgment of the architect in preparing the plans and specifications. It may be that the work done and material furnished were exactly as required by the contract and plans and specifications. This we do not know; nor can we, by any manner of means, ascertain the facts from the record before us.

[2, 3] The party who alleges a contract, either as a cause of action or a defense, has the burden of proving it, if the existence of the contract is put in issue; and he has the burden of proving every fact essential to the cause of action or defense. The rule applies to implied as well as to express contracts. 9 Cyc. 757, and many cases there cited. "Upon the plaintiff is thrown the burden of proving what the terms of the contract were, what the plans and specifications were, where the building was to be performed according to plans and specifications, and a compliance with them." 6 Cyc. 98, and cases cited.

There was no competent evidence before the court or jury that would warrant the verdict or sustain the judgment. Before a verdict could be returned in favor of plaintiff, the jury should have found that Lang-

worthy, the contractor, had breached his contract; and how could the jury say that the contract had been breached when the contract was not offered in evidence, nor were its terms or conditions, nor the terms or conditions of the plans and specifications, known to the court or jury? There being no competent evidence to sustain a judgment, the court should have directed a verdict for the defendant, and for its failure to do so the judgment should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

### GOSNELL v. PRINCE.

(Supreme Court of Oklahoma. Sept. 17, 1912.)

(Syllabus by the Court.)

#### 1. JUDGMENT (§ 744\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

Where, in a suit to quiet title to certain land, certain contracts and transactions were adjudged illegal and void and to create no right or title in the plaintiff in that suit, it was prejudicial error in an ejectment suit to recover the land, brought by the defendant in the suit to quiet title against the plaintiff in the suit to quiet title, to admit evidence of the making of the contracts and occurring of the transactions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.\*]

#### 2. JURY (§ 32\*)—NUMBER OF JURORS.

In an action brought prior to statehood, but tried since statehood, a unanimous verdict of the jury is required.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 221-225; Dec. Dig. § 32.\*]

Error from District Court, Tillman County; J. T. Johnson, Judge.

Action by R. L. Gosnell against J. H. Prince. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

McElhoes, Ferris & Rhinefort, of Lawton, and George Ahern, of Frederick, for plaintiff in error. Mounts & Davis, of Frederick, for defendant in error.

ROSSER, C. This is an ejectment suit brought by R. L. Gosnell against J. E. Prince to recover a certain lot in the town of Frederick. The land was patented to Gosnell by the United States government, and it is not claimed that he has ever made a written conveyance of the lot to any one. From the evidence it appears that, when the Blackwell, Enid & Southwestern Railway was projected, several gentlemen of Vernon, Tex., agreed to engage in the business of locating town sites and selling lots along the new road. They foresaw a future for a town at or near where Frederick, Okla., is now situated, and entered into an agreement with S. N. Gosnell (not the plaintiff in this case) to locate four homesteaders on the site of Frederick, and

to get the homesteaders to convey to the company to be formed by the Vernon parties. S. N. Gosnell filed four persons according to his agreement, one of whom is the plaintiff here. Before the persons so filed had made final proof or obtained titles, people began to settle on the town site and to make improvements. About the same time some other parties conceived the idea that they also could make some money in the town-site business, and with that in view started a town at Hazel, which it seems was about a half mile from the town site of Frederick. The Vernon people had an understanding with the railroad company by which the station was to be located at a point to be designated by them, and with this for a lever they proceeded to pry off, from time to time, a portion of the inhabitants of Hazel and to locate them in their town site of Frederick. Among others who had located at Hazel was the defendant, Prince. Under an agreement with Mr. Bismark Houssells, who was looking after the matter for the Vernon people, he moved his drug store from the town of Hazel to the lot now in controversy, and became identified with the town of Frederick. By written agreement, made before the defendant moved to Frederick, Houssells, for the town-site company, promised to give to Prince a lot in Frederick. This agreement was dated April 4, 1902, before plaintiff had any title, and before the Vernon people could lawfully contract for title. The plaintiff was not in Frederick at the time the defendant moved on the lot. In July following the move, Gosnell brought an unlawful detainer proceeding against the defendant in the justice court and was defeated. He tried to take an appeal, but for some reason the appeal was not perfected. In the latter part of the year he made application to prove up and have patent issued for town-site purposes. The secretary approved the town site, and a patent was issued to plaintiff. The Vernon people advanced plaintiff money to pay for the land, and a final receipt was issued to him December 24, 1902. The amount advanced was about \$1,400. When plaintiff obtained title to the quarter section, the Vernon people made another contract with him by which he was to get one-tenth of the proceeds of the land. They formed a corporation in which he received one-tenth of the stock. He refused, though, to make a deed to the lot in suit to the defendant, and refused to deed it to the town-site company.

Some time after plaintiff obtained title from the government, defendant brought a suit against him to quiet title, and alleged the facts, as to how the land was obtained, that he was in possession under contract with Houssells and had made improvements. He also alleged that, in order to obtain the approval by the secretary of the town site, Gosnell had represented that persons had gone

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



on the land and made improvements, and that, by reason of all these things, a trust had been created on the lot in his favor. The trial court sustained a demurrer to the petition, and on appeal the decision of the trial court was affirmed; the case being reported in 19 Okl. 175, 92 Pac. 164. The Supreme Court of the territory of Oklahoma held that a contract by a homesteader, made before he had obtained title, to alienate the land, when he should have obtained the title, was void, and that no right, either in law or equity, could grow out of such a contract, and that the contract by which Houssells for the town-site company agreed to give defendant a lot was void. The town-site company made considerable effort to get plaintiff to convey to defendant, but failed. It then made a conveyance to defendant dated July 15, 1908. The issue submitted to the jury was whether or not the plaintiff, subsequent to the 24th of December, 1902, the date of the final receipt, agreed to convey the lot to the Frederick Town-Site Company.

[1] The defendant, over the objections of the plaintiff, was permitted to introduce evidence of transactions and negotiations prior to December 24, 1902. A large portion of the evidence related to such matters. This is assigned as error. It may well be doubted whether the facts pleaded constituted a defense to the action, because they were all in existence and within defendant's knowledge at the time he brought the suit to quiet the title to the land. *Farmers' State Bank v. Stephenson*, 23 Okl. 695, 102 Pac. 992; *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650. It seems to be a case for the application of the maxim, "Nemo debet bis vexari pro una et eadem causa." But not deciding this point, because not raised by the parties, there can be no question that evidence concerning contracts held void in the suit to quiet title was not admissible in this suit. The admission of the written agreement by Houssells to give defendant a lot was highly prejudicial to plaintiff. It had been held void in the former case, and should not have been admitted. See *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 271; *Union Sav. & L. Ass'n v. Byrne*, 114 Fed. 831, 52 C. C. A. 465; *Glencave Granite Co. v. Cutlan* (1896) 1 Chan. 667; *Lindquist v. Maurepas Land & Lbr. Co.*, 112 La. 1030, 36 South. 843; *Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551.

[2] The court instructed the jury that three-fourths concurring could return a verdict, and the verdict was in fact returned by 10 jurors concurring. This case was pending at statehood. It was necessary for all the jurors to concur in order to render a verdict. *Pacific Mut. L. Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026; *Kerfoot-Bell Co. v. Kerfoot*, 30 Okl. 19, 118 Pac. 367; *Border v. Carrabine*, 30 Okl. 740, 120 Pac. 1087; *Mc-*

*Leod v. Spencer*, No. 2,068, 126 Pac. 753, not yet officially reported, and cases there cited.

The case should be reversed and remanded.

PER CURIAM. Adopted in whole.

## GROSS CONST. CO. v. HALES et al.

(Supreme Court of Oklahoma. Jan. 16, 1912.)

(Syllabus by the Court.)

### 1. PLEADING (§ 267\*)—AMENDMENT—CROSS-PETITION.

Where a cross-petition alleged that by written contract plaintiff had engaged to pay for certain party walls, it was not error to permit an amendment during the trial alleging that the parties entered into a contract by which plaintiff agreed to pay for certain party walls, but that by mutual mistake the written contract did not express the real agreement, and praying for reformation of the written contract, plaintiff not claiming surprise, and it appearing that all persons who knew anything about the transaction testified in the case, and it was not error to admit evidence in support of the amendment.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 808; Dec. Dig. § 267.\*]

### 2. PLEADING (§ 267\*)—AMENDMENT—CROSS-PETITION.

Such an amendment did not change substantially the "claim or defense" which was, both before and after the amendment, that plaintiff had agreed to pay for the party walls.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 808; Dec. Dig. § 267.\*]

### 3. PARTY WALLS (§ 10\*)—CONTRACTS — EVIDENCE.

When plaintiff took contracts to erect at the same time buildings on seven lots belonging to various persons, two of which lots belonged to defendant, and where the contract with defendant provided that "this contract will include all walls and party walls, which are to be paid for by the contractor," and the defendant testified that plaintiff agreed to pay for all party walls for which defendant was liable, and defendant is corroborated in some particulars by other witnesses, the evidence was sufficient to sustain a finding that plaintiff agreed to pay for a party wall on one of the buildings on the east side of the block not adjoining defendant's building, but for the cost of which he was liable, though plaintiff's manager denies there was such an agreement.

[Ed. Note.—For other cases, see *Party Walls*, Cent. Dig. §§ 54-64; Dec. Dig. § 10.\*]

(Additional Syllabus by Editorial Staff.)

### 4. REFORMATION OF INSTRUMENTS (§ 18\*)—MISTAKE.

Where, by a mistake as to the effect of the language used, a writing does not truly express the contract, equity will relieve.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 72, 73; Dec. Dig. § 18.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; R. H. Loofbourrow, Judge.

Action by the Gross Construction Company against George H. Hales and others. Judgment for defendants, and plaintiff brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Everest, Smith & Campbell, of Oklahoma City, for plaintiff in error. Flynn, Chambers & Lowe and W. F. Wilson, all of Oklahoma City, for defendant in error George H. Hales.

ROSSER, C. This suit was brought by the Gross Construction Company against George H. Hales to recover a judgment for the balance claimed to be due it upon a certain building contract, for the construction of a building upon lots 10 and 11, block 7, in Oklahoma City, amounting, as alleged, to \$3,192.41. Hirsch and Kauffman were made parties because they had become interested in the property since the transaction in controversy. The pleadings, exhibits thereto, and preliminary motions in the case cover 60 pages of the record. Defendant filed an answer and cross-petition. The answer was a general denial, but in the trial it was practically admitted that the plaintiff and defendant entered into the contract sued upon, and the only matter in controversy between them was as to a certain credit, which the defendant claims he was entitled to on account of certain party walls, for which he claims the plaintiff agreed to pay. The defendant, in his cross-petition, gave a long and complicated description of the lots which had been owned by him, and upon which party walls had been built, certain fractional parts of which, set out minutely in the cross-petition, the defendant had originally been bound to pay for. The cross-petition then alleged that plaintiff was to pay the amount defendant owed for party walls out of the sum agreed to be paid it on the building contract, and that plaintiff's agreement to pay was contained in the written building contract.

The building contract was upon a form used by the National Association of Architects and Builders, and into the form was written the following: "This contract will include all walls and party walls, which are to be paid for by the contractor." The plans and specification, according to which the building was constructed, were not produced at the trial. The defendant, after persistent effort to show by parol testimony what was meant by the provisions in the contract, that it was to "include all walls and party walls, which were to be paid for by the contractor," offered to amend his cross-petition by alleging that he was induced to sign the contract through fraudulent representations made to him by plaintiff with reference to the construction that would be placed upon the contract which he signed, and that he relied upon the statements made by the plaintiff, and he believed them to be true, and signed the contract, relying upon such representations. The court refused to permit the amendment. The defendant then undertook to prove that the contract to pay for the party walls was made by the plaintiff separate and distinct from the written contract, and that there was a valid and binding agreement

made between the plaintiff and defendant by which the plaintiff agreed to pay defendant's portion of the price of the construction of the wall on the east side of lot 16. When this evidence was excluded by the court, the defendant asked leave to amend his answer to the effect that the contract sued on did not express the real agreement between the parties, and that the failure to so express said agreement between the parties was a mutual mistake upon the part of the plaintiff and defendant Hales, and that it was the agreement of the parties that plaintiff should pay for that portion of the wall on the east side of lot 16, block 7, of Oklahoma City, or the price of the construction of that wall that defendant, by former agreement entered into with one S. M. Gloyd, had agreed to pay, and also that the same agreement was entered into with reference to the plaintiff paying for that portion of the party wall on the west side of lot 10 that defendant was bound to pay, and asked that the agreement be reformed to state what the actual understanding and agreement of the parties was. The court permitted this amendment, and the trial then proceeded, and there was a verdict and judgment reducing the plaintiff's claim to the extent of the amount claimed by the defendant for the party wall.

The defendant testified that before the contract was signed the plaintiff agreed to pay for half of "Sipes' wall," and "Will Hales' wall, and also the partnership walls on all the rest of the building." He said that after he had this conversation with the plaintiff that the clause, "This contract will include all walls and party walls, which are to be paid for by the contractor," was written into the contract. And then stated that he had a talk with the plaintiff's manager as to what this meant, and said: "He (meaning plaintiff) told me he would pay for the east wall, Mr. Gloyd's, and all the party walls. That is the reason that I had it put in that way. I had signed a contract with Mr. Gloyd, and Mr. Gross knew all about it. When we talked this over, Mr. Gross agreed to pay for all the walls for this contract, in this contract." Then the examination proceeds as follows: "Q. Did you tell him that the clause intended he should pay for all these walls in this contract? A. I told him that he would have to agree, before I would sign this contract, he would pay for all the walls, Jasper Sipes', W. T. Hales', Gloyd's wall, and Heinrich's wall, and his own wall, and he agreed to and did. That was the conversation." Defendant was corroborated to a certain extent by the witness Heinrich. It also appears that plaintiff paid for some of the party walls and gave defendant credit on his account for \$550.50 that defendant had paid on the Sipes' wall.

The grounds urged by plaintiff for a reversal of this case are reducible to two heads: First that the court erred in permitting the defendant to amend his answer so as to al-

lege that through mistakes the contract failed to express the real intention of the parties. Second, that the evidence was not sufficient to support the allegations of the answer as amended.

[1, 2] Plaintiff's position is that the amendment permitted was inconsistent with the allegations of the original cross-petition, and that because of its inconsistency the amendment should not have been allowed, and that proof of the allegations of the amendment should not have been allowed.

The amendment, and evidence in its support, was properly received. The fourth paragraph of the cross-petition, on which the parties went to trial, alleged that the building contractor provided that the plaintiff should pay for all the walls and party walls that the defendant had been liable for. When defendant was not permitted to show by oral testimony that the provisions in the written contract, "This contract will include all walls and party walls, which are to be paid for by the contractor," meant that plaintiff was to pay for the walls for which defendant had originally been liable, he amended by alleging that the contract did not express the real agreement, and that its failure to express the real agreement was a mutual mistake of the parties, and that the real agreement was that plaintiff should pay for the walls. This was not inconsistent with the cross-petition as it stood before the amendment was made. Section 5679 of Snyder's Compiled Laws is as follows: "The court, may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party or correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." And under this section it has been held that the form of action may be changed so long as the amendment does not "change substantially the claim of defense." *Ft. Produce Co. v. S. W. Grain & Produce Co.*, 26 Okl. 13, 108 Pac. 386; *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987; *Stevens v. Matthewson*, 45 Kan. 594, 26 Pac. 38. The claim or defense was that plaintiff had agreed to pay for the walls and had not done so. The amendment only related to the evidence of the promise. The defendant alleged that plaintiff had agreed to pay for the walls, and that the agreement was embodied in the written contract. The amendment, in effect, was that they agreed, but that the written contract failed to embody the agreement. The plaintiff did not claim

surprise or attempt to show that it was not prepared to meet the issue. The matter of permitting amendments is largely within the discretion of the trial court. *Kuchler v. Weaver*, 23 Okl. 420, 100 Pac. 915, 18 Ann. Cas. 462; *Alcorn v. Dennis*, 25 Okl. 135, 105 Pac. 1012, and cases cited therein; *Trower v. Roberts*, 30 Okl. 215, 120 Pac. 617, decided in November, 1911. It cannot be questioned that the matters pleaded in the amendment could have been proven if originally contained in the cross-petition, and the plaintiff not claiming to have been surprised, and it appearing that all witnesses who knew anything about the transaction testified at the trial, the case should not be reversed because of the amendment.

[3] Plaintiff's position that the evidence is not sufficient to support the verdict is not tenable. The evidence of the defendant supported as it was by the witness Heinrich, and the circumstances in the case, was ample to support the findings. The plaintiff was building on all the seven lots at one time, and the defendant made the agreement to pay him \$28,000. It is a very reasonable conclusion that he would arrange with the contractor for a lump sum to cover all he would have to pay with reference to the erection of all the buildings, and this view is supported by the words written into the contract that plaintiff would pay for "all walls," etc.

[4] The case of *McNinch v. Northwestern Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803, is not in conflict with this view. In that case the defendant claimed that the contract sued on was fraudulently written in different terms to those agreed on by the parties, and the court held that merely representing to a man in possession of his faculties and able to read that a contract contained something different to what it actually contained was not such fraud as would void the contract. This rule is supported by all the authorities.

But in this case the theory of the defendant was that both parties understood the contract, and that, by mistake as to the effect of the language used, the writing did not truly express the contract. In such cases equity will relieve. *Pomeroy's Eq. Juris.*, at section 845, after referring to a previous section, states the rule as follows: "If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, *by means of a mistake of law*, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is not a mistake as to the legal import of the *contract actually made*, but the mistake of law prevents the real contract from being embodied in the written instru-

ment. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmatively or defensively, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms of language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not conformed to these instances." This rule is supported by the following authorities: *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589, opinion by Marshall; *Ivinson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66; *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, 48 N. Y. 408; *Maher v. Insurance Co.*, 67 N. Y. 283; *O'Donnell v. Harmon*, 3 Daly (N. Y.) 424; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; *Canedy v. Marcey*, 13 Gray (Mass.) 373, opinion by Shaw; *Stedwell v. Anderson*, 21 Conn. 139; *Huss v. Morris*, 63 Pa. 367, opinion by Sharswood; *Cooke v. Husbands*, 11 Md. 492; *Larkins v. Biddle*, 21 Ala. 252; *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Clopton v. Martin*, 11 Ala. 187; *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Smith v. Jordan*, 13 Minn. 264 (Gil. 246) 97 Am. Dec. 232; *Wall v. Melke*, 89 Minn. 232, 94 N. W. 688; *Sparks v. Pittman*, 51 Miss. 511; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Oliver v. Mutual Com. Marine Ins. Co.*, 2 Curt. 277, Fed. Cas. No. 10,498; *Lansing v. Commercial Union Ins. Co.*, 4 Neb. (Unof.) 140, 93 N. W. 756; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543; *Hausbrandt v. Hofer*, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289; *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401; *Richmond v. Ogden St. Ry. Co.*, 44 Or. 48, 74 Pac. 333; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Springs v. Harven*, 56 N. C. 96. Many other cases might be cited sustaining the proposition, but it is not necessary to cite any other, except the case of *Farmers' & Merchants' National Bank v. Hoyt*, 29 Okl. 772, 120 Pac. 264.

But plaintiff contends that, though defendant may have been mistaken as to the terms, he cannot have relief because plaintiff understood the effect of the language used, and cautioned the witness Heinrich not to explain to defendant its true effect. But if they made the contract as claimed in the amended answer, then, for the purpose of preparing it in written form, defendant was a mere draftsman. "Parties to an agreement may be mistaken as to some material fact connected therewith which formed the consideration thereof or inducement thereto, on the one side or the other, or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown

that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsman, or one party only, and it may be a mistake of law or of fact. Equity interferes in such a case, to compel the parties to execute the agreement which they have actually made." *Pitcher v. Hennessey*, 48 N. Y. 415.

If the contract actually made was that the plaintiff was to pay for the walls, and it was the intention of the parties it should be drawn that way, it should be reformed, although plaintiff may have understood its legal effect when it was presented. For the plaintiff to permit defendant to sign it believing it expressed the true contract, knowing that it did not, was a species of fraud, of which plaintiff cannot take advantage. In the case of *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, the first paragraph of the syllabus is as follows: "Equity will relieve against a mistake in a deed or contract in writing, upon satisfactory parol proof of such mistake, whether the relief is sought affirmatively by a suit to reform the contract, or by way of defense to a bill for specific performance, and this notwithstanding the fact that the mistake is denied by the opposite party." In the course of the opinion, Chancellor Kent said: "It is unnecessary to enter more minutely into the parol proof of the fact of the mistake. On that point there is no room for doubt. The only doubt with me is whether the defendant was not conscious of the error in the deed at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind is abundantly proved. He asked Corbet, a witness, if he could not so run the line as to save the lower mill seat to himself; and he told David Brown that he meant to take counsel, and, if he found he could hold the whole lot, he intended to do so, as it was not his fault that the deed was made as it was. It would be a great defect in what Lord Eldon terms the moral jurisdiction of the court, if there was no relief for such a case. Suppose Mrs. Mann had applied for relief, instantly, on discovery of the mistake, and immediately after delivery of the deed, was no power in the whole administration of justice competent to help her? It has been the constant language of the courts of equity that parties can have relief in a contract founded in mistake as well as fraud. The rule in the courts of law is that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself."

There is no substantial error in the record, and the case should be affirmed.

PER CURIAM. Adopted in whole.

### FISH v. BLOODWORTH.

(Supreme Court of Oklahoma. Nov. 19, 1912.)

(Syllabus by the Court.)

#### 1. PRINCIPAL AND AGENT (§ 194\*)—AUTHORITY OF AGENT—INSTRUCTIONS.

F., as B.'s agent, procured a loan for her. He sent a check for the proceeds to G., making it payable to the order of G. and B. The testimony was in conflict as to whether or not G. forged B.'s name to the check. The check was paid by the drawee bank and G. absconded with the money. There was also conflict in the testimony as to whether G. was the agent of B. or F. The court so instructed the jury as to make the case turn upon the question of forgery, and not agency. *Held*, that this was error, as the question of agency was the controlling question in the case.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 727-731; Dec. Dig. § 194.\*]

#### 2. PRINCIPAL AND AGENT (§ 158\*)—AUTHORITY OF AGENT—INSTRUCTIONS.

Where loss is inflicted upon one of two innocent parties by the fraud and forgery of a third party, who is alleged by each party to be the agent of the other, the material question in the case is which one of the parties was he agent for, as his principal must bear the loss.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589-593; Dec. Dig. § 158.\*]

#### 3. WITNESSES (§ 56\*)—COMPETENCY—HUSBAND AND WIFE.

Where a husband accompanies his wife to hear a conversation between her and a third person, particularly when this conversation is not with the adverse party and does not concern the vital issue in the case, the husband is not acting as the agent of his wife concerning the transaction in such a sense as to make him competent as a witness in a case to which she is a party, within the meaning of section 5842, Comp. Laws 1909, making the husband and wife incompetent as witnesses for or against each other, "except concerning transactions in which one acted as agent for the other."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 153-156; Dec. Dig. § 56.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Garvin County; R. McMillan, Judge.

Action by Eliza Bloodworth against C. O. Fish. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Carr & Field, of Pauls Valley, and Tibbetts & Green, of Guthrie, for plaintiff in error. O. W. Patchell, Marion Henderson, and J. T. Blanton, all of Pauls Valley, for defendant in error.

AMES, C. [1, 2] The plaintiff sued the defendant for the proceeds of a loan which she alleged that he had procured for her as her agent. She alleged that she had delivered to him a note and mortgage, and that

he had procured the money from the lender and had failed to deliver it to her. The defendant admitted having procured the money for her, but alleged that he had sent a check for the money to one Graham, the plaintiff's agent; that the check was payable to the joint order of Graham and the plaintiff; that it had been indorsed by them both and returned to him; and that in that manner he had remitted to her the money which she claimed. The defendant lived at Guthrie, while Graham lived at Pauls Valley. The plaintiff claims that Graham was the defendant's agent, while the defendant claims that Graham was the plaintiff's agent. It is clear that, when the defendant procured the loan, after deducting his commission he sent the check to Graham, payable to the order of Graham and the plaintiff. The check was drawn upon a bank at Pauls Valley. Graham presented to this bank what purported to be an authority from the plaintiff permitting him to indorse the check. He thereupon indorsed the check with his own name and with hers and procured the money. There was evidence tending to show that this written authority was a forgery, and there was evidence tending to show that the plaintiff had admitted executing it. There was evidence tending to show that Graham was the plaintiff's agent, and there was evidence tending to show that Graham was the defendant's agent. The allegations of authority were not denied under oath, nor was any reply to the answer filed; but the case was treated in the trial court as though the issues were completed, and will be so treated here. Under the instructions of the trial court, the case was made to turn upon the issue as to whether the written authority purporting to have been executed by the plaintiff, authorizing Graham to cash the check, was a forgery, and upon this issue the jury returned a verdict for the plaintiff.

We do not think this was the controlling issue in the case, as the means which Graham pursued in securing possession of the money was a mere incident to the fact that he did secure the money and did not account for it. If Graham were being prosecuted for forgery, then, of course, whether or not he had this authority would be the material issue; but here the question is: Shall the plaintiff or the defendant suffer by the wrongdoing of Graham? The plaintiff is innocent in the matter; the defendant is innocent in the matter. There must be a complete loss of the proceeds of this loan to one of two innocent parties. Which one shall suffer the loss? Graham has the money. He has absconded. The money therefore cannot be procured from him. Shall the loss be borne by the plaintiff or the defendant? Manifestly, it must be borne by the one for whom Graham was acting. If Graham was acting as agent for the defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant, then his embezzlement must be charged to the account of the defendant. If Graham was acting as agent for the plaintiff, then manifestly the payment of the money to him was payment to the plaintiff, and she must stand the loss. If the defendant, instead of sending the check to Graham, had sent currency, the situation would have been the same. The fact that Graham may or may not have been guilty of forgery is purely incidental, because the ultimate question is who is responsible for his conduct, and whether he forged the authority does not determine whether he was agent for the plaintiff or defendant, because he might forge this authority had he been agent for either. Manifestly it was the duty of the defendant to pay the money over to the plaintiff, or her authorized agent. If, therefore, Graham was her authorized agent, he got the money, and when he got the money it was equivalent in law to the plaintiff herself having received it, and if he forged the authority it would not alter the fact that he had the money. On the other hand, if Graham was the defendant's agent, then it is equally clear that the defendant had not discharged his duty by paying the money over to the plaintiff, because remitting the money to his own agent would not be a remittance to the plaintiff. The case must therefore turn upon the question whether Graham was the agent for the plaintiff or defendant, and as this issue was not properly submitted to the jury, and as the instructions made the case turn upon the question of forgery, there was error which requires a reversal.

[3] One other question requires consideration. The plaintiff's husband was permitted to testify as to a conversation taking place some time after the check had been cashed, between the cashier of the bank, the plaintiff, and himself, over the objection of the defendant that he was an incompetent witness, on account of the relation between him and the plaintiff. He testified that he was acting as agent for his wife in going with her to the bank to talk about the matter with the cashier. This is an adroit and ingenious position, but in its final analysis it seems no more than a claim that he was the agent of his wife to hear a conversation. The statute provides (Comp. Laws 1909, § 5342): "The following persons shall be incompetent to testify: \* \* \* (3) Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards. \* \* \*". The existence of the agency may be shown by the wife or husband. *Smith v. Travel*, 20 Okl. 512, 94 Pac. 529. And when the agency is established then the husband or wife may

testify. *Armstrong, Byrd & Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *Wade v. Sumner*, 80 Okl. 784, 120 Pac. 1011. But what was the "transaction" concerning which the husband proposed to testify in this case? It was not the transaction between the plaintiff and the defendant. He did not claim to have acted as her agent in that respect. It was not any aspect of the business which he transacted for her, but it was merely a conversation with the cashier of the bank. The cashier testified that the plaintiff admitted to him that she signed the written authority, while the plaintiff denied the admission, and the transaction in which her husband acted as her agent was to hear this denial and corroborate her testimony at the trial.

Some of the cases hold that the husband or wife cannot testify for the other as the agent, when the matter about which the testimony is offered occurs in the immediate presence of the other, who can testify as fully as the one claiming to be the agent. *Miller v. Stebbins*, 77 Vt. 183, 59 Atl. 844; *Pingree v. Johnson*, 69 Vt. 225, 39 Atl. 202; *Eastabrooks v. Prentiss*, 34 Vt. 457; *Leigh v. Citizens' Savings Bank*, (Ky.) 102 S. W. 233. On the other hand, in *Menk v. Steinfert*, 39 Wis. 370, it is held that, where the agency exists, the husband may testify as to acts done by him as the wife's agent, whether done in her presence or absence. It is not necessary, however, in this case, to lay down any general rule as to whether one may testify for or against the other as to matters happening in the presence of both, because here the subject-matter of the husband's testimony does not seem to us to be such a transaction as brings the matter within the rule of agency. The husband was not the plaintiff's agent to transact any part of the business, but merely accompanied her and participated in a conversation. In *Hale v. Danforth*, 40 Wis. 382, the court, in holding that a wife, who had been requested by her husband to ask the indorser of a note whether he was going to pay it, was not the husband's agent in such a sense as to be a competent witness for him to show admissions made to her by the indorser, say: "Mrs. Hale was clothed by her husband with no authority to act for and bind him in any matter whatever. She was merely constituted the bearer of an interrogatory, a service which includes none of the essential elements, but only the mere shadow of an agency. To hold that she was the agent of her husband, and therefore a competent witness for him, would open the door to gross abuse. If anything is well settled in the law, it is settled to be against a sound public policy to permit husband and wife to testify against each other."

In *Donk Bros. Coal & Coke Co. v. Stroetter*, 229 Ill. 134, 82 N. E. 250, it is said: "The court permitted appellee's wife to testify, over appellant's objection, to a conversation with Mr. Donk tending to show a

promise to pay the appellee \$5 per acre for securing these options. The statute makes the wife competent to testify for or against her husband 'in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband.' But in this case no transaction was had and conducted by Mrs. Stroetter. She testified that her husband sent her to Mr. Donk's office, and she had this conversation with Mr. Donk as the agent of her husband. But she conducted no business. To make a wife a competent witness under this clause it should appear that she was authorized by her husband to conduct some business transaction for him which she did conduct, and then she may testify. It was error to overrule the defendant's objection to her testimony. It is true the jury did not find in favor of the plaintiff for the \$5 per acre he claimed, but neither did they find in favor of the 50 cents per acre which the defendant claimed. Their finding was necessarily dependent largely on the credit of these two witnesses. If Mr. Donk's credit had not been attacked by Mrs. Stroetter's testimony to an inconsistent statement out of court, we cannot know that the jury would not have accepted his version of the conversations with Mr. Stroetter and found the commission was to be only 50 cents instead of fixing it at \$1.50 per acre. Where a clear error appears which may have influenced the verdict, an appellate court must reverse the judgment."

In *Wagonseller v. Nancy Rexford*, 2 Ill. App. 455. It is said in the syllabus: "The only evidence of the agency was that of the husband who testified: 'I am her agent in the transaction of her business.' He further stated that he went with his wife when she made the bargain in question, and afterwards went to see about the matter of pay. This evidence comes far short of proving an agency on the part of the husband 'in matters of business transactions,' where the transaction was conducted by the husband as agent for the wife, and is not proof of agency sufficient to let in his testimony in regard to admissions of the deceased."

We think the case comes within the reasoning of the last cases cited, and that the husband was not the plaintiff's agent concerning any transaction, and that therefore his testimony should not have been admitted.

The case should be reversed and remanded.

SHARP, C., did not participate in this case.

PER CURIAM. Adopted in whole.

#### SNYDER v. BLAKE.

(Supreme Court of Oklahoma. Oct. 22, 1912.)

(Syllabus by the Court.)

#### 1. ELECTIONS (§ 291\*)—CONTESTS—EVIDENCE.

One who seeks to have an election declared void and set aside upon the ground that by

irregularities and fraudulent misconduct of the election officers in some precincts persons were prevented from voting must allege and prove that such persons were qualified voters, and that the number thereof was sufficient that if they had voted and had cast their vote for the next highest candidate the result of the election would have been changed.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 286; Dec. Dig. § 291.\*]

(Additional Syllabus by Editorial Staff.)

#### 2. ELECTIONS (§ 84\*)—QUALIFICATION OF VOTERS—DETERMINATION.

Under Const. art. 3, § 4a, providing that no person shall be allowed to vote unless he be able to read and write any section of the Constitution of the state, but that no person who was on January 1, 1893, or at any time prior thereto entitled to vote under any form of government or at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to vote because of inability to so read and write sections of the Constitution, when any person not within those provisions presented himself to vote, the precinct officers might require him to read and write a section of the Constitution before permitting him to vote.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 84.\*]

#### 3. ELECTIONS (§ 319\*)—QUALIFICATION OF VOTERS—DETERMINATION.

Under Const. art. 3, § 4a, where a proposed voter reads intelligibly and writes legibly the section of the Constitution designated by the election officers, he demonstrates his qualifications to vote, and acts of the election officers requiring him to write at great length many provisions of the Constitution, or detaining him for any great length of time under pretense of examination, thereby delaying other persons from entering the polls, are without authority of law.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 346; Dec. Dig. § 319.\*]

Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by A. L. Snyder against Harrie Blake. Judgment for defendant, and plaintiff brings error. Affirmed.

A. A. Davidson, of Muskogee, and Robert F. Blair, of Wagoner, for plaintiff in error. Joseph S. Dickey, Jr., of Wagoner, for defendant in error.

HAYES, J. This is an action in the nature of a quo warranto, brought by plaintiff in error in the court below to try the title to the office of clerk of the district court of Wagoner county, and grows out of the general election held in that county on November 8, 1910, for the purpose of electing state and county officers.

Plaintiff in error, who will hereinafter be referred to as "plaintiff," was elected to the office of clerk of the district court of Wagoner county on September 17, 1907, and thereafter duly qualified and took charge of said office, by reason of which facts he was entitled to hold same until the second Monday in January, 1911, and until his successor was duly elected and qualified. At the election on November 8, 1910, plaintiff was a candidate as the nominee and candidate of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Republican party to succeed himself, and defendant was, as candidate and nominee of the Democratic party for said office, plaintiff's competitor. At that election, as shown by the returns duly canvassed by the election board of the county, a total of 1,675 votes were cast for all candidates for said office, of which number 937 were cast for defendant and 738 for plaintiff, or a majority of 199 in favor of defendant. By reason thereof, there was issued to defendant a certificate of election, and he thereafter qualified and took possession of the office. Plaintiff now seeks to oust defendant from the office and to obtain possession thereof upon the ground that the election of 1910 as to said office was void and should be set aside on account of fraud and misconduct on the part of the election officers, or some of them, in said county, and of other persons set forth in his amended petition. Plaintiff does not contend that he received a sufficient number of votes at said election, or would have received a sufficient number of votes in the absence of the alleged fraud and misconduct on the part of some of said election officers to have elected him to said office, but alleges in his petition that a sufficient number of qualified voters were deprived by the wrongful misconduct of the election officers of the right to vote to render the result of said election doubtful and the real choice of the people of a candidate for said office impossible of determination.

In his petition in the lower court, plaintiff alleges in detail and at much length the various fraudulent acts and misconduct of the election officers which he claims invalidate the election. We shall, however, state only the general substance of those allegations. He alleges that prior to the election of 1910 Wagoner county was divided into 25 voting precincts; that no change or alteration had been made in such precincts prior to that election, but that at that election polls were opened in only 21 places in the county; that at 5 of such precincts the polling places were not at the usual and established places for holding elections in such precincts; that the voters of two precincts were required to vote at one place, which was not the established polling place of either of the theretofore existing precincts. He alleges that in various precincts in the county a large number of negro voters were present on the election day for the purpose of presenting themselves to the election officers of the various precincts to vote and remained there for such purpose all day; that only a few of such voters at each place were permitted to and did enter the polling places for the purpose of qualifying as voters; that at such places such proposed voters were subjected to a pretended examination which occupied the whole of said day; that other voters in large numbers present had no opportunity to present themselves to the

election officers and prove their qualifications to vote; that in some precincts persons who established their qualifications to vote were by the election officers arbitrarily refused the right to do so and were prevented from voting. The number of voters he alleges to have been deprived of the privilege of voting by these acts of the officers is in excess of a number sufficient to have changed the result of the election, had they been permitted to vote and all of them had cast their votes for plaintiff.

Defendant in his answer alleges that, if the voters were deprived of the privilege of voting at said election by the election officers, it was done without defendant's knowledge or consent, and that the same was done by the election officers in an honest and faithful effort to discharge the duties of their offices, and that their action was free from any fraud whatever. He further alleges that there was a conspiracy between the Central Committee of the Republican party of the county of which plaintiff was the nominee, and the political friends and adherents of plaintiff, to defeat defendant by inducing persons who were not qualified voters to vote at said election; and that in furtherance of said conspiracy they had caused threats to be made and sent to the election inspectors throughout the county, threatening such officers with prosecution if they enforced certain provisions of the election laws of this state, to be found in section 4a, art. 3, of the Constitution; and that many negroes, in furtherance of this conspiracy, who were not entitled to vote, crowded about the polling places on the day of the election, demanding the privilege to vote, creating confusion and hindering and obstructing the election officers; and that, because of such confusion and acts of alleged illegal voters, the election officers were hindered and delayed in the conducting of said election.

The cause was tried to the court without a jury. The trial court made a general finding in favor of defendant, and also found specifically as to certain issues of fact presented by the pleadings. He found that the alleged changes in the election precincts complained of by plaintiff had been regularly made by the county election board after due notice thereof had been posted throughout the county. He found "that the persons offering or attempting to offer themselves to vote at the different polling places throughout the county were fair and honestly dealt with by the election officers; and the action of said officers was free from fraud or oppression, except as to about 30 or 40 persons who offered themselves to vote; and the evidence does not show whether or not said 40 persons were legal voters." He also found that "the allegations of plaintiff's petition charging conspiracy and fraud are not sustained by the evidence." Upon the general



finding and these special findings, a judgment was rendered for defendant.

Counsel for plaintiff has set out in his brief in *hac verba* the 13 assignments of error alleged in his petition in error, but he does not in his brief separately set forth and number the specifications of error complained of and argument and citation of authorities in support of each point relied upon in the same order as required by rule 25 (95 Pac. viii) of this court. An enforcement of this rule would require an affirmance of the judgment of the trial court, or a dismissal of this appeal without any consideration of the case upon the merits; but, from the argument in the brief, it can be gathered that plaintiff's complaint here is that the finding of the trial court exonerating the election officers from any conspiracy or fraudulent acts by which any one was prevented from voting is not sustained by the evidence.

The conduct of the election officers complained of pertains to the manner in which they enforced or attempted to enforce the provisions of section 4a, art. 3, of the Constitution. That section reads as follows: "No person shall be registered as an elector of this state, or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

Under the foregoing provision, no person who was not on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who did not at that time reside in some foreign nation, or who was not a lineal descendant of such person, was entitled to vote at the election, unless he was able to read and write any section of the Constitution. There is evidence on the part of plaintiff tending to establish that in several of the election precincts in Wagoner county at the election involved herein the precinct election officers, when any negro offered himself as a voter to vote at said election, he was examined by the election officers, touching his qualifications under the foregoing provision of the Constitution; and that the examination of each such person who offered himself to vote was prolonged

a great and unnecessary length of time by the election officers, ranging from 30 minutes to 2 hours; and that, pending the time such examination was being made touching the qualifications of such voter, no other negro voter was admitted to the election room to offer to qualify himself as a voter, and as a result of this practice many such persons who were present on the day of the election for the purpose of voting were prevented from offering proof as to their qualifications to vote and were prevented from voting. The evidence on behalf of defendant, on the other hand, as to some of the precincts involved, contradicts the evidence of plaintiff that such conduct was indulged in by the election officers, and the finding of the trial court as to such precincts is conclusive upon this court. There are, however, certain precincts as to which it does not seem to us that the evidence of defendant substantially conflicts with the evidence of plaintiff to the effect that the foregoing practice of the election officers was followed.

[2] When any person who was not entitled to vote under any form of government on the 1st day of January, 1866, and who did not at that time reside in some foreign nation and was not a lineal descendant of such person, presented himself as a qualified voter and asked the privilege of voting, the precinct officers were authorized to require such person to read and write a section of the Constitution before permitting him to vote. *Ex parte Shaw*, 4 Okl. Cr. 416, 113 Pac. 1062.

[3] But when such proposed voter read intelligibly and wrote legibly, the section of the Constitution designated by the election officers, he demonstrated his qualifications to vote, and acts on the part of the election officers requiring him to write at great length many provisions of the Constitution, or detaining him for any great length of time under a pretense of examination, and thereby delay other persons from entering the polls, was without authority of law.

A large number of persons, variously estimated from 250 to 400, mostly negroes, congregated at the polling place at Vans Lake on election day. Many of them came for the purpose of voting. Some of them offered to qualify as voters, but were refused permission to do so, because the election officers were engaged at the time in examining other persons as to their qualifications. One person, who had been a teacher in the public schools and had taught 30 years, was admitted to the booth and questioned concerning his qualifications to vote; and, upon being required to read and write a section of the Constitution, he read seven or eight pages of the Constitution and was then given a tablet and pencil to write. One of the officers read slowly to him from the Constitution, and the proposed voter wrote as he was dictated to until he had written some 21 pages. After he had been detained in the

booth for 2 hours and 15 minutes, he was held by the election officers not qualified and was denied the privilege of voting. Another person who had been principal of a school for five years made application to vote; and, upon its being determined that he would be required to read and write a section of the Constitution, he read a section of the Constitution, and thereupon proceeded to write dictations made to him by one of the election officers, and was detained in the booth for an hour and 30 minutes, during most of which time he was employed in writing, and at the end thereof, was pronounced disqualified to vote. Practically the entire day at this precinct was consumed by the election officers in the examination of eight persons, and the other persons at the polls who desired to offer to vote and be examined touching their qualifications therefor were denied the opportunity to do so. At another precinct no negro was permitted to vote unless he could immediately memorize a section of the Constitution selected and read to him by the election inspector and write the same from memory. At this precinct there were 40 persons present for the purpose of qualifying themselves to vote under the foregoing provision of the Constitution. Of this number, 37 could read and write; but under the rule adopted by the board, requiring such proposed voters to memorize immediately any section of the Constitution read to them and to write the same, none was able to qualify, and all were denied the privilege of voting. The conduct of the election officers at these precincts can find no justification in the law, and their protest that they acted in good faith is refuted by their conduct.

[1] But, under our view of this case, it is not material whether the conduct of the election officers was actuated by a fraudulent purpose or pursued in good faith under a mistaken interpretation of the law as to the duties it imposed upon them. The vital question in the case is whether by such conduct a sufficient number of qualified voters was deprived of the right to vote that, if they had all voted and cast their votes for plaintiff, the result of the election would have been changed. In *Martin v. McGarr*, 27 Okl. 653, 117 Pac. 323, 38 L. R. A. (N. S.) 1007, this court held: "An election is void where qualified electors are corruptly and fraudulently deprived of an opportunity to register and vote sufficient in number, had all been counted for the next highest candidate, to have changed the result of the election."

The question in that case was presented upon a demurrer to a petition which alleged that, at a certain election in the city of Muskogee by reason of various fraudulent and corrupt acts of the election officials who conducted the election, a sufficient number of qualified voters were deprived of the right to

vote to change the result of the election, and that by reason thereof the election was void. The question directly under consideration in that case was whether the denial of a sufficient number of qualified voters of the right to vote at any election in numbers sufficient to change the result of the election, if they had been permitted to vote, and had all cast their votes for the candidate receiving the smaller vote, operated to render the entire election void, or to render void only the vote in the precincts where such irregularities occurred. Whether the effect would be different when denial of such right was the result of fraud and misconduct of the election officers from its effect when the injuries were the result of a misinterpretation of the law or mistakes made by the election officers attempting in good faith to enforce the law was not considered. In *McCrary on Elections*, par. 527, it is said: "The fact that the right to register or to vote has been denied to any person or persons duly qualified to vote may always be shown in a case of contested election, whether such denial was fraudulent or not. The effect upon the rights of electors and upon the result of the election is the same whether such denial be the result of intentional wrong on the part of the officers of the election, or of accident, or an honest mistake as to the law. And if the number of voters whose rights have thus been denied is large enough to materially affect the result, such denial will vitiate the election."

Although we think, as to some of the precincts, the general finding of the court that there was no fraud or misconduct on the part of the election officers cannot be sustained, this error cannot be material or result prejudicially to plaintiff, unless the evidence establishes that as a result of such conduct qualified voters who attended the polls on election day for the purpose of voting, and who would have voted but for such conduct of the officers, in a great number, sufficient to have changed the result of the election, were prevented from voting. While there is much evidence to the effect that there was a large number of persons about the polls in some of the precincts on election day who did not vote and who probably were deterred from offering to vote because of the procedure adopted by the election board, there is an entire absence of any evidence, except as to between 50 and 60 of such persons, that they were qualified electors. But if these 50 or 60 persons had not by the irregular conduct of the election officers been prevented from offering to vote or from voting, and they had all cast their votes for plaintiff, the result of the election would not have been changed. It is admitted in the record that at these precincts, where the irregularities occurred and at the other precincts of the county in which no irregularities were established, 1,675 persons cast their votes,

whose qualifications to vote are not questioned. It is a rule of law adopted by almost all of the courts that the entire vote of an election or of a precinct will not be rejected, where it is possible to ascertain and eliminate the fraudulent vote. 15 Cyc. 372. Irregularities and misconduct in conducting an election do not vitiate the election, unless the irregularities or misconduct are in violation of mandatory provisions of the statute, or such in themselves as to change the result or render it impossible to ascertain the result of the election. *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706; *O'Laughlin v. City of Kirkwood et al.*, 107 Mo. App. 302, 81 S. W. 512.

If the influence of the fraud, corrupt practice, or irregularities upon the result of the election can be shown with reasonable certainty, the courts require that to be done, and the votes affected thereby are rejected and the result of the election determined by the unaffected votes legally cast. It is not sufficient to vitiate an entire election that fraud or irregularities have been committed; it must be shown that such fraud or irregularities deprived some one of the right to vote who was qualified to do so, or so changed the vote cast that it did not express the uncorrupted and free choice of the voter. Irregularities or fraudulent conduct on the part of the election officers, that may have prevented or deterred persons who were not qualified to vote from offering to vote and from voting, do not, however reprehensible such conduct is, affect the result of the election. Under the rule announced in *Martin v. McGarr*, supra, a legal voter qualified to vote at the place where he offers to vote, but who is prevented from doing so, by the fraudulent, corrupt, or mistaken conduct of the election officers, may have his vote counted for the purpose of ascertaining whether, if he had voted, the result of the election might have been different and therefrom it be determined that the result of such irregularities was to throw such doubt about the result of the election as to render the election void; but a vote of a person who is not qualified to vote can be counted and considered for no purpose. The presumptions are in favor of the validity of the election, and the burden is upon plaintiff who questions its validity to show facts sufficient to destroy it.

As to what consideration will be given in election contests and quo warranto proceedings to votes illegally rejected, the authorities are not in harmony, where not controlled by statutory or constitutional provisions. By some it is held that, upon its being shown for whom the rejected votes would have been cast, if they had not been illegally rejected, they shall then be counted for such candidate. Others hold, as held by this court in *Martin v. McGarr*, supra, that it is sufficient

to show that votes of qualified electors have been illegally rejected, and they can then be considered as if they had been cast for the candidate having the next highest in number as shown by the returns; and, if the rejected votes be sufficient to change the result of the election, then the election will be declared void for uncertainty. The former of these rules is established and prevails in the federal House of Representatives. In *Frost v. Metcalfe*, 1 Ellsworth's Election Cas. 289, it was held that, in order to authorize rejected votes to be counted, it was necessary to establish: First, the person offering to vote must have been a legal voter at the place where he offered to vote; second, he must have offered to vote; third, it must have been rejected; and, fourth, it must be shown for whom he offered to vote. The requirement that the burden is upon plaintiff to prove the qualifications of the voter whose vote is rejected is not an impossible or unreasonable burden; it is a fact easily susceptible of proof, and can, as a rule, be established by the evidence of the person who has been prevented from voting.

Since plaintiff has failed to establish that a sufficient number of qualified electors were prevented by the misconduct and irregularities of the election officers from voting to have changed the result, had they been permitted to vote and had voted for him, the judgment of the trial court refusing to declare the election void should be affirmed.

TURNER, C. J., and DUNN and KANE, JJ., concur. WILLIAMS, J., concurs in the conclusion.

#### CITY STATE BANK OF HOBART v. PICKARD.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

#### 1. BILLS AND NOTES (§ 332\*)—RIGHTS AND LIABILITIES ON TRANSFER—BONA FIDE PURCHASERS.

The indorsee of a negotiable promissory note for value and before maturity from another who is the apparent owner obtains a good title, and, in order to defeat his recovery thereon against the maker, defendant must not only plead facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it, but must go further and plead that the indorsee had actual notice thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 805; Dec. Dig. § 332.\*]

(Additional Syllabus by Editorial Staff.)

#### 2. BILLS AND NOTES (§ 481\*) — ACTIONS — PLEADING.

In an action by an indorsee on a note, the plea of defendants held not to show that the indorser had no title to the note, or that the indorsee had notice that he had no title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1530-1532, 1559-1561; Dec. Dig. § 481.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action by the City State Bank of Hobart against H. G. Pickard. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

W. A. Phelps, of Hobart, for plaintiff in error.

TURNER, C. J. On January 25, 1909, the City State Bank of Hobart, plaintiff in error, in the district court of Kiowa county, sued, in the first count, H. G. Pickard, one of the defendants in error, on a promissory note for \$185, dated April 11, 1908, whereby defendant promised to pay to the order of Earl Davidson that amount, with interest, on December 1, 1908, and which said note had been indorsed by him to plaintiff for value and before maturity. In the second count plaintiff sued Earl Davidson as indorser, and in the third count both Pickard and Davidson as maker and indorser thereof, respectively. Davidson made no defense. After demurrer thereto filed and overruled, Pickard, in the first paragraph of his answer, admitted the corporate existence of plaintiff, but denied each and every other allegation contained in the petition not in his answer specifically admitted. And as his second defense therein alleged that on January 1, 1908, R. E. Hobbs and Earl Davidson were litigating over a certain piece of land (describing it), both of whom claimed to be the owner; that, desiring to rent the place pending the litigation, defendant entered into possession thereof with the understanding and agreement between Hobbs, Davidson, and himself that he would farm the same that year and pay therefor as rent to the winner one-third of all crops of grain raised thereon and one-fourth of all the cotton; that pursuant to said agreement he cultivated the land, and while so doing on April 11, 1908, Davidson induced him to commute the rents to \$185, which was done, whereupon he executed the note in controversy; that the same was executed in plaintiff's bank in the presence of its cashier, who heard defendant call the attention of Davidson to the agreement aforesaid; that at the September term, 1908, of the district court of Kiowa county, Hobbs prevailed in the litigation and recovered judgment against Davidson, whereupon defendant, by virtue of the terms of said agreement, became liable to him for the rent of said land; that plaintiff had full notice of the agreement as stated and the terms and conditions upon which said note was executed prior to its indorsement by the payee, by reason of all of which, he says, the consideration therefor has failed. In the second paragraph, for another defense he alleged that on October 17, 1908, said Hobbs in an action then pending before a justice of the peace in that county, wherein he was plaintiff and defendant and said Davidson and another were defendants, recovered judgment against

said Davidson for the restitution of said land, which was not appealed from and now remains in full force and effect; that by reason thereof defendant's right of possession thereto had failed, and defendant can no longer hold possession of the premises under Davidson as landlord; that the consideration of the note had failed; and that he had not at the time of the rendition of said judgment gathered his crops raised on the place during that year. In a third paragraph for another defense he alleged that on January 13, 1909, said Hobbs, electing to ratify said agreement between defendant and said Davidson from a commutation of rent to a rental in cash as stated, in an action then pending before a justice of the peace in that county, wherein said Hobbs was plaintiff and defendant and said Davidson were defendants, sued to recover a sum of \$185 rent for said land, in which said action he recovered judgment for \$170, the balance due upon said note; that the judgment remains unpaid and unappealed from; that the full amount thereof had been paid into court by defendant; that by reason thereof the consideration for said note had failed; that plaintiff had notice of the pendency of said suit and was a party thereto, but failed to set up his claim against defendant, and upon its own motion was dismissed as a party to the suit.

[1] When to said second, third, and fourth defenses a demurrer was overruled, the case was brought here, and said action of the court assigned as error. As the note is negotiable and is alleged and admitted to have come into the hands of plaintiff as indorsee of the apparent owner for value and before maturity, in order to defeat recovery thereon (no fraud being claimed), it was necessary for defendant not only to plead that the bank as indorsee took it knowing facts and circumstances that would cause one of ordinary prudence to suspect that Davidson had no interest in it, but he must go further and plead that the bank had actual notice of that fact. Or as stated in the syllabus in *Swift et al. v. Smith's Adm'rs*, 102 U. S. 442, 26 L. Ed. 193: "One who purchases mercantile paper before due, from another who is apparently the owner, though he may know facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it, can lose his right only by actual notice or bad faith."

[2] Applying this rule and construing the pleading liberally with a view to substantial justice, it cannot fairly be said that the same states facts sufficient to show that Davidson had no title to the note, much less that the bank took it as his indorsee with actual notice thereof. The most that can be said of the second defense is it fairly states that, although the maker agreed to pay a share of the crop as rent to the winner of the land, he nevertheless, in the absence of

one of the parties to that agreement, repudiated the same and agreed with the other to attorn to him as his landlord, in a certain amount, and executed and delivered to him therefor the note in question. What though defendant pleads that he at the same time called the attention of Davidson to the previous agreement, and that, too, in the presence of plaintiff's cashier? Called his attention for what purpose? The plea is silent. To disaffirm it as indicated by the execution of the note in controversy? Or to affirm it and to the fact that the previous agreement was to remain in full force and effect and that the note was to be considered as delivered only in the event Davidson prevailed in the pending litigation over the land? If the latter, he should have pleaded it, and that the contingency had never happened, and that the bank had actual notice of this arrangement at the time it became the indorsee of the note. This, it seems, would have been a good defense. *Tovera v. Parker et al.*, 128 Pac. 101. But we cannot read it into this plea upon the supposition that this is what defendant then and there called Davidson's attention to. This for the reason, among others, that we cannot presume, in the absence of averment fairly susceptible to that construction, that a note delivered when executed was not intended to take effect absolutely, but was intended to take effect conditionally. We are therefore of opinion that there is nothing in the plea to induce us to believe that Davidson was without title to the note, much less that the bank had notice thereof, even assuming that notice to the cashier of what was pleaded as said in his presence was notice to the bank. For the reasons stated, the court erred in overruling the demurrer to the second defense set forth in defendant's answer.

As defendant in error has filed no brief in support of the action of the court as to the remaining defenses pleaded, and as we can think of no ground upon which it could possibly be sustained, the judgment of the trial court is reversed and remanded, with instructions to proceed in accordance with this opinion. All the Justices concur.

**JOPLIN SASH & DOOR WORKS v. OKLAHOMA PRESBYTERIAN COLLEGE FOR GIRLS et al.**

(Supreme Court of Oklahoma. Oct. 15, 1912.)

(Syllabus by the Court.)

**1. MECHANICS' LIENS (§ 132\*)—PROCEEDINGS TO PERFECT—FILING STATEMENT OF CLAIM.**

A written contract was entered into between G. Company, a contractor, and J., a subcontractor, whereby the latter was to furnish a certain list of building material, to be used in the construction of a college building for a third party. Prior to the completion of said building it was discovered by the contractor's foreman that a small list of materials called

for in the original building plans and specifications had been omitted from the contract. These materials were of the same kind as those included in the original list, and, when the omission was discovered, were ordered of the subcontractor who shipped them to the contractor, 18 days after the last material included in the original list was furnished. No new contract was made. These materials were furnished during the progress of the work on the building, and were used therein, and reasonable charges made therefor; and all were included in one settlement with the contractor. *Held*, that all related to the one contract; that the furnishing of the additional materials did not constitute the transactions separate and distinct, or independent contracts, within the meaning of section 6153, Comp. Laws 1909, requiring that the subcontractor shall, within 60 days after the date upon which material was last furnished under the subcontract, file with the clerk of the district court, etc., a verified statement setting forth the amount due, etc.; and that the statement required being filed within 60 days from the date that the materials were last furnished, including the second list, was filed within time, and constituted in this regard a compliance with the statute.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.\*]

**2. MECHANICS' LIENS (§ 132\*)—PROCEEDINGS TO PERFECT—TIME FOR FILING STATEMENT.**

Where material is furnished, all going to the same general purpose, as the building of a house or any of its parts, though such material be ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be considered as a unit, or as being but a single contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.\*]

Commissioners' Opinion, Division No. 1; Error from District Court, Bryan County; Summers Hardy, Judge.

Action by the Oklahoma Presbyterian College for Girls and others against the Joplin Sash & Door Works. From a judgment for plaintiffs, defendant Joplin Sash & Door Works brings error. Reversed and remanded.

February 16, 1911, the defendants in error, the Oklahoma Presbyterian College for Girls of Durant, Okl., a corporation, and the Executive Committee of Home Missions of the Presbyterian Church in the United States, brought suit in the district court of Bryan county under the provisions of section 6160, Comp. Laws 1909, naming the M. J. Gill Construction Company, of Ardmore, Okl., the National Surety Company, Kansas City Structural Steel Company, Choctaw Pressed Brick Company, Pearce Bros., Mrs. Laura Bellharz, Will Leach & Co., Steger Lumber Company, A. L. Severance Hardware Company, Grider-Potts Hardware Company, A. H. Wolff, Bortoli Mosaic & Tile Company, B. M. McDaniel, S. O. Maxey, Joplin Sash & Door Works, Southern Architectural Cement Stone Company, Durant Drug Company, the United Sash & Door Company, J. R. Price, and Fraley's Planing Mill of Ardmore, Okl., as defendants.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Personal judgment was sought against defendants M. J. Gill Construction Company and the National Surety Company. It was further asked that the other defendants be required to appear and prove their liens, and that the validity thereof be determined by the court. The defendant Joplin Sash & Door Works appeared and filed its answer, counterclaim, and cross-petition, and prayed judgment against its codefendants M. J. Gill Construction Company and the National Surety Company for the balance due on its account, and for judgment declaring a first and prior mechanics' lien upon the real estate and buildings of the plaintiffs, and that said lien be foreclosed and the premises ordered sold and the proceeds of the sale applied to the discharge of its judgment. To this answer and cross-petition, the defendant National Surety Company demurred, both upon the ground that several causes of action were improperly joined therein; and that said action and cross-petition did not state facts sufficient to constitute a cause of action against said demurring codefendant. The demurrer was sustained on the first ground. Reply was filed, and upon trial of the merits before the court special findings of fact and conclusions of law were submitted and filed, and judgment entered thereon. Among other findings the court found that the materials furnished by the Joplin Sash & Door Works under its written contract amounted to \$2,206, and that the last item of this account was furnished on the 8th day of September, 1910, and that under a subsequent oral contract other materials, amounting to \$41.30, were furnished and used in the college building, and that the last material under said latter contract was furnished on the 26th of September, 1910. The lien claim or statement was filed November 22, 1910, and included the balance due on the written contract, and what was termed the claim for extras furnished September 26th, amounting to \$41.30.

Hays & Caudill, of Durant, for plaintiff in error. O. C. Hatchett and Robert Crockett, both of Durant, for defendant in error Presbyterian College for Girls.

SHARP, C. (after stating the facts as above). [1, 2] In view of the conclusion that we have reached, it will be unnecessary to consider but one of the numerous assignments of error: Was the material furnished under a single, separate, and distinct contract? If so, upon that ground the judgment of the trial court should be reversed. The last item under the original written contract was furnished September 8, 1910, or more than 60 days prior to filing the lien statement. The lien of plaintiff in error is one provided for by section 6153, Comp. Laws 1909, which provides that any person who shall furnish material under a subcontract with the contractor may obtain a lien upon the land of the owner for the amount due

him for such material and labor by filing with the clerk of the district court of the county in which the land is situated, within 60 days after the date upon which the material was last furnished under such subcontract, a statement verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed; and further provides for service of notice of lien upon the owner.

The contract between the plaintiff in error and the M. J. Gill Construction Company, dated January 22, 1910, was predicated upon a list furnished by G. F. Yarborough, foreman of the construction company, according to plans and specifications prepared by H. A. Overbeck, architect. The written contract was in the form of a proposition or offer to furnish materials according to the foreman's list, and was accepted in writing by the construction company. It included millwork such as was provided for in the plans and specifications for the college building, and defined what kind or class of material constituted millwork. Articles of the class named, as well as any other material not therein specified, were not included in the estimate (afterwards reduced to a contract), and if furnished should be charged extra. The items originally ordered were furnished June 7, August 13, and September 8, 1910. While the work was in progress it was discovered that the bill was short through an oversight of the foreman of the construction company. Acting upon instructions from the architect, an additional order for these omitted materials was made, and the same were furnished September 26, 1910, or 18 days after the shipment of the last item under the written contract. The building at the time had not been completed and was not made ready for occupancy for some time thereafter.

No new contract was made, either between the owner and the contractor, or the latter and the subcontractor; simply an order for additional materials. This, being received, was filled, and a reasonable charge made for the materials so furnished. These additional materials were of the same kind or similar to those included in that contract. They in effect supplemented the contract. All related to the one contract, entered into the one building, were furnished during the progress of the work and at a time relatively near the furnishing of the first ordered materials. The transactions involved one settlement, and were in a way connected and continuous in their nature. The last items were furnished before the expiration of 60 days from the date of furnishing the last material under the original list. Extras were contemplated, though not specifically provided for in the original contract. The mere fact of furnishing additional materials sub-

sequent to filing the original order is not sufficient of itself to constitute the transactions as separate and distinct, or independent contracts, within the meaning of the statute limiting the time for filing liens. Herein we think the trial court erred. What the contract in fact was, and whether the contract thus formed is entire and continuous, presents a mixed question of fact and law. *Pace v. Bettes*, 17 Mo. App. 366; *Phillips on Mechanics' Liens*, § 325. And while the finding of the court was that, as a question of fact, there were separate contracts, we feel that the court erred in concluding that the transactions, though separate in point of time, constituted, within the meaning of the statute, separate and distinct or independent contracts. The total value, according to the testimony, of the materials furnished by the subcontractor, was \$2,247.30. Of this amount the written contract included \$2,206.00, leaving a balance to be supplied of but \$41.30. That items of the same character amounting to this small sum and intended for the same general use should be left open and made the subject of a separate contract, either with the present claimant or a third party, will not be presumed.

In this connection it is said in *Phillips on Mechanics' Liens*, par. 229: "But when work or material is done or furnished, all going to the same general purpose, as the building of a house or any of its parts, though such work be done or ordered at different times, yet if the several parts form an entire sale, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be treated as a unit, or as being but a single contract."

On the same subject it is said, in *Rockel on Mechanics' Liens*, par. 98: "As a general rule it may be stated that deliveries, even if made under separate contracts, if the work is continuous, will be considered as one, and the time limit for filing will date from the last item furnished." Treating the last delivery as a claim for extras, the same author, in paragraph 99, says: "If extra work is done or extra material furnished without special contract in the execution of the principal contract, they will be considered as a part of the principal contract, and the time for filing the statement will date from the day when the extras were furnished. \* \* \* As to what will be included in the subcontractor's contract as a continuing one, or as to how it may be kept alive by successive deliveries, the same rules will generally be applied as to the principal contractor."

In discussing this same subject it is said in *Jones on Liens*, vol. 2, § 1441: "Where a mechanic furnishes labor and materials under different contracts which relate to similar kinds of work, and are in fact additional to the original contract, and are

made before the work under that contract is completed, the services are regarded as continuous, and a statement may be filed within the time limited after the entire work is done, though the work under some of the contracts has ceased more than that time before the filing of the statement. Thus, if a mechanic, while erecting a building under a written contract, orally agree with the owner to build an additional room, and does build it, he is entitled to a lien on the whole building for the work done under the oral agreement. Extra work done, and extra material furnished, by a contractor during the performance of his agreement, may be included in, and made a part of, his claim, if this be filed within the time allowed by statute. Such work and materials, though outside the contract, are so closely connected with it that, in filing the claim, they may be included with the work done and materials furnished under the contract. A contract for extra work, or for the extension of time, under a building contract, need not be in writing."

In *Union Trust Co. v. Casserly et al.*, 127 Mich. 183, 86 N. W. 545, it was contended that the testimony showed that the contract was for the delivery of a specific amount of material, and that the delivery of other items was under separate contracts, and that therefore under the statute a lien should have been filed within 60 days after the furnishing of each item. The court held to the contrary and adhered to the rule announced in *Phillips on Mechanics' Liens*, supra.

In *Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 80 S. W. 688, the earlier authorities of the state are reviewed. It was contended that the last material furnished was under a new and distinct contract for extra work. It was held that where a materialman agreed with the contractor on an estimate of lumber to be used in a building, but furnished considerable additional lumber under the contract, and where lumber was ordered for extra work for which the contractor had made separate contract with the owner of the building, made no fresh arrangement with the contractor, and knew nothing of his new contract with the owner, and charged the material on the running account with the contractor, which had been continuous from the time the latter began to build the building, its entire contract with the contractor would be treated as a continuous and connected transaction, and the lien limitation would not begin to run until the date of the last item. There, as here, the material was charged on a running account with the contractor. It was said by the court: "These facts bring the case within the orbit of decisions holding that when materials are furnished for the same improvement, in installments and at intervals, but the parties intend them to be included in one account and settlement, the

entire account will be treated as a continuous and connected transaction, and the lien limitation begins to run from the last item of it."

In *Frankoviz v. Smith*, 34 Minn. 403, 28 N. W. 225, the same general rule is announced, and it is said in the syllabus: "In a claim for mechanic's lien which includes different items of material delivered at different times, the account is to be treated as a unit, and the time within which the account and affidavit must be filed for record begins to run from the date of last item, providing they were all delivered for the same job of work; as for constructing the building, if that was the job in hand, or for doing the same job of repairing. But if some of them were delivered for some other work—as where the construction is completed, and afterwards some further thing to be done is determined on—the furnishing of such items cannot suspend the running of the time for filing as to the account for constructing."

In *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695, it was held that after a contract is made to furnish specified materials, to be used in the construction of a building, an implied understanding to furnish extras, if called for, may be inferred from the circumstances of the case. In such a case, the extras furnished and other material formed one continuous account, and the time fixed by the statute in which to file the lien statement runs from the date of the last item of the whole account. *Miller et al. v. Batchelder*, 117 Mass. 179; *Hofer's Appeal*, 116 Pa. 360, 9 Atl. 441; *Brick Co. v. Stout*, 45 Minn. 327, 47 N. W. 974; *Scheible v. Schickler*, 63 Minn. 471, 65 N. W. 920; *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350; *Rush v. Able*, 90 Pa. 153; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546; *Jones v. Swan*, 21 Iowa, 181.

The statute, as already shown, provides that lien statements shall be filed within 60 days after the date upon which material was last furnished under the subcontract, and this, we hold, under the testimony, was September 26, 1908. The filing of the lien with the clerk of the district court of Bryan county on November 22d thereafter gave to the subcontractor a lien upon the building and grounds in and upon which its materials were used.

The court therefore erred in its decree, in holding that the claimant was not entitled to a lien upon the property of plaintiffs for the balance due under the list forming a part of the original written contract, and the judgment of the trial court should be reversed, and the cause remanded, with instructions to cause to be entered a judgment in favor of the Joplin Sash & Door Works, subjecting the lands and college building erected thereon to the payment of its judg-

ment against the construction company, and to determine the order of payment among the various lien claimants whose liens have been established by final judgment, and for further proceedings in conformity with this opinion.

AMES, C., did not participate in the consideration of the case.

PER CURIAM. Adopted in whole.

HUGHES et al. v. GARRELTS et al.

(Supreme Court of Oklahoma. Oct. 15, 1912.)

(Syllabus by the Court.)

RECEIVERS (§ 19\*)—APPOINTMENT—WHEN AUTHORIZED.

Under section 5772, Comp. Laws 1909, where a party moving for a receiver shows that he has a probable cause of action, and that the rents, issues, and profits of the land in litigation are being removed, or there is danger of the same being lost, it is proper and right that the appointment should be made to hold them and prevent loss during the pendency of the litigation, and this without reference to the probable solvency or insolvency of the party against whom the proceedings are brought.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 27; Dec. Dig. § 19.\*]

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by Enoch H. Hughes and others against Carson H. Garrelts and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Wood & Witten, of Okmulgee, E. J. Smith, of Denison, Tex., and Cottingham & Bledsoe, of Oklahoma City, for plaintiffs in error. Belford & Hiatt, of Okmulgee, for defendant in error Skelton. R. T. Potter and Stanford & Cochran, all of Okmulgee (C. B. McCrory, of Muskogee, of counsel), for other defendants in error.

DUNN, J. This case presents error from an order of the district court of Okmulgee county denying application of plaintiffs in error and certain interveners for the appointment of a receiver to take, receive, and hold certain profits and rents pending litigation over the title of the land involved, until the determination thereof may be had. The petition was filed on the 12th day of April, 1912, and is in form an ordinary action in ejectment, except that it sets forth the manner in which the plaintiffs derived their title, including the Creek law of descent and distribution, and prays for possession, damages, rents, and profits. In the second count thereof it is averred that the lands are oil lands, and that the defendants have developed the same for oil and gas and have produced large amounts therefrom, and are continuing to do so. The prayer is that plaintiff's title be quieted and an account be taken of the oil and gas produced, and for general relief.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The interveners, likewise claiming an interest in the property, joined in the application for a receiver. All of these parties claim as heirs of Moses Hughes, and of Jimmie P. Hughes, the latter, of whom was an allottee of the Creek Nation. The defendants filed answer in which they deny plaintiffs' rights and aver that they are developing and operating the premises for oil and gas under a good and valid oil and gas lease, and denying that the corporation to which they are running the oil is of doubtful solvency, and aver that the same is able to respond in damages.

The evidence showed that between January 10, and May 10, 1912, oil had been run to the value of about \$40,000, more than \$30,000 of which had been paid to the defendants. Oil at the time of the trial was being produced at the rate of about 1,000 barrels a day, and was of the value of about 68 cents per barrel. The defendants made no showing, and the record contains none, of any right, title, or interest which they may have in and to the land, except it appears that L. S. Skelton, one of the defendants, executed a lease to the Okmulgee Gas Company, dated November 30, 1910, and the said company executed an assignment thereof to L. S. Skelton December 22, 1911. But little, if any, question is raised in this proceeding as to the title which plaintiffs and interveners assert. This question, however, is not before us for determination, nor was it necessary, in order to qualify plaintiffs and interveners to be heard for them, to show that they had an absolute title to the land. The statute under which the proceeding is brought (section 5772, Comp. Laws 1909) reads as follows: "A receiver may be appointed by the Supreme Court, the district court, or any judge of either, or in the absence of said judges from the county, by the probate judge: First, In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured."

By the foregoing it is seen that, where interest in property or fund or the proceeds thereof is probable, and where the property is being removed or is in danger of being lost, this is sufficient. Willard Oil Co. v. Riley et al., 29 Okl. 19, 115 Pac. 1103. The evidence discloses that the oil which is being taken is being exclusively delivered to a concern called the American Refining Company, of which the defendant Skelton was unable to say whether the same was a domestic or foreign corporation, and whose president resided in St. Louis, Mo. Under these circumstances, in our judgment the conclusion

reached by the trial court denying the application for a receiver to receive and hold the proceeds of this property until the final determination of the action was error. Appellate courts are generally slow to disturb the conclusion reached in such cases by trial courts for the reasons set out in the case of Willard Oil Co. v. Riley et al., supra, but in the present case, that plaintiffs' and interveners' rights and interests are probable is, from the showing made, beyond question, and the defendants made no showing of any kind or character disclosing that they possessed any interest whatever in this property further than that of having sunk oil and gas wells thereon for the purpose of enabling them to receive its products. In fact, from a reading of the record we are impressed that, viewing the magnitude of interests involved, they have not dealt with entire frankness with the court. It is almost, if not quite, patent that the purpose animating them has been that of delay and to secure as speedily as possible the entire product, for when the Prairie Oil & Gas Company notified them that it would no longer make returns to them for oil run during the litigation, there was prompt change made from it to the present concern, which makes payment in full. It is true that this is explained on the theory that it was in consonance with a previous contract, but the fact remains as stated. Nor is it necessary, in order that plaintiffs be entitled to to the relief demanded, that it be shown that the defendants or the concerns receiving the oil are insolvent. Mead et al. v. Burk et al., 156 Ind. 577, 60 N. E. 338.

A discussion of the principles involved is contained in the case of Ulman v. Clark, 75 Fed. 868, from the United States Circuit Court of West Virginia, wherein it is said: "It is laid down as a general principle by all the authorities that, where a party moving for the appointment of a receiver exhibits an apparently good title to the property in controversy, and that there is an imminent danger of the loss of the profits and rents of the property, a receiver may be granted for the preservation of the rents and profits pendente lite. High, Rec. § 576, and the cases there cited. And such I understand to be the law as laid down in Beach on Receivers. It is not alleged in this bill that the defendants to this action are insolvent at this time, or that there is a mismanagement of the property. On the contrary, it is conceded in the bill that there is no desire to take the property out of the hands of the parties who are operating it. The only purpose and object of this proceeding is to husband the rents and profits of this property pending this litigation, so that they may be turned over to the rightful owner of this property at the termination of it. This proceeding is in the nature of an ancillary proceeding to the action at law, and has for its one object and purpose the protection of the issues of

this property. As we have seen, this application does not contemplate the change of the status of the realty itself. On the contrary, it is conceded by the bill that those who are operating the property as lessees should not be disturbed in their operations. If this motion contemplated the change of the possession of this property, it would involve a far different question than the one involved in the issue upon this motion. Numerous and various authorities have been cited by the defendants to show that the courts of equity will not entertain a motion to disturb the possession of a property pending a litigation in an action of ejectment; but such is not the motion in this case, and I do not see any valid reasons for refusing the motion asked for. There appears to be no desire upon the part of the plaintiffs to this action to interfere with the possession of the lessees of the property, but only, as I have said, to bring into the custody of the court the rents, issues, and profits of it, that they be husbanded and held to answer the judgment at the end of the litigation of the action at law. It is said that the granting of this motion would affect the rights of the shareholders in this association, by depriving them of the revenues arising from the operation of the mines upon the land in controversy. This may be so, but is a court of equity to deny the right of parties to invoke its aid to preserve the rents and issues of a property which may be dissipated and scattered, and which may never be gathered together so as to respond to a judgment at law when obtained? Should a court permit parties who are scattered over the country—some in foreign countries, as appears in this case—to carry off the revenues arising from the rents and profits of this land, and turn over to the plaintiffs, if they obtain a judgment at law, a series of vexatious lawsuits to enable them to assert their judgment? Or, rather, is it not the duty of a court of equity, under such circumstances, to have the rents, issues, and profits in its custody, so that at the end of the litigation it may turn them all over to the rightful owner? It may be inconvenient to, and may work a hardship upon, the shareholders in this case; but a court of equity must look to the merits and the rights of the parties involved in the questions before it for consideration, and not to the hardships that may be the result of its action in reference to the legal rights of the parties concerned. \* \* \* There is no effort or desire upon the part of the plaintiffs to this action to interfere with the subject-matter of the litigation in the ejectment case by the appointment of a receiver; but it is for the purpose of preserving from waste, loss, and destruction the rents and profits arising out of the property, so that they may, in the language of the chancellor in the *Chase Case* found in [1 Bland (Md.) 206] 17 Am. Dec. 277, 'harvest and gather the fruits

until the labors of the controversy are over.' It is clear to my mind that the plaintiffs have probable cause of action against these defendants, and that the benefit to be derived from such cause of action might be lost if a receiver was not appointed, and it is no answer to this position that these parties are responsible at this time."

The purpose of this proceeding is not to deprive the defendants of either the possession of the land nor of the right to continue operation, but it is its purpose to see to it that the oil and gas produced goes to the one who is entitled thereto, and not those who are not entitled to it, and this cannot be determined until the final trial of the main action. That it is proper and right to thus hold the proceeds we think there can be no doubt. It will bring no substantial harm to any one and will be absolutely conducive to justice to all.

We have carefully considered all of the objections and contentions urged by counsel for defendants, but find the same not sufficient to overcome the manifest equities shown by plaintiffs and interveners.

The order of the trial court, therefore, denying the application for a receiver, is set aside and reversed, and this cause is remanded, with instructions to enter one in accord with this opinion requiring him to demand and receive of the defendants and them to deliver the net proceeds of oil and gas produced on this land from the date of the institution of the original action and defendants to continue to deliver and him receive and hold the same subject to the final judgment in the case.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. HAYES, J., absent.

GALBREATH GAS CO. v. LINDSEY et al.  
(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 422\*)—DEFECTIVE VERIFICATION—WAIVER.

Where a temporary restraining order is granted by a judge in chambers, without notice, solely upon the face of a petition improperly verified, the defect in the verification is waived where, without raising it, defendant answers to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414-1417; Dec. Dig. § 422.\*]

2. INJUNCTION (§ 118\*)—PETITION—IRREPARABLE INJURY.

Petition examined, and held that a threatened irreparable injury for which the law affords no adequate remedy is disclosed on its face, and that the same properly invokes the aid of a court of equity in the absence of an allegation that defendant is insolvent.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

3. PLEADING (§ 194\*)—DEMURRER—FORM.

A demurrer to an answer, which alleges "that the second clause of the first paragraph

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the answer is not responsive to an allegation contained in the petition," and that "the third clause of said paragraph is evasive," and of another paragraph "that the same states conclusions of law and is not responsive \* \* \* to the allegations \* \* \* of the petition," is insufficient under the statute, and was properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444-446, 449-452; Dec. Dig. § 194.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. INJUNCTION (§ 122\*) — PETITION—VERIFICATION—STATUTES.**

Under Comp. Laws 1909, § 5757, providing that an injunction may be granted on its satisfactorily appearing to the court or judge, by the affidavit of the plaintiff or his agent, that plaintiff is entitled thereto, a petition verified on information and belief only is insufficient.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 262-268; Dec. Dig. § 122.\*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Suit by Lila D. Lindsey and others against the Galbreath Gas Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions.

Haskell B. Talley, of Tulsa, for plaintiff in error. Chas. L. Fildes, of Tulsa, for defendants in error.

TURNER, C. J. On May 27, 1909, Lee Lindsey and wife, Lila D. Lindsey, filed in the district court of Tulsa county their petition, the object of which was to restrain the defendant from disconnecting its gas supply pipes from plaintiff's premises, and from refusing to supply the same with gas for heating and lighting the residence and running an engine, situate on the premises, used for pumping water throughout the tenements located thereon, basing their right to the gas supply upon an alleged contract with defendant, a copy of which is filed as an exhibit to their petition. They also sought to enjoin the collection of defendant's claim of \$160 for gas claimed to have been furnished by defendant under said contract, upon the ground that the same was an excessive charge under the contract. On the same day application was made to the district judge, in chambers, for a restraining order, which was granted, without notice, solely upon the face of the petition, which was verified thus:

"State of Oklahoma, County of Tulsa—ss.:

"Before the subscriber personally appeared Lee Lindsey, who, being duly sworn, says that he is one of the plaintiffs in the foregoing petition, and that each and every allegation therein made is true to the best of their knowledge and belief. Lee W. Lindsey.

"Subscribed and sworn to before me this 26th day of May, A. D. 1909. Peter Deichman, Notary Public."

On June 2d, to show cause, defendant filed a motion to vacate the order, on the ground that the same was unsupported by sufficient affidavit, and on the same day a general de-

murrer, which was overruled; whereupon, on June 5, 1909, it filed a motion to dissolve the injunction. On June 12, 1909, this motion, which is verified, but unsupported by affidavit, was overruled; whereupon, on June 14, 1909, defendant filed substantially the same motion thus supported, which was met with counter affidavits and also overruled. Thereupon defendant answered in effect a general denial, and, after making certain specific denials, for further defense said: " \* \* \* That the plaintiffs have used on their said premises the gas of the defendant for the purpose of running a gas engine which consumes a large amount of gas, and an amount, in all probability, exceeding the gas consumed for all other purposes by the plaintiffs in their residence for heating and lighting purposes; that the use of the defendant's gas for the running of said gas engine was not contemplated in said alleged contract of December 10, 1906, and that the defendant did not, under said contract, or under any other contract, agree to furnish the plaintiffs with gas for the use of said gas engine, and that by so using the gas of the defendant, plaintiffs have avoided and rendered inoperative said contract; and that the plaintiffs have estopped themselves to claim any right under said contract of December 10, 1906, by reason of the fact that the said plaintiffs have so used the gas of the defendant for other and additional purposes not contemplated under said alleged contract." To this plaintiffs demurred " \* \* \* upon the grounds that said answer is insufficient, in that the second clause of the first paragraph is not responsive to any allegation contained in the petition, and because the third clause of said paragraph is evasive, and does not deny the execution of the contract therein described. And, for further grounds of demurrer, the second paragraph of said answer states conclusions of law and is not responsive, either by way of avoidance, confession, or denial of the allegations, or either of them, contained in the said petition"—which was sustained and exceptions saved, and on refusing to plead further judgment was rendered and entered against defendant by "default," the injunction made perpetual, and defendant brings the case here.

[1, 4] It is first contended that the court erred in refusing to dissolve the restraining order, for the reason that the same was granted upon the face of the petition improperly verified. That such it was seems clear. Comp. Laws of Okla. 1909, § 5757, says: "The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or in his absence from the county, by the county judge, upon its appearing satisfactory to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

In *City of Atchison, etc., v. Bartholow et al.*, 4 Kan. 139, the temporary injunction was granted, as here; the petition being sworn to upon the information and belief of petitioner. In holding the same insufficient, and that the court erred in receiving it in evidence over objection and in granting the injunction thereupon, the court said: "Section 248 of the Code provides that 'a temporary injunction may be ordered upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.' The affidavit of the plaintiff to the necessary facts will, under this provision, be sufficient, and the petition, if properly verified, may be used as an affidavit, i. e., it may be read as testimony. To determine whether the petition here was admissible as testimony, it will be necessary to ascertain the legal requirements of an affidavit." And, after holding that such it did not possess, said: "The petition, as verified, was not 'a declaration under oath,' and it was error to permit it to be read, against the objection of the defendant, for which reason the order of injunction must be vacated." See, also, *Long v. Kasebeer*, 28 Kan. 226; *State ex rel. v. Loomis*, 46 Kan. 107, 26 Pac. 472; *Center Tp. v. Hunt*, 16 Kan. 430; *State v. Bd. Co. Com'rs*, 35 Kan. 150, 10 Pac. 535; *Ruge v. Apalachicola, etc., Co. et al.*, 25 Fla. 656, 6 South. 489; *Lee v. Clark*, 49 Ga. 81; *Kaehler v. Dobberpuhl*, 56 Wis. 497, 14 N. W. 631. And so we might hold and vacate the order for insufficient verification were it not for the fact that the court was not called on to pass upon the motion intended to raise the question, filed June 2d, and the question thereby sought to be raised cannot be raised in this court for the first time. 2 High on Inj. § 1569, says: "So the insufficiency of the verification, as the basis for a preliminary injunction, cannot be raised upon an appeal from a final decree granting a perpetual injunction; and in such case it is immaterial that the bill was improperly verified, or that a preliminary injunction was improperly granted upon such verification. So, although a preliminary injunction has been improperly granted because of the lack of verification to the bill, yet if it has been allowed to stand until the hearing, and the evidence discloses sufficient equity to support it, it should be perpetuated. And an objection for want of proper verification must be taken in apt time, and if raised after a hearing upon the merits it comes too late." Or, as stated by us in the syllabus in *Glasco v. School Dist. No. 22, McClain County*, 24 Okl. 236, 103 Pac. 687: "Any defect or irregularity involved in the verification of a petition for an injunction is waived where, without raising it, defendant answers to the merits."

[2] It is next contended by defendant that the court erred in overruling its demurrer to the petition, because, it says, the same disclosures on its face that plaintiffs have an adequate

remedy at law. The point is not well taken. The petition substantially states that on December 10, 1906, plaintiffs and defendant entered into a contract, whereby defendant agreed to furnish to plaintiffs, for the period of 15 years, all the gas they might find necessary to use for lighting and heating at their residence, situated and described on certain lands in Tulsa county, at the rate of \$6 per annum according to the contract filed as an exhibit; that pursuant thereto plaintiffs forthwith provided the tenements on the described premises with necessary pipes for conveying gas; that defendant thereupon connected the same with its supply pipe, at the same time placing a meter in said tenements for the measurement of gas so furnished and consumed, and thereupon furnished the same as provided in said contract; that a short time thereafter defendant, at the request of plaintiffs and pursuant to said contract, also connected its pipes with a certain engine and boiler placed on the premises by plaintiffs for the purpose of pumping water from a well thereon into and through said tenements; that the furnishing of said gas to be used, as aforesaid, was at that time regarded and considered by the parties to the contract to be in keeping with its terms, and was so regarded by them up to May 16, 1909, at which time defendant presented plaintiffs a bill for about \$160 for gas supplied to said engine and boiler, and is now threatening to disconnect its pipes, unless said bill is paid; that plaintiffs will be deprived of light, heat, and water for said premises, unless defendant is enjoined from carrying said threat into execution; that plaintiffs have at all times complied with their part of said contract, and have paid for gas thus consumed \$6 per annum up to the date aforesaid; that at the time of connecting its pipes with said engine and boiler, as stated, no meter was installed by defendant for the measurement of gas thus to be consumed, nor has it since installed a meter for that purpose and that its demand for payment of \$160 is unjust and in violation of said contract; that the injury threatened will work irreparable injury to plaintiffs, and is imminent; wherefore they pray that defendant be enjoined, etc.

In *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417, Edwards brought a petition for injunction against the company, in which he sought to enjoin it from disconnecting its water main from the private pipe running therefrom to his residence, and from interfering with his use of the water at his residence, under the terms of a contract which he set up as made between himself and the company. The court said: "In *Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229, 33 Pac. 689, the plaintiffs, who were the owners of a large brewery, sought an injunction to prevent the defendant from shutting off water from the plaintiffs' private pipe, which connected with the defendant's system of piping. The court held: 'An

injunction will lie to enjoin a water company from breaking its contract to supply water to a brewery, when turning off the water would stop the brewing, destroy a large quantity of malt, and injure the brewers' trade.' Pemberton, J., in the opinion, said: 'We think the facts stated in the complaint, which are confessed by the demurrer, entitle the appellants to invoke the equity jurisdiction of the court, and to the negative and preventative relief of injunction' [citing *Callery v. New Orleans Water Works Co.*, 35 La. Ann. 798; *Brown v. Frankfort (Ky.)* 9 S. W. 384; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 50; *Graves v. Key City Gas Co.*, 83 Iowa, 714, 50 N. W. 283; *School Dist. v. Ohio Valley Gas Co.*, 154 Pa. 539, 25 Atl. 868]. The plaintiff is without an adequate remedy at law. A court of law could neither prevent the defendant from depriving him of the water, nor restore to him such use after he had been once deprived of it; and the damages which he would sustain in the future, during the long period covered by the contract, by being deprived of the use of a plentiful supply of pure water flowing through pipes upon his premises, and easily and conveniently accessible at all times for the varied necessities and even luxuries of a household, would be difficult to ascertain, and could not, with any certainty, be estimated. Even if the plaintiff could, by erecting and maintaining a private system of waterworks, supply his residence and premises with water in the same manner and to the same extent that the defendant now does under its contract with him, the damages which the plaintiff would sustain by being deprived of the use of the water, as now supplied to him, during the period of time required for him to complete his own water plant would be practically impossible of ascertainment with any degree of certainty, to say nothing of the necessity, in order to arrive at the amount of his damages, of estimating the cost of constructing, keeping in repair, and operating, from year to year, such private works"—and held that the petition was improperly dismissed.

*Sickles v. Manhattan Gas Light Co.*, 64 How. Prac. (N. Y.) 33, was a motion to continue a temporary injunction to restrain defendants from removing the meter or cutting off the supply of gas from plaintiff's premises. Plaintiff asserted that the bill presented was unjust. He prayed that the amount due the company be ascertained, and that the company be directed to accept the sum so ascertained and restrained from removing the meter. The court sustained the motion, and in passing said: "The learned counsel for the defendant contend upon the argument that in a case of this character an injunction should not be granted, for the reason that the defendant is perfectly responsible, and that the plaintiff could have paid the amount demanded of him under protest, and brought

an action to recover the amount illegally demanded from him. In this view I do not concur, for the reason that it has long been settled that a court of equity will intervene by injunction to prevent irreparable mischief. This seems to me to be a case in which, if the plaintiff is right, it cannot be justly claimed that he can be fully compensated by an action for damages. The use of gas in cities has become almost as great a necessity as the use of water, and an illegal deprivation of one or the other, particularly where such use is for ordinary domestic and family purposes, would cause, I think, such damage as to call for the interposition of a court of equity. See *Cromwell v. Stevens*, 2 Daly, 15." See, also, 2 *Hughes on Injunctions*, § 1122a; *White v. Fayette Fuel & Gas Co.*, 139 Pa. 492, 20 Atl. 1062; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

We are therefore of opinion that the demurrer should have been overruled.

[3] But the case must be reversed because the court erred in sustaining the demurrer to defendant's answer. This for the reason that a demurrer will not lie against a pleading defective only as alleged therein. If it were true that the "second clause of the first paragraph of the answer is not responsive to any allegation contained in the petition," or that "the third clause of said paragraph is evasive," and of another paragraph "that the same states conclusions of law, and is not responsive \* \* \* to the allegations \* \* \* of the petition," these are not grounds for demurrer, but rather for a motion to strike for surplusage and a motion to make more definite and certain. *Comp. Laws of Okla.* 1909, §§ 5629, 5659; 6 *Enc. Pldg. & Prac.* 309. The last authority cited, at page 309, says: "Where the causes for which parties may demur to pleadings are fixed by statute, those causes are exclusive, and no other ground of demurrer will be entertained by the court." At page 317 such a demurrer as the one here under consideration is termed an insufficient demurrer, of which a number of examples are there given. In the cases cited it is uniformly held that such present no issue of law, and should be overruled. And in *Burnette v. Elliott*, 72 Kan. at page 627, 84 Pac. at page 375, the court said: "The complaint that the petition offends the rule regarding clearness and conciseness of statement will not avail, as indefiniteness and informality cannot be reached by a demurrer, much less by an objection to evidence." 31 Cyc. 282 says: "Except in a few states where the Code enumerates ambiguity, indefiniteness, or uncertainty as a ground of demurrer, no demurrer will lie in the Code states for uncertainty or indefiniteness; a motion to make more definite and certain being the proper remedy." *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Street R. Co. v. Stone*, 54

Kan. 83, 37 Pac. 1012; McPherson v. Kingsbaker, 22 Kan. 646; Western Massachusetts Ins. Co. v. Duffey, 2 Kan. 347; Guthrie v. Shaffer, 7 Okl. 459, 54 Pac. 698.

In point is also Stiles, Treas., v. City of Guthrie, 3 Okl. 34, 41 Pac. 386, where the court said: "There was, however, no error committed in overruling the demurrer upon the ground of this misjoinder, for our statute does not make misjoinder of parties, either plaintiff or defendant, a ground of demurrer; and, although it may plainly appear on the face of the petition that there is a misjoinder of parties in one or both of these respects, it is not a defect in a petition for which a demurrer lies. Winfield Town Company v. Maris, 11 Kan. 128; McKee v. Eaton, 26 Kan. 226; White v. Scott, 26 Kan. 476; Hurd v. Simpson, 47 Kan. 372 [27 Pac. 961]." See, also, Owen et al. v. City of Tulsa, 27 Okl. 268, 111 Pac. 320, where this case is cited with approval.

The cause is therefore reversed and remanded, with directions to overrule said demurrer to the answer and proceed to the trial of the cause upon its merits. All the Justices concur.

#### ANHEUSER-BUSCH BREWING ASS'N v. DOSS et al.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

EVIDENCE (§§ 10, 34\*)—INTOXICATING LIQUORS (§ 329\*)—WRONGFUL SALE—RECOVERY OF PRICE—JUDICIAL NOTICE.

This court will take judicial knowledge of the fact that cities and towns within that portion of the state which was formerly Indian Territory are within that portion of the state into which it is a violation of law to introduce beer, whisky, and other intoxicating beverages and will not lend its aid in the collection of debts claimed to be due on shipments of such beverages into such territory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14, 49, 50; Dec. Dig. §§ 10, 34;\* Intoxicating Liquors, Cent. Dig. §§ 474-481; Dec. Dig. § 329.\*]

Commissioners' Opinion, Division No. 2. Error from Grady County Court; N. M. Williams, Judge.

Action by the Anheuser-Busch Brewing Association against C. T. Doss and others, associated as Chickasha Aerie, No. 131, Fraternal Order of Eagles. Judgment for defendants, and plaintiff brings error. Affirmed.

Wm. Stacey, of Chickasha, for plaintiff in error.

HARRISON, C. In June, 1909, Anheuser-Busch Brewing Association brought suit in the county court of Grady county against C. T. Doss, James Downs, Ben Jones, Dave Hill, J. W. Speake, and James A. Darnell, for the sum of \$158.14, alleged to be due plaintiff on various shipments of beer at dif-

ferent dates between March 14, 1908, and April 20, 1908, alleged to have been ordered by C. T. Doss as the agent of Aerie No. 131, Fraternal Order of Eagles at Chickasha, Okl., composed of defendants above named and others to plaintiff unknown. Defendants denied liability on said account and denied the authority of said C. T. Doss to contract such debt as the agent of said Order of Eagles. The cause was tried in October, 1909, and judgment rendered in favor of defendant. From this judgment plaintiff appeals, assigning, as the principal ground for reversal, the ruling of the court in excluding the testimony of C. T. Doss, by whom plaintiff sought to prove the alleged agency. From the nature of this case and from the character of the debt sued upon, it is unnecessary to pass upon the question whether the parol testimony of the agent himself is competent to prove his agency. Conceding the rule to be that such testimony is competent, yet it is immaterial to a determination of this cause.

The record discloses that the account sued upon was for shipments of beer consigned to defendants at Chickasha, Okl. This court takes judicial cognizance that Chickasha is within that portion of the state into which it is a violation of law to introduce beverages of this character and will not lend its aid to the collection of debts made in open violation of the law.

Following the rule of this court announced in Haley Co. v. State, 125 Pac. 736, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

#### SCOTT v. SMITH.

(Supreme Court of Oklahoma. Dec. 7, 1912.)

(Syllabus by the Court.)

REPLEVIN (§ 25\*)—PROCEEDINGS FOR TAKING PROPERTY—AFFIDAVIT AND BOND.

Under section 5687, Comp. Laws 1909, should the plaintiff seek immediate possession of the property in question, he must resort to replevin proceedings, make the statutory affidavit and bond, and procure an order of delivery. But the right to maintain an action to recover possession of specific personal property does not depend upon the taking out of an order of delivery, at or after the commencement of the action. It is an ancillary order to be had at the option of the plaintiff upon the making of an affidavit and the giving of a statutory undertaking. But whether obtained or not the plaintiff is still entitled to a trial of the main issue.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 125-127; Dec. Dig. § 25.\*]

Commissioners' Opinion, Division No. 2. Error from Blaine County Court; O. T. Dyer, Special Judge.

Action by O. A. Smith against Levi Scott for possession of specific personal property. Judgment for plaintiff, and defendant brings error. Affirmed.

I. H. Lookabaugh, of Watonga, for plaintiff in error. Laurance H. Hampton, of Watonga, for defendant in error.

**HARRISON, C.** This action was begun March 19, 1908, by O. A. Smith, against Levi Scott, for possession of certain personal property consisting of cows and calves and two cream separators, of the aggregate value of \$940. Simultaneous with the filing of his petition and the issuance of summons thereupon, he brought replevin proceedings for the immediate possession of the property. An order of replevin was issued by the court, pursuant to which the property was given into the possession of plaintiff. No redelivery bond was given. In October, 1908, upon a verdict of a jury the court rendered judgment in favor of plaintiff for possession of the property in question. In due time defendant appealed to this court. The material contention of plaintiff in error is that the court erred in overruling his motion to quash the order of replevin; the motion being based upon the ground that the replevin bond was defective, and that the affidavit in replevin was fatally defective in that it had not been signed by the plaintiff until after the motion to quash the order of replevin had been filed. It is agreed in the record that the affidavit was not signed by the party making it, until after the motion to quash was filed. It does not appear in the record whether or not the bond in replevin was ever amended. But it appears that the affidavit was signed, and that the court overruled the motion to quash the order. It is not necessary in deciding this case to decide whether the defect in the affidavit was such a defect as could be remedied by amendment, as that question was not raised in the proceedings below, nor is it presented here.

The decisive question here involved is whether the judgment should be reversed because the court overruled the motion to quash the order of replevin. It is true that article 9, c. 87, Compiled Laws 1909, provides that an order of replevin shall not issue until the prescribed affidavit has been made, and the prescribed undertaking has been executed, and further provides in section 5700 of said article as follows: "Any order for the delivery of property issued under this article, without the affidavit and undertaking required, shall be set aside at the cost of the clerk issuing the same, and such clerk as well as the plaintiff, shall also be liable in damages to the party injured."

Now admitting for the purposes of this case that the court erred in overruling the motion to quash the order of replevin, admitting that the order was wrongfully issued, then, in the absence of any showing that defendant was damaged by reason of the unlawful issuance of the order, the question is whether a judgment, founded upon the merits of the case, upon the facts, as to whether plaintiff

was entitled to possession of the property, should be reversed. The record discloses that after the court overruled the motion to quash the order of replevin, and after the time had expired for filing an answer to plaintiff's petition, the defendant obtained leave of court to file an answer out of it, and upon leave of court filed such answer. The issue as to whether plaintiff was entitled to possession of the property was thus joined, which issue was submitted to the jury, by the court, and upon the facts in the case the jury returned a verdict in favor of plaintiff. The verdict we must say is fairly supported by the evidence, and, under the settled rule of this court, a verdict reasonably supported by evidence will not be disturbed. It follows therefore that the verdict in favor of plaintiff decides in the negative the question as to whether defendant was damaged by reason of the order of replevin. This perhaps might not be true if plaintiff had no right under the statutes to maintain an action for possession of his property, independent of any proceedings in replevin. But section 5687, Compiled Laws 1909, provides: "The plaintiff in an action to recover the possession of specific personal property, may at the commencement of the suit, or at any time before answering, claim the immediate delivery of such property as provided in this chapter."

Now in an action under this statute, if plaintiff seeks immediate possession, he must, of course, resort to replevin proceedings, make the statutory affidavit and bond, and procure an order of delivery; but the section clearly implies the right to maintain an action for possession of specific personal property, independent of replevin proceedings. This right is upheld in *Ward v. Masterson*, 10 Kan. 77, and in *Batchelor v. Walburn*, 23 Kan. 733, both opinions by Justice Brewer, of the Supreme Court of that state. In each case it was held that an action may be maintained under our Code without a seizure of the property, at some time before final determination of the suit, and therefore without an affidavit and bond.

In *Batchelor v. Walburn*, supra, Justice Brewer, in discussing the proposition, after quoting the section of Kansas statutes identical with ours, says: "The action exists, or may exist, before the order. The section recognizes the action before, and says certain things may be done in it. It nowhere provides that a failure to take the order abates the action, or that defendant may prevent a recovery by showing that plaintiff has not availed himself of all the privileges which the statute has given. The order for the delivery is ancillary. It is like an order of injunction, which may be the final judgment or a provisional remedy, Code, § 237. In replevin, the judgment may be for the possession, or the value thereof in case a delivery cannot be had. Code, § 185. And delivery may be enforced after

judgment by attachment, as for a contempt. Code, § 188. It would be a strange omission if such action could not be maintained—in many cases a gross denial of justice. Immediate delivery can be secured only by giving bond. This is sometimes impossible, especially where the plaintiff is poor or a stranger. In such a case, to turn him over to a mere action for the value would often give no relief. The defendant might be execution proof. The property might have great personal value; it might be a family relic, something which the plaintiff would under no circumstances part with. And yet, because he is unable to give bond, he must, according to defendant's theory, sell it at its market value. In 1 Wait, Pr. 711, the author says: "The Code, however, leaves it optional with the plaintiff to proceed to recover the possession of the property, under the provisions of section 206 of the Code (section 206 of the New York Code corresponds with section 176 of our Code), before judgment in the action, or to seek the specific recovery of the property after judgment. It is not necessary that the plaintiff, in an action to recover the possession of personal property under the Code, should claim the delivery of the property before judgment and furnish security to the defendant, as was indispensable in the old action of replevin. Although he may not resort, in the action, to the provisional remedy of claim and delivery, he may still have judgment and execution for the restitution of the property, with damages for its detention if he succeeds in establishing his right to recover." Vogel v. Badcock, 1 Abb. Prac. [N. Y.] 176; Corbin v. Milton, 27 How. Prac. [N. Y.] 76."

In Varner v. Bowling, 54 Kan. 380, 38 Pac. 481, it was held: "The right to maintain an action of replevin does not depend upon the taking out of an order of delivery at or after the commencement of the action. It is an ancillary order to be had at the option of the plaintiff upon the making of an affidavit, and the giving of a statutory undertaking; but, whether obtained or not, the plaintiff is still entitled to a trial of the main issue."

In the above case the bond or undertaking was insufficient, and defendant moved that additional security be required, which motion was sustained by the court; and plaintiff, being unable to give additional security demanded a trial of the main issue. This was refused by the court and the action dismissed. It was held that the denial of a trial and the dismissal of the action was error, following the rule in Ward v. Masterson, and Batchelor v. Walburn, supra. Thus it is seen that this had become the established rule in Kansas, at the time of the adoption of our Code of Procedure from that state, and is clearly in harmony with reason, and with the provisions of the Code. Therefore, as plaintiff had the right to maintain his

action for possession of the property, independent of replevin proceedings, and as he was awarded possession of same, upon the facts bearing upon the issues formed by the petition and answer, we cannot see wherein the substantial rights of defendant, aside from the costs in the replevin proceedings, were affected, by reason of the replevin proceedings, be they ever so defective. Suppose, for illustration, defendant's motion to quash had been sustained, the order of replevin set aside, and the property returned to defendant. Then, upon a trial of the main issue, the right to possession of the property, under the evidence, would have been determined in favor of plaintiff, and the property turned back to him, thereby showing that plaintiff was entitled to possession from the beginning, and that defendant, being wrongfully in possession at the beginning, had lost no legal rights by reason of the replevin proceedings. Hence inasmuch as the record before us shows that the same results would have been reached, whether the motion to quash had been sustained or not, or whether the issue had been tried under proper replevin proceedings, or tried under the petition and answer, not saying what the judgment of this court might have been on the defective affidavit, under different circumstances, nor passing upon the liability of the officer for issuing the order upon the affidavit and bond in question, we cannot feel that the ultimate ends of justice would be reached by a reversal of this judgment, and by sending it back to be retried with the same results.

Upon the whole record we think the costs incurred in procuring the order of replevin—that is, the costs of the replevin proceedings up to the time the motion to quash the order was filed—should be paid by the plaintiff below. With this exception the judgment is affirmed.

PER CURIAM. Adopted in whole.

AMERICAN TRUST CO. et al. v. CHITTY et al.

(Supreme Court of Oklahoma. Nov. 19, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 220\*)—EXAMINATION—PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT.

In an action in conversion, where conspiracy is charged, it is not error to permit an attorney to testify that he had, long prior to the commencement of the action, advised one of the defendants that an abstract of title to certain land, over which the controversy arose, showed defective title; such evidence being offered, not as a legal opinion of the attorney but to show knowledge of bad title, on the part of the defendants; no objection being made that the conversation was privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 783, 784; Dec. Dig. § 220.\*]



**2. EXECUTORS AND ADMINISTRATORS (§ 431\*)—ACTIONS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIM.**

A claim arising on contract must be presented to the administrator for allowance or rejection before suit can be maintained thereon, but not so where the claim arises in tort or other wrongful act of the deceased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1679, 1681, 1682; Dec. Dig. § 431.\*]

**3. WITNESSES (§ 139\*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.**

It is error for a court to permit a witness to testify relative to a conversation had personally with a deceased person, where witness acquired title or cause of action immediately from such deceased person. Section 5841, Comp. Laws 1909.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

**4. APPEAL AND ERROR (§ 1026\*)—REVIEW—HARMLESS ERROR.**

It is not every error occurring at the trial that will warrant the court in reversing the judgment of the trial court. This court in every stage of action must disregard error, where the substantial rights of the adverse party are not affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. § 1026.\*]

**5. EVIDENCE (§ 222\*)—ADMISSIONS—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.**

In an action where several defendants are charged with conspiring and acting together with a common end and purpose in view, testimony of witness as to conversation and acts of one, relative to his relations with the other, is admissible as against all defendants.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768-808; Dec. Dig. § 222.\*]

**6. EVIDENCE (§ 434\*)—PAROL EVIDENCE AFFECTING WRITINGS SHOWING INVALIDITY OF WRITING.**

Parol evidence is always admissible to show that a purported deed or other contract was not, in fact, the deed or contract made and entered into by the parties; the object being, not to vary the terms of a written instrument, but to show that by mistake of fact or fraud a different deed or contract was made than the one inquired about.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.\*]

**7. REQUESTED INSTRUCTIONS EXAMINED.**

Requested instructions examined, and held not to state the law applicable to the facts in this case.

Commissioners' Opinion, Division No. 1. Error from District Court, Garvin County; R. McMillan, Judge.

Action in conversion by M. A. Chitty against the American Trust Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Hocker, of Purcell, for plaintiffs in error. J. B. Thompson, of Pauls Valley, for defendant in error.

ROBERTSON, C. Chitty, plaintiff below, charges in his petition that on February 5, 1907, the American Trust Company, acting by and through its duly authorized agents, J. W. Gillett, F. P. Kibbey, and R. C. Hess,

and the said J. W. Gillett, F. P. Kibbey, and R. C. Hess acting for themselves, and conspiring together with the said American Trust Company and with John M. Cavin, falsely and fraudulently represented to said M. A. Chitty that the said John M. Cavin was seised, and had an absolute and indefeasible estate in fee simple, in certain real estate in Garvin county; that said land had been filed upon as the surplus allotment of an intermarried citizen of the Choctaw or Chickasaw Tribes of Indians, with the exception of one 20-acre tract; that said intermarried citizen had disposed of said surplus to said American Trust Company by warranty deed, and that the said American Trust Company had disposed of said land to John M. Cavin by warranty deed, and that the perfect title to the said land was in the said Cavin except a mortgage in favor of one John Marsh in the sum of \$1,700. It was further represented to said Chitty that said first-named parties had an abstract showing the above facts in detail, that they also had a release of the mortgage from said John Marsh, and that a warranty deed from John M. Cavin and wife would vest a perfect title to said land in the purchaser. Plaintiff, A. M. Chitty, relying on the statements so made by said parties, and believing the same to be true, was induced to and did purchase said land from said Cavin and agreed to pay therefor the sum of \$3,075, to be paid when the said the American Trust Company should secure a general warranty deed, accompanied by an abstract showing an absolute and indefeasible title in fee simple in the said John M. Cavin in all said land except the 20 acres as aforesaid, and the balance, to wit, \$300, to be paid when the title to the 20 acres should be perfected; that, in accordance with the terms of said contract, the plaintiff deposited \$3,075 with the American Trust Company, to be paid to the said John M. Cavin and the American Trust Company as their interests might appear upon the execution of the proper deed, accompanied by the abstract, showing such title as would vest the complete and indefeasible estate in fee simple in plaintiff. Plaintiff charges that immediately upon paying said money to the American Trust Company the said American Trust Company paid out to said John M. Cavin the sum of \$1,575 of said money, and took and converted to its own use \$1,500 of said money; that said parties and each and all of them then and there well knew that said lands had not been filed upon as surplus allotment of an intermarried citizen of either Choctaw or Chickasaw Tribes of Indians; that they, and each of them, well knew that the title to said lands had been questioned upon numerous occasions, and that said John M. Cavin, who had purchased said lands from the American Trust Company, had refused to pay for the same because of defective title.

Plaintiff further charges that the said contract was further breached, in that no abstract of title was ever produced by any of the parties showing that, with the exception of the 20 acres, as aforesaid, all of said land had been filed upon as surplus allotment of the Choctaw or Chickasaw Tribes of Indians, and that proper conveyance with covenants of warranty had been executed by said intermarried citizen, and that a good and indefeasible title was vested in said John M. Cavin, and that a deed containing proper covenants of warranty would convey to plaintiff a perfect title to said land; that without procuring any abstract at all the said defendants, immediately upon the deposit by plaintiff of the said sum of \$3,075, acting together, took and divided and converted said money to their own use and benefit. Plaintiff further charges that, immediately after the making of said contract of purchase and depositing the money as aforesaid, he was informed that the title to said land was imperfect, and not as represented; that he immediately notified the said American Trust Company, J. W. Gillett, F. P. Kibbey, R. C. Hess, and John M. Cavin that he would not accept a deed to said land, nor pay for the same, nor consent that the money which he had deposited with the said American Trust Company should be paid out, because of his information that the title to said land was not good, and had been misrepresented to him; that he then and there immediately demanded a return of his money; that the said defendants and each of them have failed and refused to return the same, and ever since have held and converted the same to their own use and benefit; that since said time, and in March, 1908, the defendant J. W. Gillett had died, and that Mrs. Mary P. Gillett had been appointed and was now the acting administratrix of his estate. The defendants and each of them answered by general denial. The defendant, John M. Cavin answered separately by general denial, and, in addition, denied that he had acted wrongfully in and about the premises, or that he had acted in conjunction with said other named defendants, and alleged that prior to the time mentioned in plaintiff's petition he had purchased the land from the American Trust Company, but later had discovered a defect in the title to a part thereof, and had refused to complete the payments therefor; that at the request of the other defendants, and at the time mentioned in plaintiff's petition, he had agreed to reconvey said land by quitclaim deed to plaintiff, who was at the time present and heard their conversation; that he and his wife did execute a quitclaim deed to said land, and that if the deed conveying the same was a general warranty deed, as the American Trust Company now claimed it to be, it was a forgery, as he had never executed such a deed; that immediately after the execution of said quit-

claim deed the American Trust Company paid him the amount of money which he, before that time, had paid it for said land. The cause was tried to a jury, and a verdict in favor of plaintiff in the sum of \$3,574.73 was returned, upon which judgment was entered, and to reverse which defendants bring this appeal.

[1] Many assignments of error are raised in the petition in error, and presented by the brief of the plaintiffs in error. We will treat them in the order in which they appear. The first is: The court erred in the admission of the following testimony: Q. What did you tell him? What was your opinion as to whether the title was good or bad? A. Well, I advised him under that abstract that I didn't think the title to the land was good." This testimony was elicited from Mr. Thompson, attorney for Chitty, who was questioned by Mr. Carr, attorney for Cavin, one of the defendants, but who had filed a separate answer. The purpose of such testimony as claimed by Chitty in his brief was to show that the defendants knew of the defect in title, and that the same had been called to their attention, or at least to the attention of some of them, and that notice to one was notice to all under the charge of conspiracy as laid in the petition. Prior to the admission of this testimony, the other defendants had testified that they did not know of the defect of title. We are of opinion that the admission of this testimony was not error, under the circumstances. Mr. Thompson did not testify as an attorney giving a legal opinion, but as an ordinary witness of an independent fact, of a conversation had with one of the defendants, on a subject, the knowledge of which to any of the defendants was an important element in the charge of conspiracy. As such, the testimony was admissible. The trial court, perhaps, should have admonished the jury that this was the only purpose of the testimony, but the failure to do so, in the absence of a specific request for such limitation, will not warrant a reversal of the case. No objection was made that the conversation was privileged.

[2] The next error assigned is that with reference to the action of the trial court in rejecting testimony offered by Mary P. Gillett, administratrix, as to her final discharge as such administratrix. J. W. Gillett, one of the defendants, died after suit had been instituted, and the action had been revived in the name of Mary P. Gillett, administratrix, etc. Defendants claim that this suit cannot be maintained as against the estate, for that no claim had ever been presented to the administratrix as is required by law, and that the same is therefore now barred by statute. This contention might be good were this a debt or claim arising out of a contract, but, being for conversion, a claim arising out of a tort or wrong, no such presentation is necessary. Our Code on this subject is identical

with the California Code, and 1 Church on Probate Law and Practice, p. 735, says: "As the statute which relates to the presentation of claims against estates before actions can be maintained thereon relates to claims arising on contracts, other actions do not come within the rule. Thus no presentation of a claim is necessary before the bringing of an action to recover damages for wrongful acts." See, also, *Hardin v. Sin Claire*, 115 Cal. 460, 47 Pac. 363. We can see no error in the ruling of the court on this subject.

[3] The third ground urged for reversal is that the court permitted plaintiff to testify of and concerning a conversation had with deceased, Gillett, one of the original defendants. Timely objection to the reception of this evidence was made by counsel for defendants, but the objection was overruled, and the witness was permitted to testify as follows: "A. Mr. Gillett said that he would be willing that any lawyer in this territory or state should pass on this title, excepting Mr. Thompson, and he wouldn't object to him, but he was an enemy of his; that Mr. Thompson thought he was pretty smart, but that he thought there was other men just as smart as him in the territory." The record discloses that this conversation occurred at a meeting between the officers of the American Trust Company and Chitty, at which time the question of the title to the land in controversy was under discussion. Mr. Hess, one of the defendants, in answer to a question concerning the examination of the abstract, said, as testified to by Chitty, "that the American Trust Company would be willing to have me have any lawyer in the state or territory to pass upon the abstract, excepting J. B. Thompson, and they would not object to him only he was an enemy of theirs." At this point the objection above noted was made by Mr. Hocker as follows: "I don't think he can detail such conversation with Mr. Gillett. The Court: You want to prove what Mr. Gillett said at that time? Mr. Thompson: Yes; just what he said as to the land." Objection overruled, defendants except. Whereupon the witness Chitty testified as above with reference to a conversation had personally with Mr. Gillett, deceased. The admission of this testimony was error. Section 5841, Comp. Laws 1909, provides: "No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person, etc. \* \* \*" However, it will be noted that the same conversation had taken place between Mr. Hess, one of the defendants, and the witness Chitty, and had been given in detail just before the testimony complained of was given.

[4] The evidence of the conversation had between Chitty and Hess was competent, and, while that between Chitty and Gillett was incompetent, it was error of such character that this court would not be justified in interfering with the verdict of the jury on that account. "It is not every error occurring at the trial that will warrant the court in reversing the judgment of a trial court. This court in every stage of action must disregard error, or defect in pleading or proceeding, which does not affect the substantial rights of the adverse party." *Yukon Mill & Gr. Co. v. Imperial Roller Mills Co.*, 127 Pac. 422, not yet officially reported.

[5] It is next objected that the court erred in permitting plaintiff to testify as to a conversation had with Mr. Hess, one of the defendants, relative to his relation with the American Trust Company, thus: "A. Mr. Hess said he was representing the American Trust Company, etc. Mr. Hocker: I don't know about the declarations of the agent to prove an agency. I move the court that the statement be stricken from the record and the jury instructed not to consider it. By the Court: Overruled. Exceptions." There is no error in this ruling of the court. Hess was one of the defendants in the action. The allegations of the petition charge the defendants with conspiracy in that they all acted together, jointly, and with a common end and purpose in view. Such being the case, the testimony was competent to show how Hess acted, or claimed, to act, in order to prove a joint tort.

[6] It is next urged that the court erred in permitting the defendant Cavin to testify as follows: "Q. I will ask you if that was a quitclaim deed or a warranty deed? A. It was a quitclaim deed. We only agreed in the deed we signed to defend against those claiming by, through, or under us. Mr. Hocker: I move the court to exclude from the jury that portion of the deposition of J. M. Cavin that seeks to vary the terms of the written deed by parol. (Overruled. Exceptions.)"

It is charged in Cavin's separate answer that he was to quitclaim the land; that he refused to make a warranty deed. This testimony by Cavin is in support of the allegations of his answer, and is offered by one of the defendants in the action. He was testifying as to a fact clearly within his knowledge. It could have been shown on cross-examination that he was mistaken. The original deed was, in fact, offered in evidence by defendants, and examined by the jury. The objection that the testimony attempts to vary the terms of a written instrument is not good. Parol evidence is always admissible to show that the purported contract was not, in fact, the contract made and entered into by the parties; the object of such testimony being, not to vary the terms of the written instrument, but to show that by mistake or fraud a wholly different instrument was made and

executed. For this purpose, and this alone, such testimony was competent. Colonial Jewelry Co. v. Jones, 127 Pac. 405, not yet officially reported.

[7] It is also urged that the court erred in refusing to give the following requested instruction: "(a) The jury are instructed that the allotment of a deceased member of the Choctaw-Chickasaw Tribe of Indians may be sold by the heirs of such allottee immediately after selection and prior to the issuance of allotment certificate or patent." As a general proposition of law the above is correct. *Hancock v. Mutual Trust Co.*, 24 Okl. 391, 103 Pac. 566. The trouble with this instruction is that it does not apply to the admitted facts in this case. In the case at bar there were several different tracts of land with many different heirs, some not determined. It is impossible to ascertain from the record the names and ages of the so-called heirs. If the heirs were all determined and were all of age, the above instruction might, and doubtless would, be the law of the case on that particular point. The surplus of a deceased Indian was not subject to be sold prior to April 6, 1906, and since then only by approval of the deed by the Secretary of the Interior, or some probate court having jurisdiction of the estate of the deceased. *Mullen v. U. S.*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834.

The next instruction complained of is as follows: "The jury are instructed that, upon the death of a member of the Choctaw-Chickasaw Tribe of Indians, if such allottee dies without issue and unmarried and without a will, his lands and allotment go to his father and mother, or one of them, if living, and such father and mother may sell the same, and convey good title to the purchaser." What has been said with reference to instruction "a" above may be said of this instruction also. The case of *Shulthis v. MacDougal* (C. C.) 162 Fed. 331, does not apply to nor govern in this case, for there is nothing in the record to show when the land was allotted or when the allottee died, whether before or after allotment. If the allotment had been made before the allottee died, the surplus would have been alienable by the heirs, but no showing to this effect is made by the record in the case, hence the refusal of the court to give this unqualified instruction was not error.

It is next urged that the court erred in refusing to give the following requested instruction: "The jury are instructed that if lands are selected in the name of an enrolled Indian, and after selection such lands are sold to an innocent purchaser, the fact that the Secretary of the Interior canceled the name of such enrolled person from the Indian rolls, and canceled the allotments of lands, cannot affect the title to such lands in the hands of innocent purchaser." This instruction does not state the law applicable to the facts in this case, and the authority

of *Sorrels v. Jones et al.*, 26 Okl. 569, 110 Pac. 743, cited by learned counsel for plaintiffs in error does not sustain, but, on the contrary, defeats such contention.

The next two assignments of error, being requests for peremptory instructions in favor of defendants Hess and Kibbey, do not require any consideration at our hands, for the reason that this was an action in conversion on account of the wrongful acts of defendants, and not one for rescission of contract, and, while the expressions found in the petition are not as carefully worded as they might have been, yet, as a whole, it fairly states a cause of action in conversion by conspiracy, and it was upon this theory that the case was tried by the parties to the court below.

The next two assignments refer again to the failure of plaintiff to present his claim to the administratrix for allowance. This has been completely disposed of hereinabove, and needs no further consideration.

This observation also applies to and controls us in the determination of assignments of error "j" and "k."

Assignment of error "h," as urged by plaintiff in error, deals with a refused instruction, the substance of which is given by the court on pages 215 and 216 of the record, and evidently overlooked by counsel.

Assignment of error "i" is predicated upon the failure of the court to give the following instruction: "The jury are instructed that no warranty of title can be had by mere verbal statement as to the title, or even language expressing a warranty of title, and therefore, before you can find against the defendants Kibbey and Hess, or the American Trust Company, or the estate of Gillett, deceased, by reason of a statement of warranty, standing alone, you must find that such warranty was evidenced by writing, for no man may be held to answer the default or miscarriage or upon the guaranty of obligation of another, except such promise be in writing." There was no error in refusing this instruction, for this is not an action on guaranty or on contract, but on tort as has hereinbefore been pointed out. As was well said by counsel for defendant in error, the evidence of title was not offered for the purpose of proving verbal warranty or guaranty, but was offered and admitted for the sole and only purpose of showing fraud and conspiracy. Hence the court did not err in refusing the offered instruction. The case was tried on a wholly different theory.

Assignment of error "l" is based upon the failure to instruct as to the law on deceit, and for the reasons last above given was inapplicable to the facts of this case, and should not have been given.

The same observations apply also to errors "m," "n," and "o."

The record is full of objections of one kind and another, upon every one of which error has been predicated by the voluminous brief

of learned counsel. But, as has been seen, these objections are trivial, and based largely upon a misconception of the theory upon which this case was tried in the lower court. To our mind the case presented a simple question of conversion of money. Counsel insists all the way through his able brief that the cause of action was purely equitable, and was for rescission of contract, on the ground of fraud and deceit. The objections, with one exception, are without merit. The court did err in permitting witness Chitty to testify with reference to a conversation had personally with Gillett, deceased, but, as has been pointed out, this evidence, although improperly admitted, tended to prove what in fact was an immaterial issue. The case could, and in our opinion would, have been decided as it was, had this testimony been wholly omitted. It will also be remembered that the witness testified in the same connection as to the same conversation had with defendant Hess, and the information thus properly derived was presented to the jury, in the form of competent evidence. We would not, under all the facts and circumstances of this case, with a full knowledge of the issues raised by the pleadings, be warranted in disturbing the judgment entered by the trial court on account of this slight error, nor do we feel disposed to interfere. On the contrary, from a careful review of the entire record, we are of opinion that substantial justice was done by the verdict of the jury, and that the judgment of the district court of Garvin county should in all things be affirmed.

PER CURIAM. Adopted in whole.

#### HOCKER, v. CARROLL.

(Supreme Court of Oklahoma. Dec. 3, 1912.)

##### (Syllabus by the Court.)

#### 1. EXEMPTIONS (§ 119\*) — PROCEEDINGS TO PROTECT—NOTICE OF CLAIM.

The United States commissioner for P. commissioner's district, after issuing an execution based on a judgment on a contract, absented himself from said district so that the judgment debtor could not give notice of his intention to claim as exempt a mare levied upon under said execution, which he was entitled to claim as exempt under the laws then in force in the Indian Territory. At the execution sale the debtor gave notice of his intention to claim the mare as exempt. In an action in replevin by him against the execution purchaser for possession of the mare, *held*, he was entitled to recover.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 140-145; Dec. Dig. § 119.\*]

##### (Additional Syllabus by Editorial Staff.)

#### 2. UNITED STATES COMMISSIONERS (§ 5\*)—JURISDICTION.

Under Mansf. Dig. §§ 4016-4018 (Ind. T. Ann. St. 1899, §§ 2696-2698), providing for the election of justices of the peace in each township, and Act March 1, 1895, c. 145, 28 Stat. 693, § 4, providing for the appointment

of United States commissioners in Indian Territory, and making them ex officio justices of the peace, a United States commissioner has no authority to sit as a justice of the peace outside his township or district.

[Ed. Note.—For other cases, see United States Commissioners, Cent. Dig. § 8; Dec. Dig. § 5.\*]

#### 3. JUSTICES OF THE PEACE (§ 32\*)—JURISDICTION—STATUTORY PROVISIONS.

Statutes conferring jurisdiction on justices of the peace are to be strictly construed and not to be extended by implication beyond their express terms.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 72, 73; Dec. Dig. § 32.\*]

#### 4. EXEMPTIONS (§ 116\*) — PROCEEDINGS TO PROTECT—"ACCIDENT."

Under the rule that a debtor is excused by unavoidable accident or mistake in failing to make the claim for his exemptions under the procedure laid down by statute, an "accident" is an event which, under the circumstances, is unusual and unexpected, or the happening of an event without the concurrence of the will of the person by whose agency it was caused.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 137; Dec. Dig. § 116.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 62-70; vol. 8, p. 7560.]

Error from District Court, McClain County; R. McMillan, Judge.

Action by F. J. Carroll, for the use of the Union National Bank, against J. W. Hocker. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Hocker, of Purcell, pro se. Glasco & Jacobs, of Purcell, for defendant in error.

WILLIAMS, J. The defendant in error, for the use of the Union National Bank, as plaintiff, commenced an action in the mayor's court of the incorporated town of Purcell, against the plaintiff in error, J. W. Hocker, as defendant, on September 5, 1907, to recover a certain iron gray mare.

[1] Execution issued by the United States commissioner for the Southern judicial district of the Indian Territory, at Purcell, on a judgment on a contract, and the defendant sought to claim the mare as exempt. When the execution was placed in the hands of the constable for said district, said commissioner was absent on a 30-day vacation. After due notice to the plaintiff by the judgment debtor that he would file his schedule of exemptions as provided by section 3006 of Mansfield's Digest of the statutes of Arkansas 1884 (section 2121, Ind. Ter. Stats. 1899), he filed same with the commissioner for the Ardmore district. Said schedule was disallowed on the ground that he had no jurisdiction in the premises. Afterwards the mare was sold under said execution, and in due time a replevin action was commenced for her recovery. The Southern judicial district and the Purcell commissioner's district corresponded respectively to a county and township by the statute of Arkansas, extended by section 9 of the Act of March 1, 1895, c. 145,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

28 U. S. Stat. 693, in force in the Indian Territory. *Graham v. Stowe*, 1 Ind. T. 405, 37 S. W. 837; *Watkins v. United States*, 3 Ind. T. 231, 54 S. W. 819; *Purcell Who. Gro. Co. v. Bryant*, 6 Ind. T. 78, 89 S. W. 662; Act May 2, 1890, c. 182, § 32, 26 U. S. Stat. p. 81; section 4, c. 145, 28 U. S. Stat. p. 693.

In *Thompson v. Ogle*, 55 Ark. 101, 17 S. W. 583, it is said: "In a case in which the defendant failed to claim his exemptions before sale, on account of absence in attendance upon a sick family, the Supreme Court of California held that the sale was no bar to his claim. *Haswell v. Parsons*, 15 Cal. 266. And this court held that a sale did not divest a debtor's homestead where the failure to claim it before sale was occasioned by the fraud of the plaintiff. *Carter v. Jennings*, 53 Ark. 242. If a failure to make the claim in proper time may be excused for fraud, upon like principle it would, we think, be excused for unavoidable accident or mistake. In this case the debtor did everything in his power to assert his constitutional rights in the manner provided by the statute. On the day of the levy he gave notice of his intention to claim his exemptions; he could do nothing more until after a lapse of five days, and within that time he died. He was still the owner of the property, subject to a defeasible lien which he was proceeding to displace, when prevented by his death. As he left a widow and personal estate, including the mule, worth less than \$300, it passed to her. \* \* \* She could not prevent the sale by filing the schedule and obtaining a supersedeas, for this remedy is provided for the debtor only. But she did all that she could do to assert her rights and hold the property, and all that it was necessary to do to protect the judgment creditor, as well as bidders at the execution sale, by giving notice at the sale of her rights and intention to assert them. When the policy of the law is considered, it cannot be held that she forfeited its benefits because she did no more."

Statutory provision was made for the issuance of executions by justices of the peace when the justice of the peace was absent from his office so that he could not be found, or when he was absent from his township or county for more than 10 days. Sections 4107 and 4108 of *Mansfield's Digest* 1884 (sections 2787 and 2788, Ind. Ter. Stats. 1899). Also when no justice of the peace was in the township, or when all the justices thereof were disqualified, actions may be brought before some justice of the peace in some other township in the county. Section 4031 of *Mansfield's Digest* of Arkansas 1884 (section 2711, Ind. Ter. Stats. 1899). The jurisdiction of the justice of the peace is coextensive with the county in which he is elected or appointed. Section 4027, *Mansfield's Digest* of Arkansas 1884 (section 2707, Ind. Ter. Stats. 1899). All the foregoing sections of

*Mansfield's Digest* were extended in force in the Indian Territory by acts of Congress. Section 31 of Act of May 2, 1890, 26 U. S. Stat. at L. p. 91; section 4 of Act of March 1, 1895, c. 145, 28 U. S. Stat. at L. p. 693.

[2] Such United States commissioner was not authorized to sit as justice of the peace outside of his township or district. *Leiber v. Argabright*, 25 Okl. 177, 105 Pac. 341; sections 2696, 2697, and 2698, Ind. Ter. Stats. 1899 (sections 4016, 4017, and 4018, *Mansfield's Digest* of 1884); section 4, c. 145, 28 U. S. Stat. p. 693.

Section 4, c. 145, Act of Congress of March 1, 1895 (28 U. S. Stat. p. 693), provides as follows: " \* \* \* The judge for each district may fix the place where, or the time when, each commissioner shall hold his regular terms of court. The order appointing such commissioners shall be in writing and shall be spread upon the records of one of the courts of the district for which they are appointed; and such order shall designate, by metes and bounds, the portion of the district for which they are appointed. They shall have all the powers of commissioners of the circuit courts of the United States. They shall be ex officio notaries public and ex officio justices of the peace within and for the portion of the district for which they are appointed, and shall have the power as such to solemnize marriages. \* \* \*"

In *Thompson v. Ogle*, supra, the widow of the deceased debtor, who left a personal estate, including the live stock, worth less than \$300, it passing to her by virtue of the statute, could not prevent the sale by filing the schedule to obtain a supersedeas. Section 3006 of *Mansfield's Digest* of the Statutes of Arkansas 1884 (section 2121, Ind. Ter. Stats. 1899). If the widow by operation of law, succeeding to the rights of her deceased husband after notice was had, could not file the schedule and cause supersedeas to issue, how can the conclusion be reached that when the justice of the peace or commissioner is absent so he cannot be found, or when he is to be absent from the township or county for over 10 days and has deposited his docket with the nearest justice of the peace or commissioner in the county, then, any justice of the peace or commissioner of the county being authorized to issue an execution on any judgment rendered by such absent justice of the peace or commissioner, that any justice of the peace or commissioner in the county would have a right to entertain the filing of the schedule upon an execution issued by such absent justice of the peace or commissioner?

[3] Statutes conferring jurisdiction upon justices of the peace are to be strictly construed and not to be aided or extended by implication beyond their express term. *St. Louis & S. F. R. Co. v. Couch*, 28 Okl. 331, 114 Pac. 694; *Sims v. Kennedy*, 67 Kan. 383, 73 Pac. 51.

[4] It is not within the express terms of the statute that any other than the justice of the peace issuing the execution may entertain the filing of the schedule of exemptions. The absention of the commissioner from the Purcell district, after the issuance of the execution, appears to bring this case within the rule in *Thompson v. Ogle*, supra. The debtor would be excused for unavoidable accident or mistake in failing to make the claim for his exemptions under the procedure laid down by the statute.

Bouvier defines "accident" to be "an event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused. \* \* \*". The absence of the commissioner from his township or district was unavoidable, so far as the debtor was concerned, and entitled him, after giving notice at the execution sale of his rights and of his intention to assert them, to maintain a replevin action for the recovery of his exempt property. This is in line with the principle announced by paragraph 4 of the syllabus in *J. W. Rippey & Son v. Art Wall Paper Co.*, 27 Okl. 600, 112 Pac. 1119, which has also been reaffirmed in *Duffield v. Ingraham*, 128 Pac. 111, decided by this court, but not yet officially reported. *Binion et al. v. Lyle*, 28 Okl. 430, 114 Pac. 618, arose under the statutes of Oklahoma Territory.

It is not essential to pass on the question of the amendment of the schedule filed before the Ardmore commissioner, as he had no jurisdiction to entertain the filing of such schedule.

The judgment of the lower court must be affirmed. All the Justices concur.

#### WASHINGTON v. MILLER.

(Supreme Court of Oklahoma. Jan. 9, 1912.  
Rehearing Denied June 25, 1912.)

##### (Syllabus by the Court.)

#### 1. INDIANS (§ 18\*)—INDIAN LANDS—DESCENT—SUPPLEMENTAL CREEK AGREEMENT.

George Washington, a full-blood Seminole Indian, married Cissie, a full-blood Creek Indian, 1893, to whom was born four children, two of whom died in infancy, before allotment, the third in 1901, while the fourth, Waitie Washington, died November 3, 1907, an unmarried minor, without children or descendants of children. Prior to Waitie's death, his mother separated from his father, George Washington, and took up with Mack Cosar, by whom she had one child, Lillie Cosar. After the separation, George Washington remarried, and by the latter marriage had three children, who with Lillie Cosar are half brothers and sisters of Waitie Washington. In July, 1909, Cissie Cosar sold the allotment of her said son, Waitie Washington, to Frank L. Warren, by warranty deed, said sale being duly approved by the county court of Hughes county. Warren's grantee

brought suit to quiet title against George Washington. *Held:*

First. Under these facts, George Washington did not inherit any estate in and to his son's allotment.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

#### 2. INDIANS (§ 18\*)—INDIAN LANDS—DESCENT—CREEK AGREEMENT.

Second. Section 6 of the Supplemental Creek Agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to wit, November 3, 1907, and the terms thereof controlled in the devolution of said estate. 32 Stat. 500, approved June 30, 1902.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

#### 3. INDIANS (§ 3\*)—INDIAN LANDS—CREEK AGREEMENT—REPEAL.

Third. Section 2 of the act of Congress entitled, "An act to provide for additional U. S. judges in the Indian Territory, and for other purposes," approved April 28, 1904 (Act April 28, 1904, c. 1824, 33 Stat. 573), did not repeal, by implication, or otherwise, section 6 of the said Supplemental Creek Agreement (Treaty with Creek Indians, June 30, 1902, 32 Stat. 500).

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 5-7, 11; Dec. Dig. § 3.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; John Caruthers, Judge.

Action by Charles W. Miller against George Washington and others to quiet title to certain real property. Judgment for plaintiff, and defendant Washington brings error. Affirmed.

Charles W. Miller, the defendant in error, plaintiff below, brought suit against George Washington, plaintiff in error, defendant below, and Cissie Cosar, and Lillie Cosar to quiet title to 160 acres of land, situated in Hughes county, Okl. It appears from the record that George Washington, a full-blood Seminole Indian, and enrolled as such, and she who is now Cissie Cosar, who is a full-blood Creek Indian, and enrolled as such, were married in 1893. Four children were born to them, two of whom died in infancy before enrollment, the third in 1901, and Waitie, the fourth on November 3, 1907, prior to statehood; he being an unmarried minor at the time of his death, and without children or descendants of children. The land in controversy is the allotment of Waitie Washington. The record further shows that Cissie, the mother of Waitie, lived with plaintiff in error, George Washington, for about 10 years, when they separated, she taking up with one Mack Cosar, and by whom she had one child, Lillie Cosar, who is also a defendant in the action below, but not a party to this action in this court. George Washington, after his separation from Cissie, the mother of Waitie Washington, remarried, and by his second wife had three children, who with Lillie Cosar are half brothers and sisters of said Waitie Washington. Cissie Cosar on July 16, 1909, sold and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conveyed by general warranty deed, duly approved by the county court of Hughes county, the land in question to one Frank L. Warren, who later sold the same to Oscar S. Penny, whose administrator sold it to the First National Bank of Holdenville, which later conveyed it to this defendant in error, who filed his petition to quiet title on May 15, 1911, and on June 14, 1911, plaintiff in error filed his answer, in which he says: "George Washington, defendant, desiring to facilitate this cause as rapidly as possible, hereby waives the signature of plaintiff or his counsel herein to the petition, and likewise all grounds of demurrer thereto, and for his answer to said petition herein filed denies," etc. So that any defect there may have been in the petition by the answer on the part of plaintiff in error has been waived, and no further consideration will be given the assignment of error in which the sufficiency of the petition is complained of. In his answer George Washington sets up all the facts hereinabove enumerated, and admits possession in the defendant in error. Defendant in error, on the filing of this answer by George Washington, but before answer, plea, appearance, or default of either of the other defendants, filed his motion for judgment on the pleadings, as against George Washington only, and the court of consideration thereof sustained the same, and entered a decree in favor of the defendant in error and against the plaintiff in error, quieting the title to said land in said defendant in error, Charles W. Miller. No attempt was made at the time to adjudicate any questions in this case as between defendant in error and Cissie Cosar and Lillie Cosar, and no reference was made to them directly or indirectly in the decree entered by the court. From this judgment plaintiff in error appeals.

Lawson & Samples, of Holdenville, for plaintiff in error. Warren & Miller, of Holdenville, for defendant in error.

ROBERTSON, C. (after stating the facts as above). [1, 2] There is but one question in this case, viz.: Did George Washington, a full-blood Seminole, and the father of Waitie Washington, whose mother was a full-blood Creek, under the admitted facts of the pleadings herein, inherit any estate or interest in the allotment of Waitie Washington? We think the question must be answered in the negative. Section 6 of the Supplemental Creek Agreement (32 Stat. 500), ratified June 30, 1902, was in force at the time the descent was cast in this case, to wit, November 3, 1907. Said section reads as follows, to wit: "Sec. 6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution, according to the laws of

the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory: Provided, that only citizens of the Creek Nation, male and female and their Creek descendants, shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

[3] Counsel for plaintiff in error admit that said section is controlling of the question under discussion, provided the same is not repealed or nullified by Act Cong. April 28, 1904, entitled, "An act providing for additional judges in the Indian Territory, and for other purposes," section 2 of which reads as follows: "Sec. 2. All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise. That the sum of twenty thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available." Act April 28, 1904, c. 1824, 33 Stat. 573. In an able and exhaustive brief, which gives in an interesting and instructive manner a complete résumé of the various enactments on this particular subject in the Indian Territory since 1890, plaintiff in error contends that the last-mentioned act of Congress repeals section 6 of the Supplemental Creek Treaty, supra. We cannot concur in this opinion. There is no repealing clause attached to the act of April 28, 1904, and, if the said section 6 was repealed, it would be by implication, and the law does not look with favor upon such repeals. Then, too, the act of April 28, 1904, is a general act, while the Supplemental Creek Agreement of June 30, 1902, is a special act, and nothing in the general act can work a repeal of the special act unless the language used, and the objects and purposes intended, permit of no other conclusion. We fully agree with counsel that where two statutes are so repugnant to each other that they cannot stand or be construed together, the first in point of time is repealed by the last, if not expressly, then by necessary implication. But we do not agree that there is such conflict or repugnancy between these two acts. The intent of the lawmaker is to be deduced and gathered



from the whole statute and by a comparison of other statutes *pari materia*.

We must also concede the soundness of the proposition laid down in *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60: "Where two acts are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. Where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." But a careful examination of these statutes fails to show any such conflict or repugnancy as would warrant us in saying that a repeal by implication of section 6 of the Supplemental Creek Agreement, *supra*, was had. On the contrary, the conflict between the two is largely a creature of the imagination, as an examination of those statutes will readily disclose. The act of April 28, 1904, was evidently passed for the sole purpose of taking from the tribal courts their criminal, civil, and probate jurisdiction, and vesting it in the United States courts of the Indian Territory, and by section 2, especially to set at rest all doubts as to whether or not United States courts could and did have probate jurisdiction, and the act also provided additional facilities in the matter of extra judges and court towns. There was no attempt to provide by said act a new law of descent and distribution. There is nothing in the act that will warrant such an inference or justify such a conclusion. The action of the act of April 28, 1904, complained of, reads as follows: "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estate in said territory, whether Indian freedmen or otherwise." This part of said section does not repeal any law in force in the Indian Territory except those acts which excluded certain persons and estates from the operation of the law of Arkansas (and the tribal laws did so to a certain extent), making their misdemeanors, and certain felonies, punishable by the United States laws (which were the Arkansas Laws), and bringing their estates within the scope of the Arkansas laws for probate purposes. Certainly no other construction can be given to that part of section 2, while the balance of said section deals with the jurisdiction of the Indian Territory courts as witness: "And full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, in guardianship of minors, and incompetents, whether Indian freedmen or otherwise." This gave to the United States courts probate jurisdiction in all those enumerated classes of cases in some of which

jurisdiction had not theretofore been exercised. And as is well said by counsel for defendant in error in his brief: "It also set at rest any doubt which there might be of a United States court having such jurisdiction." Certainly there is no repeal of section 6 of the Supplemental Creek Treaty in this section. This act of April 28, 1904, *supra*, put in force in the Indian Territory the laws of Arkansas in certain classes of cases where certain tribal laws had theretofore controlled, but did not in any manner effect the provisions of the special act known as the Supplemental Creek Treaty of June 30, 1902. To hold that it did would also in like effect hold that it would repeal all the restrictions upon alienation of Indian lands, the provisions for special United States courts, all tribal tax laws, all laws forbidding taxing of Indian lands, etc., indeed, very few, if any, United States laws would be left in force in the Indian Territory, for, as counsel contends, only such laws would be in force as had theretofore been put in force from the statutes of Arkansas. We do not deem further consideration of this subject necessary. Undoubtedly the devolution of the land embraced in this controversy is controlled by section 6 of the Supplemental Creek Treaty, *supra*, and, such being the case, it is plainly apparent that the plaintiff, George Washington, the full-blood Seminole, father of Waitie Washington, a half-blood Creek, did not inherit any interest in his allotment, and therefore the judgment of the district court of Hughes county should be affirmed.

PER CURIAM. Adopted in whole.

UNITED STATES FIDELITY & GUARANTY CO. v. HANSEN et al. VAN WINKLE et al. v. SAME. AMERICAN SURETY CO. OF NEW YORK v. SAME.

(Supreme Court of Oklahoma. Oct. 23, 1912.)

(Syllabus by the Court.)

1. INDIANS (§ 15\*)—SALE OF PROPERTY—JURISDICTION OF COURT.

Under the terms of section 7 of the Indian Appropriation Bill of May 27, 1902, c. 888, 32 Stat. 275, which provides that the interests of minor heirs "shall be sold by a guardian duly appointed by the proper court," the probate courts of Oklahoma territory were the proper courts to appoint guardians of minor heirs of a deceased Indian to whom a patent containing restrictions upon alienation had been issued for lands allotted to him, and had jurisdiction to order a sale of such lands.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

2. INDIANS (§ 15\*)—LANDS—SALE—TRUST FUND.

Where allotted lands of a deceased Indian were sold pursuant to the provisions of section 7 of the Indian Appropriation Bill of May 27, 1902, c. 888, 32 Stat. 275, the purchase price remained a trust fund so long as the United States government retained posses-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

sion or control, but the trust character ended when the possession and control was relinquished by the government.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

### 3. INDIANS (§ 15\*)—LANDS—SALE—TRUST FUND.

Under the provisions of said act the government had the option either to retain the control of the purchase money or to end its trusteeship by relinquishing its control, and the Secretary of the Interior had the authority to exercise the option.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

### 4. GUARDIAN AND WARD (§ 174\*)—BONDS—LIABILITY OF SURETY.

The general guardian's bond is liable for the failure of a guardian to pay over the money received for land sold by order of court, although he gave a special bond as required by section 5509, Comp. Laws 1909, before making the sale.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 590-599; Dec. Dig. § 174.\*]

### 5. GUARDIAN AND WARD (§ 15\*)—BOND—VALIDITY.

Where the conditions of a guardian's bond recite that the principal had been appointed guardian of a certain minor and showed clearly the purpose for which the bond was given, the bond is valid although the name of the obligee does not appear in the blank left for that purpose in the first paragraph of the bond.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 56-64; Dec. Dig. § 15.\*]

### 6. GUARDIAN AND WARD (§ 177\*)—RELEASE OF BOND—JURISDICTION OF PROBATE COURT.

A probate court has jurisdiction to release a guardian's bond from liability for defaults occurring after the order is made.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 607-619; Dec. Dig. § 177.\*]

### 7. GUARDIAN AND WARD (§ 177\*)—RELEASE OF BOND—JURISDICTION OF PROBATE COURT.

Where a guardian's bond has been released by order of court, no recovery can be had thereon for a default of the guardian occurring after the order was made.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 607-619; Dec. Dig. § 177.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; W. M. Boles, Judge.

Action by John A. Hansen, as guardian of Rosa Little Crow, a minor, against R. S. Steele and others. Judgment for plaintiff, and the defendants United States Fidelity & Guaranty Company, American Surety Company, Lee Van Winkle, and Major Moberly, separately, bring error. Affirmed.

Flynn, Ames & Chambers and Russell G. Lowe, all of Oklahoma City, for United States Fidelity & Guaranty Co. Geo. A. Matlack, of Oklahoma City, for Lee Van Winkle and Major Moberly. P. W. Cress, of Perry, for American Surety Co. John Embury, of Oklahoma City, and Isaac D. Taylor, of Guthrie, for John A. Hansen.

ROSSER, C. For convenience the plaintiff below will be referred to here as plain-

tiff, and the defendants below will be referred to as defendants.

The above styled and numbered causes are appeals taken by the defendants named from a judgment of the district court of Noble county, Okl., rendered on the 4th day of May, 1910, in favor of Rosa Moncooya against R. S. Steele, the United States Fidelity & Guaranty Company, American Surety Company, Lee Van Winkle, and Maj. Moberly. Some time in 1902 R. S. Steele was appointed guardian of Rosa Little Crow, who was a member of the Missouri or Otoe tribe of Indians. About the time of his appointment he gave a bond as guardian in the penal sum of \$500 with the United States Fidelity & Guaranty Company as surety. On the 31st day of July, 1905, he gave an additional bond as guardian in the sum of \$800 with the American Surety Company as surety. On the 7th day of August, 1905, he filed another bond in the penal sum of \$1,600 with Lee Van Winkle and Maj. Moberly as sureties. On the 24th of August, 1905, the court made two orders releasing the American Surety Company from further liability on the bond. The minor had no personal property, but she owned some land from which the guardian received some rent. She also had an annuity by virtue of her membership in the Otoe tribe of Indians, and her guardian sold certain lands which she had inherited for the sum of \$875. At the end of his guardianship the guardian failed to pay over the money in his hands belonging to her, amounting to over \$1,200. John A. Hansen, the original plaintiff in this suit, brought a suit against R. S. Steele, the guardian, and the United States Fidelity & Guaranty Company, the American Surety Company, Lee Van Winkle, and Maj. Moberly, the sureties on his various guardian bonds. Rosa Little Crow became of age and married during the pendency of the action, and the suit proceeded in the name of Rosa Moncooya, as plaintiff. The trial court rendered judgment for the plaintiff against R. S. Steele, Lee Van Winkle, and Maj. Moberly for the amount which he failed to pay over, and against the other two defendants for the amount of the penalty of their respective bonds, and the defendants the United States Fidelity & Guaranty Company, the American Surety Company, Lee Van Winkle and Maj. Moberly filed separate appeals. The three cases are consolidated here and will be considered together.

The grounds relied upon by all the appellants are: (1) That the probate court had no jurisdiction to appoint a guardian of the minor, and that therefore the bonds are void. (2) That the land was a trust estate, subject to the control of the United States, and that the money received for the land was of the same character, and that the trustee, the United States government, could not surrender the possession to the guardian so as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to make him liable as such. (3) That the general guardian's bond is not liable for the proceeds of the sale of land, for the reason that the special bond given to properly conduct the sale is intended for that purpose. The United States Fidelity & Guaranty Company and the American Surety Company each claim a reversal as to it upon other grounds that will be noticed later.

[1] 1. It is contended that the probate court had no jurisdiction to appoint a guardian because section 12 of the original act of Oklahoma territory (Act May 2, 1890, c. 182, 26 Stat. 81) only gave jurisdiction over members of the Indian tribes to the district courts. That section is as follows: "That jurisdiction is hereby conferred upon the district courts in the territory of Oklahoma over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the territory of Oklahoma and any citizen or member of one tribe or nation who may commit any offense or crime in said territory against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the territory of Oklahoma as he would be if both parties were citizens of the United States; and any person residing in the territory of Oklahoma, in whom there is Indian blood, shall have the right to invoke the aid of courts therein for the protection of his person or property, as though he were a citizen of the United States. Provided: That nothing in this act contained shall be so construed as to give jurisdiction to the courts established in said territory in controversies arising between Indians of the same tribe, while sustaining their tribal relations."

There is room for controversy as to whether this section confined the jurisdiction over Indians to the district court. Congress by a later act did so confine it. Act March 3, 1905, c. 1479, 33 Stat. 1063. But it is not necessary to consider the effect of this section of the organic act upon the jurisdiction of the probate courts of Oklahoma territory over the estates of minor Indians. The organic act was approved May 2, 1890. At that time the act of February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians of the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes" (Act Feb. 8, 1887, c. 119, 24 Stat. L. 389), sometimes called the "general allotment act," was in force. The portion of section 5 of that act bearing upon the question involved here is as follows: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus

allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made, touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act."

It will be observed that under this act lands allotted could not be alienated for 25 years. The United States held the lands as trustee for the allottee during this period. The patent in effect designated the allottee as cestui que trust but without power of alienation. The Indian Appropriation Bill of May 27, 1902, c. 888, 32 Stat. L. 275, gave to the allottee, the cestui que trust, a limited power of alienation, subject, however, to the approval of the trustee, the United States government, acting through the Secretary of the Interior. Section 7 of that bill is as follows: "That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the state or territory where the same is situate: Provided, that the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

This is a later act of Congress than the

organic act. It will not be disputed that, even though the organic act prohibited the probate courts from exercising jurisdiction over members of Indian tribes, Congress could have conferred the jurisdiction upon those courts by a later enactment. The question then is whether section 7 of the Appropriation Bill, quoted above, conferred jurisdiction upon the probate courts, or recognized their jurisdiction. The general allotment act was not limited to the Indians in Oklahoma territory. It extended to all Indians in the United States. Section 7 of the Appropriation Bill, being designed to remove some of the restrictions created by the general allotment act, extended in the same way. It was not limited in its effect to one state or to Oklahoma territory. When it provided that lands of minor heirs should be sold only by guardian duly appointed by the "proper court" upon the order of such court, it undoubtedly meant the court having jurisdiction under the laws of the state or territory where the land was situated to appoint guardians and administer the estates of minors. This court in Oklahoma territory was the probate court. It is clear that any other holding would lead to great inconvenience. No other court had the machinery necessary to carry on such business. It is highly probable that in making the requirement that the sale should be through a guardian it was intended to give to titles thus conveyed the appearance of regularity and stability. If the district courts had taken jurisdiction of that class of guardianships when there was no law of the territory conferring the jurisdiction upon them, and when they did not attempt to exercise it in other cases, it would have resulted in uncertainty and confusion which could not have been otherwise than detrimental to the interests of the ward. The organic act of the territory of Oklahoma provided for probate courts, and, while it did not define their jurisdiction, the name indicated that Congress expected that probate jurisdiction would be conferred upon them, and the appointment of guardians for minors is embraced within the term "probate jurisdiction." The Department of the Interior recognized the jurisdiction of the probate court in such cases. The construction of the statute by the officers of the federal government is entitled to consideration; but it is believed there is not much room for construction. The plain language of the statute recognized the jurisdiction of the probate court. It was the only proper court to appoint guardians.

[2] 2. The second ground relied upon for a reversal is that, as the United States held the land in trust for the allottee, the money received for the land was impressed with the same trust character as the land, and that the guardian had no right to receive, as guardian, the money paid for the land.

This position, if correct, would not constitute a defense as to the money paid him

as rent, nor as to the annuity moneys paid him. The question is as to the proceeds of the land.

The position of the United States government with reference to the lands and moneys of the Indian tribes, such as the Otoes, is frequently described as that of a trustee. This does not mean, however, that the trusteeship of the government has all the incidents of an ordinary trust. The government is a self-appointed trustee, and it has the right to determine when its trust shall end. When the government abdicates its office as trustee, there is no power elsewhere to appoint a new trustee and administer the trust. It has the right to administer the trust as it sees fit and to terminate it when it gets ready. This, of course, does not mean that an officer of the government is not governed by law in disposing of Indian lands and paying out the proceeds. When the land belonging to Rosa Little Crow was sold, the government had the right to retain the money derived from the sale and to administer it as a trust estate. It had also the right to discharge itself of the trust by paying the money to her or to her legally appointed guardian, if there was nothing in the law prohibiting it.

[3] The act of May 27, 1902, quoted above, permitting the sale of the land, was silent as to the disposition of the proceeds. It did require all sales to be approved by the Secretary of the Interior. It was held in *United States v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425, that the Secretary by virtue of the act was vested with authority to regulate the disposition of the proceeds. In that case the money was deposited in a bank in accordance with a requirement of the department, and it was held that the government thereby retained control over it. But the reasoning of the court leads to the conclusion that the government had the option either to retain or relinquish control, and that the Secretary of the Interior had the authority to exercise this option. In the course of the opinion the court said: "Nor is the complainant without lawful authority to hold these proceeds and to control their disposition in the same way that it held and controlled the lands in trust for the benefit of these Indian heirs. The act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the powers to consider and determine the terms and considerations on which such sales should be approved. By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited lands

might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge of the amounts, not to exceed \$10 each in any one month, and subject to their checks for larger amounts only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The act of Congress authorizes the Secretary to make these regulations for the purpose of carrying into effect the act of 1902, and, when made, they had the force of statutory enactments. Rev. St. §§ 441, 465 (U. S. Comp. St. 1901, pp. 252, 264; U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 591; Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588. \* \* \* The lands and their proceeds, *so long as they are held or controlled by the United States*, and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county."

This case is relied upon by the defendants as establishing the rule that the proceeds of the sale of the land is impressed with the same trust that existed upon the land. It does establish that rule, but only so far as the United States retains the possession or control. It also holds that the Secretary has plenary power, and that it is in his discretion whether the trust should be continued or relinquished. The case of *National Bank of Commerce v. Anderson*, 147 Fed. 87, 77 C. C. A. 259, is also cited to establish the proposition that the money arising from sales remains a trust fund. The court so holds in that case, and seems to view the regulations of the Secretary of the Interior with reference to the disposition of the proceeds of the sale, as different constructions placed upon the law. A better view, however, is believed to be that the Secretary considered that he had the right to either relinquish or continue his trust relation to the money received for the land. The case decided that the money cannot be paid to the allottee or his order until authorized by the Secretary, but does not intimate that the trust continues after the money has been paid over by the authority of the Secretary.

The first regulations promulgated by the Secretary provided that the consideration money must in no case be paid to the grantors; but a certificate from the cashier or other officer of some reputable bank, or, in case there is no bank convenient, from a United States Indian agent, showing that the stipulated price named in the deed for the land has been deposited in such bank, or with such agent, as the case may be, to

be paid to the grantors or their order upon the presentation of the deed duly approved by the Secretary of the Interior or by the President, must accompany such deed. This regulation was in force at the time Rosa Little Crow's land was sold and the money paid to her guardian. Afterward the Secretary made regulations requiring the proceeds to be placed in a bank to be designated by the Commissioner of Indian Affairs, "to the credit of each heir in proper proportions subject to the check of such heirs, or, in case of minors, subject to the check of their recognized guardians, for amounts not exceeding \$10.00 in any one month, when approved by the agent or other officer in charge, and only when so approved, and for sums in excess of \$10.00 per month upon the approval of such agent only when specifically authorized by the Commissioner of Indian Affairs." This later regulation cannot affect the case at bar, for the reason that the transactions in this case were had before it was put in force. Among the regulations in force at the time the land was sold and the money paid to the guardian was section 6, which is as follows: "In all cases the probate judge, or officer having probate jurisdiction, is respectfully requested and urged, in taking the bond of guardian, to require such guardian to give a trust or guarantee company, wherever practicable, as surety."

Under the regulations in force at the time the money was paid to Steele in this case there was no specific reference to guardians, except that they were requested and urged to give bonds with a trust or guaranty company as surety. The only interest the Secretary could have in making such regulations would be to protect the ward from embezzlement or failure to account, and it was evidently contemplated that the guardian would receive the money. It can hardly be contended that after the money had been paid to the grantor, or to his or her guardian, the trust continues. The Secretary permitted the money in this case to be paid to the guardian. This put an end to the trust in the legal sense, and the guardian was required to account just as he would be for any other character of property. The subsequent regulations promulgated by the Secretary, requiring the money to be deposited in a bank and paid out upon the check approved by an agent or other officer in charge, provided that a greater sum than \$10 could be paid upon the approval of the agent when specifically authorized by the Commissioner of Indian Affairs. Even under the regulations as they now exist, should a larger sum be paid than \$10 a month, where the record is silent, as it is in this case, as to whether or not the Commissioner of Indian Affairs authorized the payment, it would be presumed that he did, and the guardian would be required to account.

[4] 3. The next contention of the defendants is that the bonds sued on are general

guardian's bonds and are not liable for the proceeds of sales of real estate. It is their contention that a general guardian's bond cannot be held liable for the proceeds of sales of real estate because the statute (section 5509, Comp. Laws) also requires every guardian authorized to sell real estate to give bond conditioned to sell the land in the manner and to account for the proceeds of the sale as provided for in articles 8 and 15 of Comp. Laws. A number of cases are cited which seem to support this contention. They have not been carefully examined in connection with the statutes of the respective states in which they are decided. If predicated upon a statute the same in substance as ours, this court would not follow them, while, if on a different statute, they are not in point. Section 5479, Comp. Laws, requiring guardians to make bonds, is as follows: "Before the order appointing any person guardian under this article takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following condition shall form and constitute a part of every such bond, without being expressed therein: (1) To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order. (2) To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward. (3) To render an account on oath of the property, estate and moneys of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the county judge, or with the ward, if he be of full age, or his legal representative, and to pay over and deliver all the estate to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office, as such guardian according to law."

The guardian is required by paragraph 1 of the section to make an inventory of all the estate, *real* and personal. By paragraph 2 he is required to dispose of and manage the estate according to law. By paragraph 3 he is required to pay over and deliver all the estate, moneys, and effects remaining in

his hands, or due from him, etc. Nothing can be clearer than the language used and no satisfactory reason can be given for excepting from the liability of the bond the proceeds of sale of real property. Its language covers every duty of the guardian concerning all the property of the ward. Section 5509 does not change the liability of the sureties on a general bond. It merely, as an additional precaution and protection, requires the additional bond. It was enacted for the protection of the wards, and not for the purpose of relieving sureties on a general bond from liability which the law fixes thereon. This precise question was before this court recently in the case of *Southern Surety Co. v. Burney*, 126 Pac. 748, not yet officially reported, and in that case Commissioner Robertson decided that the sureties upon the general guardian's bonds were liable for the proceeds of sales of real estate. A number of authorities are cited in the opinion which support the doctrine there announced, and the case is here followed.

[5] The defendant the United States Fidelity & Guaranty Company in its brief contends that it is not liable on its bond, for the reason that no obligee is named in the bond. The name of the obligee is left blank, but the condition of the bond recites that R. S. Steele has been appointed guardian of Rosa Little Crow, and shows that the bond is to secure the faithful performance of his duties as guardian. The failure to formally designate the obligee did not vitiate the bond. The recitals in the condition made it clear for whose benefit the bond was given. The law provided that the bond must be given to the minor, and, when the bond clearly showed that it was given to secure the faithful performance by R. S. Steele of his duties as guardian of Rosa Little Crow, the surety could not escape liability because the minor's name was not written in the first blank left for that purpose.

As said by the Supreme Court of New Hampshire in *Judge v. Ordway*, 23 N. H. 198: "We notice the kind of bond the law authorizes the judge to receive, and requires him to exact. Thus we know what the parties must have intended, much better than by any rules of construction; and we are bound to give the language used such construction as will give effect to the intention of the law, and of the court, and of the parties concerned, if it can be done consistently with the language used, however unskillfully the instrument may be drawn, and though some of the expressions used might even be understood to import a different meaning, if they were to be construed merely by the ordinary rules of interpretation, and without that same light which the statute affords us as to the intention of the parties and of the probate court."

In *State v. Wood*, 51 Ark. 205, 10 S. W. 624, where a county treasurer's bond failed

to name the obligee, it was held that a recovery could be had upon the bond. In the course of the opinion Cockrill, C. J., said: "It was never regarded as necessary that the obligee in a bond should be specified *eo nomine*. It was enough if he was so designated that he might be certainly ascertained. *Preston v. Hull*, 12 Am. Law Reg. [N. S.] 699, and note; *Fellows v. Gilman*, 4 Wend. [N. Y.] 419. \* \* \* The condition which shows the design of the bond is the important requirement in such an undertaking, and when that is properly framed, as it is conceded it was in this instance, 'the naming of an obligee,' as Judge Cooley expressed it in delivering the judgment for the Supreme Court of Michigan, 'the merest formality possible, so that if the instrument omitted to name one \* \* \* the substance of the undertaking would remain.' *Bay County v. Brock*, 44 Mich. 45 [6 N. W. 101]. The substance remaining, how can the bond be void for informality?"

In *County of Bay v. Brock*, 44 Mich. 45, 6 N. W. 101, it is held that the insertion of the wrong name as obligee did not vitiate the bond. In the course of the opinion the court said: "The purpose of the bond is sufficiently indicated by the condition. It is to protect and give indemnity to all persons in whose favor a duty may arise, to be performed by the sheriff, and who may be damaged by neglect or failure in performance."

In the case of *Ryndak v. Seawell*, 23 Okl. 759, 102 Pac. 125, the court quoted with approval the following from the case of *Rose v. Winn*, 51 Tex. 545: "In regard to ordinary bonds, when the intention is manifest from the instrument itself, the court will transpose or reject insensible words and supply accidental words in order to give effect to that intention."

See, also, *Bennehan v. Webb*, 28 N. C. 57; *State v. Martin*, 69 N. C. 175; *Leach v. Flemming*, 85 N. C. 447; *Giles v. Halsted*, 24 N. J. Law, 366, 61 Am. Dec. 668; *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11, 30 Am. Dec. 391; *Huffman v. Koppelkon*, 8 Neb. 344, 1 N. W. 243.

[6, 7] The American Surety Company further contends that it is not liable for the further reason that the probate court made an order on the 24th day of August, 1905, releasing it from further liability. The bond executed by the American Surety Company as surety was filed and approved August 1, 1905. On the 7th day of August, 1905, the guardian executed another bond with Lee Van Winkle and Major Moberly as sureties, which was intended as a substitute for the bond of the American Surety Company. On the 24th of the same month the probate court entered an order, in which it was recited that the application of the American Surety Company to be released came on to be heard, and the court having given notice,

and it appearing that no injury could result, the court released the American Surety Company from the further liability and required the guardian to give a new bond, "and that, upon the giving of said new bond by said guardian, the American Surety Company of New York be released and discharged from the bond of said R. S. Steele, guardian, on account of any of his future acts as such guardian." On the same day the court entered another order reciting that the guardian filed his bond in the sum of \$1,600 with Van Winkle and Moberly as sureties, and asked that the bond of the American Surety Company be released, that the court approved the new bond, and that the bond filed August 1, 1905, "and the surety thereon, the American Surety Company of New York, is hereby released from further liability thereon from and after this date." The evidence shows that no money was received or paid out by the guardian between the 1st and 24th of August. The statute (section 1866, Wilson's Rev. & Ann. St.; section 5524, Comp. Laws) provides that: "The judge of the probate court may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate." This statute gave the authority to release the bond. It is urged that no notice was given or investigation made as to whether injury would result; but the order recites that there was both, and the recitals are conclusive as against a collateral attack. The testimony offered to impeach the record was clearly incompetent under the pleadings and issues in the case.

The suit on the bond is not based on any defalcation of the guardian during the term of his guardianship. It is based on his failure to pay over on the expiration of his term. The dereliction of the guardian having occurred long after the American Surety Company was discharged, it cannot be held liable.

Under a somewhat similar statute, the power of the probate court to discharge sureties has been upheld in a number of states. See *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Jamison v. Cosby*, 11 Humph. (Tenn.) 273; *Wilborne v. Commonwealth*, 23 Ky. (5 J. J. Marsh.) 617; 21 Cyc. 235.

The defendant in error urges that the guardian and his bondsmen are estopped to deny his liability for the money received by him as such, regardless of the other questions involved in this case. The view that is taken of the questions renders it unnecessary to decide the question of estoppel.

The judgment of the lower court should be affirmed as to all the defendants except the American Surety Company. As to that

company the judgment should be reversed and here rendered in its favor.

PER CURIAM. Adopted in whole.

**UNITED STATES FIDELITY & GUARANTY  
CO. v. HANSEN et al.**

(Supreme Court of Oklahoma. Oct. 23, 1912.)

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; W. M. Bolea, Judge.

Action by John A. Hansen, guardian of Harry Saunders, a minor, against R. S. Steele and another. Judgment for plaintiff, and defendant United States Fidelity & Guaranty Company brings error. Affirmed.

Flynn, Ames & Chambers and Russell G. Lowe, all of Oklahoma City, for plaintiff in error. John Embry, of Oklahoma City, and Isaac D. Taylor, of Guthrie, for defendant in error.

ROSSER, C. This was an action brought by John A. Hansen, as guardian of Harry Saunders, a minor, against R. S. Steele, former guardian of the same minor, and the United States Fidelity & Guaranty Company, surety upon his bond as such guardian. Steele was ordered by the county court to pay over certain moneys in his hands at the end of his guardianship, and he has failed and refused to do so. Some or all the moneys in his hands were the proceeds of the sale of lands belonging to a minor Oteo Indian.

This case is controlled by the decision in Nos. 2,215, 2,216, and 2,339, United States Fidelity & Guaranty Co., American Surety Co., Lee Van Winkle, and Major Moberly v. John A. Hansen, as Guardian of Rosa Little Crow, a Minor, 129 Pac. 60, in which the opinion has just been rendered.

On the authority of that case, and for reasons given therein, the judgment is affirmed.

PER CURIAM. Adopted in whole.

**CHICAGO, R. I. & P. RY. CO. v. MOORE.**  
(Supreme Court of Oklahoma. Oct. 23, 1912.)

(Syllabus by the Court.)

**MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—APPLIANCES—PROXIMATE CAUSE OF INJURY.**

Where a shaft on an engine was broken in such a way as that an inspection would have discovered the break, and it should have been foreseen that the break would make it necessary to repair or remove the shaft while on the road, and the engine was sent out in this condition and broke down on the road, the failure to inspect and repair was the proximate cause of the injury; and the company is liable for injuries received by the fireman in attempting to repair, although it was his duty to repair while on the road in cases of emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Pottawatomie County; Roy Hoffman, Judge.

Action by E. W. Moore against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, and J. H. Woods, of Shawnee, for plaintiff in error. H. H. Smith and W. T. Williams, both of Shawnee, for defendant in error.

ROSSER, C. The plaintiff, E. W. Moore, brought this suit against the defendant, the Chicago, Rock Island & Pacific Railway Company, hereinafter referred to as the company, to recover damages for personal injuries sustained while in the employ of the company.

The plaintiff was employed by the company as a fireman on one of its locomotive engines, and the engine on which he worked ran between Shawnee and Halleyville. On the 8th of February, 1908, while running from Halleyville to Shawnee, the engine got out of order. An examination disclosed that, what is called in the testimony, the "eccentric" was broken. It appears that the eccentric mentioned is connected with the reverse lever, and controls the engine as to traveling forward or backward. The eccentric blade or shaft is fastened to the axle with what are called "straps," and the straps are fastened on with bolts. It was necessary to remove the eccentric, and the plaintiff and engineer went to work to remove it. The engineer worked at the end connected with the links, which are attached to the reverse lever. The plaintiff worked at the other end. When he loosened the bolts, the straps fell and broke and crushed his finger. An examination showed that the blade had been broken nearly all the way across, and that only about an inch, or inch and a half, of the distance across the blade had been freshly broken. The break for the remaining distance across the blade had been done so long that the ends had become black and rusty. The evidence showed that it was the duty of the fireman to assist the engineer in making repairs, should the necessity arise when out on the road. It was the duty of the roundhouse foreman to inspect engines before they were sent out. From the nature of the break in the eccentric, the jury had the right to presume that a proper inspection would have discovered it.

There was a verdict and judgment for plaintiff, and defendant has appealed.

The defendant contends that the failure to inspect was not the proximate cause of the injury, and that no higher degree of liability was imposed upon the company than if there had been no defect existing at the time the engine was sent out, and the necessity for repairs had been caused by some accident occurring after the engine went out.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the case, or doing what such a person would not have done. Railroad Co. v. Jones, 95 U. S. 441, 24 L. Ed. 506. In Whittaker's Smith on Negligence it is said that negligence, in



law, is "a breach of duty unintentional and proximately producing injury to another possessing equal rights." If limited to actionable negligence, this definition is correct; but an act may be negligent without being the proximate cause of an injury, and hence not actionable.

The failure to inspect the engine in this case was negligence. It was the duty of the company to inspect and use due care to send out its engines with all their parts in good condition. If, by reason of the failure to inspect, the broken part had derailed the engine and injured the plaintiff, there would be no question as to his right to recover. The connection between the negligence and the injury would have been direct, natural, and continuous. But under the facts of this case the question is more difficult. The question here is whether the negligence is the proximate cause of the injury.

In *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. Mr. Justice Strong said: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd* (Squib Case), 2 W. Bl. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. \* \* \* We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to misfeasance or nonfeasance. They are not, when there is sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether

there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding."

It is fundamental that in order to create a liability for negligence the negligence must be the proximate, and not merely the remote, cause of the injury. "*In jure non remota causa sed proxima spectatur.*" It is also the law that, where there is an intervening human agency between the act of negligence and the injury, the negligence is not the proximate cause of the injury, unless a reasonable person should have foreseen that the negligence would naturally have put the intervening agency to work. The rule is otherwise where the injury is produced by the negligence through a continuous succession of occurrences, following each other naturally and directly in obedience to natural law of cause and effect. In such cases the person guilty of negligence is liable, whether he could reasonably have foreseen the result or not. The rule in this regard is well stated in *Gilson v. Delaware & Hudson Canal Co.*, 65 Vt. 213, 28 Atl. 70, 36 Am. St. Rep. 802, as follows: "It is a maxim of the law that the immediate, not the remote, cause of an event is regarded. In the application of this maxim, the law rejects, as not constituting ground for an action, damage not flowing proximately from the act complained of. In other words, the law always refers the damage to the proximate, not to the remote, cause. It is laid down in many cases and by leading text-writers that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or the wrongful act, and that it was such as might, or ought to, have been foreseen in the light of the attending circumstances. But this rule is no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and in which such consequences, although not probable, have actually flowed in unbroken sequence from the original wrongful act." But in ascertaining whether the act or omission relied upon as negligent was in fact so, it is always proper to inquire whether a reasonable man would have anticipated injury from the act or omission.

In the case of *Smith v. London & Southwestern Ry. Co.*, Lr. 6 C. P. 14, Blackburn, J., delivering an oral opinion, and therefore using strong and vigorous style rarely attained in written opinions, and using illustrations applicable to the condition of English society, said: "If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road, where

he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shews that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so, and kills a man who is in the receipt of a large income, he is liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer." In the same case Channell, B., said: "I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth v. Birmingham Water Works Co.*, referred to by Mr. Kindgon; but when it has been once determined that there is evidence of negligence the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

In Hughes, G. & R. of Law, text index "Negligence," the rule is stated thus: "*Whoever does a wrongful act is liable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer. If an independent agency intervene, this will break the causal connection, unless, under all the circumstances of the case, this intervention itself should have been anticipated.*" This principle has been applied in a number of cases, and in a number of different conditions. See *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa, 483, 103 N. W. 481; *Burk v. Creamery Package Mfg. Co.*, 126 Iowa, 730, 102 N. W. 793, 106 Am. St. Rep. 377; *Lane v. Atlantic*, 111 Mass. 136.

Applying the rule laid down above, is the defendant liable? The injury to plaintiff did not follow in direct and unbroken sequence from the defendant's negligence. The independent agency of the plaintiff himself intervened, but it is believed that the company is liable. A somewhat similar case is *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa, 483, 103 N. W. 481. In that case the injured person was a child of tender years. A doubt was there expressed as to whether a person being of mature years would not have been guilty of contributory negligence in that case. A fence had been so defectively constructed that it was blown over by the wind. The child that was afterwards injured, assisted by another child, set up the fence. It was afterwards blown down again, and

struck and injured the child. The court said: "If the owner of the garden, or any person of mature years interested therein, had discovered the prostrate panels, and restored them to their position against the wire fence, and had thereafter been injured by reason of such panels being again blown down, he might possibly be precluded from a recovery of damages on the ground of contributory negligence; but we feel very certain his act would not be such an independent intervening cause, disconnected from the primary act complained of, and not reasonably to have been anticipated by the defendants, as would be required to relieve the latter from liability for negligence in the original construction." But it is not suggested in the opinion that an adult would have been guilty of contributory negligence if, in attempting to set up the fence, it had then and there blown over and injured him.

The plaintiff in this case was not guilty of negligence in attempting to repair the engine. That the defect would cause the engine to break down, and consequently require the plaintiff to attempt to repair it, was in every way probable, and should have been anticipated. It is true that it was his duty to make repairs while on the road; and it is also true that he could not recover for injuries received while making such repairs, where the repairs were not made necessary through the fault of the company. Under the rules promulgated by the company for the government of its employes, the company were required to inspect and to use care to send out its engines in good condition. It was the duty of the company to use due care to prevent the necessity for repairs on the road; and when by its failure to use such care the repairs were made necessary, and the risk of injury to plaintiff thereby increased, it became liable for injuries received while making them. The danger of injury while making such repairs was a risk against which it was the duty of the company to use care to protect the plaintiff. He was to repair only in cases of emergencies, such as the company, by reasonable care, could not provide against; and the company had no right to place him in the employment of making repairs, where by reasonable care it could have prevented the necessity for such employment.

In *Conlon v. Ohio Short Line Railway Co.*, 23 Or. 490, 32 Pac. 397, the court said: "The defendant claims that, under the facts disclosed by the evidence, it was not liable for the injury which the plaintiff sustained, because the risk arising from the plaintiff's employment, in assisting to remove the obstruction from the track, was not increased by any act of omission or commission of the defendant, but the correctness of this proposition depends upon the fact whether the defendant was negligent in not using proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm; for if

the injury which the plaintiff sustained was the result of an omission of the defendant to take the proper precautionary measures, either before or after the storm, to lessen or avoid the liability to accident, it did not arise out of any risk which the plaintiff assumed as incident to his employment. \* \* \*

It may be admitted that if the performance of his duties had required that he should ride over the track from place to place, where his services were needed to clear the track of obstructions, the risk he assumed included the danger of bridges being undermined or swept out by freshets or floods, when they occurred from inevitable accident, but not when the danger might have been ascertained and averted in time to avoid the injury by the exercise of reasonable care or of proper precaution."

The facts of the case from which the above quotation is made are not at all similar to the facts of the case at bar; but the principle that, though a man assumes the risk of a certain employment, it is the duty of the master to protect him from the risk, as far as he reasonably can, is there decided. See, also, *Greenlee v. Southern Railway Co.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734.

In *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215, the plaintiff was employed by the defendant to burn brick with crude oil, and before his injury had assisted in burning several kilns of brick. On the day of the injury a change had been made in one of the supply pipes of oil, so that it could only be cut off at two points, one at the tank and the other where the small burner pipes join the feed pipes. There had formerly been a stopcock at the joining of the supply pipe and the feed pipe. The hose carrying oil from the car which supplied it to the kilns burst, and the oil caught fire. The employes were unable, on account of the heat, to cut off the flow of oil nearest the kiln, and the plaintiff, while trying to move the car, was burnt because the flow of oil could not be cut off. If the middle cock had been on the supply pipe, it could have been stopped. In sustaining a judgment for plaintiff, the court said: "That the master, although not held to guarantee the absolute perfection and suitability of the machinery and appliances furnished the servants, is nevertheless bound to provide that which is safe and suitable for carrying on the business in which the servant is engaged, and is held to the employment of every precaution which a reasonably prudent man would exercise under like circumstances, is well established. Arising by implication from the contract of employment, as well as from reasons of public policy and natural justice, the duty rests upon the master, whether a corporation or a natural person, not to expose the servant, in the discharge of his duty, to perils and dangers against which the master may guard by the exercise

of reasonable care. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Fairbank v. Haentzsch*, 73 Ill. 236; *Missouri Furnace Co. v. Abend*, 107 Ill. 44 [47 Am. Rep. 425]. Hence the rule is that the master must, either personally or by his agent, if an individual, and by its agents, if a corporation, exercise reasonable and proper care, taking into consideration the nature of the business and the instrumentalities employed, to provide and keep in suitable repair and condition safe and suitable machinery and appliances, adequately sufficient for use by the servant in and about the business in which they are to be used by him; and if a servant is injured in consequence of a neglect of such duty or a negligent discharge of it, he being in the exercise of ordinary care for his own safety, the master is liable. Cases supra; *Chicago & Alton Railroad Co. v. Platt*, 89 Ill. 141; *Railroad Co. v. Troesch*, 68 Ill. 545 [18 Am. Rep. 578]; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358 [3 N. E. 456]; *Wood on Master and Servant*, § 326 et seq.; *Beach on Contributory Neg.* § 123; *Hough v. Railroad Co.*, 100 U. S. 213 [25 L. Ed. 612]."

Of course, if the defendant had used due care to send out the engine in good condition, and the shaft had broken after it went out, the defendant would not have been liable. Neither could an employe regularly engaged in repairing the machinery of the company recover for an injury received as the one complained of here, however negligently the necessity for repairs might have been caused, because it was his regular business to repair, and the danger in his employment was exactly the same, whether the repairs were made necessary by negligence or accident. But in this case the repairs, under the circumstances, were made necessary by the negligence of the company, and enhanced the risk of injury. The intervention of the act of the plaintiff between the negligence of the company and the injury should have been anticipated. When the engine broke, it became necessary to repair. The plaintiff could not go off and leave it. It should have been foreseen that he would attempt to remedy the defect and thereby incur the risk of injury.

The defendant is charged with knowledge of the defect, and knowing the defect it must have known that some sort of injury was likely to result. It must have known that if nothing worse happened the shaft would break, and that it would be necessary to repair it, and thereby the risk of injury would be enhanced. It is true, as argued by the defendant, the plaintiff could have gone off and left the engine, but it should have been so anticipated that he would not do so, and that he would attempt to repair it just as he did.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

**MOORE v. STATE.**

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1913.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 1130\*)—APPEAL AND ERROR—REVIEW—SCOPE AND EXTENT.**

When an appeal is taken to this court by a person convicted of violating the criminal laws of this state, and no brief is filed on his behalf, and no appearance made for oral argument, this court will examine the record for fundamental errors only, and, if none be disclosed, the judgment of the trial court will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.\*]

Appeal from Murray County Court, Harry W. Fielding, Judge.

Will Moore was convicted of violating the prohibitory law, and appeals. Affirmed.

Emanuel & Broadbent, of Sulphur, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**ARMSTRONG, J.** The plaintiff in error, Will Moore, was convicted in the county court of Murray county on a charge of having in his possession intoxicating liquors for the purpose of selling the same, and his punishment fixed at imprisonment in the county jail for a period of 30 days and a fine of \$75. We have carefully examined the record and find no error sufficient to justify a reversal of the judgment. No brief was filed on behalf of the plaintiff in error, and no appearance made for oral argument.

This court examined the record for fundamental errors only, and, finding none, the judgment is affirmed, with direction to the trial court to enforce the judgment and sentence.

**FURMAN, P. J., and DOYLE, J., concur.**

**McRAE v. STATE.**

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1913.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 673\*)—TRIAL—MOTIVE—EVIDENCE—LIMITATION.**

Where the motive of a person for going to a certain place or for doing a certain act is material, it is permissible to show the reasons for the presence of such person at such place or for committing the act which is the subject of inquiry: but, where such evidence is admitted, the jury should be clearly instructed by the court as to the reason for which it was received and should be prohibited by the court from considering it for any other purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.\*]

**2. INTOXICATING LIQUORS (§ 226\*)—SEIZURE—MOTIVE OF OFFICER.**

Where the motive of an officer for making a seizure of intoxicating liquors is not an issue

in a case, it is improper to allow him to state any information which he had received and upon which he acted in making such seizure.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 282-286; Dec. Dig. § 226.\*]

**3. CRIMINAL LAW (§ 1169\*) — APPEAL—REVIEW—HEARSAY EVIDENCE.**

Where hearsay evidence has been received which reasonably contributed to a verdict of guilty, the reception of such evidence does not constitute harmless error, but will be ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

**4. CONSTITUTIONAL LAW (§ 268\*)—DUE PROCESS OF LAW—CONVICTION ON HEARSAY EVIDENCE—SUSPICION.**

A conviction based upon hearsay evidence or upon suspicion is not obtained by due process of law and is contrary to the Constitution of this state and also to the Constitution of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 756, 757; Dec. Dig. § 268.\*]

Appeal from Superior Court, Grady County; Will Linn, Judge.

Bill McRae and Bob Powell were jointly prosecuted for having possession of intoxicating liquors for the purpose of unlawfully disposing of them. Powell was convicted and sentenced to pay a fine of \$500 and be confined six months in the county jail, while McRae was found guilty and punishment assessed, and he appeals. Reversed.

A. L. Herr, of Chickasha, for appellant. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

**FURMAN, P. J.** Upon the trial of this cause G. W. Featherstone, a deputy sheriff of Grady county, testified that he was acquainted with appellant and one Bob Powell; that on the 20th day of May, 1911, he had occasion to make a certain search of a room in the Scotty rooming house in the city of Chickasha. He then testified as follows: "Q. What was the cause of your making the search? By Counsel for the Defendants: Objected to, if the court please, for the reason that it is incompetent, irrelevant, and immaterial. (Which objection was then and there by the court overruled, and the defendants duly saved an exception.) A. Why, we had had complaints. By Counsel for the Defendants: Wait a minute. We move to strike out the answer of the witness as incompetent, irrelevant, and immaterial and purely calls for hearsay testimony. (Which objection was then and there by the court overruled, and the defendants duly saved an exception.) Q. What was the cause of your making the search? A. We had information that they were handling beer and whisky up there in some of those rooms—it is the annex of the Scotty rooming house up there. Q. Who was? By Counsel for the Defendants: Objected to, if the court please,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as incompetent, irrelevant, and immaterial, because it clearly shows hearsay testimony. By Counsel for Plaintiff: It is offered, if your honor please, to show the motive of Mr. Featherstone in making this search. By the Court: I will overrule the objection, gentlemen. (To which ruling of the court the defendant then and there duly saved an exception.) Q. You had information that who was handling beer there, Mr. Featherstone? A. Well, that the defendants here were seen going and coming up and down the stairs there. Q. From where? By Counsel for the Defendants: Defendants now move the court to strike the answer of the witness out for the reason that it is not responsive to the question, and for the further reason that the testimony given is incompetent, irrelevant, and immaterial and wholly hearsay testimony. (Which motion was then and there by the court overruled, and the defendants duly saved an exception.) Q. The defendants were going and coming from where to where? A. They were going from and coming to this Scotty rooming house there, and they were in business on the corner of Third street and Kansas avenue."

[1-4] The court doubtless admitted this testimony upon the theory that the county attorney had the right to show the motives of the officers in making the raid. Where the motive of any person, be he officer or not, for going to any place or for doing any act, is material, it is always admissible to show the reasons for the presence of such person at such place or for doing the act which is the subject of inquiry. Where such evidence is admissible, the jury should be clearly instructed by the court as to the reasons why it was received and should be prohibited by the court from considering it for any other purpose. The announcement by the county attorney of the purpose for which the testimony was offered was not alone sufficient. The motive of the officer was not in issue in this case and had not been in any manner attacked. Neither were the jury instructed as to the purpose for which this testimony was admitted. It was purely hearsay and did not come within any of the exceptions admitting such evidence. The persons who gave the officers the information described should have been summoned as witnesses and placed upon the stand and subjected to cross-examination, so that the jury might have been able to determine as to whether or not these statements were based upon their own personal knowledge or were merely a matter of rumor or suspicion. If hearsay of this kind was admissible as evidence, no man, however innocent, would be safe, and any man might be convicted of an offense with which he was not in any manner connected. Section 15 of Williams' Const. Okl. provides: "No person shall be deprived of life, liberty or property without due process

of law." No one will contend that a conviction based upon hearsay and suspicion constitutes due process of law. Even if this provision were not in our Constitution, the fourteenth amendment to the Constitution of the United States is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under this provision no state or court has the right to deprive any person of life, liberty, or property except in a lawful manner and upon lawful evidence. It is true that the admission of illegal testimony does not necessarily deprive a defendant of due process of law, because the other testimony in a case might show that it did not affect the results; but where illegal evidence is admitted which is material in its character and which goes directly to the question at issue, and where the record shows that such evidence reasonably contributed to a verdict of guilty, then such a conviction cannot be said to have been obtained by due process of law. This is the condition of the record now before us. The hearsay evidence admitted was material and directly involved the pivotal points in the case, and without this testimony the jury might well have returned a verdict of acquittal. We cannot therefore say that the introduction of this evidence was harmless error.

The judgment of the lower court is therefore reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

#### McSPADDEN v. STATE

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1913.)

#### (Syllabus by the Court.)

#### 1. JURY (§ 24\*)—TRIAL BY JURY—ASSESSMENT OF PUNISHMENT.

(a) In all cases of conviction by a jury for any offense against the laws of the state of Oklahoma, if the defendant requests it, the court must submit the question of punishment to the jury, and it is error for the court to overrule such request.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 143; Dec. Dig. § 24.\*]

#### 2. CRIMINAL LAW (§ 1183\*)—APPEAL AND ERROR—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.

(b) If the court refuses to submit the question of punishment of a defendant to the jury, when requested so to do, such refusal will not necessarily result in the reversal of a case, but this court upon appeal may so modify the judgment as will prevent injustice to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3199; Dec. Dig. § 1183.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. CRIMINAL LAW (§ 1166½\*)—TRIAL—CONDUCT IN GENERAL.

(c) Attorneys for a defendant are entitled to and must receive absolutely fair treatment at the hands of the trial court, and when this is not accorded them, and the error is of such a character that it may have influenced the jury in finding a verdict, a conviction will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.\*]

Appeal from Rogers County Court; H. Tom Knight, Judge.

Otto McSpadden was convicted of unlawfully selling intoxicating liquors, and his punishment was assessed at a fine of \$500 and six months' imprisonment, and he appeals. Reversed and remanded for new trial.

Archibald Bonds and J. I. Howard, both of Claremore, for appellant. Smith O. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

FURMAN, P. J. [1] We only deem it necessary to discuss one of the questions presented by the record. When this case was tried, counsel for appellant requested the court to instruct the jury that, if they found the defendant guilty, they might assess his punishment. This request was denied by the court, to which action of the court the appellant duly excepted at the time. Sections 2028 and 2029, Comp. Laws 1909, are as follows:

"Sec. 2028. Jury May Assess Punishment.—In all cases of a verdict of conviction for any offense against any of the laws of the state of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict and the court shall render a judgment according to such verdict, except as hereinafter provided.

"Sec. 2029. Failure of Jury.—Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly."

Under these statutes, it was appellant's right to have the question of punishment submitted to the jury if he so demanded, and to give the jury the privilege of assessing such punishment if they saw fit. The court therefore erred in overruling the request of appellant to submit the question of punishment to the jury.

[2] Section 6955, Comp. Laws 1909, is as follows: "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court."

In the case of Fritz v. State, 128 Pac. 170, decided at the November term of this court, Judge Doyle, discussing this statute, said: "Under this statute, this court, exercising its revisory jurisdiction, has the power and authority to modify any judgment appealed from by reducing the sentence. However, that power should not be exercised unless it is apparent that injustice has been done."

As the jury agreed unanimously that appellant was guilty, if the question of punishment had been submitted to them they could not have done less than fix his punishment at 30 days' confinement in the county jail and a fine of \$50, while they might have assessed it at a fine of \$500 and six months' imprisonment. If they had done so, we would not have regarded the punishment as excessive. The trial court did not have the right to substitute his judgment for that of the jury on the subject of punishment after the defendant had requested that this be left to the jury. If the matter had stopped here, we could and would have affirmed the conviction and modified the judgment by reducing the punishment to the least amount which could have been inflicted by the jury, and thereby have avoided the possibility of injury to appellant on account of the error of the trial judge.

[3] In fact, we at first intended to make this disposition of the case, but, upon making a second and more careful examination of the case-made, we find that, when counsel for appellant requested the court to submit the question of punishment to the jury, the court not only did not comply with this request but fined counsel for appellant \$5 for contempt of court, which he was forced to pay. In the case of Ostendorf v. State, 128 Pac. 143, decided at the November term of this court, we clearly stated that it was the right and duty of counsel for a defendant to do everything that was fair and legal to protect the substantial rights of their clients, and in so doing they should be upheld by the courts. We have also repeatedly declared that attorneys for a defendant were entitled to and must receive absolutely fair treatment at the hands of the courts and prosecuting attorneys, and we intend to enforce this rule rigidly. It requires no argument to show that unfairness and justice cannot be harmonized with each other. Counsel for appellant in this case was clearly within his rights in requesting the court to submit the question of punishment to the jury. To refuse to grant this request, and at the same time to adjudge counsel guilty of contempt of court and fine him for the same, was a flagrant outrage on his rights, and could not have been otherwise than injurious to appellant. Courts have no right to humiliate and outrage lawyers for the defense for doing their duty. The effect of this necessarily creates the impression upon the minds of the jury

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that counsel for the defense has been guilty of unfairness and improper conduct, and this is calculated to excite their prejudice against the defendant. It may be accepted as a cardinal principle of criminal jurisprudence that fairness is a necessary element in the trial of criminal cases in this state. Attorneys for the defense may rely with confidence upon the protection of this court as long as they act within their legal rights. This is as much our duty as it is to condemn their conduct when they are guilty of unprofessional practice.

Because of the conduct of the trial court as above pointed out, the judgment of the lower court is reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

### HARGROVE v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 13, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 430\*) — INTOXICATING LIQUORS (§§ 224, 233\*) — CRIMINAL PROSECUTIONS—ADMISSION OF EVIDENCE.

A certified copy of the record of the United States internal revenue collector for the district of Oklahoma, showing the payment of a special revenue tax for pursuing the business of retail liquor dealer in Oklahoma, is admissible in evidence against a defendant, charged with the sale of such liquors. The effect of the introduction of such evidence simply shifts the burden of proof and requires the defendant to introduce such testimony as will raise a reasonable doubt of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1019; Dec. Dig. § 430;\* Intoxicating Liquors, Cent. Dig. §§ 275-281, 293-297, 298½; Dec. Dig. §§ 224, 233.\*]

#### 2. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

For circumstantial evidence sustaining a conviction against a defendant charged with the illegal sale of intoxicating liquors, see opinion.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from Oklahoma County Court; John W. Hayson, Judge.

T. C. Hargrove was convicted of selling intoxicating liquors, and his punishment assessed at confinement in the county jail for 90 days and a fine of \$300, and he appeals. Affirmed.

Jennings & Levy, of Oklahoma City, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. [1] First. The state introduced in evidence a certified copy of the record of the United States internal revenue collector for the district of Oklahoma, showing that the defendant had taken out an internal revenue license to pursue the business of retail liquor dealer in Oklahoma City covering the time of the commission of the of-

fense charged. To the introduction of this evidence counsel for appellant excepted. The admissibility of this testimony is not an open question in Oklahoma. See Billingsley v. State, 4 Okl. Cr. 597, 113 Pac. 241. Our statute makes the payment of this internal revenue tax prima facie evidence of the defendant's guilt. This does not in any manner deprive a defendant of any substantial right or interfere with the jury in the consideration of the evidence. It simply fixes the burden of proof in such cases. The court therefore did not err in admitting this testimony.

[2] Second. Counsel contends that the verdict is contrary to the evidence. With this we cannot agree. It is true that the testimony against appellant is all purely circumstantial, but we think that the circumstances are incapable of reasonable explanation consistent with the innocence of appellant.

George Wood testified for the state that he knew the place of business of defendant on Second street in the city of Oklahoma; that he had been there a number of times; that he was there on the 16th day of May, 1911, and saw the defendant there; that Jack Willingham was with witness; that witness and Willingham walked into the place of business of appellant, and Willingham asked if they had anything to drink; that the defendant objected to witness, and said he did not know him; that he wanted to be positive; defendant said he knew Willingham; that witness and Willingham finally went back into the rear of the building; that Willingham bought a bottle of beer back there; that witness paid for it; witness does not know the name of the person from whom the beer was purchased.

Jack Willingham testified that he had known the defendant for three years; that he went into the place of business of the defendant on Second street on the 16th day of May, 1911; that witness bought two bottles of beer there; that witness saw the defendant at this place of business as he came out of the house; that witness had seen the defendant around this place of business before this time; that the beer was not purchased from the defendant.

J. C. Gilmore testified that he was acquainted with the defendant and had known him for three years; that defendant's place of business was 309 West Second street; defendant has his sign on the front window; that witness frequently saw the defendant about his place of business during 1911; that the defendant kept a pool hall and cigar stand at this place of business.

It is utterly immaterial as to who made the sale. The proof is positive that the defendant had possession of and was in charge of the place of business at which the sale was made, and that the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had taken out an internal revenue license to sell liquors at this place, and that, when Wood entered the place, appellant objected to his going back where the liquor was bought because he did not know Wood. These circumstances conclusively establish the fact that appellant had a guilty connection with this transaction.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG and DOYLE, JJ., concur.

### MCGILL v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 13, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 789\*)—CRIMINAL PROSECUTIONS—INSTRUCTIONS.

When a trial court instructs a jury that it is necessary for them to find from the facts, beyond a reasonable doubt, that a person on trial for having the unlawful possession of intoxicating liquor with intent to sell the same had such liquor for his own use, and a conviction results, such conviction cannot be sustained on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

#### 2. CRIMINAL LAW (§ 922\*)—NEW TRIAL—GROUNDS—ERRONEOUS INSTRUCTIONS.

When, by oversight or otherwise, a trial court gives an instruction which requires the jury to find that the accused is innocent beyond a reasonable doubt, and a conviction results, he should set aside such conviction and grant a new trial according to law. There is no rule of law that requires a jury to find an accused innocent beyond a reasonable doubt, but, on the contrary, the universal rule is that his *guilt* must be found beyond a reasonable doubt; and an acquittal should follow, unless the facts satisfy the jury, beyond a reasonable doubt, of the guilt of the accused on trial for the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

Appeal from Superior Court, Logan County; S. S. Lawrence, Judge.

Enoch McGill was convicted of violating the prohibitory law, and appeals. Reversed and remanded for new trial.

James Hepburn, of Guthrie, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Enoch McGill, was tried and convicted at the July, 1911, term of the superior court of Logan county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at imprisonment in the county jail for a period of 30 days and a fine of \$50.

[1] The Attorney General has filed a confession in error in this case, based upon the following instruction of the court: "It

is admitted by the defendant that he had in his possession at that time one quart bottle partly filled with whisky, one pint bottle partly filled with whisky, and one point of beer; but he claims, and testified before you, that he then and there had such liquors in his possession for his own personal use, and not for the purpose of sale. You are at liberty, and it is your duty, to determine from all the facts, circumstances, and testimony in this case whether the defendant had these liquors in his possession for his own personal use, or whether he had them there for the purpose of sale. If you believe from all the evidence, facts, and circumstances in the case, beyond a reasonable doubt, that he did have said liquors in his possession for his own use only, and not for the purpose of sale, or any part thereof, then you will find the defendant not guilty. And if, on the other hand, you believe from all the facts, circumstances, and evidence in the case, beyond a reasonable doubt, that he did have said liquors in his possession, or any part thereof for the purpose of sale, you will find the defendant guilty."

In *Mitchell v. State*, 6 Okl. Cr. 622, 117 Pac. 650, we held an instruction which places the burden upon the accused to establish his innocence by a preponderance of the evidence was erroneous, and a conviction upon a record showing such instruction could not be sustained.

[2] The instruction here complained of is more serious; the court having required the jury to find from the evidence, beyond a reasonable doubt, that the accused had the liquors in his possession for his own use only, and not for the purpose of sale. If such were the law, it would not be necessary for the state to make out a case. Our citizenship could be dragged into court and required to prove that they had not committed a crime. Whereas, it is fundamental that the burden is upon the state to make out a case of guilt beyond a reasonable doubt; and such burden never shifts from the state to the accused at any stage of the trial, nor under any circumstances, to the extent of requiring an accused to prove his innocence beyond a reasonable doubt, or even by a preponderance of the evidence. All that is ever required to entitle an accused to an acquittal is that the jury, upon a consideration of the whole case, entertain a reasonable doubt as to his guilt.

A trial court should not permit a case to come to this court on appeal when, by oversight or otherwise, this character of instruction is included in the record. A conviction should be set aside and a new trial forthwith awarded by the trial court, conducted according to law.

Let the judgment be reversed and the cause remanded, with direction to grant a new trial.

FURMAN, C. J., and DOYLE, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**WARNER v. STATE.**

(Criminal Court of Appeals of Oklahoma. Jan. 18, 1913.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 101\*)—COURTS—JURISDICTION—MISDEMEANORS—COUNTY COURTS—TRANSFER OF CAUSE.**

(a) When an indictment is returned by a grand jury in a district court charging a misdemeanor, it is the duty of the judge of the district court to make an order transferring such indictment to the county court for trial.

(b) When an order is made by a district court for the transfer of a misdemeanor indictment to a county court, it is the duty of the clerk of such district court to properly enter said order in the minutes of the court and certify the same down, together with the indictment and other papers in the case.

(c) When an order is made by a district court for the transfer of an indictment in a misdemeanor case, and the clerk fails to enter such order properly upon the minutes, and the papers and indictment are certified to the county court without such order of transfer, although the same was in fact made, and then upon application of the county attorney the district court enters an order nunc pro tunc, and the clerk certifies the same to the county court, this is sufficient to take the place of the original order and to validate the transfer in all respects.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 198-205; Dec. Dig. § 101.\*]

**2. CRIMINAL LAW (§ 101\*)—COURTS—JURISDICTION—TRANSFER OF CAUSE—DEFECTS IN TRANSFER.**

When an indictment charging a misdemeanor is transferred from a district court to a county court, and the person against whom the offense is charged appears in court, gives bond, waives arraignment, and enters a plea to the indictment, any defects in the transfer are thereby waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 198-205; Dec. Dig. § 101.\*]

Appeal from Okmulgee County Court; Geo.

A. Jones, Judge.

Charles Warner was convicted of violating the prohibitory law, and he appeals. Affirmed.

M. M. Alexander, of Okmulgee, for plaintiff in error. Smith O. Matson, Asst. Atty. Gen., for the State.

**ARMSTRONG, J.** The plaintiff in error, Charles Warner, was tried and convicted at the October, 1911, term of the county court of Okmulgee county on a charge of selling intoxicating liquors, and his punishment fixed by the court at a fine of \$500 and imprisonment in the county jail for a period of 90 days.

[1] The only assignment of error that is urged for reversal of this judgment is based upon the contention that the county court was without jurisdiction to try the accused by reason of alleged irregularities in transferring the indictment from the district court to the county court. Counsel in his brief has argued the question at length. A motion to dismiss was filed in the county court on this ground; the allegation of the motion being

in the following language: "Comes now the defendant in the above-entitled cause \* \* \* and \* \* \* moves the court that it dismiss the action herein pending against this defendant, and for cause of said dismissal shows to this honorable court that it is without jurisdiction to hear and determine this action now pending against this defendant for the reason that there is no order of court of record in this court transferring said cause from the district court of Okmulgee county, Oklahoma, to the county court of said county and state, as is provided by law. The defendant in support of his motion shows unto this honorable court that this cause is now pending in this court by virtue of an indictment returned into the district court of Okmulgee county, Oklahoma, and that no order was made of record whereby said cause, which was a misdemeanor, was transferred to the county court of Okmulgee county, Oklahoma, at the time the clerk of the district court aforesaid pretended to transfer said cause to said county court aforesaid, but that the clerk of said district court made a transcript of a pretended order of transfer of said cause to the county court aforesaid which pretended order is not of record in this court. \* \* \* The motion then sets out an unsigned order of the judge of the district court of Okmulgee county ordering the transfer of this cause to the county court. Upon the filing of this motion, the county attorney appeared before the district court and asked that a nunc pro tunc order be entered of record transferring the cause, which was done. Such order among other things contains the following recital: "And it appearing to the court that certain indictments were returned by said grand jury to said district court, and that each and all of said indictments, hereafter referred to by number, were misdemeanors and properly triable in the county court of Okmulgee county, Oklahoma. And it further appearing to the court that by inadvertence, oversight, and mistake the criminal journal of the district court of Okmulgee county, Oklahoma, does not show that said causes were transferred to the county court of Okmulgee county, Oklahoma, as required by law. It is therefore here ordered and adjudged by the court that an entry nunc pro tunc be entered in the criminal journal of said court as of date, December 18, 1910," etc. This nunc pro tunc order includes the case at bar.

Counsel for appellant at no time contended by his motion, nor does he contend here in his brief, that the district court failed to make an order transferring the indictment in this cause to the county court as provided by statute. His contention is based solely upon the ground that there was no certified copy of such order included in the papers on file at the time they were transferred. It is

true that this order should have been included in the papers, but, if the order was in fact made, it is not fatal to the jurisdiction of the county court that a certified copy thereof did not come down from the district court to the county court at the same time and attached to the indictment. This omission, while it should not have occurred, was an omission of a duty imposed upon the clerk and not the court. The court having made the order, the clerk should have entered it in the record. Having failed to enter it in the record when the court's attention was called to it, the order should have been made and certified down. This was done. This court has never held the contrary, and, in fact, has specifically said that it was the duty of the county attorney to see that these orders were properly made and included in the record, and that, when this was not done, the county court should return them to the district court for completion. See *Hendrix v. State*, 5 Okl. Cr. 125, 113 Pac. 544. The bringing down of a nunc pro tunc order showing the transfer answers all the purposes of an original order. The county court had jurisdiction in fact, but the record did not show it until this nunc pro tunc order was filed. The county court properly refused to overrule the motion to dismiss the indictment.

[2] In this case it appears that the accused was arrested on a warrant from the county court after the indictment was transferred from the district court; that he gave bond for his appearance, waived arraignment, and entered a plea of not guilty. This action upon his part had the effect of waiving any defect in the transfer, and, even though the county attorney had not procured the nunc pro tunc order, this judgment would not be reversed. See *Eakins v. State*, 7 Okl. Cr. 351, 123 Pac. 1035.

There being no other error urged for reversal, and none appearing from our examination of the record, the judgment of the trial court is affirmed.

FURMAN, P. J., and DOYLE, J., concur.

#### PROCTOR v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 18, 1913.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 371\*)—ILLEGAL TRANSPORTATION—EVIDENCE—"UNLAWFULLY CONVEYING INTOXICATING LIQUOR."**

Where a defendant is on trial for a specific offense, evidence of unrelated offenses is not admissible, unless relevant to the issue and tending to show motive or intent; and an unlawful intent is not an ingredient of the offense of unlawfully conveying intoxicating liquors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371;\* Intoxicating Liquors, Cent. Dig. § 286.]

Appeal from Oklahoma County Court; John W. Hayson, Judge.

Cal Proctor was convicted of wrongfully transporting beer, and appeals. Reversed.

Ledru Guthrie and J. H. Beaty, both of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error was informed against, charged with a violation of the prohibitory law. It was alleged that he did unlawfully and wrongfully transport beer from a place in Oklahoma City, unknown, to and within a certain building situated at 122 Grand avenue in said city. He was found guilty, and his punishment assessed at imprisonment for 30 days in jail and to pay a fine of \$50. The verdict was signed by five jurors. Judgment and sentence in accordance therewith was entered October 10, 1911. To reverse the judgment an appeal was perfected. It is contended that the verdict is not supported by law or the evidence in the case.

The evidence in the case was substantially as follows:

L. K. Reynolds testified that he was a deputy sheriff; that with three other deputies he was at the premises known as 122 West Grand on or about May 18, 1911, about 9 p. m., and the defendant drove a buggy into the alley behind the building and took a sack of beer out of the buggy and took it into the building; that he came down the stairway on which he was standing and went into the building and found a gunny sack with possibly two dozen bottles of beer in it, and he arrested the defendant. Over an objection properly made, the court permitted the witness to testify that he had found intoxicating liquor there before.

He was further asked in his examination in chief: "Q. You may state whether or not that is a place that is generally known that intoxicating liquors are kept and sold. By Ledru Guthrie: Objected to for the reason that it is incompetent, irrelevant, and immaterial. By the Court: Overruled, and exception allowed for the defendant. A. Yes, sir. We have visited that place on different occasions."

J. C. Gilmore testified that he was standing out on the back stairs; that he saw the defendant get out of the buggy and go into his place of business, 122 West Grand, carrying this sack with him.

C. C. Stoner testified, as taken from the transcript: "Q. State under what circumstances you saw this defendant at that place, at that time. A. We were executing a search warrant. Q. Where were you when you first seen the defendant? A. Standing on the steps in the rear of the building. Q. State whether or not you seen the defendant go into the back door of that building. A. Yes, sir. Q. How long after he had gone in

did you go into that building? A. Just a short time; we went right in after him. Q. State whether or not you seen him drive up in the buggy and get out and go into that building. A. No, sir; I did not see him drive up. Q. Well, state what you did see him do. A. I just seen him going in at the back door. Q. Where did you next see him? A. In the rear of 122 West Grand avenue. I was upstairs; and when I got downstairs and got in there Mr. Gilmore and Mr. Reynolds and Mr. Burkebyle were in there, and Mr. Proctor and some one else. Q. This defendant? A. Yes, sir. Q. State whether or not this sack of beer was setting on the floor. A. Yes, sir; it was setting on the floor in the sack. Q. Do you know who put that sack of beer on the floor in that room? A. No, sir; I do not. Q. Had you ever been at 122 West Grand avenue prior to this time? A. Yes, sir. Q. What was your occasion there? A. Executing search warrants. Q. What did or do you know about this place being a place where intoxicating liquors are kept and sold? By Ledru Guthrie: Objected to for the reason that it is incompetent, irrelevant, and immaterial. By the Court: Overruled, and exceptions allowed the defendant. A. Well, I have found liquor there before."

Aside from the question of the sufficiency of the evidence, which we will not discuss, further than to say that it is very weak on the essential ingredient of the offense charged, that there must be a conveyance from a place beyond the premises of the defendant, however, we would not disturb the verdict for this reason alone, but the court, over the objection of the defendant, permitted testimony concerning violations of other provisions of the prohibition act.

It is a settled rule that, upon the trial of a defendant on a specific act, evidence of other offenses committed by him is not admissible.

This prosecution was under that subdivision of the prohibition act which provides that it shall be unlawful "to ship or in any way convey such liquor from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized." And it was only necessary for the state to prove such conveyance. It was unnecessary to prove intent. For this reason the admission of this testimony did not come within any of the exceptions of the rule above stated.

Over the objection of the defendant, evidence of the reputation of the place was also admitted. In a prosecution of this kind this evidence was merely hearsay. If the prosecuting attorney expected to offer this kind of testimony, he should have charged the defendant with the offense of maintaining a place, or unlawful possession with intent to violate provisions of the prohibition law.

We must therefore hold that the evidence

admitted over the objection of the defendant was prejudicial to his substantial rights, as without this illegal testimony the jury might have refused to return a verdict of guilty.

The judgment of the county court is therefore reversed, and the cause remanded for a new trial.

## HENDRIX v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 18, 1913.)

(Syllabus by the Court.)

### 1. CRIMINAL LAW (§ 507\*)—EVIDENCE—"ACCOMPLICE."

The term "accomplice," as used in section 6836, Comp. Laws 1909, providing that no person shall be convicted of a crime on the testimony of an accomplice without corroboration, is construed as meaning one culpably implicated in the commission of the crime of which the defendant is accused; in other words, an associate, one who knowingly and voluntarily co-operates or aids or assists in the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096, 1098; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

### 2. CRIMINAL LAW (§ 507\*)—EVIDENCE—TESTIMONY OF "ACCOMPLICES"—CORROBORATION.

A participant in a game of poker or other prohibited games played for money, checks, credit, or any representative of value is an accomplice of his adversary, within the meaning of the statute which requires the testimony of an accomplice to be corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096, 1098; Dec. Dig. § 507.\*]

### 3. CRIMINAL LAW (§ 511\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In this case, it is held that the testimony of the accomplice was sufficiently corroborated by the other evidence to justify the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.\*]

Appeal from Bryan County Court; J. L. Rappolee, Judge.

George Hendrix was convicted of playing poker, and he appeals. Affirmed.

C. C. Hatchett, of Durant, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was informed against for the offense of unlawfully playing at a certain game of poker for money. Upon his trial he was found guilty of gaming in manner and form as charged in the information. A motion for a new trial was duly filed and overruled, and he was sentenced to pay a fine of \$25.

The first witness for the state, Jim Hickey, testified that he lives at Robbers' Roost, and went on the night of the day named in the information to Brown's Chapel school-house on Twelve Mile Prairie, in Bryan county, and found there three boys, one of whom

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was the defendant, playing poker; that witness sat into the game, and they played about an hour, when one of the boys dropped out; that he did not know his name; that the defendant, George Hendrix, next dropped out, and witness continued playing with the other gentleman until Tom Stamford came in and put a stop to the game; that he had plead guilty, and paid a fine for this gambling. Tom Stamford testified that he lived on Twelve Mile Prairie, and went to the Brown's Chapel schoolhouse before daylight about 8 o'clock in the morning, and there found four boys; that he knew Jim Hickey and the defendant, George Hendrix; that the other two he did not know; that Hickey and one of the boys were playing cards with a common deck of playing cards; that the defendant was looking on, and the other boy was asleep. The state rested, and the defendant demurred, on the ground that the evidence was insufficient to support a conviction, which was overruled. The defendant did not offer any testimony. The defendant requested several instructions, all relating to the question whether or not the witness Jim Hickey was an accomplice of the defendant. The court refused to give these instructions or any instruction relating to the proposition that the witness Hickey was an accomplice of the defendant.

[1] The learned counsel for the defendant in his brief says: "The only proposition presented to this court and the proposition that is squarely presented to the court in this case is: Was the witness Hickey an accomplice of the defendant? We do not now contend that if this case had been submitted to the jury under proper instructions relative to the witness Hickey being an accomplice of the defendant, and the jury had returned a verdict of guilty, but that there was sufficient testimony upon which to base the verdict. We concede that, if the jury had been properly instructed as to the law, and had then found the defendant guilty, that there were sufficient circumstances corroborating the witness Hickey for the court to permit the verdict to stand." The term "accomplice," as used in our Procedure Criminal (section 6836, Snyder's Sta.), providing that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, in the absence of a statutory definition, includes all who are principals, as defined by our Penal Code as follows: "Sec. 2045. All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals." Words used in any statute are to be understood in their ordinary sense, except where a contrary intention plainly appears. An "accomplice" is defined in Wharton, Cr. Ev. pt. 440, as a person who "knowingly,

voluntarily, and with common intent with the principal offender unites in the commission of a crime." We think the term "accomplice," as used in section 6836, must be considered as meaning one culpably implicated in the commission of the crime of which the defendant is accused; that is, an associate, one who knowingly and voluntarily co-operates or aids or assists in the commission of the crime.

[2] The question presented for decision is, when two or more persons play a game of poker for money, checks, credit, or any representative of value, are they accomplices of each other? In the few cases where this question has been passed upon the decisions are conflicting. In the case of Commonwealth v. Bossie, 100 Ky. 151, 37 S. W. 844, the Court of Appeals of Kentucky held that each person engaged in a game of chance is not an accomplice within the rule forbidding a conviction on the uncorroborated testimony of an accomplice. The question presented was before the Supreme Court of Alabama in the case of Davidson v. State, 33 Ala. 350, and it was held that a participant in a game of cards is an accomplice of his adversary within the meaning of the statute which forbids a conviction on the uncorroborated testimony of an accomplice. In discussing the question the court said: "When two or more persons play cards together, although each may be contending with all the rest, it is the combination of all the successive acts of all the different persons, which constitutes the game at cards. Each player, by every act of his done in pursuance of the law of the game, contributes an appointed part to the combination of acts, which together make a game with cards. It is clear, therefore, that in playing at a game with cards each player is a participant in the production of the result which the law condemns. If the statutory offense were winning at a game with cards, then adversaries in the game could not be accomplices. The loser of the game could not be said to participate in the accomplishment of the unlawful object (winning at a game). Our argument does not involve the position that adversaries in fact are accomplices in law. Antagonists in playing cards are not adversaries, as to the thing which constitutes the offense. They agree together as to the playing at a game with cards, and each voluntarily contributes to that end; and they are adversaries as to which one shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skillfully. If a community of purpose be necessary to constitute one an accomplice, our position is still maintainable. It would be absurd to contend that any other common object than to commit the offense was necessary to make one an accomplice with the accused. Those who play together

at a game with cards have a common object to play at the game, and that is the offense. They have diverse objects to play with the greatest skill, and that does not constitute the offense. Each sits down to the card table with a common purpose to do that which the law condemns; but each has an ultimate object to accomplish by playing at a game with cards in violation of the law. They concur in the purpose to violate the law. They do not concur in the object to be accomplished by the violation. The offense is complete before it is known who will be the winner." See, also, *Bird v. State*, 36 Ala. 279, and *State v. Light*, 17 Or. 358, 21 Pac. 132. In the latter case it was held that the dealer of a game of stud poker is an accomplice with those who bet money or value at such game. Both are necessary to complete the offense, each performing a separate and necessary part in the violation of the statute.

Our Penal Code prohibits the playing of poker, and punishes every person who bets or plays at or against this and other prohibited games as guilty of a misdemeanor, punishable by a fine of not less than \$25. The acts of at least two or more persons concurring together are necessary to effect a violation of the statute. Playing at cards is not the means by which the end contemplated by the statute is accomplished; but that is the very thing which constitutes the offense, and, as participation in guilt is what makes an accomplice, it is our opinion that each participant of the game prohibited by the statute is an accomplice of his adversary within the meaning of section 6836, which forbids a conviction on the uncorroborated testimony of an accomplice.

[3] The question as raised in the present case is purely technical. The testimony for the state shows several separate games, entirely independent of each other, thus being separate and distinct offenses, and no election by the state was demanded by the defendant. The witness Hickey testified that, when he went to the schoolhouse, he found the defendant and two others engaged in a game of poker. Hickey's guilt or innocence was not necessarily connected with the guilt or innocence of the defendant in the game played before he became a participant, and, if in the first game Hickey was not a participant, then he would not be an accomplice as to that particular offense, and a conviction of that would stand even on his uncorroborated testimony. Furthermore, as an accomplice his testimony was corroborated by other evidence amply sufficient to justify the verdict. If the instructions requested had been given, the verdict would certainly have been the same, and the trial court imposed only the minimum fine. This court has repeatedly held that a judgment of conviction will not be reversed, unless it shall appear

from the whole record that there was error prejudicial to the substantial rights of the defendant, or by reason thereof it seems probable that injustice may have been done.

Perceiving no prejudicial error, the judgment of the county court of Bryan county will be affirmed.

ARMSTRONG, P. J., and FURMAN, J.,  
concur.

### WILSFORD v. STATE.

(Criminal Court of Appeals of Oklahoma.

Jan. 18, 1913.)

(Syllabus by the Court.)

#### INDICTMENT AND INFORMATION (§ 133\*)—DEFECTS—OBJECTIONS TO EVIDENCE.

When the defendant enters his plea of not guilty and waits until after the jury has been impaneled and sworn, and then for the first time questions the sufficiency of the information by objecting to the introduction of testimony on the ground of such insufficiency, the objection should be overruled, if by any reasonable construction or intendment the information can be sustained.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 454-468; Dec. Dig. § 133.\*]

Appeal from Oklahoma County Court; John W. Hayson, Judge.

Thomas Wilsford was convicted of violating the prohibition law, and appeals. Affirmed.

F. W. Fischer, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Oklahoma county, wherein plaintiff in error was convicted of the crime of selling intoxicating liquors.

On the 10th day of October, 1911, in accordance with the verdict of the jury, judgment was rendered, and he was sentenced to be confined in the county jail for a term of four months, and that he pay a fine of \$400, and in default of the payment of the fine the same to be satisfied by further confinement as by law provided. From this judgment an appeal was properly perfected.

We have carefully examined the record, and our conclusion is that the assignments of error are not well taken.

It is first contended that the evidence is insufficient to support the verdict. Two witnesses testified that the defendant was present and went with them to the room in the rear, where they purchased the beer, and that he directed them to pay the negro porter for it.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Certified copy of the internal revenue record was produced, showing payment of the special retail liquor dealers' tax for one year from July 1, 1910. The defendant, testifying on his own behalf, admitted that he had paid the special tax; that he had paid it for the purpose of conducting a place on Reno street, as designated in the revenue stamp, but that he was not the proprietor at 508 North Broadway, where the witness bought the beer; that that place was owned by Thom Sims, and that he had known Sims 25 years, and when he was out of the place and the defendant present he would often sell cigars; that he had left Reno street, and was running a pool hall at 518 North Broadway at that time.

This court has repeatedly held that where there is evidence in the record to support the verdict, and the verdict has been approved by the trial court, this court will not disturb the judgment.

It is also assigned as error that the court erred in overruling an objection to the introduction of testimony, on the ground that the information was insufficient. No demurrer was interposed, and this court has held that when the defendant enters his plea of not guilty and waits until after the jury has been impaneled and sworn, and then for the first time questions the sufficiency of the information by objecting to the introduction of testimony on the ground of such insufficiency, the objection should be overruled, if by any reasonable construction or intendment the information can be sustained. The information was sufficient.

Finding no error in the record, the judgment of the county court of Oklahoma county is affirmed.

### FLOWERS v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 13, 1913.)

*(Syllabus by the Court.)*

#### INTOXICATING LIQUORS (§ 19\*) — CRIMINAL PROSECUTION—STATUTORY PROVISIONS.

A conviction based upon section 4, c. 70, Session Laws of 1911, cannot be sustained under the doctrine laid down in *Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 25; Dec. Dig. § 19.\*]

Appeal from Stephens County Court; W. H. Admire, Judge.

A. C. Flowers was convicted of violating the prohibitory law, and appeals. Reversed and remanded, with direction to dismiss.

Burns & Meek, of Duncan, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The prosecution in this case was based upon section 4, c. 70, Session Laws 1911; the charging part of the information being as follows: " \* \* \* The said A. C. Flowers, late of Stephens county, and within the jurisdiction of this court, did willfully and unlawfully have in his possession at his place of business more than one quart of intoxicating liquor, to wit, 41 quarts of beer, contrary to the form of the statutes," etc. The punishment imposed in this case was imprisonment for 30 days in the county jail and a fine of \$50. Upon the conviction, a motion for a new trial was filed and overruled, and the judgment and sentence followed. The Attorney General has filed a confession in error setting out that this conviction is based on a statute heretofore declared unconstitutional by this court. The question here raised was determined by this court in *Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596, wherein the act in question was declared unconstitutional.

Following the rule laid down in that case, the judgment is reversed, and the cause remanded, with direction to the trial court to dismiss.

FURMAN, P. J., and DOYLE, J., concur.

### FLOWERS v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 13, 1913.)

*(Syllabus by the Court.)*

#### INTOXICATING LIQUORS (§ 202\*) — CRIMINAL PROSECUTIONS—INFORMATION.

When a person is to be prosecuted on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, the information should specifically so charge; but this court has held that an information which charges an intent to violate the prohibitory law is sufficient. However, because such informations have been sustained, it does not mean that they are approved by this court as models.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 222; Dec. Dig. § 202.\*]

Appeal from Stephens County Court; W. H. Admire, Judge.

A. C. Flowers was convicted of violating the prohibitory law, and appeals. Affirmed.

Burns & Meek, of Duncan, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, A. C. Flowers, was tried and convicted at the October, 1911, term of the county court of Stephens county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same. The charging part

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

of the information is as follows: " \* \* \* The said A. C. Flowers, late of Stephens county, and within the jurisdiction of this court, did willfully and unlawfully have in possession 41 quarts of intoxicating liquor, to wit, beer for the purpose and intent of violating the prohibition laws of the state of Oklahoma. \* \* \* " The accused was arrested, gave bond for his appearance, was later arraigned, and entered a plea of not guilty. No demurrer or motion to set aside the information raising its sufficiency was filed. After the trial was concluded and a verdict of guilty returned, a motion for a new trial was filed complaining that the information was insufficient in that it charged the accused with intent to violate the prohibitory law.

The proof in the record clearly establishes to our minds that the accused was in possession of the liquor charged, with the intent to sell the same. The information should have charged that he had possession of the prohibited liquors with the intent to sell them, and not with intent to violate the prohibition laws; but such an information has been held sufficient by this court. See *State v. Feebeck*, 3 Okl. Cr. 508, 107 Pac. 442; *Childers v. State*, 4 Okl. Cr. 237, 111 Pac. 958; *Ex parte Spencer*, 7 Okl. Cr. 113, 122 Pac. 557. We decline at this time to disturb the ruling of the court, but these informations are not approved by this court as models of pleading and should be avoided.

We have carefully considered the other assignments raised by the brief, and find no error sufficient to justify a reversal of the judgment. It is therefore affirmed.

FURMAN, P. J., and DOYLE, J., concur.

#### WILSON v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1913.)

*(Syllabus by the Court.)*

#### 1. PHYSICIANS AND SURGEONS (§ 6\*)—PRACTICING WITHOUT AUTHORITY—FAILURE TO RECORD LICENSE.

A person who has been regularly licensed to practice medicine in this state, and who has failed to record the certificate issued to him by the board having jurisdiction to issue licenses under the laws of this state in the county in which he resides and maintains a place of business, cannot be convicted under section 4256, Comp. Laws 1909, for practicing medicine without a license, but is subject to prosecution under section 4252, Id., for failure to record his license in said county.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.\*]

#### 2. PHYSICIANS AND SURGEONS (§ 6\*)—PRACTICING WITHOUT AUTHORITY—CRIMINAL PROSECUTION—EVIDENCE.

A certificate to practice medicine in this state issued by the state board having jurisdiction to issue same, properly authenticated and under the seal of said board, is entitled to be received in evidence when tendered on behalf of a person who is on trial charged with practicing medicine without authority, and such certificate when bona fide is a complete defense to a prosecution based on section 4256, Comp. Laws 1909.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.\*]

Appeal from Woodward County Court; C. H. Wyand, Judge.

Horace L. Wilson was convicted of practicing medicine without a license, and appeals. Reversed and remanded.

Fred M. Elkin and George W. Buckner, of Enid, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Horace L. Wilson, was tried and convicted in the county court of Woodward county on an information charging him with practicing medicine in said county without having at the time a valid and unrevoked certificate from the state board of medical examiners of the state of Oklahoma. The information is based upon section 4256, Compiled Laws 1909, which is as follows: "Any person practicing medicine and surgery in this state, without having at the time a valid unrevoked certificate as provided in this act, shall be deemed guilty of a misdemeanor and shall be fined not less than one hundred (\$100) dollars nor more than five hundred (\$500) dollars, or by imprisonment for a term of not less than sixty days nor more than one hundred and eighty days, or both such fine and imprisonment, and each day's practice shall constitute a separate offense. \* \* \* " The punishment of the accused was fixed by the jury at a fine of \$200 and imprisonment in the county jail for a period of 20 days.

A number of assignments of error are brought. Among others, it is urged that the court erred in refusing to admit in evidence a certificate issued by him in 1907 by the state board of health, which certificate is as follows: "State of [Great seal of the state of Oklahoma 1907.] Oklahoma. Physician's Certificate. No. 2,115. This certifies that the Oklahoma state board of health having received evidence that Horace L. Wilson, of the county of Woodward and state of Oklahoma, is a practitioner of medicine, legally licensed and actively engaged in the practice of medicine on the 16th day of November, 1907, and has submitted such evidence to this board this 10th day of April, 1908. We do hereby authorize him under the provisions of the Ok-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Oklahoma Constitution regulating the practice of medicine and surgery, approved November 16, 1907, to pursue the practice of medicine and surgery in this state. Given under our hands and the seal of the Oklahoma state board of health at Shawnee, this 10th day of April, in the year of our Lord one thousand nine hundred and eight. W. G. Gilly, M. D. President, Muskogee, Oklahoma. A. E. Dav-enport, M. D. Vice President, Tishomingo, Oklahoma. J. C. Mahr, M. D. Supt. and Ex Officio Secy. Shawnee, Oklahoma. [Seal.]”

The following are the indorsements thereon:

“2410. State of Oklahoma, Harper County—ss.: This instrument was filed for record on the 3rd day of June, A. D. 1908, at 9 o'clock A. M., and duly recorded in Book 1, Misc., on page 84. W. H. Little, Register of Deeds. [Seal.]

“2:15 P. M. p. 13. Pawnee, Oklahoma. Filed June 1, 1909. Frank Shoemaker, County Clerk. Recorded page —, Book —, Fees 50¢ Pd.

“State of Oklahoma, County of Craig—ss.: This instrument was filed and recorded in this office in Physician's Register at page 13, this 9th day of June, 1909, at 2:15 o'clock P. M. R. F. Nix, County Clerk.

“Filed Oct. 9, 1909. J. H. Donart, County Clerk, Payne County. [Seal.] Recorded on page 10, Medicial Register #1. Fee Paid \$1.00.

“State of Oklahoma, Pottawatomie County—ss.: This instrument was filed for record this the 18th day of Oct. A. D. 1909, at 10 o'clock A. M., and is duly recorded in Book 1, of —, page 45. Fee 75¢. J. F. Cottell, County Clerk, by F. L. Cottell, Deputy. [Seal.]”

This certificate is under the seal of the state board of health, and is from the board which at that time had or was exercising jurisdiction to grant licenses to practice medicine in this state under the constitutional provisions and the statutory law.

[1, 2] The certificate should have been admitted, and, when admitted, was a complete defense by the accused to the charge contained in the information. It clearly appears that the accused had not recorded this certificate in Woodward county. Section 4252, Compiled Laws 1909, provides as follows: “Every person holding a certificate authorizing him to practice medicine and surgery in this state, must have it recorded in the office of the county clerk, as herein provided. Every such person on the change of residence must have his certificate recorded in like manner in the county to which he shall have changed his residence, and said certificate shall be displayed in his office as evidence of having complied with the law. The absence of such record shall be prima facie evidence of the want of possession of such certificate, and every such person holding

such certificate who shall practice medicine and surgery or attempt to practice medicine and surgery without first having recorded same with the county clerk, as herein provided, shall be deemed guilty of a misdemeanor.” The accused should have been prosecuted under this section of the statute, and had this been done, and a conviction resulted, no relief could have been had in this court upon the ground set out in the petition in error. We do not deem it necessary to consider the other assignments.

For the error indicated, the cause is reversed and remanded, with directions to grant a new trial.

FURMAN, P. J., and DOYLE, J., concur.

# STATE ex rel. QUIGLEY v. SUPERIOR COURT FOR KING COUNTY et al.

(Supreme Court of Washington. Jan. 4, 1913.)

## 1. CERTIORARI (§ 5\*)—REMEDY BY APPEAL—ELECTION CONTESTS.

A refusal of the trial court in an election contest to order a recount of the ballots will not be reviewed by certiorari on the ground that the remedy by appeal authorized by Rem. & Bal. Code, § 4956, is not adequate because of the delay in hearing the appeal, where, although the contestee will take and hold office before the appeal can be heard, it does not appear that his term will expire, since the remedy is as adequate as in any other case, and the Legislature must be presumed to have considered it adequate.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

## 2. ELECTIONS (§ 305\*)—CONTESTS—APPEAL—RECORD—PHYSICAL AND DOCUMENTARY EVIDENCE.

On an appeal in an election contest to review the refusal of the trial court to order a recount, the ballots may be preserved and made exhibits in the case, notwithstanding the provision of Rem. & Bal. Code, § 4923, requiring their destruction at the end of six months, since rejected evidence may be preserved in the statement of facts the same as that received.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.\*]

## 3. CERTIORARI (§ 5\*)—REMEDY BY APPEAL.

Certiorari will not lie where the remedy by appeal is adequate.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

## 4. ELECTIONS (§ 269\*)—ELECTION CONTESTS—PROCEDURE.

Election contests rest solely on statute, and are governed by the provisions of the statute providing therefor.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.\*]

Mount, C. J., and Fullerton, J., dissenting.

En Banc. Certiorari by the State, on the relation of Andrew J. Quigley, against the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Superior Court for King County and others. On motion to quash writ. Motion granted and writ denied.

Geo. H. Rummens, of Seattle, for plaintiff. W. H. White, Kitt Gould, and Edgar C. Snyder, all of Seattle, for respondents.

ELLIS, J. On December 13, 1912, the relator procured upon ex parte application a writ of certiorari to review the proceedings of the superior court of King county in an action to contest an election. On the return day fixed by the writ, the respondent Byron Phelps moved to quash the writ on the ground of lack of jurisdiction. Briefly, the ruling sought to be reviewed is the action of the trial court in refusing to order a recount of the ballots until some proof aliunde the ballot boxes should be made tending to impeach the regularity or integrity of the official count and canvass.

[1, 2] It is contended that certiorari will not lie, because the statute governing election contests accords an adequate remedy by appeal. Rem. & Bal. Code, § 4956. The relator argues that the remedy by appeal would not be adequate, for the reason that the contestee would take office on January 13, 1913, and would hold the office a number of months before an appeal could be heard, and that the six months during which the ballots will be preserved under the statute (Rem. & Bal. Code, § 4928) would expire, and the ballots would be destroyed before a retrial could be had. This argument is not convincing. The same result would follow in every case of election contest if it would follow in this case, and the section of the statute giving the appeal would be nugatory. But no such result need follow in any case. Documentary and physical evidence when properly offered may, although rejected, be preserved, and made exhibits in the case. The same facilities exist for the preservation in the statement of facts of evidence offered and rejected as of that received. The remedy by appeal would be as adequate in this as in any other election contest. The delay would be no greater than in an appeal in a case of any other character, and we have repeatedly held that the delay incident to an appeal cannot be regarded as affecting the adequacy of the remedy. *Jones v. Paul*, 56 Wash. 355, 105 Pac. 625; *State ex rel. Young v. Denney*, 34 Wash. 56, 74 Pac. 1021; *State ex rel. Nelson v. Superior Court*, 31 Wash. 32, 71 Pac. 601; *State ex rel. N. P. Ry. Co. v. Superior Court*, 46 Wash. 303, 89 Pac. 879; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648.

[3] Where the remedy by appeal is adequate, certiorari or other extraordinary remedy will not lie. *State ex rel. Coplen v. Superior Court*, 66 Wash. 225, 119 Pac. 383; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Washington*

*Dredging, etc., Co. v. Moore*, 21 Wash. 629, 59 Pac. 505; *State ex rel. Hibbard v. Superior Court*, 21 Wash. 631, 59 Pac. 505; *State ex rel. Townsend G. & E. L. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933. The Legislature in enacting section 4956, providing the remedy by appeal in election contests in the very same statute allowing a contest, must be presumed to have considered that remedy adequate in such cases. To hold that it is inadequate in this case is to hold that it is inadequate in any such case. It is, in effect, to repeal the statute, and declare a policy contrary to that expressly declared by the Legislature upon a subject clearly within its province. The decisions of this court cited by the relator are not pertinent to the case here. *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Royse v. Superior Court*, 46 Wash. 616, 91 Pac. 4, 12 L. R. A. (N. S.) 1010, 123 Am. St. Rep. 948, 13 Ann. Cas. 870. In each of these cases the remedy by appeal was held inadequate because, and only because, the term of office would expire before the hearing on appeal could be had. No such condition is found in the case before us. The other case cited—*State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385—rests upon the same ground, namely, that the remedy by appeal was inadequate to preserve the fruits of the litigation if won.

[4] The proceedings in contest here presented are not in quo warranto, either as at common law or as given by our analogous statutory action. The right to a contest such as here sought to be reviewed rests solely upon, and is governed by, the provisions of the particular statute providing therefor. Rem. & Bal. Code, §§ 4941-4957, inclusive. The section giving the remedy by appeal has never been repealed either expressly or by implication. To entertain this writ, in the absence of anything distinguishing the proceeding from other election contests brought under the statute, would be a gratuitous assumption of the legislative function.

The motion to quash is granted, and the application is denied.

PARKER, CROW, MAIN, MORRIS, CHADWICK, and GOSE, JJ., concur.

FULLERTON, J. (dissenting). I am unable to concur either in the opinion announced by Judge ELLIS or in the judgment which the majority of the court think proper to render in this case. The statute thought to require judgments entered in election contests to be brought to this court by appeal only was first enacted by the territorial Legislature in 1866. It was re-enacted in the form of a Code by the territorial Legislature of 1881, and published in the Code of that year known as the Code of 1881. Since that time it has been carried forward

by the codifiers of the laws of Washington into the several codes, without change of verbiage except to substitute the term "Superior Court" for the term "District Court," wherever such term appeared in the act. The statutes relating to appeals were changed and modified a number of times by the territorial Legislature between the years 1866 and the change from the territorial form of government into statehood, and twice since that time. The changes made in the statutes during this period in this respect were radical. Indeed, there is scarcely any resemblance between the present statute relating to appeals and the statutes relating thereto of 1866 or 1881. It has seemed to me, therefore, that if the term "appeal" as used in the statute of 1866, or Code of 1881, ever had any technical significance, it has lost it by the subsequent repeal of the statutes to which it did relate and the enactments of new and different statutes called statutes of appeal. In other words, inasmuch as the right and method of contesting an election was statutory, rendering it necessary to provide for a review in the higher court from the judgment of the court of original jurisdiction if such review was to be had, the Legislature used the term "appeal" in the sense of "review," and not in the sense of making a distinction between two forms or methods of review that might thereafter be provided. This being the true meaning of the statute, the court should give it effect by allowing reviews in this court for election contests by a writ of review whenever the remedy by appeal is not plain, speedy, or adequate. That the remedy by appeal in this instance does not afford a plain, speedy or adequate remedy seems to me to be incontrovertible. The delays incident to the fact that this court can hear appeals only at regular sessions, and the delays incident to the procedure itself, even if pursued with the utmost diligence, will hardly render it impossible to have a final determination of this case before the term of the officer whose right is sought to be contested expires. Other reasons might be given, but this fact alone to my mind shows that the remedy by appeal is inadequate.

The case should therefore be determined upon its merits.

MOUNT, C. J., concurs.

#### McALLISTER v. CHAMBERS.

(Supreme Court of Washington. Jan. 7, 1913.)

#### PAYMENT (§ 70\*) — EVIDENCE — FINANCIAL CONDITION.

In an action against the decedent's estate on a note more than 20 years overdue, evidence that deceased before his death was financially able to pay the note and was loaning

money, and before his death had divided his property among his children, one of whom was wife of plaintiff, and the payments made by a transfer of property were as principal, and not interest on the note, was admissible as tending to show payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 203-218; Dec. Dig. § 70.\*]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by H. B. McAllister against Robert L. Chambers, as administrator of the estate of Frederick Meyer, deceased. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

Gordon, Easterday & Askren and M. S. Lindsay, all of Tacoma, for appellant. H. W. Lueders, of Tacoma, for respondent.

MOUNT, C. J. The plaintiff brought this action in January, 1912, to recover upon a promissory note executed by Frederick Meyer in his lifetime. The note was executed by the deceased on September 15, 1890, for \$1,200, and made payable to the plaintiff 30 days after date, with interest at 10 per cent. per annum. The complaint alleges that on November 11, 1890, interest was paid on the note to November 11, 1896; that on August 1, 1906, interest was paid to that date, and on August 1, 1910, interest was paid to August 1, 1911; that no further payments were made on the note; that after the death of the maker on June 23, 1911, Robert L. Chambers was appointed administrator for Mr. Meyer's estate; that a claim was filed for the amount of the note, and rejected by the administrator October 29, 1911. The prayer of the complaint is for \$1,200, with interest at 10 per cent. per annum since August 1, 1911. The defendant, for answer, denied the note upon information and belief and, as affirmative defenses, alleged (1) that if the deceased made the note in his lifetime it was fully paid by him prior to his death, and (2) that the action is barred by lapse of time. At the trial of the case the defendant sought to show that the deceased, after the execution of the note and before his death, was financially able to pay the note, and was loaning his own money at rates of interest varying from 6 to 8 per cent. per annum, and prior to his death Mr. Meyer assembled his children and divided his property among them; one of them being the wife of plaintiff. Defendant also offered entries in a book, made by deceased at the time of the payments, for the purpose of showing that the payments made by transfer of property were not made as interest payments, but were paid upon the principal. This evidence was all excluded at the trial, and the jury directed to find a verdict for the plaintiff.

We think all this evidence should have been received. These facts, if true, were circumstances tending to show payment. The maker of the note was dead. The note was more than 20 years old before suit was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

brought upon it. At about the time it became due, 6 years' interest was paid in advance upon it, and after the expiration of that period no payment was made until 1906, 16 years later, when 10 years' interest was paid, equaling the face of the note. It is possible that interest payments were made as stated, but such facts would depend somewhat upon the business character and financial condition of the maker of the note. The circumstances offered reasonably tended to rebut the evidence that the note was not paid. In *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884, we said: "In a trial of a case any circumstance is admissible which reasonably tends to establish the theory of the party offering it, or to explain, qualify, or disprove the testimony of his adversary. When death has stilled the lips of one of the parties to the transaction, and demand is being asserted against his estate, his representative should be permitted to combat the claim with any circumstance reasonably tending to shed light upon the transaction in controversy." We think this is applicable to the case presented here, and that the evidence should have been received and the case submitted to the jury.

The judgment is therefore reversed, and the cause remanded for a new trial.

MORRIS, ELLIS, FULLERTON, and MAIN, JJ., concur.

### BACKUS v. FEEKS et al.

(Supreme Court of Washington. Jan. 6, 1913.)

#### 1. FRAUDS, STATUTE OF (§ 123\*)—CONTRACTS—LEASES.

A parol lease for a term exceeding a year, where lessee has taken possession with lessor's consent, is enforceable as a tenancy from month to month, not being wholly void.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 272-274; Dec. Dig. § 123.\*]

#### 2. FRAUDS, STATUTE OF (§ 143\*)—SURETYSHIP CONTRACT—EFFECT OF TERMINATION OF PRINCIPAL CONTRACT.

An instrument executed by the sureties of a lessee recited the execution of a five-year lease which contained certain "covenants, agreements and obligations to be kept and performed" by lessee, and continued that if lessors "shall at all times in every particular keep and perform in every way all the covenants, agreements and obligations in said lease contained and at the expiration or earlier determination of said lease, return the property therein demised" to lessor in the condition provided and save himself harmless against all loss arising by reason of the execution of the lease, the obligation should be void. *Held* that, though the lease was voidable under the statute because unacknowledged and for a longer term than a year, the suretyship contract contemplated that lessee should pay the rent for the full term, so that the sureties were liable where lessee took advantage of his legal rights

to consider the tenancy as one from month to month and terminated it by a month's notice.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 344-350; Dec. Dig. § 143.\*]

#### 3. GUARANTY (§ 5\*)—INVALIDITY OF ORIGINAL OBLIGATION.

A guaranty contract may stand by itself, though the obligation guaranteed is invalid; the question of whether the guarantor's liability is measured by that of the principal debtor being largely a matter of the construction of the guaranty contract.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 7; Dec. Dig. § 5.\*]

#### 4. FRAUDS, STATUTE OF (§ 143\*)—PERSONS ENTITLED TO ASSERT.

The statute referring to the execution of leases for a longer term than a year is merely a statute of frauds, so that a surety of the performance of the obligations of a lease voidable under the statute because unacknowledged, and for longer than a year, cannot take advantage of the statute to avoid his liability; the defense of the statute of frauds being personal to the principal.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 344-350; Dec. Dig. § 143.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Manson F. Backus against A. S. Feeks and William H. Ruttle. From a judgment for plaintiff, defendant Ruttle appeals. Affirmed.

Murphy & Wall, of Seattle, for appellant. Higgins & Hughes and Hyman Zettler, all of Seattle, for respondent.

GOSE, J. On the 25th day of September, 1909, the plaintiff, his wife uniting, executed to H. N. Winters and Mamie Winters, his wife, an unacknowledged lease upon the Manhattan building in the city of Seattle, to run for a period of five years from the 1st day of October following. The lessees covenanted and agreed to pay as rental therefor \$1,050 on the 1st days of October, November, and December, 1909; \$1,500 on the 1st day of January, 1910, and on the 1st day of each month thereafter to and including the 1st day of September, 1910; \$1,600 on the 1st day of October, 1910, and the same amount on the 1st day of each month thereafter to and including the 1st day of September, 1911; \$1,700 on the 1st day of October, 1911, and a like amount on the 1st day of each month thereafter to and including the 1st day of September, 1914. On the 29th day of September, 1909, the lessees, as principals, and A. S. Feeks and William H. Ruttle, as sureties, gave to the plaintiff their joint and several bond, which recites the execution of the lease; that the lease contains certain "covenants, agreements and obligations to be kept and performed" by the lessees, and provides: "Now therefore, if the said H. N. Winters and Mamie Winters, his wife, their heirs, executors, or administrators, shall at all times and in every particular keep and perform in every way all the covenants,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

agreements and obligations in said lease contained, and at the expiration or earlier determination of said lease return the property therein demise to the said M. F. Backus and wife in a condition provided in said lease and at all times hereafter indemnify and save harmless the said Backus and wife against all loss, damage or costs arising by reason of the execution of said lease, then this obligation shall be void." The lease and bond were delivered simultaneously on September 29th and the lessee took possession of the leased premises on October 1st and remained in possession until April 6th following, when he abandoned the premises without notice to the landlord. On the 15th day of April the receiver appointed by the state court took possession of the premises, and on the 26th day of April delivered possession to the trustee in bankruptcy appointed by the federal court. On the 6th day of May the referee in bankruptcy directed the receiver to surrender the premises to the plaintiff and to disclaim and abandon the lease, and on that day the plaintiff resumed possession of the premises. The rent for the months of March, April, and May, amounting to \$4,500, was then due under the terms of the lease, and had not been paid. Thereafter and on the 3d day of June, the plaintiff leased the premises to a third party for a term of five years upon a rental that will result in a loss to him of an amount largely in excess of the penalty of the bond. The court found that the rental reserved in the last-named lease was the full market rental value of the premises at that time, and that the lease was expeditiously made. This action was thereafter instituted by the plaintiff to recover from the sureties the amount named in their bond, to wit, \$5,000. A judgment was entered against them for that amount, and the defendant Ruttle has appealed.

[1] He contends that the lease, being unacknowledged and for a term exceeding one year, is void under our statute, and hence that there is no cause of action on the bond. While the lease was not enforceable other than as a tenancy from month to month, it was not void, but valid and binding until terminated by the statutory notice. In *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871, 132 Am. St. Rep. 1071, we said that a parol lease of real property for a period longer than one year, where the lessee had taken possession with the consent of the lessor, "is only voidable." In *Koschnitzky v. Hammond Lumber Co.*, 57 Wash. 320, 106 Pac. 900, in considering the effect of an unacknowledged lease of real property for a term exceeding one year, we said, "So that it will be seen that the statute does not make the lease void in toto"; but that, in the absence of such equities as would work an estoppel, it would create a tenancy from month to month or from period to period on which

rent was payable, terminable by giving proper notice. In *Anderson v. Frye & Bruhn*, 124 Pac. 490, we held, that an unacknowledged lease of real property for the term of one year "with the privilege of two years' renewal," at a stipulated monthly rental, created a paper tenancy for a period exceeding one year; that it was not enforceable as a lease for one year only, but that it was a lease from month to month, and terminable by either party upon his giving the notice provided by the statute. Rem. & Bal. Code, § 8808. The language of the opinion is that the lease was "void and unenforceable" as a lease for one year, in that it created a privilege of renewal for a period beyond one year, and that "the tenancy under which appellant was in possession of the property prior to October 1, 1910, was terminated on that day by notice and vacation." In *Snyder v. Hardy*, 38 Wash. 666, 80 Pac. 789, it was held that one in the possession of real property under a defective lease, but with the implied consent of the owner, was not a wrongdoer, but a tenant from period to period upon which the rent was payable, and that the rental reserved in the lease was the measure and the limit of the tenant's liability. The rule of construction underlying these cases is that, where there has been an attempt to let real property for a period exceeding a year by means of an unacknowledged written lease, and the lessee has gone into possession with the express or implied consent of the owner, a tenancy from month to month or from period to period upon which rent is payable is created, and that the tenancy is terminable by the statutory notice given by either party to the other. It is apparent from a reading of these cases that the word "void" is used as the legal equivalent for unenforceable, and all that we have held is that, where the lease is for more than a year and unacknowledged, if the tenant has gone into possession, he becomes a tenant from month to month or from period to period upon which rent is payable, and that his tenancy is terminable under the provisions of Rem. & Bal. Code, § 8803.

[2] The sureties by the terms of the bond guaranteed: (1) That the lessees should perform the "covenants, agreements and obligations" contained in the lease; and (2) that they would "indemnify and save harmless the said Backus and wife against all loss, damage, or costs arising by reason of the execution of said lease." The essential inquiry here is, as indeed it is in all cases: What was the intention of the parties? Obviously their intention was that the lessees should keep their covenants as they were written; that is, that they should pay the rent for the full leasehold period. It was not contemplated that they might hold possession under the lease for a month or more, and then give the statutory notice of their in-

tention to vacate the premises and thus discharge the sureties from any liability on the bond other than the payment of the rent then accrued. While the lease is not enforceable except as a lease from month to month, it was not an immoral contract, or an illegal one in the sense that it violated any rule of public policy, and hence the parties were at liberty to mutually keep their covenants.

[3] In treating of the exceptions to the rule that the extent of the liability of the principal debtor measures and limits the liability of the surety, in 20 Cyc. 1421, the following view is announced: "Important exceptions to the above rule exist which must not be overlooked. They are found in those cases where the defect is not in the contract itself but pertains to those matters which are personal to the principal debtor; or they may arise from causes which originate in the law. A guaranty of an existing contract may stand by itself, although the obligation guaranteed is invalid; and it will usually be found that, where the fact that the supposed principal debtor is not bound is held to be a defense on behalf of the guarantor, such fact has also resulted in a failure of consideration for the contract of guaranty, or that such contract has been brought about by fraud or has been entered into under a mutual mistake. And as the guarantor may by the terms of his contract make himself liable for the principal debt, although it be invalid, the question of whether the liability of a guarantor is to be measured by the liability of the principal debtor is largely a matter of interpretation of the contract of guaranty." This principle finds support in the following cases: *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208; *Yorkshire Ry. Wagon Co. v. McClure*, 19 Ch. Div. (L. R.) 1881-2, 478; *Robbins v. Robinson*, 176 Pa. 341, 35 Atl. 337; *Mason v. Nichols*, 22 Wis. 376; *Klessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Slocum v. Taylor*, 8 Serg. & R. (Pa.) 399; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382; *Mitchell v. Hydraulic, etc., Co.*, 129 S. W. 148.

In *McLaughlin v. McGovern* the lessees entered into and remained in possession of the leased premises, but only one of them signed the lease. The defendant guaranteed "the fulfillment [by the lessees] for the part of this agreement to be performed by them," and was held liable on the guaranty. The court said: "What is the obligation assumed by the defendant in this case? It is not that Reynolds and Tague shall execute the lease, but that they shall fulfill the engagements contained in the instrument upon which his guaranty was indorsed." In

the *McClure* Case it was held that the lender may recover against the sureties although the loan was made to a railway company which could not borrow. The same principle was announced in *Robbins v. Robinson*, and in *Mason v. Nichols*. In *Klessig v. Allspaugh*, the sureties upon a contractor's bond were held liable, notwithstanding the fact that the contract itself was "wholly void" because not filed with the recorder as required by statute. The court said that, although the contract could not be enforced because not recorded, "the contractor might nevertheless perform, and the plaintiff could accept such performance and neither be guilty of any wrong in so doing." A like principle was announced in *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576. In *Slocum v. Taylor*, it was held that a surety on a bond conditioned for the performance of an award of arbitrators was liable, although the award was given in an action instituted before a justice of the peace for an amount exceeding his jurisdiction, and his judgment had been reversed. In *Kyger v. Sipe*, it was held that the surety was liable upon his bond where the principal, an infant, had disaffirmed and was therefore discharged. In *Davis v. Statts*, a like rule was applied to the sureties upon the note of a married woman who was discharged upon her plea of coverture. In *Mitchell v. Hydraulic, etc., Co.*, it was held that the sureties upon a bond, given by a private corporation as security for the fulfillment of a building contract void as to it because in excess of its powers as defined by its charter, were liable.

[4] There is another reason for affirming the judgment. Our statute in reference to the execution and construction of leases is a statute of frauds only. In *First Presbyterian Church v. Swanson*, 100 Ill. App. 39, it was held that the defense of the statute of frauds was a privilege personal to the principal, and that the sureties upon a contractor's bond may not invoke the statute on account of the failure of their principal to sign the contract secured by the bond. 20 Cyc. 306, states that this is almost the universal rule.

The appellant relies upon the rule stated in 1 Brandt on Suretyship Guaranty (3d Ed.) § 163: "A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are *inherent* to the debt; not those which are personal to the debtor"—insisting that the obligation of the sureties in the case at bar is "inherent to the debt." We are not able to agree with this contention.

The judgment is affirmed.

MOUNT, C. J., and PARKER, CROW, and CHADWICK, JJ., concur.

**GORHAM-REVERE RUBBER CO. v.  
BROADWAY AUTOMOBILE CO.**

(Supreme Court of Washington. Jan. 21,  
1913.)

**1. APPEAL AND ERROR (§ 47\*)—“AMOUNT INVOLVED”—HOW DETERMINED.**

The original amount sued for, and not the amount of the judgment determines the Supreme Court's jurisdiction of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-225; Dec. Dig. § 47.\*

For other definitions, see Words and Phrases, vol. 1, p. 378.]

**2. APPEAL AND ERROR (§ 51\*)—AMOUNT INVOLVED—EFFECT OF COUNTERCLAIM.**

A counterclaim for more than \$200 authorizes an appeal by either party, although the amount demanded is less than \$200 if the appeal involves a review of the ruling on the counterclaim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 237, 267; Dec. Dig. § 51.\*]

**3. APPEAL AND ERROR (§ 51\*)—AMOUNT INVOLVED—EFFECT OF COUNTERCLAIM.**

Where the trial court dismissed both the complaint and the counterclaim and plaintiff alone appeals, the Supreme Court has no jurisdiction where the amount claimed in the complaint was less than \$200, although the counterclaim was for more than that amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 237, 267; Dec. Dig. § 51.\*]

**4. APPEAL AND ERROR (§ 51\*)—AMOUNT INVOLVED—EFFECT OF COUNTERCLAIM.**

Where no affirmative judgment is rendered on a counterclaim, but the result of the suit is simply to defeat plaintiff's claim, his right to appeal depends on the amount put in controversy by the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 237, 267; Dec. Dig. § 51.\*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Gorham-Revere Rubber Company against the Broadway Automobile Company. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Leopold M. Stern and J. W. Russell, both of Seattle, for appellant. Hughes, McMicken, Dovell & Ramsey and France & Helsell, all of Seattle, for respondent.

**ELLIS, J.** The plaintiff, a California corporation as successor in interest to Gorham Rubber Company, also a California corporation, brought this action in February, 1911, to recover for goods sold to the defendant at an agreed price of \$157.25. The complaint set up the plaintiff's incorporation, payment of its annual license fee, sale of the goods, and nonpayment therefor. The defendant by an amended answer put in issue the incorporation of the plaintiff and the payment of its license fee, denied the sale, denied failure to pay, and set up a counterclaim for \$557.85. The counterclaim was put in issue by the reply. The cause came on for trial by the court without a jury on December 5, 1911. The plaintiff, being then un-

prepared to prove payment of the corporate license fee, was permitted to proceed with the trial, upon condition that it would procure and present a duplicate receipt for the necessary fee within two days. At the trial the defendant admitted the purchase of the goods and the failure to pay for the same. The plaintiff put in evidence a certificate of the filing of its articles of incorporation in the office of the Secretary of State in this state, and a certificate showing that it had appointed an agent in this state, and evidence that it had opened an office and was doing business in this state. Evidence was also taken as to defendant's counterclaim. The court found against the defendant upon its counterclaim, and ordered judgment in favor of the plaintiff for the amount demanded in its complaint. On December 18, 1911, the plaintiff offered in evidence a duplicate receipt for its corporation license fee for the fiscal year beginning July 1, 1911. This on objection was excluded, on the ground that it did not cover the fiscal year in which the action was begun. The plaintiff requested sufficient time to procure a duplicate receipt for the fiscal year beginning July 1, 1910. The request was denied and the action was dismissed. The plaintiff appeals.

The respondent moves to dismiss the appeal, on the ground that the amount in controversy does not exceed \$200. It is, of course, admitted that, but for the respondent's counterclaim which exceeded \$200 in amount, the motion would be well taken, since the amount sued for in the complaint was far short of \$200. The appellant contends however, that the original amount in controversy was the amount of its claim plus the amount of the counterclaim. The exact question here presented has never been decided by this court.

[1] In several cases we have held that the original amount sued for, and not the amount of the judgment recovered, determines the question of jurisdiction. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Bleecker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Trumbull v. School District*, 22 Wash. 631, 61 Pac. 714; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378.

[2] We have also held that, upon an appeal by a defendant, he occupies substantially the position of a plaintiff appealing from an adverse judgment, and that the amount claimed by him in a counterclaim becomes the appellate amount in controversy, and, if over \$200, confers jurisdiction though a less amount was sued for by the plaintiff in his complaint. *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440, citing 1 Ency. Pl. & Pr., p. 734, and *Sorrill v. McGougan*, 44 Wash. 558, 87 Pac. 825. In such a case, upon the principle of mutuality of remedy, the plaintiff would also have the right of appeal. The amount of the counterclaim being involved

in the appeal would, if over \$200, confer jurisdiction for an appeal by either side.

[3] Here, however, the defendant has not appealed, but has acquiesced in the ruling dismissing its counterclaim, thus in effect abandoning and eliminating the counterclaim from the controversy. The plaintiff has appealed from a judgment dismissing his action; his original claim being for less than \$200. The original amount in controversy on the issue raised by the complaint is all that is, or can be, involved in this appeal. Neither party could appeal from the judgment without excepting to the ruling on, and preserving the issue raised by the counterclaim, which neither party has done in this case. The appellate jurisdiction of this court is determined by the original amount of the controversy involved here, not by what might have been involved had the appeal sought a review of the ruling on the counterclaim. An analogous situation was presented in *Puyallup Light, Heat & Power Co. v. Stevenson*, 21 Wash. 604, 59 Pac. 504, in which it was held that where, subsequent to an appeal in an action for unlawful detainer and damages, the possession of the premises was surrendered, leaving but the amount of damages in controversy which amount was less than \$200, this court cannot entertain jurisdiction. The holding in that case is obviously based upon the fact that the original amount in controversy upon the issue sought to be reviewed was less than the jurisdictional amount for appeal.

[4] A careful consideration of this question leads us to the conclusion that the correct rule in such a case as this is that laid down in 2 Cyc. p. 572, as follows: "Where no affirmative judgment is rendered in favor of defendant upon a counterclaim, but the result of the suit is simply to defeat plaintiff's claim, his right to appeal depends upon the amount put in controversy by his complaint." See, also, *Pickett v. Hollingsworth*, 6 Ind. App. 436, 33 N. E. 911.

The appeal is dismissed.

MOUNT, MORRIS, FULLERTON, and MAIN, JJ., concur.

#### RICHARDS v. BUSSELL et al.

(Supreme Court of Washington. Jan. 8, 1913.)

Supplemental opinion on recall of remittitur. Judgment corrected, and cause remanded with directions to set aside judgment in part as stated.

For former opinion, see 127 Pac. 198.

Bausman & Kelleher, of Seattle, and Graves, Kizer & Graves, of Spokane, for plaintiff. G. E. De Steiguer and Preston & Thorgrimson, all of Seattle, for respondents.

PARKER, J. In this case the Dexter Horton National Bank was made a defendant, because of a mortgage given to it by Bussell and wife upon the tide lands here involved to secure indebtedness owing by them to it. By its answer and cross-complaint the bank sought to foreclose this mortgage, and also sought foreclosure of another mortgage upon other real property and a pledge of certain personal property given by Bussell and wife to it as additional security for the same indebtedness. The trial court, in its final judgment and decree, awarded judgment in favor of the bank against Bussell and wife for this indebtedness, and decreed foreclosure of the mortgage and pledge of property other than the tide lands involved as well as decreeing foreclosure of the tide land certificates against the tide lands. The appeals of both Richards and Bussell and wife were taken only from so much of the final judgment and decree as awarded foreclosure of the tide land certificates. In our opinion in this case (127 Pac. 198) we inadvertently omitted mention of these facts, and our direction therein to the superior court might be construed as a direction to set aside the final judgment and decree in so far as it awarded judgment and foreclosure against Bussell and wife in favor of the bank upon property other than the tide lands, as well as that portion thereof awarding foreclosure against the tide lands. We did not intend that our disposition of the cause should be so construed.

The remittitur having been recalled for the purpose of making our decision more certain in this respect, we now direct that the cause be remanded to the trial court, with directions to set aside its final judgment and decree only in so far as it awards foreclosure of the tide land certificates against the tide lands involved, and that there be entered a decree of foreclosure against the tide lands in accordance with the views expressed in our opinion. In so far as the final judgment and decree awards judgment against Bussell and wife in favor of the bank, and foreclosure of the mortgage and pledge given to the bank of property other than the tide lands here involved, the final judgment and decree will remain undisturbed.

MOUNT, C. J., and CROW, ELLIS, GOSE, MORRIS, and FULLERTON, JJ., concur. MAIN, J., took no part.

#### GOODFELLOW v. FIRST NAT. BANK.

(Supreme Court of Washington. Jan. 18, 1913.)

1. PARTIES (§ 7\*)—CAPACITY TO SUE—"TRUSTEE OF EXPRESS TRUST."

A loan broker, who deposited his client's money in a bank in his own name as agent, and delivered his checks, as agent, for the amount of a loan, was entitled to sue in his own name for the amount of such checks, they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

having been paid on the payee's forged indorsement, under Rem. & Bal. Code, § 179, requiring every action to be prosecuted in the name of the real party in interest, except as otherwise provided, and section 180, authorizing the trustee of an express trust to sue without joining the person for whose benefit the suit is prosecuted, and defining "trustee of an express trust" as including a person with whom or in whose name a contract is made for the benefit of another.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 9-11; Dec. Dig. § 7; Contracts, Cent. Dig. § 1596.]

For other definitions, see Words and Phrases, vol. 8, pp. 7134-7136.]

## 2. BANKS AND BANKING (§ 148\*)—CHECKS—PAYMENT OF FORGED PAPER.

P. applied to a loan broker for a loan, representing that he was the agent of B., and obtained such loan by producing a note and mortgage to which B's name was forged. The broker drew checks for the amount of the loan to the order of B., and delivered them to P. *Held*, that payment of the checks by the bank to P. on B's forged indorsement was not justified on the theory that P. was the payee intended.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.\*]

## 3. BANKS AND BANKING (§ 148\*)—CHECKS—PAYMENT OF FORGED PAPER.

Where a person obtained a loan, representing that he was the agent of another, and received checks for the amount of the loan to the order of his principal, the drawer of the check did not vouch to the bank for such alleged agent's authority to indorse the name of the payee thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.\*]

## 4. BANKS AND BANKING (§ 148\*)—CHECKS—PAYMENT OF FORGED PAPER.

It is the duty of a bank, on which a check is drawn payable to a certain person or order, to ascertain the identity of the person therein named as payee; and payment to any other person is justified only where the bank has been misled by the negligence or other fault of the drawer.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.\*]

Department 2. Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by John Goodfellow against the First National Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Vince H. Faben, of Seattle, for appellant. Peters & Powell, of Seattle, for respondent.

**MAIN, J.** This is an action brought by the respondent to recover from the appellant funds which he claims to have had on deposit in appellant's bank, and which were paid out upon a forged indorsement. During the months of August and September, 1910, and for a considerable time prior thereto, the respondent was engaged in real estate and loan brokerage business at Seattle, Wash. With him was associated his son, H. A. Goodfellow. An account was kept in the appellant's bank under the name of John Goodfellow,

agent. Upon this account H. A. Goodfellow, the son, had authority to draw checks. Some time during the month of August, 1910, one D. M. Peeples sought from H. A. Goodfellow a loan in the sum of \$5,000 for one Martha B. Barnes and her husband, whom he stated were clients of his, and desired the money principally for the purpose of paying local assessments and taxes upon the real estate offered as security. One Sieburn was a client of respondent's office at the time, and had money to loan. Upon making an examination of the land offered as security, Sieburn indicated his willingness to make the loan. An abstract of title was thereupon delivered to H. A. Goodfellow by Peeples. Goodfellow, upon a casual examination of the abstract, noticed that the property stood in the name of Martha B. Barnes and her husband, W. H. T. Barnes, and thereupon asked Peeples the residence of the parties owning the land. Peeples stated that the Barneses formerly lived at Blaine, Wash., but had recently moved to Portland, Or. The Goodfellows, both father and son, had known the Barneses, who formerly lived at Fremont in Seattle, for something over 20 years, but had had no communication with them for 10 years prior to this time. H. A. Goodfellow thereupon addressed a letter to W. H. T. Barnes at Blaine, Wash., inquiring if he desired a loan of \$5,000 upon the land covered by the abstract. This letter was received by Barnes, but he made no reply thereto. Immediately after the delivery of the abstract by Peeples to Goodfellow, it was turned over to the attorney for Sieburn for examination. The title being approved, a note and mortgage for the sum of \$5,000, made out ready for signature, were delivered to Peeples by H. A. Goodfellow, in order that he might have his clients, the Barneses, execute the same. In the course of a few days Peeples returned to Goodfellow, in his office, the note and mortgage, which purported to have been executed by the Barneses at Portland, Or. Thereupon Sieburn was communicated with, and the following day Sieburn, Peeples, and Goodfellow met at the latter's office for the purpose of closing the transaction. Sieburn took the abstract and, with Peeples, went to the city hall, where, with his own check, Sieburn paid assessments against the property in the sum of approximately \$3,400. Sieburn and Peeples then returned to the office of Goodfellow. Sieburn caused the portion of the \$5,000 loan not consumed in the payment of assessments to be placed to the credit of John Goodfellow, agent, in the appellant's bank, and H. A. Goodfellow thereupon drew a check, payable to the order of Martha B. Barnes, for the sum of \$928.13, which check was signed "J. Goodfellow, Agent, by H. A. Goodfellow." This check was delivered to Peeples, and in the course of three or four days thereafter Peeples caused himself to be introduced at the Mercantile

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Bank in the city of Seattle, and thereupon presented the check, which at that time bore the following indorsement: "Martha B. Barnes, Dave Arlington, D. M. Peeples." The check was cashed by the bank, Peeples thereupon opening an account, and the sum of \$200 was deposited to his credit. The check passed through the clearing house, and was paid by the bank of the appellant; this bank relying upon the indorsement of the Mercantile Bank. A few days later, and on September 7th, a second check, for the sum of \$42.01, was made out, payable to the order of Martha B. Barnes, and delivered to Peeples. This check took substantially the same course as the preceding one, and was ultimately paid by the bank of the appellant. Some two weeks after these checks had been paid, it was discovered that the name of Martha B. Barnes on the back thereof was a forgery. It further appears from the evidence in this case that Martha B. Barnes and her husband, W. H. T. Barnes, had not been in the city of Portland at the time the note and mortgage purported to be executed there; neither had they executed the note or mortgage at any other time or place. Peeples was in fact not their agent. They had not authorized him, or any other person, to procure a loan for them. Subsequently the respondent drew his check for a sum sufficient to cover the amounts covered by the two checks on which the name of Martha B. Barnes was forged, and presented the same to the appellant's bank, where payment was refused. Thereupon this action was brought. The cause was tried to the court without a jury, and judgment rendered in favor of the respondent for the amount of the two checks in question, from which judgment the cause was brought here on appeal.

[1] The first contention of the appellant is that the plaintiff has no legal capacity to sue, for the reason that the suit was not brought in the name of the real party in interest. In support of this contention the appellant cites 1 Rem. & Bal. Code, § 179, which provides: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law." But the succeeding section 180 provides, among other things, that a "trustee of an express trust may sue without joining the person for whose benefit the suit is prosecuted," and then defines what a trustee of an express trust is, within the meaning of this section. Such definition is as follows: "A trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." The right of the appellant to bring the action in his own name, under section 180 of the Code, is amply supported by authority. *Citizens' National Bank of Dayton v. County of Columbia*, 23 Wash. 441, 63 Pac. 209; *Cremer v. Wimmer*, 40 Minn. 511, 42 N. W. 467; *Albany & Rensselaer, etc., Co. v.*

*Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982.

[2] The next question presented on this appeal is whether or not the checks in question were paid on the indorsement of the payee, which was intended by the drawer. In other words, did H. A. Goodfellow intend, when he delivered the checks to Peeples, that Peeples, or any person other than Martha B. Barnes, should indorse her name thereon? The appellant contends that he did, and supports this contention by the citation of the following authorities: *Emporia National Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171; *Maloney v. Clark*, 6 Kan. 82; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *United States v. Exchange Ntl. Bank (C. C.)* 45 Fed. 163; *Jamieson & McFarland v. Helm*, 43 Wash. 153, 86 Pac. 165. These are all cases where the payee of the check or bill was an impostor, assuming the name of some other person for the purpose of deception, imposition, and fraud. The impostor assumed to be, and by such assumption induced the drawer of the check or bill to believe that he was in fact, the person he claimed to be. The check or bill in each case was drawn payable to such impostor, and was intended by the drawer to be indorsed and cashed by him. The principle by which all of these cases are controlled is that, where the drawer of a check or bill makes it payable to a person who represents himself to be another, and delivers it to him, he thereby endows such impostor with authority to indorse and cash the check.

[3, 4] But this principle is not applicable in the instant case. Here the check was made payable to the order of an existing person, in whose name the title to the property covered by the mortgage stood, and it was delivered to Peeples as the agent of Mrs. Barnes. In such a case the drawer does not vouch for the right of the agent, or any other unauthorized person, to indorse the name of the payee upon the check. The law imposes upon the bank, on which a check is drawn payable to a certain person or order, the duty of ascertaining the identity of the person therein named as payee; and it is only when the bank has been misled by some act of negligence or other fault of the drawer that it will be justified in making payment of the check to any other than the person named therein as payee. We know of no authority against this proposition. In support of it, see *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 694, 114 Am. St. Rep. 595; *First Nat. Bank v. Pease*, 168 Ill. 43, 48 N. E. 160; *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43; *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; *First Nat.*

*Bank v. Farmers' & Mechanics' Bank*, 56 Neb. 149, 76 N. W. 430; *Armstrong v. National Bank*, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Russell v. First Nat. Bank of Hartselle*, 2 Ala. App. 342, 56 South. 868; *Western Union Telegraph Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115; *Mercantile Nat. Bank v. Silverman*, 148 App. Div. 1, 132 N. Y. Supp. 1017.

The third contention made by the appellant is that H. A. Goodfellow was negligent in the transaction in not ascertaining from the Barneses, before making the loan, whether or not they desired the loan in question. It is clearly the law, as the cases above cited show, that where the drawer of a check has been guilty of negligence, or there exist such facts as will work an estoppel upon him, he must suffer the loss, rather than the bank paying it upon a forged indorsement. The trial court found that the plaintiff, through H. A. Goodfellow, in negotiating the loan in question and in accepting the note and mortgage and in drawing and delivering the two checks payable to the order of Martha B. Barnes, exercised due and ordinary care; and that during the negotiations with Peoples there came to the notice of H. A. Goodfellow no fact or circumstance which would have caused an ordinarily prudent person to inquire into the authority of Peoples to represent Mrs. Barnes and her husband, or to suspect that Peoples was not authorized by the Barneses to negotiate the loan.

A reading of the statement of facts convinces us that these findings of the court are sustained by the weight of the evidence. The judgment will therefore be affirmed.

MOUNT, FULLERTON, MORRIS, and ELLIS, JJ., concur.

#### BROUNTY et ux. v. MAJORS et ux.

(Supreme Court of Washington. Jan. 21, 1913.)

#### APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A trial court's findings will not be disturbed on appeal if sustained by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-8982; Dec. Dig. § 1010.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by William J. Brounty and wife against Thomas E. Majors and wife. From the judgment, plaintiffs appeal. Affirmed.

Hathaway & Alston, of Everett, for appellants. Stiger & Dally, of Everett, for respondents.

MAIN, J. This is an action for the recovery of possession of real property and damages for the detention thereof. The cause was tried to the court, and the pivotal facts as found by the court are as follows: At the time of the commencement of this action, and for more than eight years prior thereto, the respondents were in possession of lot 6, block 12, McMahon's First addition to Arlington, Snohomish county, state of Washington. The respondents entered into possession of this lot under claim of right and in good faith, and during all the time were in open, notorious, exclusive, and adverse possession of the same. While in such possession, they placed upon the lot, subsequent to the 11th day of June, 1903, permanent improvements, which were at the time of the trial of the reasonable value of \$200. The trial court further found that the appellants were the owners of the lot, and that they were entitled to the possession thereof; that the reasonable rental value of the lot during the time of the occupancy of the same by the defendants was the sum of \$40. Thereupon the court entered judgment in favor of the respondents for the sum of \$160, and in favor of the appellants for the possession of the lot. From the judgment this appeal is taken.

Three grounds of error are urged: (1) The insufficiency of the evidence to sustain the court's findings with reference to the improvements; (2) that the amount allowed the appellants in the judgment as the rental value of the lot is less than the evidence warranted; and (3) that the respondents were mere trespassers, and therefore had no legal claim against the appellants for the permanent improvements to the lot.

Upon this appeal no question of law is presented. The findings of the trial court are specifically against the appellants on all points urged. From a reading of the record we are unable to say that the findings of the trial court are not sustained by the fair preponderance of the evidence.

The judgment will therefore be affirmed.

MOUNT, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

#### GOLDEN et al. v. PILCHUCK TRIBE NO. 42, IMPROVED ORDER OF REDMEN.

(Supreme Court of Washington. Jan. 21, 1913.)

#### 1. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASERS—NOTICE—CONSTRUCTION OF DEED—AMBIGUITY—EXTRINSIC CIRCUMSTANCES.

While, if the description in a deed is ambiguous, the situation of the parties at the time, the attending circumstances, and evidence of any construction put upon its language by the parties themselves may be considered in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

determining its meaning, such extrinsic matters can be considered as against a subsequent purchaser from the grantor only in so far as he was bound to take notice thereof at the time of his purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. § 230.\*]

**2. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASERS—NOTICE—DESCRIPTION OF PROPERTY CONVEYED.**

Although a grantor, who conveyed "his one-half undivided interest" in four lots and lots 19 and 20 in another block, owned only a one-half interest in the four lots and owned the whole of lots 19 and 20, the qualification of "one-half undivided interest" by "his" was insufficient, as against a subsequent purchaser of lots 19 and 20 from the grantor's administrator, to limit the application of that expression to the four lots and show that it was intended to convey the whole of lots 19 and 20, since the record of the title to lots 19 and 20 would not have shown that he owned only a one-half interest in the four lots, and hence the purchaser was not required to take notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. § 230.\*]

**3. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASERS—NOTICE—FACTS PUTTING ON INQUIRY.**

Where a deed was ambiguous as to whether it conveyed the whole or only a one-half interest in two lots, a subsequent purchaser from the grantor's administrator was not bound to take notice of the grantee's payment of the taxes on the whole tract as bearing on the proper construction.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

**4. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASERS—ADVERSE POSSESSION—NOTICE.**

The payment of taxes on the whole tract of land by one of two joint owners is not notice to strangers that the one paying the taxes claims title to the whole, nor that the co-owner is acquiescing in such claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

**5. DEEDS (§ 111\*)—CONSTRUCTION—CONSTRUING AGAINST GRANTOR.**

The rule of strict construction against the grantor has practical application where possession is taken under the deed, and also as applied to covenants, conditions, and limitations, but should be applied with caution in construing the description of the property conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315, 334, 335; Dec. Dig. § 111.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 388\*)—SALE OF REALTY—CAVEAT EMPTOR.**

Notwithstanding the rule of caveat emptor, a purchaser of unoccupied land from an administrator, where no rights of minors or incompetent persons are involved, may rely upon deceased's title as shown by the records to the same extent that any purchaser may so rely.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 388\*)—SALE OF LAND—BONA FIDE PURCHASER—DESCRIPTION OF PROPERTY CONVEYED.**

A grantor, who had previously conveyed an undivided one-half interest in lots 1, 2, 3, and 4 in block 623, conveyed "his one-half un-

divided interest in lots 1, 2, 3 and 4 in block 623 and lots 19 and 20 block 625"; there being no punctuation mark whatever before the words "and lots 19 and 20." *Held*, that as against a subsequent purchaser of the grantor's interest from the grantor's administrator, who was entitled to rely solely on the language of the deed, and who was not chargeable with notice of extrinsic circumstances, the deed conveyed only a one-half interest in lots 19 and 20.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.\*]

Gose, J., dissenting.

**Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.**

Action by Patrick Golden and another against Pilchuck Tribe No. 42, Improved Order of Red Men. Judgment for plaintiffs, and defendant appeals. Reversed, with directions to dismiss.

Coleman, Fogarty & Anderson, of Everett, for appellant. Cooley & Horan and R. Mulvihill, all of Everett, for respondents.

**PARKER, J.** The plaintiffs seek a decree quieting title as against the claim of the defendant to lots 19 and 20 in block 625, in the city of Everett. Findings and judgment being rendered in favor of the plaintiffs, the defendant has appealed.

The controlling facts are not in dispute and may be summarized as follows: Both the respondents and appellant claim title through Charles D. Sweeney, who in the year 1893 was the owner of the lots here involved, and also of lots 1, 2, 3, and 4 in block 623 in the city of Everett. In June of that year he conveyed to respondents an undivided half interest in lots 1, 2, 3, and 4 of block 623. Thereafter in January, 1896, he conveyed to respondents an interest in all of these lots by the following description: " \* \* \* Does by these presents grant, bargain, sell, convey and confirm unto the said parties of the second part, and to their heirs and assigns, the following described tract, lots or parcels of land, situate, lying and being in the county of Snohomish, state of Washington, and particularly bounded and described as follows, to wit: His one-half undivided interest in lots one (1) two (2) three (3) and four (4) in block six hundred twenty-three of Everett (623) and lots nineteen (19) twenty (20), block six hundred twenty-five (625) of Everett as shown upon the plat thereof filed for record in the county auditor's office in and for said county." Thereafter Charles D. Sweeney died, and thereafter in February, 1901, his administrator, in pursuance of an order of the superior court made in the administration of his estate, conveyed to Philip Young "all the right, title, interest and estate of the said Charles D. Sweeney, deceased, at the time of his death, \* \* \* in and to \* \* \* an undivided half interest in lots nineteen (19) and twenty (20) in block six

hundred and twenty-five (625), as shown upon the plat of Everett. \* \* \* Thereafter in June, 1905, through mesne conveyances, appellant acquired whatever title and interest in the lots passed to Philip Young by the conveyance from the administrator, and appellant has at all times since then claimed to be the owner of an undivided half interest in lots 19 and 20. It is to quiet title in respondents as against this claim of appellant that this action is prosecuted. The lots are vacant and unoccupied. No claim is made against the regularity of the proceedings leading up to, nor against the validity of, the administrator's deed to Philip Young, further than that Charles D. Sweeney had prior to his death parted with all of his title and interest to lots 19 and 20, and that therefore the administrator's deed conveyed no title or interest therein to Philip Young. No question is made against Philip Young and his grantees, including appellant, being purchasers for value and in good faith, except only in so far as they may be bound by the rule of caveat emptor as applied to purchasers at administrators' sales.

[1] The principal question here presented is: Did Charles D. Sweeney by his deed of January, 1896, to respondents, convey his entire title and interest in lots 19 and 20, or did he by that deed convey only an undivided one-half interest therein? This problem is to be solved by the language of the description of the interest conveyed by that deed, which, however, if ambiguous, may be aided by the then situation of the parties thereto, the attending circumstances, and evidence of any construction which the parties themselves put upon the language of the description: such extrinsic matters, however, to be considered in aid of such ambiguous description only in so far as appellant was bound to take notice of such extrinsic matters at the time of acquiring this deed in 1905. It is insisted by counsel for appellant that the words "his one-half undivided interest," as used in the description in the deed from Sweeney to respondent which we have above quoted, had reference to all of the lots there specified, and hence that only an undivided one-half of lots 19 and 20 passed to respondents by that conveyance; while counsel for respondents insist that such words had reference only to the lots 1, 2, 3, and 4, and that therefore the whole of the lots 19 and 20 passed to them by that conveyance.

Counsel for appellant invoke the general rule as stated in 13 Cyc. 638, as follows: "Where a deed conveys a moiety or undivided part of a piece of land and then proceeds with a description of other land without express words showing an intention to convey all the latter described land, the words of limitation used in describing the first-mentioned parcel will be construed as also applying to the latter." While this seems to be a fair statement of the law in general terms upon this subject, the decided cases have

dealt with facts so varying as to suggest caution in applying the rule without careful consideration of the particular language of the description involved. Among the decisions coming to our notice which lend support to appellants' contentions, the following are most worthy of notice:

In the early case of Hapgood v. Whitman, 13 Mass. 464, decided in 1816, there was involved a description in a conveyance much like that here involved. Both the facts involved and the conclusion reached in that case will be best understood by quoting therefrom as follows: "The action was submitted to the decision of the court on a case agreed by the parties, in which the whole question was whether by a certain deed, a copy of which was in the case, the tenant took the whole, or a moiety only, of the land in question. By that deed, the tenant's father, in consideration of the love and affection he bore to his said son, and his desire to see him comfortably settled in the world, granted to him in fee 'the one-half of the land hereafter described, both in quantity and quality, one-half of all the land contained within the bounds hereafter mentioned, namely, beginning,' etc. (particularly reciting the boundary lines), 'the one-half of the whole of said land, and one-half of the buildings on the same, except the dwelling house; and also one other piece of land, being meadow and upland, containing seven acres, more or less, and bounded as follows, namely, beginning,' etc.; the last-described piece being the land in question. \* \* \*

The words, *one-half of the land hereafter described, and one-half of all the land contained within the bounds hereafter mentioned*, necessarily apply to the land which is the subject of this suit; although these words are not repeated in that part of the deed which conveyed this particular lot. The terms *and also*, which introduce the description of the land in question, show that the same portion of the land was intended to be granted as of that described in the preceding part." The words "and also" as there used, connecting the descriptions of the tracts involved, are substantially of the same import as the word "and" used in the description here involved, connecting the designation of lots 19 and 20 with the prior designation of lots 1, 2, 3, and 4. Indeed, in this case the descriptions seem to be even more closely related, because here all of the lots are designated in a single clause without any punctuation whatever, while in the Hapgood Case the words "and also" were preceded by a semicolon.

In the case of Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400, dealing with a situation not unlike this, the court said: "The description of the estate conveyed by the deed from Abner to George Knight is 'one undivided moiety or half part of a certain lot or tract of land situate in Northport aforesaid, and butted and bounded as fol-

lows, viz.' It then proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, 'containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land.' Was the fishery included in the lot, half of which was conveyed, or included in the conveyance as a distinct portion of property? There is no indication of an intention to convey two distinct pieces of property, the one being an undivided half of the lot, and the other the entire salmon fishery. The grammatical arrangement of the language is opposed to such a construction, and is suited to convey an undivided half of the fishery as a right appertaining to the lot. The word 'containing' is clearly connected with the word lot, or tract, as its substantive, showing that the whole lot contained a certain number of acres and rods. The word 'including' is coupled to it, and must have the same antecedent, showing that the lot included the fishery. No other construction can be admitted without doing great violence to the language."

In *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511, there was involved a description of an "undivided half" of a parcel of land "and also" another parcel. The court held that the interest conveyed in the second parcel was limited by the words "undivided half," as well as the interest conveyed in the first parcel.

The following decision is cited and relied upon by counsel for appellants: In *Child v. Wells*, 13 Pick. (Mass.) 121, the court recognized the principle upon which the above-noticed cases were decided, though the particular facts there involved called for a different decision. The question was disposed of in the following language: "The deed purports to convey an undivided moiety of a tract (described), also one other tract of land (described), also an undivided moiety of a third and fourth tract (described). The controversy is in regard to the second parcel only. The argument presents two questions: (1) Whether by a fair construction of the deed, the whole or a moiety of the second parcel was conveyed. \* \* \* Where a deed contains a description of a moiety of one tract of land, and then goes on to describe another parcel, beginning with the word 'also,' this affords some ground to infer that the force and effect of this word was intended to extend to the word 'moiety,' as a qualification of the other descriptive words, and if there were nothing to control it, and such construction should appear consistent with the general intent of the deed, it might be reasonable to adopt it. This construction would be a little helped, if it should be, 'also one other tract'; the word 'other' indicating some connection between the first and second parcels. But in the deed under consideration, there are two oth-

er parcels, the descriptions of which, in both cases, begin like the first, with the words 'one-half of undivided tract,' etc. Taking the whole together, then, it conveys to the grantee and his assigns: (1) One-half of an undivided tract of land lying, etc. (2) Also, a tract of land lying, etc. (3) Also, one-half of undivided tract of woodland, etc. (4) Also, one-half undivided tract or parcel of land lying, etc. The writer of the deed was obviously illiterate and unskillful; but making every allowance for this, it is impossible, we think, to put any construction upon the language, which will limit the conveyance of the second parcel to a moiety. We are of opinion that the whole of the second parcel passed by this deed." While this decision is cited and relied upon by counsel for respondents, we think it lends greater support to appellant's contentions in view of the language here involved.

In *Hodges v. Thayer*, 110 Mass. 287, there was involved a description reading "all those tracts or parcels of land situate, lying and being, \* \* \* to wit, one equal and undivided one-half part of. \* \* \*" Then follow descriptions of several other tracts by clauses separated from each other by semicolons. Construing these descriptions, the court said: "'All those tracts or parcels of land situate,' etc., 'described as follows.' The first particular description is of 'one equal and undivided one-half part' of certain tracts, defined by number of township, range, section, and lot, or fraction of section, indicated by points of compass. Then, after a semicolon, the description proceeds, 'also, lots three and four,' etc. The fact that the statement of the undivided half interest is contained only in one of the clauses of particular description, and that the whole is preceded with the general phrase, 'all those tracts or parcels,' indicates that the statement of partial interest was not also applicable to all the tracts contained in the deed; or, to state it differently, the absence of the qualifying words, in the general terms of the description, indicates that they were not applicable generally to all the tracts." This decision we think comes nearer lending support to the contention of counsel for respondent than any other coming to our notice. It is to be noticed, however, that each description involved was by a clause separated from the others by a semicolon.

In *Michon v. Ayalla*, 84 Tex. 685, 19 S. W. 878, there was involved a description which seemed to convey an undivided interest only, but was followed by the words: "To have and to hold my entire interest in and to the foregoing described property." This was held to convey the grantor's entire interest in the property, though apparently she then had a greater interest than the undivided interest which was so designated.

In *Murphy v. Murphy*, 132 N. C. 360, 43 S. E. 922, and *McLennen v. McDonnell*, 78 Cal. 273, 20 Pac. 566, we find situations much

like this where the same conclusions were reached.

The decision in *Witt v. Harlan*, 66 Tex. 660, 2 S. W. 41, is of some interest in connection with this question, though we regard it as of but little aid here.

[2] Some contention is made by counsel for respondents, rested upon the fact that the description in the conveyance made by Charles D. Sweeney to respondents in 1896 commenced with the word "his," and the fact that at that time he had an undivided half interest in lots 1, 2, 3, and 4, and had the entire title to lots 19 and 20. There might be some basis for this fact having some influence in our decision here, if appellant at the time of acquiring this deed had been required to take notice of the fact that Charles D. Sweeney had only an undivided half interest in lots 1, 2, 3, and 4; but we think appellant was not required to take notice of any such fact. Sweeney's one-half interest in those lots would not have been disclosed by an examination of his title to lots 19 and 20. That deed would not have appeared upon an abstract of title to lot 19 or 20. It seems to us that the words "his half undivided interest," as used in the deed, would not suggest to a prospective purchaser of the other undivided half that that expression had reference only to lots 1, 2, 3, and 4 in that deed.

[3, 4] It appears that from the years 1896 to 1904, inclusive, the taxes upon lots 19 and 20 were paid by respondents. It may be suggested, though it is not plain from the briefs that it is so contended, that this is a circumstance pointing to a construction of the deed by the parties indicating a conveyance of the whole of lots 19 and 20 to respondents by Charles D. Sweeney. We think that in any event this was not a circumstance which appellant was bound to take notice of; and, even if it were, the payment of taxes upon an entire tract of land by one or two joint owners is no evidence to a stranger that the one so paying the taxes, claims title to the whole, nor that his co-owner is acquiescing in such claim. Such payment of taxes simply inures to the benefit of both. 38 Cyc. 50. It does appear that, from the time of acquiring its deed in 1905, until the commencement of this action in 1909, appellant paid all of the taxes upon its claimed undivided half interest, and also paid several hundred dollars additional upon local improvement assessments made by the city of Everett.

[5] Counsel for respondents insist upon the rule of strict construction against the grantor. If we were of the opinion that this description was so ambiguous as to call for extrinsic aid in determining its meaning, and all other rules of construction had failed in furnishing us aid as to its true meaning, it is possible we might resort to the rule of strict construction as against the grantor. That rule has practical application where

possession is taken under the deed, and also as applied to covenants, conditions, and limitations in a deed; but we apprehend it should be applied with caution when it comes to construing the language of the description of the property embodied in the deed. In the text of 13 Cyc. 609, it is said: "In case of ambiguity in a deed, or where it admits of two constructions, it will be construed most strongly against the grantor, or most favorably to the grantee. This rule is subservient to the ascertained intention of the parties, and is to be modified by the rule requiring effect to be given every word so far as possible; nor is it to be applied or invoked until all other rules of construction fail. It is also declared to be of doubtful propriety, its value seriously affected, and it has even been said that it has no application at the present time."

[6] Counsel for respondents invokes the rule of caveat emptor as applied to sales by administrators, citing *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936, and *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. Rep. 924. In the *Towner* Case the doctrine was applied only to the extent of requiring the purchaser to take notice of the want of power of an administrator to sell certain kind of property of the deceased for the benefit of creditors, and in the *Matson* Case the court said, at page 259 of 48 Wash., page 325 of 93 Pac. (125 Am. St. Rep. 924): "The rule of caveat emptor applies in all its vigor to sales by administrators or executors in this state, and the purchaser acquires only the interest of the estate"—thus recognizing that the doctrine does not go to the extent of requiring such a purchaser to look beyond the actual interest or title of the deceased at the time of his death, and the power to sell the particular property involved in the administration. We know of no law that does not permit the purchaser at an administrator's sale to rely upon the title of the deceased at the time of his death as shown by the records of the county where the land lies, when such land is unoccupied as in this case, and no rights of minors or incompetent persons are involved, to the same extent any purchaser may so rely. In the text of 39 Cyc. 1741, it is said: "It is the policy of the law that all matters affecting the title to land shall be placed on record, and, where an intending purchaser finds nothing on record to indicate an adverse claim, and has no notice of any facts sufficient to put him on inquiry as to matters not of record, he has the right to presume that there is no adverse claim." Our decisions are in harmony with this view. *White v. McSorley*, 47 Wash. 18, 91 Pac. 243; *McDougall v. Murray*, 57 Wash. 76, 106 Pac. 490, 26 L. R. A. (N. S.) 159; *Eyanson v. Waldlich*, 57 Wash. 234, 106 Pac. 746.

[7] We are of the opinion that when appellant acquired its deed to the undivided

half interest in lots 19 and 20, in June, 1905, it was entitled to rely solely upon the language of the description of the deed from Charles D. Sweeney to respondents, of January, 1896; and in view of the fact that all of the designated lots of that description following the words "his one-half undivided interest" are in one clause, without any punctuation whatever, we conclude that by that conveyance Charles D. Sweeney did not part with more than an undivided half interest in lots 19 and 20, and that he died possessed of the title to the other undivided half interest therein; hence, that undivided half interest passed by the deed of his administrator and by mesne conveyance to appellant.

We conclude that respondents were not entitled to have title quieted in them as against the claim of appellant to an undivided half interest in lots 19 and 20.

The judgment is reversed, with directions to the trial court to dismiss the action.

CROW, C. J., and MOUNT and CHADWICK, JJ., concur.

GOSE, J. (dissenting). I think the two deeds, when read together, fortified by the conduct of the parties during the lifetime of the grantor, show a clear intention to convey the entire fee of the property in controversy. I therefore dissent.

DAVIES v. ROSE-MARSHALL COAL CO.  
(Supreme Court of Washington. Jan. 20, 1913.)

PLEADING (§ 369\*)—ELECTION BETWEEN COUNTS.

Where the complaint, in an action for the death of plaintiff's decedent, alleged that it was due to defendant's failure to provide protecting timbers in a mine and the consequent caving in of a chute, and to failure to establish a proper ventilating system, which failure resulted in his inhaling poisonous gases while stunned, it stated but one cause of action; and it was error to require him to elect upon which of the two negligent acts he would rely.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Thomas Davies against the Rose-Marshall Coal Company. From a judgment of dismissal, plaintiff appeals. Reversed and remanded, with directions.

Brady & Rummens, of Seattle, for appellant. John W. Roberts and Geo. L. Spirk, both of Seattle (Geo. D. Emery, of Seattle, of counsel), for respondent.

CROW, C. J. This action was commenced by Thomas Davies, a minor, by his guardian ad litem, to recover damages resulting from the death of his father, alleged to have been

caused by negligent acts of the defendant. Plaintiff alleged that the defendant owned and was operating a coal mine, in which Thomas Davies, Sr., plaintiff's father, was employed as a miner; that it became necessary for the father to pass through and work in and near to chute No. 8; that to make his working place safe it was necessary that the chute should be timbered and propped to prevent it from caving, and that it should be supplied with a sufficient quantity of fresh air; that the defendant at all times failed and neglected to timber the chute, or to furnish timbers for that purpose; and that the ventilating system of the mine was defective and insufficient for the purpose of providing fresh and wholesome air. Plaintiff further alleged: "That on the 30th day of December, 1910, while the said Thomas Davies, now deceased, was a strong, robust, able-bodied man in perfect health, he entered chute 8 for the purpose of going to his working place, when, by reason of having no timber supplied him with which to prop said chute, and by reason of the lack of proper timbers in said chute to support the same, stone, coal, and debris fell therefrom down, upon, and against said Thomas Davies, and by reason of the fact that there was no air circulating through his said working place, and through chute 8, a large quantity of sickening and poisonous gas was accumulated therein and permitted to remain therein to such an extent that human life could not be sustained therein, and when said Thomas Davies had reached a point along said chute 8 where said gas was accumulated, on account of inhaling such gas, and on account of the stone and coal and debris falling upon him, said Thomas Davies was precipitated down through said chute 8 to the bottom thereof next to the gangway, and by reason thereof died on said 30th day of December, 1910. \* \* \*" To this complaint the defendant interposed the following motion: "Comes now the defendant and moves the court to require the plaintiff to elect whether or not the plaintiff will rely upon the failure to timber, or to furnish timbers, as the moving or proximate cause of the death of the deceased, or whether he will rely upon the allegations in relation to poisonous gases in the mine, and require the plaintiff to elect upon which cause of action it will stand and proceed to the trial of this cause. If the court should overrule or deny the motion for election, then the defendant moves the court to require the plaintiff to separately state and number its causes of action, for the reason that two separate and distinct causes of action are improperly pleaded and joined as one." Upon hearing, this motion was sustained. Thereupon the plaintiff declined to amend or plead further, and the cause was dismissed. The plaintiff has appealed.

The only question presented is whether

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the complaint states more than one cause of action. Respondent contends that two causes are pleaded without being separately stated and numbered, and that they are inconsistent. Appellant insists that but one cause is pleaded. It is apparent from the allegations of the complaint that respondent's negligence in failing to provide timbers, and his further negligence in failing to establish and maintain a proper ventilating system, were concurrent and joint causes of the death of its employé. As suggested by appellant, there was but one death, although it resulted from concurrent acts of negligence. The wrongful death caused by appellant's negligent acts, and the damages resulting therefrom, constituted but one cause of action. Possibly the absence of timbers and the consequent caving of the chute would not have caused death, but would only have stunned or have slightly injured Davies. On the other hand, the poisonous air alone might not have caused his death; for if he had not been struck by falling debris he might have been able to escape from the foul air before falling down the chute. Were appellant compelled to state the several acts of negligence as separate causes of action, or to elect one act of negligence as the cause of action upon which to seek a recovery of damages, he might fail in his proof of the negligent act which caused death, whatever his election might be. In *Dutro v. Street Railway Co.*, 111 Mo. App. 258, 86 S. W. 915, the court said: "A cause of action may be founded upon two separate acts of negligence which, concurring in operation, produce a joint result—the injury. \* \* \* When two or more proximate causes contribute to produce an injury, each is sufficient within itself to support a cause of action for the recovery of the entire damage resulting; and it logically follows that a plaintiff who pleads in his petition all of such claimed acts of negligence is entitled to recover upon proof of any one of them. *Waller v. Railway*, 59 Mo. App. 426; *Banks v. Railway*, 40 Mo. App. 464; *McDermott v. Railway*, 87 Mo. 285." There was but one cause of action, and the motion was improperly sustained.

The judgment is reversed and the cause remanded, with instructions to overrule the motion.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

KLODEK v. MAY CREEK LOGGING CO.  
(Supreme Court of Washington. Jan. 21, 1913.)

1. PHYSICIANS AND SURGEONS (§ 18\*)—ACTION FOR NEGLIGENT TREATMENT—EVIDENCE.

In an action for negligent and unskilled treatment of an injury by a hospital physician, the testimony of a competent witness on whether the treatment given plaintiff was the usual

and customary treatment should have been admitted.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.\*]

2. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of such evidence was harmless, however, where the same fact was testified to by other witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

3. PHYSICIANS AND SURGEONS (§ 18\*)—ACTION FOR NEGLIGENT TREATMENT—EVIDENCE.

In an action for malpractice in treatment of a knee, resulting in permanent injury, the admission in evidence of a newspaper advertisement describing defendant's specialty as of the "Eye and Nose" was not error.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.\*]

4. MASTER AND SERVANT (§ 297\*)—INJURIES TO SERVANT—VERDICT AND FINDINGS—INCONSISTENCY.

While, in an employé's action for the negligent treatment of his injuries by a hospital association engaged by his employer and paid from monthly dues collected by the employer from its employés, a special finding that the employer retained part of the dues was technically inconsistent with a general verdict against the employer, on the theory that the hospital was the employer's agent, it was not materially hostile thereto, where plaintiff relied upon a special contract with his employer to furnish him with treatment in case of injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.\*]

5. APPEAL AND ERROR (§ 1002\*)—FINDINGS OF FACT—AGENCY.

A finding upon conflicting evidence that a bookkeeper in charge of a logging company's store was authorized, in the absence of the general manager and superintendent, to contract that the company would, in case of injury, provide proper treatment for an employé engaged by him will not be disturbed on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Paul Klodek against the May Creek Logging Company. From judgment for plaintiff, defendant appeals. Affirmed.

Gates & Emery, of Seattle, for appellant. Miller & Lysons, of Seattle, for respondent.

CHADWICK, J. Paul Klodek sought employment at the office of an employment agency in the city of Seattle. He was furnished with transportation to the defendant's logging camp, and given a memorandum of his employment for presentation to the company. The memorandum is as follows:

"Seattle, Wash., Feb. 21, 1910.

"Received from Paul Klodek the sum of (\$1.00) one dollar, for which we agree to furnish correct information by which he shall secure a position as buckler with May Creek Logging Co., Kenndale, on order received



at 1 o'clock M. on the ——— day of Feb. 21, 1910, wages \$1.00 per day. Board, \$5.00 per wk. Failing to do which, we promise to refund the said sum of \$1.00 on return of this receipt without delay, together with a written statement on the back thereof from the employer that the applicant did not procure the situation. But the undersigned does not hold himself responsible for any expense incurred by the said Paul Klodek should he fail to procure the situation above stated, unless the information given at this office, upon which he acted and applied for situation should be found to have been incorrect and misleading. [Signed] Crawford & Pratt, Employment Agents, by Pratt.

"I agree to above conditions: [Signed] Paul Klodek."

Appellant at once proceeded to the camp. Mr. Fish, the general manager and superintendent, was absent, and the memorandum was presented to a Mr. Graves, who was bookkeeper and in charge of the company's store.

Plaintiff testified concerning his employment as follows: "A. I got a ticket from the employment office, and I go to the camp and to the office. I give the ticket to the man, and I says, 'Are you the man that hires a bucker from the agent's office?' and he says, 'Yes.' Q. What else, then, did you say? A. Well, I asked him, I says, 'Now, have you got the tools here? and he says to me I can get it in the office after breakfast. Q. Well, what else did you talk with the man there? A. Then he asked me, 'Can you file your own saw?' Q. What else took place? A. Well, he says, 'That is what we want.' I says, 'How is business down there?' And I says to him, 'How is business down in that camp?' And he says, '\$5 board, \$3 wages, and \$1 hospital fees.' I wanted to find out how is that \$1 to a hospital; what for? Well, he says if I be sick, or if I be hurt, he says, 'I give you good doctors and hospital, and attend to you until you get well.' I says, 'That is good, sir;' and the next day I started to work."

At the time plaintiff was employed, the defendant company was under contract with the American Hospital Association, a corporation engaged in supplying medical and surgical assistance and hospital service to employes of logging companies who might be hurt or require such service in the course of their employment. It seems that plaintiff was not directly informed of this by Mr. Graves, but at the time of his employment, and subsequent thereto, a notice of such fact was posted on the door of the bunk house. While engaged in the work assigned to him, plaintiff fell from a log or tree, striking his knee against the blade of a double-bitted axe, and received very severe injuries. The patella was cut in two pieces, and the left tibia was splintered off for about five inches. Plaintiff was taken to the Providence Hospi-

tal in the city of Seattle, where, after an operation by, and one subsequent consultation with, a surgeon, he was attended by the physician of the hospital association. There is no claim of negligence in the matter of the injury, but it is contended that, in violation of its contract, defendant suffered plaintiff to go without proper or sufficient treatment; that the physician of the hospital association was unskilled and incompetent, so that plaintiff was made a cripple for life. The defense is that defendant owed no obligation, except to provide a hospital service of good repute, and having done so it has discharged its full duty. The charge of negligent and unskillful treatment is also denied by defendant. Such other facts as may become incidentally important will be discussed in the body of the opinion.

[1, 2] It is assigned as error that the court sustained an objection to a question put to a nurse who had some years' experience; the question being, "Now, was this treatment that was given to the plaintiff the usual and customary treatment?" Granting that she was qualified, the nurse might have answered the question. 2 Jones' Evidence, 370. But it is not always that a case will be reversed because of the improper exclusion of evidence, where from the whole record the fact sought to be proven is testified to by other witnesses, as it was in this case. The court will treat the question as if it were an offer to cumulate evidence upon a motion for a new trial, and hold that no prejudice has resulted therefrom.

[3] The next error assigned is that the appellant was prejudiced by the introduction of a newspaper advertisement containing the name of the attending physician and describing his specialty and place of business: "Eye & Nose. 206-7 Marion Bldg." We are unwilling to hold that this was error. We will take notice of modern tendencies and conditions in the medical profession; and if a physician holds himself out as a specialist along certain lines it is no discredit to him to show that fact, and from it raise the inference that he is not keeping up with practice in other lines. At any rate, he or those relying upon him should not complain of the burden of meeting the prima facie showing. The basis of the charge in this case is that the physician was incompetent and unskilled. It was for the jury to say whether he was or not; and the fact that he was specializing in other branches of the profession was a circumstance relevant to the issues.

[4] The court submitted special interrogatories to the jury, which found in answer thereto that, in receiving \$1 per month from plaintiff, defendant was acting for itself, and not as agent for the American Hospital Association; that it retained a portion of the dues; that it undertook to treat plaintiff until he was cured; that it employed the attending physician; and that it did not pro-

cure or provide a suitable, competent, or skilled physician or surgeon to treat the respondent. All of these findings are said to be contrary to the evidence, and they are, if appellant's theory is accepted as final, for its contract with the hospital association was proved, and its testimony showing that it paid over all the money collected is not rebutted. But this theory ignores respondent's contention that there was a special contract; and the jury found as one of its special verdicts that appellant did make a special contract with respondent as alleged and maintained by him. If there was such a contract, it may well be that the appellant acted for itself, and that the hospital association was its agent in the performance of its contract. The finding that it did retain a portion of the dues would, under this conclusion, be technically inconsistent with, but not hostile to, the general verdict.

[5] The authority of Mr. Graves to make a contract, or, if made, that it was not within the scope of his employment with respondent, is denied. There was evidence to go to the jury upon this disputed question. The question of agency is usually one of fact, and the finding of the jury will not be disturbed where the evidence is conflicting.

Many objections are urged to the instructions given and refused. If we accept the theory of the appellant that it owed no primary duty to respondent, except to use ordinary care in selecting a hospital association, most of the objections would be well taken. But we find the instructions complained of to be consistent with the theory of the respondent that there was a special contract, and those given are therefore not objectionable. The instructions refused were sufficiently covered by other instructions. There was no error.

Judgment affirmed.

CROW, GOSE, and PARKER, JJ., concur.

GASOF v. STANDARD ICE CO. et al.

(Supreme Court of Washington. Jan. 18, 1913.)

**1. MASTER AND SERVANT (§ 304\*)—INJURY TO EMPLOYÉ OF ANOTHER—LIABILITY OF MASTER.**

Where the employés of a street-grading contractor negligently permit a rock to roll down and injure another's employé, who is working in an excavation in the street, and where the fact that men were working in the excavation was or should have been known to the contractor, he is liable for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1226-1228; Dec. Dig. § 304.\*]

**2. TRIAL (§ 194\*)—INJURY TO EMPLOYÉ OF ANOTHER—INSTRUCTION.**

In an action for injury from the negligence of a street-grading contractor's employés in permitting a rock to roll into an excavation where plaintiff was working under employment

by another, under a permit from the city, an instruction that such permit could be considered in determining whether the contractor, in the exercise of reasonable care, should have known that plaintiff was working in the excavation was not objectionable as charging that the permit was evidence of notice to the contractor that plaintiff was working in the excavation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

**3. MASTER AND SERVANT (§ 330\*)—INJURIES TO EMPLOYÉ OF ANOTHER—EVIDENCE.**

Where, in such action, the contractor admitted that he had seen the permit, but claimed that he did not recognize the place where the work was being done under it, evidence of the permit was material on the issue of notice to defendant of plaintiff's presence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**4. DAMAGES (§ 131\*)—EXCESSIVE RECOVERY—PERSONAL INJURIES.**

A recovery of \$1,000 for severe injuries, consisting of two broken ribs and other bruises, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 131.\*]

**5. MASTER AND SERVANT (§ 315\*)—INJURY TO SERVANT—NEGLIGENCE.**

Where plaintiff was injured solely by the negligence of the servants of an independent, street-grading contractor in permitting a hidden rock plowed up by them to roll in upon him, and where the excavation in the street in which he was working under his employer's instructions was of itself reasonably safe, his employer was not liable; the employer not being required to anticipate dangers which he could not foresee, and which might be caused by some intervening, responsible agency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244-1253, 1255, 1256; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Joe Gasof against the Standard Ice Company and another. From judgment for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

John W. Roberts and Ballinger, Battle, Hulbert & Shorts, all of Seattle, for appellants. James Kiefer, of Seattle, for respondent.

MOUNT, J. Action for personal injuries. The plaintiff recovered a judgment upon the verdict of a jury for \$1,000 against the two defendants to this action. The defendants have appealed separately.

The facts are as follows: Defendant McLellan had a contract with the city of Seattle to grade Elliott avenue, running in a northerly and southerly direction. Cedar street, running easterly and westerly, intersects Elliott avenue at right angles. At the point of intersection, to the westerly of Elliott avenue, there was an abrupt declivity, so that Cedar street westerly of the avenue was impassable for vehicles, and was used by pedestrians only by means of a stairway.

The defendant Standard Ice Company had constructed buildings upon the west side of Elliott avenue. These buildings occupied a part of Cedar street. They were considerably below the grade of Elliott avenue. In order to protect these buildings, the ice company intended to and did build a concrete retaining wall in front of their buildings below the street grade. In order to do this work, it was necessary to excavate in the street. The ice company obtained from the city permission to construct this retaining wall, or areaway, as it was called in the permit, in front of its property, in accordance with plans and specifications submitted to the city authorities. The ice company then proceeded to make an excavation in the side hill on the westerly side of Elliott avenue and immediately to the east of their buildings. This excavation was six or eight feet in width, and about sixteen feet in depth on the wall next to the street. It extended upon Elliott avenue and across Cedar street on the west side of that avenue. The plaintiff was employed by the ice company as a common laborer, wheeling dirt out of this excavation to the westerly. The defendant McLellan knew that the work was being done, and urged the ice company to complete the work, so that he could finish grading the avenue. His men had been engaged for a day or two plowing and scraping upon Elliott avenue upon the east side of the avenue opposite to where the ice company were making the cut, as above stated. While two of Mr. McLellan's employes were plowing about the center of the avenue, they turned up a large angular rock or boulder. These men attempted to roll this rock out of the way of the plow and place it upon a ridge between where they were plowing and the cut being made by the ice company. While attempting to do this, the rock got beyond their control and rolled down the sloping ground to the cut, and dropped upon the plaintiff, who was working there, and injured him.

[1] The appellant McLellan argues that the court erred in submitting the case to the jury, because there was no sufficient evidence of negligence of this appellant. There was evidence to the effect that defendant McLellan knew that the ice company was making the excavation, and that the men were working therein. There was also evidence to the effect that the servants of McLellan carelessly placed the rock or permitted it to roll down into the excavation. This clearly made a case to go to the jury as against McLellan; for if he knew that men were working in the cut, or should have known it, he was liable for his servants' carelessness in conducting their work so as to injure one who was rightfully in the cut. During the trial the defendant Standard Ice Company introduced in evidence a permit from the city to build the area wall between these buildings and the street, according to

plans and specifications approved by the city. This area wall was to be constructed near the street line, on the west side of Elliott avenue and across Cedar street.

[2, 3] In the course of the instructions to the jury, the court gave the following: "Evidence of a permit is immaterial in this case, except in so far as it may be considered by you in determining whether or not the defendant McLellan knew, or by the exercise of reasonable care should have known, that plaintiff was working in the trench in question. Of course, the mere fact that the man was working down there without a permit would not justify the defendant in this case to be negligent to him. They should take that degree of care which they would take if he had a permit. So you are entitled to consider, then, whether or not the defendant McLellan knew, or should have known, that the men were working in that trench." It is argued by the appellant McLellan that this instruction is erroneous, because it tells the jury that this permit was evidence of notice to McLellan that the plaintiff was working in the excavation, and was therefore prejudicial. The instruction is not so pointed as that. It simply says the jury may consider the permit in determining whether the defendant McLellan, in the exercise of reasonable care, should have known of the fact that plaintiff was working in the trench. It was admitted that McLellan had seen the permit, which was posted upon the ice company's building, but he claims that he did not recognize the exact place where the work was to be done under the permit. There was also evidence that he had seen the work being done. The permit itself and the fact that McLellan had seen it may not have been sufficient evidence of notice that the ice company had men working there at this particular time. But the fact that the permit was posted and seen by him was sufficient to put him upon inquiry, and that, together with the showing that he afterwards examined the progress of the work and urged the ice company to complete the work, were facts which the jury had a right to consider in determining the question of notice. The permit itself, when posted, was but one item in the line of circumstances tending to show notice; and the court therefore was right in informing the jury that they might consider it in determining the question of notice.

[4] The appellant McLellan also argues that the judgment is excessive. The judgment was for \$1,000. The plaintiff was severely injured. He had two of his ribs broken, and suffered from other bruises. We think the amount awarded is not so excessive as to justify a reduction by us.

[5] The appellant Standard Ice Company contends that the court erred in not directing a verdict in its favor. We are satisfied that this position is well taken. It is claimed that the ice company was negligent in

not furnishing the plaintiff a safe place in which to work. We find nothing in the record to indicate that dangers such as this might have been foreseen. There was no evidence that there were rocks and other dangerous objects above which were likely to roll down upon the plaintiff. If the place was unsafe, it became so only by the negligent act of the employees of Mr. McLellan, for whose acts the ice company was not responsible. The plaintiff in order to hold the ice company, relies upon the rule laid down in *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330. In that case an injured employee and the persons causing the injury were in the employment of the same master, and we held that it was the duty of the master to protect employees sent to a dangerous place against the danger of falling objects, where the dangers were created by the master without notice to the servant, after he had been sent into the dangerous place. That case is therefore readily distinguishable by that fact. If the ice company had negligently sent a workman upon the street, where he was likely to injure the plaintiff, this case would then be controlled by the *Richardson* Case, *supra*. But such is not the fact. The place where the ice company sent the plaintiff was reasonably safe. The appellant McLellan sent the men upon the street. They plowed up a hidden rock, and their negligence caused the rock to roll down upon the plaintiff. "A master is not, as a rule, liable for injuries to his servants caused by the acts or omissions of third persons over whom he has no control." 26 Cyc. 1090. In *Wilson v. Northern Pacific Ry. Co.*, 31 Wash. 67, 71 Pac. 718, we said: "When the danger is not known and not suspected, and where there are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact." The respondent argues that it was the duty of the ice company to place some guard around the top of the excavation, in order to keep dangerous substances from rolling into the excavation; and that if this had been done the injury would not have occurred. The evidence did not show that there were in sight any rocks or other dangerous substances which were likely to roll down into the excavation. The contrary appeared. The place was apparently safe. There was nothing to indicate that dangers would result from that source, and it cannot be held that the ice company was required to anticipate dangers which could not be foreseen, and which might be caused by some intervening, responsible agency. We are satisfied, therefore, that no negligence was shown against the ice company. The cause as to it should be dismissed. It is so ordered.

The judgment is affirmed against the ap-

pellant McLellan and reversed as to the Standard Ice Company, the latter to recover its costs against respondent.

CROW, C. J., and CHADWICK, PARKER, and GOSE, JJ., concur.

### RITTER v. NORMAN.

(Supreme Court of Washington. Jan. 20, 1913.)

INNKEEPERS (§ 10\*)—STAIRWAYS—INJURY TO GUEST—CONTRIBUTORY NEGLIGENCE.

A hotel guest is not chargeable with contributory negligence in using a dark stairway, on which she was injured, in going from her room to the ground floor, where that was her only means of going below, the elevator being out of commission, in the absence of an affirmative showing of carelessness on her part.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by May Ritter against Charles Norman. Judgment for plaintiff, and defendant appeals. Affirmed.

Kellogg & Huntton, of Seattle, for appellant. John E. Humphries and Geo. B. Cole, both of Seattle, for respondent.

CHADWICK, J. Defendant was the proprietor of a hotel, and plaintiff was on March 31, 1910, and for some time prior thereto had been a lodger therein. Plaintiff occupied a room on the sixth floor. On the day mentioned the elevator was out of commission, and plaintiff undertook to go from her room to the ground floor by way of the stairway leading down from floor to floor. The stairway was somewhere near the center of the building, as we suppose, not having the drawings to which the witnesses referred when upon the stand. The stairway ran at a right angle from the hall, descended a few steps to a landing, making a square turn, and then running parallel to the first flight and landing on the floor below. The testimony of the plaintiff shows that there were no windows to light these stairways, nor was there any artificial light; that the stairways and landings were dark, and, in the exercise of reasonable care for her own safety, she fell on the landing which was between the fourth and third floors and was injured. A jury has returned a verdict in her favor. From the judgment upon the verdict, defendant has appealed.

It is the contention of appellant that respondent was guilty of contributory negligence, or rather, having notice and knowledge of the darkened stairway, assumed the risk, and therefore cannot recover. Several cases, including the case of *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310, are cited to sustain this argument. The discussion of the principle of contributory negligence

was not necessary to the decision in that case. What is said is a broad statement of the general rule, but it does not follow that the same rule is applicable here. In the Colman Case the plaintiff had sought lodgings in a cheap lodging house having board walls covered with cloth and paper. The building took fire, and plaintiff was injured while escaping from it; the injury resulting from the manner of construction, of which the plaintiff had notice. The court held that he could not recover, saying: "If the construction was in fact such as to make it dangerous for a guest to occupy a room in the hotel, the plaintiff was guilty of contributory negligence when, with a knowledge of the defective construction, he remained a guest of the hotel." But that case and the others cited by appellant do not fit the case at bar. Here there is no question as to the construction of the building. It was, so far as the record goes, a building of modern type, with an elevator and stairways, and was fitted up in a way to attract the patronage of the public. It had lights in the hallways and on the stairways, which might have been lighted while the elevator was out of use. It will be seen that the injury to respondent resulted, not from any defect that was so open and obvious as to put a traveler or lodger on his guard and send him on his way, but from the failure of the appellant to use his property in such a way, and to exercise those precautions which the nature of the use of the property demanded, and which he had provided to be used in just such emergencies. A guest in a hotel has a right to depend upon a stairway, and the fact that it is open and stands as an invitation at all times, and especially when the elevator, if there is one, is out of use, puts a burden upon the proprietor to put the means he has provided for the safety of his guests into operation. Nor can he complain and charge a guest with contributory negligence or assumption of risk merely because the necessities of his comings and goings drive him to the use of the stairway, unless, indeed, we are prepared to say that the mere use of a darkened way is negligence per se. Obviously it cannot be so held in the absence of facts affirmatively showing carelessness on the part of the injured person. There is such a thing as reasonable care in the use of dark stairways.

The cases cited by appellant are to be distinguished. In all of them the accident would have happened to any person acting in the same way. The doorway, or shaft, or whatever the offending instrumentality was, was not intended for the use of the party injured. Here it was so intended, and the guests of the appellant were putting the stairway to constant use. If in that use some one was injured and the jury can say, as it has said, that the failure to provide a light was the proximate cause of the injury, the courts cannot interfere. Respondent did only

what she and others were invited to do—we might say, compelled to do—while the elevator was out of repair, and she was not bound to remain in her room indefinitely waiting for the elevator. In *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140, which is a case very similar to the one at bar, a recovery was sustained. Meeting the defense here interposed, the court said: "The defendants contended that, if the use of the stairs was dangerous on account of the darkness, the plaintiff was not in the exercise of due care in using them. We think that, under the circumstances, this would not necessarily prevent the jury from finding that the plaintiff was in the exercise of due care. She went up in the elevator to the office on the fifth floor, where she had business, and, when she had finished her business, there was no way of going down except by the stairs. \* \* \* It cannot be said, as a matter of law, that she was negligent in not going back for assistance when it became dark. That fact called for greater care, and she testified in regard to the care she used. We think it was for the jury to say whether she was negligent in going on under the circumstances, exercising the degree of care in doing so which they may have found upon the evidence that she did exercise."

But we do not have to go beyond our own decisions to find authority sustaining the principle upon which this case rests. Margaret Jordan was injured by falling into a hole in a sidewalk in the city of Seattle. The defense was that she knew of the defect and, because of her persistent use of the walk, she had assumed the risk and was guilty of contributory negligence. The court said: "The fact that the walk was in daily use, and others passed over it without injury, and that it was left open to the public by the city, tends to show that the hole in the walk and the walk at that place could, with ordinary care, be passed over in safety; that the danger was slight. This, we think, in connection with the evidence that the plaintiff was stepping carefully, made out a prima facie case overcoming the presumption arising from the knowledge of the danger. It then became the duty of the jury to pass upon the question of contributory negligence as a question of fact. We do not think the plaintiff assumed the risk and consented to the injury which followed, for she took precaution and attempted to avoid or defeat the peril. We cannot say from the facts in this case, as disclosed by the record, that the plaintiff was reckless or disregarded the dictates of ordinary prudence and discretion. Unless a court can so determine without doubt or hesitation, it is its duty to leave such questions for the jury."

Judgment affirmed.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

## HUBERT et ux. v. CONNELL NORTHERN RY. CO.

(Supreme Court of Washington. Jan. 20, 1913.)

## RAILROADS (§ 113\*)—TRESPASSING—PERSONS LIABLE.

Where a railroad company, in constructing its railway, takes down the fences across its right of way, thereby permitting cattle from a highway to go thereon and then on adjoining land between which and the right of way there is no fence, it is liable for the damages caused thereby to the owner of such adjoining land, since, while one of two owners of land in one inclosure is not liable for damage done by trespassing cattle wandering from his land to that of the other owner's he is so liable where in willful disregard of the other's rights he breaks the outer inclosure, leaving it open so that cattle may wander at will over the premises of both.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-364; Dec. Dig. § 113.\*]

Parker and Mount, JJ., dissenting.

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by Charles Hubert and wife against the Connell Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Cannon, Ferris & Swan, of Spokane, for appellant. John Truax, of Ritzville, for respondents.

CHADWICK, J. Appellant acquired a right of way over certain lands of respondents. These lands adjoined a public road. When the company came to build its line of railway, it took down the fences across its right of way. They remained down during the whole period of construction, except when replaced by respondents. Cattle wandered from the highway onto the right of way, and from it at will over respondents' lands, to their damage in the sum of \$800, for which judgment was rendered in the court below.

Respondents relied upon two propositions of law to sustain their case; that is, that it was the duty of the appellant to so use its right of way as not to injure the land of another, and the act of 1907 (Laws 1907, c. 88) entitled, "An act compelling railroads to fence their rights of way, and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains." The court below was the more impressed with the first proposition. Appellant has brought its case here, insisting that neither of these positions is tenable; that it was the rule at common law, and is now in this state, that the owner of land is not liable for damage done by trespassing cattle coming onto his land and escaping to the land of another; and further that the law of 1907, defining the duty of a railway company to fence and put in cattle guards, refers only to the liability

of the company to answer for damages to stock which may be killed or injured upon its right of way. To sustain its contentions, appellant cites the following cases: Gowan v. St. Paul, etc., R. Co., 25 Minn. 328; Snyder v. Penn. R. Co., 205 Pa. 619, 55 Atl. 778; Bear v. Chicago, etc., Ry. Co., 141 Fed. 25, 72 C. C. A. 513; Frisch v. Chicago Great Western Ry. Co., 95 Minn. 398, 104 N. W. 228.

We are inclined to believe that the judgment of the court below can be made to rest upon the common law: " \* \* \* Every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other, for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage. \* \* \* Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes." 3 Blackstone, 209, 210 (Lewis' Ed.). It is also an established principle of the common law that no man shall use his own property in such manner as to injure that of another. This principle finds expression in the maxim, "Sic utere tuo ut alienum non laedas." As this court and others have construed the fence laws, it may be admitted that a railroad company is not liable under the statute for the damage done by trespassing cattle which wander from their uninclosed right of way onto another's land. Those decisions have no application here, for, if mine and my neighbor's field are in one inclosure, neither is liable to the other for damage done by trespassing cattle which wander from one ownership to another. But if either myself or my neighbor, in willful disregard of the rights of the other, break the outer inclosure and leave it open so that cattle may wander at will over the premises belonging to both of us, the offender should be held to the rule that no man may so use his property as to injure that of another. It is so here.

The statute does not compel the company to fence, but by so doing it may save itself certain presumptions of negligence and the hardship of certain rules of evidence. On the other hand, the statute does not exempt a company from the established rules of law, therefore it cannot, having an inclosure common with another (and that is the most favorable position the company can assume in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this case), throw the common close open to the public highway. The case of *Baker v. Robbins*, 9 Kan. 303, is illustrative: "Baker and Robbins owned adjoining farms, fenced in common; no partition fence having been made between them, though they used their farms in severalty. Baker turned a herd of cattle rightfully upon his own premises, without the consent of Robbins, however, and knowingly permitted them to wander upon the premises of Robbins and do great injury to a crop of wheat. Robbins sued Baker and the only question for us to determine is whether Baker is liable for said injury. We think he is. We suppose that it is settled beyond all controversy that at common law the owner of cattle was required to take care of them, and not allow them to stray or wander upon the land of another, whether such land was fenced or not; and, if he did allow his cattle to so stray or wander, he was liable for all injuries they might commit." Now, if a common owner cannot permit his own cattle to wander beyond his own boundary within a common close, it would seem to follow that, if one of two using the same inclosure opens the close so as to invite stock from the highway or range, and they do damage within the common close, the one offending should be liable. For although the stock is not his, and are in a sense trespassers, they are nevertheless within the inclosure at his implied license, and, as against his neighbor, the rule of the common law should apply as if the stock were indeed his own. If for its own purposes or because of its necessities a railroad company breaks the continuity of the fence so that its common owner is damaged, it is liable, for the proximate cause is not the trespass of wandering stock, but the willful disregard of the right of another by the party charged.

Judgment affirmed.

CROW, C. J., and GOSE, J., concur.

PARKER, J. I dissent. The doctrine announced by the majority opinion will require an owner of land, which at some time happens to be inclosed with land of another adjoining, to forever maintain the portion of the fence bordering his land or to build and forever maintain a fence along the entire common boundary line of the tracts. In other words, by this doctrine one owner is required to forever protect the land of an adjoining owner by fence simply because his land adjoins and an existing fence on three sides of each tract happens to inclose both tracts together. *Baker v. Robbins*, quoted in the opinion, is wholly foreign to the question here involved in that the cattle were there in charge of Baker, and he was responsible for their care. The case would have been exactly the same in principle had the farms

been miles apart. This is not a question of the use of appellant's land, but of who shall be compelled to fence respondent's land against trespassers, to whom appellant is a stranger.

MOUNT, J., concurs with PARKER, J.

VAN ALSTINE v. GRAY et al.

(Supreme Court of Washington. Jan. 22, 1913.)

1. APPEAL AND ERROR (§ 189\*)—NECESSITY OF OBJECTIONS—DISMISSAL.

In foreclosure, where a party defendant made no objection to the dismissal of the action, and did not ask the court to enter judgment correcting a technical error in the description, the failure to retain jurisdiction to correct the description was not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1205-1215; Dec. Dig. § 189.\*]

2. APPEAL AND ERROR (§ 973\*)—COSTS—DISCRETION OF TRIAL COURT—DISMISSAL.

The dismissal of an action without costs to either party is within the discretion of the trial court, not reviewable unless there is a manifest abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3846; Dec. Dig. § 973.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Elizabeth Van Alstine against L. W. Gray, Clarence H. Gray, and another, with cross-complaint by defendants. Judgment for defendants, and Clarence H. Gray appeals. Affirmed.

Kitt Gould, of Seattle, for appellant. G. E. Steiner, of Seattle, for respondents.

MAIN, J. This is an action to foreclose a mortgage upon certain real property. The complaint contains the usual allegations in such cases. Issue was joined by the filing of an answer and cross-complaint. The answer denies that the debt upon which the action is predicated is due, and for affirmative relief prays for the reformation of a deed and the cancellation of the mortgage. The action was tried to the court.

The facts, so far as germane to the questions presented to this court, are as follows: On February 23, 1907, respondents, the Van Alstines, being then the owners of lots 9 and 10, in block 92, in D. T. Denny's First addition to North Seattle, now the city of Seattle, sold and conveyed these lots to L. W. Gray. The deed of conveyance, through inadvertence, describes the property as lots 9 and 10, in block 92, in D. T. Denny's First addition to the city of Seattle, instead of D. T. Denny's First addition to North Seattle, which was the correct description. As a part of the purchase price, notes were given aggregating the sum of \$13,000, with interest at 6 per cent. per annum, payable semiannually. These notes were secured by a mortgage upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the lots. One note for \$1,000 was payable two years after date, one for \$2,000, three years from date, one for \$2,000, four years from date, and one for \$8,000, five years from date. On the 17th day of December, 1908, L. W. Gray transferred the legal title to the lots to his brother, Clarence H. Gray. The first note for \$1,000 was paid at maturity. Some days prior to the 23d day of February, 1910, when one of the notes would fall due, the Gray brothers went to one H. A. Raser, the friend and insurance agent of the Van Alstines, and sought his assistance in securing an extension of the notes and mortgage. For this service the Gray brothers promised Raser a commission. Through the intervention of Raser the Van Alstines agreed to the extension, and on the 21st day of February, 1910, the Gray brothers and the Van Alstines met at Raser's office, and, in pursuance of the agreement for an extension of time, an indorsement was made on the back of the note maturing February 23, 1910, as follows: "February 1, 1910. In consideration of the increase in interest on this note from six per cent. to seven per cent., and for other good and valuable consideration, the date of payment on this note is extended to February 23, 1912. This note is secured by two mortgages, one recorded in Vol. U of Mortgages, page 13, Thurston county, Washington, and one in Vol. 341 of Mortgages, page 39, of King county, Washington." A similar indorsement was made on each of the other notes, except as to the date of payment. The semiannual interest which was due and payable on the 23d day of February, 1911, was not paid. It appears from the evidence that Gray brothers paid Raser a commission of 3 per cent., or \$360, for securing the extensions. This was without the knowledge of the Van Alstines. The trial court found that the \$360, which the Gray brothers paid Raser, should be charged to the Van Alstines and applied to the payment of the interest due when the action was commenced. Applying this sum in this way, it would liquidate all interest due at the time of the institution of the action. The action was dismissed without prejudice, for the reason that it had been prematurely brought. Clarence H. Gray appeals.

[1] The appellant's first contention is that the court, while denying the right to foreclose the mortgage, should have retained jurisdiction for the purpose of correcting the error in the description of the property in the deed from the Van Alstines to L. W. Gray. This question is raised for the first time in this court. The appellant's counsel was present during the trial in the superior court, and heard the oral announcement of the court as to the dismissal of the action. At no time did he object to the dismissal of the action, or ask the court to enter a judgment correcting the description. Indeed, at

the end of the statement of facts, and as a part thereof, appears in the handwriting of the trial judge a statement as follows: "It was never understood by this court that anybody but the plaintiff was objecting to the dismissal." If the appellant desired the correction as to the description in the deed, it was his duty to call this to the attention of the trial court. The matter, in any event, is technical rather than substantial. It is a matter of common knowledge that North Seattle long ago became a part of the city of Seattle. This court will not reverse cases where the error urged is purely technical, and apparently was not considered of sufficient moment to be called to the attention of the trial court.

The second contention of appellant is that the trial court should have canceled the mortgage of record and freed the property from the lien thereof, for the reason that the change in the interest rate on the notes and the extension of the time of payment was made subsequent to the conveyance of the property to the appellant, and that the appellant had not consented thereto. There is no merit in this contention. The appellant was present at the time the extension was made, and consented thereto.

[2] The third contention of the appellant is that the court erred in dismissing the action without costs to either party. This was a matter within the discretion of the trial court, and furnishes no basis for error, unless there was a manifest abuse of discretion, which does not appear to be the fact in this case.

The judgment will be affirmed.

MOUNT, FULLERTON, MORRIS, and ELLIS, JJ., concur.

#### PATTERSON v. TOLER.

(Supreme Court of Washington. Jan. 18, 1913.)

#### TAXATION (§ 708\*)—TAX SALE—GENERAL FORECLOSURE SALE.

In case of a general foreclosure sale brought by a county on delinquent certificates issued to it, the summons is sufficient if it sufficiently describes the property, notwithstanding a mistake in the owner's name.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406; Dec. Dig. § 708.\*]

Department 2. Appeal from Superior Court, Clallam County; Lester Still, Judge. Action by Harriet E. Patterson against Ralph M. Toler. From a judgment of dismissal, plaintiff appeals. Affirmed.

Geo. Venable Smith, of Port Angeles, and T. H. Patterson, of Seattle, for appellant. Cochran & Thorp, of Port Angeles, for respondent.



**FULLERTON, J.** In 1907 the county of Clallam, in a general tax foreclosure proceeding, sold for delinquent taxes certain lots and parcels of land situated in that county now claimed by the appellant. This action was instituted by her to set aside the foreclosure proceedings and the deed executed thereunder as clouds upon her title. A demurrer was interposed and sustained to the complaint, and, on the appellant's refusing to plead further, a judgment of dismissal and for costs was entered against her. This appeal followed. In the complaint it is alleged that for the years 1900 to 1905, inclusive, the property in question appeared upon the assessment rolls as the property of Warren J. Hoag, and for the years 1906 and 1907 it appeared as the property of W. J. Hoag. In the certificate of delinquency issued to the county, which furnished the foundation for the foreclosure proceeding, the property was shown as the property of W. G. Hoag, and in the published summons the name of W. G. Hoag followed the description of the property as the owner thereof; the property being during all of such times the property of Warren J. Hoag.

It was the failure to insert in the published summons either the name of the person shown on the assessment roll to be the owner of the property, or the name of the actual owner thereof, that is thought to be so far fatal to the foreclosure proceedings as to render the same void. The appellant cites a number of cases from this court to sustain her contention to the effect that it is necessary to a valid foreclosure for delinquent taxes that the summons be addressed to the actual owner of the property or to the person shown on the assessment roll to be such owner. But the cases cited are all cases where the certificate of delinquency was issued to and foreclosed by a private individual; none of them having reference to a general foreclosure of delinquency certificates brought by the county on certificates issued to the county. In the latter class of cases a different rule obtains; the summons being sufficient in such cases if the property itself is properly described, notwithstanding a mistake may be made in the name of the person shown to be the owner. This is made clear by the case of *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688, where we said: "It is contended by appellants that the original tax proceeding was invalid for the reason that the court had no jurisdiction, inasmuch as in the foreclosure proceedings the name of the owner was given as 'Henry Aenle' instead of 'Henry Aune,' as it had appeared in the tax roll for some of the years for which taxes were delinquent. We think this contention cannot be upheld. This court has repeatedly held a tax foreclosure by a county to be a proceeding in rem. *Woodward v. Taylor*, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; *Washington Timber*

*& Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Morrison v. Shipman*, 37 Wash. 171, 79 Pac. 632; *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233. Where a county prosecutes a general foreclosure, it is immaterial what name or names are used in the summons, or whether any is used. The summons is sufficient, in the absence of fraud, if the property is properly described. We recognize a clear distinction between a foreclosure by a county and one by an individual. In the latter case, greater strictness is required; the requirements as to service of summons being much the same as in the foreclosure of a mortgage. *Laws* 1901, pp. 384, 385; *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557; *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933."

The appellant attacks the case cited, contending that it is inconsistent with other decisions of this court, and contrary to a proper construction of the statute. But a re-examination of the question suggested has convinced us that the principle of the case is sound, and that no cause exists for a modification of the rule therein announced.

The judgment is affirmed.

**MOUNT, C. J., and ELLIS, MORRIS, and MAIN, JJ., concur.**

#### STATE v. PEEPLES.

(Supreme Court of Washington. Dec. 30, 1912.)

##### 1. FORGERY (§ 16\*)—ESSENTIALS.

The constituent elements of forgery in the first degree by uttering a forged instrument are, first, the spurious character of the instrument; second, its utterance by accused; and, third, his guilty knowledge of its spurious character.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 51-53; Dec. Dig. § 16.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2900, 2910; vol. 8, p. 7665.]

##### 2. FORGERY (§ 44\*)—GUILTY KNOWLEDGE—EVIDENCE.

Guilty knowledge of the spurious character of an instrument uttered by accused, may, like any other fact, be proven by circumstantial evidence.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 117-121; Dec. Dig. § 44.\*]

##### 3. FORGERY (§ 44\*)—PROSECUTIONS—EVIDENCE—SUFFICIENCY.

In a prosecution for forgery, evidence held sufficient to establish accused's guilty knowledge of the spurious character of the instrument which he uttered.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 117-121; Dec. Dig. § 44.\*]

##### 4. CRIMINAL LAW (§ 1160\*)—APPEAL—REVIEW.

Where the verdict of conviction was supported by evidence, the appellate court cannot,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

motion for new trial having been denied, interfere, unless there was error in the admission of evidence or conduct of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

#### 5. WITNESSES (§ 277\*)—EXAMINATION—CROSS-EXAMINATION.

Where accused testified, denying his guilty knowledge of the spurious character of the instrument he had uttered, and stated that he relied upon the statements of one H., cross-examination as to whether he and H. and others had not been passing forged papers was proper as tending to impeach his testimony in chief, though tending to connect him with other offenses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

#### 6. CRIMINAL LAW (§ 720\*)—CRIMINAL LAW—ARGUMENT OF COUNSEL.

While counsel may not make intemperate assertions of opinion not based upon evidence, yet the prosecuting officers should be permitted a reasonable latitude in argument; consequently, in a prosecution for forgery, where accused had denied that he knew the spurious character of the instrument, statements by the prosecutor in the form of questions to the jury as to why a third person should be writing to accused about the instrument if they were not carrying on the same nefarious practices, and whether a gang like this would not have confederates, was not improper, being merely argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

#### 7. CRIMINAL LAW (§ 841\*) — TRIAL — EXCEPTIONS.

Under Rem. & Bal. Code, § 384, which still fixes the manner of taking exceptions, and provides that exceptions to the charge, or to the refusal to charge, may be taken by any party by stating to the court, after the jury shall have retired, that such party excepts to the same, whereupon the judge shall note the exceptions in the minutes or in the stenographer's record, exceptions to the refusal of instructions, where not called to the attention of the trial court before the motion for new trial, are insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2022; Dec. Dig. § 841.\*]

#### 8. CRIMINAL LAW (§ 547\*)—EVIDENCE—SECONDARY EVIDENCE.

Upon the second trial in a prosecution for forgery a copy of an affidavit which had been introduced at the first trial is admissible, where the officials having charge of the files testified that a diligent search had failed to enable them to find it, and that this was a reproduction of the original.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.\*]

#### 9. CRIMINAL LAW (§ 548\*)—EVIDENCE—SECONDARY EVIDENCE.

A copy of an affidavit admitted in evidence, the original having been lost after the first trial, is as much evidence of what was said or sworn to as the original.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1247; Dec. Dig. § 548.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Drewry M. Peeples was convicted of forgery, and he appeals. Affirmed.

Chas. M. Fouts, of Seattle, for appellant. John F. Murphy, Hugh M. Caldwell, and H. B. Butler, all of Seattle, for the State.

ELLIS, J. The defendant was charged by information with the commission of the crime of forgery in the first degree by knowingly uttering a forged mortgage. He was tried and convicted, and appealed to this court. On that appeal the judgment of conviction was reversed because of an erroneous instruction, to the effect that the fact of forgery is a circumstance from which guilty knowledge is presumed, unless rebutted. *State v. Peeples*, 65 Wash. 673, 118 Pac. 906. In due course he was again tried and found guilty as charged. His motion for a new trial was overruled, judgment was pronounced, and sentence imposed. He has again appealed.

[1-3] The first two assignments of error are general in their nature, being based upon the court's action in denying a new trial and imposing sentence. It is inferentially argued that the evidence was insufficient to support the verdict. The constituents of the crime charged and the things necessary to its proof are (1) the spurious character of the instrument, (2) its utterance by the appellant, and (3) his guilty knowledge of its spurious nature. As sustaining the first two of these elements, the evidence was overwhelming. It was shown beyond question that the mortgage was a forgery, and the appellant admitted his participation in its utterance. The evidence conclusively showed that the real owner of the property mortgaged was Martha B. Barnes; that her husband was W. H. T. Barnes; that they resided at Blaine, Whatcom county, Wash., were not in Portland when the spurious mortgage was there executed, and knew nothing of the mortgage till after it was made and the money paid out upon it.

The sole debatable fact upon the evidence was as to the appellant's guilty knowledge of the forgery. Such knowledge may be proven, like any other fact, by circumstantial evidence. The mortgage, the forgery of which is charged, purported to have been executed by Martha B. Barnes and W. H. T. Barnes, husband and wife, before a notary at Portland, Or. The appellant testified that in May, 1910, one D. A. Hatfield, whom he had known for a long time well and favorably, brought to the office of the Washington Abstract Company, where appellant was then employed, a man and two women, none of whom the appellant had ever seen before; that Hatfield introduced the man as Mr. Barnes, one of the women as Mrs. Barnes, his wife, and the other, a young woman, as Miss Barnes, the man's daughter; that they inquired the price of an abstract of title to the property which was afterwards covered by the alleged spurious mortgage; that about a week later he met the man Barnes on the street, and Barnes then introduced to him a Mr. Arlington, whom appellant had never seen before, as Barnes' brother-in-law; that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant next met the man Barnes about July 20, 1910, in appellant's office in the Melhorn building in Seattle, where appellant was then engaged in the real estate and loan business; that he brought with him the abstract of title to the property in question, and wanted appellant to secure a loan of \$5,000 upon the property to clear up delinquent taxes and special assessments against it; that appellant undertook the commission and, during the month of August, opened negotiations to that end with one Hugh A. Goodfellow. The evidence further showed that a loan was finally arranged for, and a note and mortgage prepared in Goodfellow's office, which the appellant took away with him to have executed by Martha B. Barnes, in whose name the property stood of record, and W. H. T. Barnes, her husband; that a few days afterwards the appellant returned with the papers executed, stating that he had sent them to Portland for that purpose; that one J. R. Seaborn, a client of Goodfellow's who furnished the money for the loan, was notified, and the three went to the office of Seaborn's attorney, who had examined the abstract, and who then examined the papers.

The attorney testified that in examining the title he noted that one Mary E. Barnes had held the title in 1893, and he required some proof that she was then unmarried; that the appellant produced an affidavit to the effect that appellant knew Mary E. Barnes, and that she was an unmarried woman when she acquired the property in 1893. The affidavit was sworn to by the appellant before Hugh A. Goodfellow as notary public. The attorney, Goodfellow, and Seaborn all testified that the appellant then stated that he had known the Barnes family for a long time, and that he knew that Miss Barnes had never been married. The failure to produce the original being accounted for, a copy of this affidavit was admitted in evidence over the appellant's objections. The copy was as follows:

"D. M. Peeples being first duly sworn on oath deposes and says: That he knew and was acquainted with Mary E. Barnes, the grantee in that certain deed dated the 5th day of August, 1893, in which James Barnes, Jr., was grantor, conveying all of block thirty-five in Woodland addition to Salmon Bay City; that said Mary E. Barnes was unmarried at the time she acquired the above-named property, and during all the time she held said property remained unmarried. In witness whereof I have hereunto set my hand this 3d day of September, 1910. [Signed] D. M. Peeples.

"Subscribed and sworn before me this 3d day of September, 1910. [Signed] Hugh A. Goodfellow, Notary Public in and for the State of Washington, Residing at Seattle."

The loan was closed, the papers delivered, and something near \$3,400 of the proceeds

applied in payment of taxes and special assessments against the property. Of the balance, \$936.13 was turned over to the appellant by Goodfellow's check, payable to the order of Martha B. Barnes, and about \$500 was held back pending the clearing up of an apparent judgment lien upon the property. This occurred about September 3, 1910. Finally, the parties being satisfied that the judgment was not a lien upon the property, Goodfellow gave the appellant his check, payable to the order of Martha B. Barnes, for \$432.01, dated September 12, 1910; that being the balance of the loan after deducting \$250 as Goodfellow's commission. The appellant testified that he sent each of these checks to Barnes at Portland as soon as received; that about September 6th the man Arlington appeared at his office with the first check and a letter from Barnes, asking the appellant to aid Arlington in cashing the check, which he did, retaining from the proceeds his own commission of \$100, and about \$35, the cost of the abstract, turning the balance over to Arlington; that about September 13th or 14th a young man, whom appellant had never seen before or since, appeared at appellant's office with the other check and a letter from Barnes, introducing him as Mr. Clark, a nephew of Barnes, and asking the appellant to aid the young man in cashing the check, which he did, turning the money over to the man Clark. On cross-examination the appellant admitted that he went to Portland on September 7th on other business, and while there saw and talked with Hatfield. It also appeared that about the time of these transactions one W. M. Whitney, an attorney, was investigating another transaction in which Hatfield and Arlington were implicated, and with which the appellant had some connection. The appellant testified that Whitney called upon him, and he had furnished Whitney the name and address of Hatfield. Whitney testified that on September 7th or 8th he called on the appellant to secure information as to the two men, and that the appellant said that he did not know Arlington at all, and at first said that he did not know who Hatfield was, but finally said maybe he did know him, and that he would try to find out where he was and would notify Whitney, but that he never did in fact furnish Hatfield's address.

The appellant also testified that, pending the closing of the loan, he received several letters from Barnes from Portland, one of which he introduced in evidence. C. S. Harley, a banker, who qualified as a handwriting expert, compared this letter with another paper in Hatfield's handwriting, and testified that in his opinion both papers had been written by the same person. We think there are ample circumstances disclosed by this evidence from which the jury might reasonably find that the appellant had guilty

knowledge of the forgery. He testified that he had known Hatfield for a long time, but if Whitney is believed he denied any acquaintance with him, though within a day or two of that time he had seen and talked with him in Portland. He testified that he had never seen any of the spurious Barnes family prior to May, 1910, but made an affidavit, in order to secure the loan, that he knew that Mary E. Barnes was an unmarried woman in 1893. He produced a letter purporting to come from Barnes in Portland at a time when the evidence shows Hatfield was in Portland, and this letter was pronounced by the expert as in Hatfield's handwriting. He admitted that throughout this period he was in correspondence with Hatfield also, though at that time denying his acquaintance. Without further particularizing, we are satisfied that no one can read the entire record without reaching the conclusion that the appellant was aware of the spurious character of the papers from their inception, and knowingly participated in their utterance. There was evidence tending to establish every element of the crime charged.

[4] The trial court having denied the motion for a new trial, we cannot interfere, unless there was prejudicial error in the admission of evidence, or in the giving or refusal to give instructions. *State v. Bailey*, 67 Wash. 336, 121 Pac. 821, and cases there cited.

[5] On cross-examination of the appellant the following questions were permitted: "Q. Isn't it a fact, Mr. Peebles, that you and Mr. Hatfield and others were engaged in passing off these spurious papers on the public, and that you were engaged in this transaction in the same way? \* \* \* Q. Isn't it a fact you executed a fictitious deed from John Paulson to Dave Arlington on July 12, 1909?" The appellant contends that this constituted error, in that it tended to prejudice the jury by connecting him with the commission of other offenses. The appellant had testified to the effect that he felt warranted in relying upon Hatfield in the matter of the introduction of the Barnes family. The first question was competent on cross-examination for the purpose of testing his right to so rely. He had also testified that he had never met Arlington until the spurious Barnes introduced him on the street. The second question was competent cross-examination upon this point. The appellant also testified that after his arrest his desk had been rifled and papers in connection with the transaction taken away. On cross-examination he was asked if confederates of his had not taken the letters to prevent the officers from getting them. All of these questions had a direct relation to the things to which the appellant had testified in chief. When a defendant, as a witness in his own behalf, details a state of facts favorable to himself,

he necessarily subjects himself to cross-examination relative to those facts. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness. *Rem. & Bal. Code*, § 2148; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *State v. Armstrong*, 29 Wash. 57, 69 Pac. 392; *State v. Hill*, 45 Wash. 694, 89 Pac. 160. "Under our Constitution a defendant in a criminal case cannot be compelled to give evidence against himself, but when he voluntarily offers himself as a witness in his own behalf, and so testifies, he is subject to all the rules of law relating to cross-examinations of other witnesses." *Bal. Code*, § 6941; *Pierce's Code*, § 2165. And, in case the accused testifies in his own behalf, he is subject to cross-examination to impair his credit as a witness to the same extent as any other witness is (*Abbott, Trial Brief [Criminal Causes]* § 396, and cases cited), and generally may be impeached in the same manner as any other witness (*State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888), 'by reputation as evidence of character, by cross-examination to character, by conviction of crime, and the like'; 'for otherwise, if he were a false witness, the customary methods of exposing this would not be available, and the investigation of truth and the punishment of crime would be defeated.'" *State v. Melvern*, 32 Wash. 7, 26, 72 Pac. 489, 495. In *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179, the cross-examination which was held improper related to a matter wholly disconnected from the defendant's testimony in chief. The distinction from the case before us is obvious.

[6] In arguing the case to the jury counsel for the state said: "Why should this man Hatfield be writing to this man if they were not carrying on the same nefarious practices?" And again: "Don't you suppose a gang working like these people are going to have a few confederates working with them?" Exceptions were taken, and these remarks are assigned as misconduct, necessitating a reversal. The connection in which these remarks were made is not preserved in the record, but, even dissociated from context, they evince an argumentative character, and are not such expressions of individual opinion of the appellant's guilt, independent of the testimony of the case, as to constitute misconduct. *State v. Armstrong*, 37 Wash. 51, 54, 79 Pac. 490; *State v. Marion*, 68 Wash. 675, 679, 124 Pac. 125; *People v. Hess*, 85 Mich. 128, 134, 48 N. W. 181; *People v. Welch*, 80 Mich. 616, 45 N. W. 482. While intemperate assertions of opinion, not based upon any evidence, will never be tolerated, it is none the less in the interest of a sound public policy that prosecuting officers be permitted a reasonable latitude in argumentative deduction from the evidence.

That is all that these remarks upon their face purport. They do not constitute prejudicial error.

[7] Error is also assigned upon the failure of the court to give certain instructions which, it is claimed, were requested by the appellant. The trial was completed on February 28, 1912. A motion for a new trial was filed on March 1, 1912, which was denied on March 9, 1912. On February 27, 1912, the proposed instructions, the failure to give which is complained of, were filed. On March 1, 1912, exceptions to the failure to give them were filed. There is nothing in the record to indicate that either these proposed instructions or these exceptions were ever called to the attention of the trial court. This is also true of the exceptions to the instructions given by the court. They are not referred to nor included in the statement of facts certified to by the trial judge, but merely appear in the transcript among the other files. This constituted neither a sufficient request, nor sufficient exceptions to its refusal, nor sufficient exceptions to the instructions given. The amendatory act of 1909 (Rem. & Bal. Code, § 339) relates merely to the time, not the manner, of taking exceptions. The manner of taking exceptions is still determinable by the old law. Rem. & Bal. Code, § 384. Though exceptions may now be taken at any time before the hearing of the motion for a new trial, so that the trial judge may have an opportunity to correct, in his ruling upon that motion, any error he may have made in his instructions, thus saving the necessity for review by appeal, they must still be stated to the trial judge and by him noted in the minutes of the court, or embodied in the record by the stenographer taking the record. Otherwise they would not serve their intended purpose. They would be an idle formality. This same question was logically discussed and the above view conclusively adopted by this court in *Coffey v. Seattle Electric Co.*, 59 Wash. 686, 109 Pac. 202. The exceptions are not sufficient to permit a review of the court's action either in refusing to give or in the giving of instructions, save one, to the giving of which exception was taken at the time and noted in the record by the stenographer.

[8, 9] The jury requested an instruction upon the purported copy of the affidavit above quoted. The appellant objected to any instruction, except that the jury be instructed to disregard the exhibit, on the ground that no proper foundation had been laid for its introduction. It is not claimed that the instruction as given was not proper if the exhibit was properly admitted. We think it was. It was shown that the

original affidavit was admitted in evidence at the former trial, and that search had been made in the papers in that case in the Supreme Court, and that it could not be found. It appeared that the affidavit was referred to in the certificate of the trial judge in that case as "Exhibit E." The transcript clerk in the county clerk's office of King county testified that in such a case he always sent up all exhibits referred to in the judge's certificate, if he could find them, and that if any could not be found he notified the attorneys in the particular case. The vault clerk in the office of the county clerk for King county testified that he had searched in the files of the original case for the original affidavit, and that he could not find it. He also testified that none of the exhibits in that case were returned to him after being sent up to the Supreme Court. The notary, before whom the original affidavit was sworn to, testified that the purported copy offered stated exactly what the original did, and, though he admitted that he did not actually compare the two, that he read the offered paper over with the original a number of times. The deputy prosecuting attorney, who conducted the former trial for the state, testified that the paper offered was in substance the same as the original; that he had examined the original several times, introduced it in evidence on the former trial, and read it to the jury; that the original contained the very allegations found in the paper offered, and in his judgment the paper was a copy of the original affidavit. The attorney who examined the abstract for the purpose of the loan, and on whose demand the original affidavit was made, testified that in his opinion the paper offered was a copy of that affidavit. We think this evidence sufficiently excused the failure to produce the original affidavit, and was sufficient to admit the paper produced as proof of the contents of the original. It follows that there was no error either in admitting the paper in evidence or in giving the instruction, which was to the effect that, if the jury found that the defendant made an affidavit, and that the paper in evidence was a true copy of that affidavit, then it was as much evidence of what was said or sworn to as the original itself would have been.

Notwithstanding the failure to properly take exceptions, we have carefully examined the instructions given in the light of the evidence, and we are satisfied that they fairly presented the law as applied thereto. We find in the record no prejudicial error.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, MORRIS, and MAIN, JJ., concur.

## CROWLEY v. BYRNE et ux.

(Supreme Court of Washington. Dec. 28, 1912.)

## 1. ESTOPPEL (§ 68\*)—DEFENSES—ESTOPPEL.

In an action to quiet title as against defendant's claim of title under a quitclaim deed and for partition, defendant cannot be heard to say that such deed is not a cloud upon plaintiff's title and at the same time claim title thereunder.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

## 2. QUIETING TITLE (§ 49\*)—SCOPE OF REMEDY—INVALIDITY OF ADVERSE CLAIM.

A decree quieting title may be had notwithstanding the absolute invalidity of the claim or estate asserted, and this is true of an action to quiet title or remove a cloud brought under Rem. & Bal. Code, § 785; and defendant in an action to try title to land will seldom, if ever, be permitted to urge that the cloud which plaintiff is seeking to remove or the claim against which he is seeking to quiet his title is not a cloud or is not a valid claim.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 98, 99; Dec. Dig. § 49.\*]

## 3. QUIETING TITLE (§ 34\*)—ACTION—SUFFICIENCY OF COMPLAINT.

Under Rem. & Bal. Code, § 785, providing that any person having a valid and subsisting interest in real property and the right of possession thereof may recover in an action against the tenant in possession, or the person claiming interest therein in an action to remove a cloud on title, a complaint, alleging that the owner of land entered into an option contract with plaintiff for the sale of an undivided one-half interest, which contract was filed for record, that thereafter plaintiff paid the full price, but did not receive any deed, and that the owner on the same day delivered a quitclaim deed to defendant, who took with actual knowledge of plaintiff's option and that he had paid the owner the full purchase price, stated a cause of action.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69-72, 76; Dec. Dig. § 34.\*]

## 4. VENDOR AND PURCHASER (§§ 54, 212\*) — CONTRACTS EXECUTED—OPTION—PAYMENT—EFFECT.

The holder of an option to purchase real property, who has fully executed the contract by payment of the purchase price, although receiving no deed therefor, becomes vested with the equitable title to the land as against the vendor and his grantees with notice; such title relating back to the date of the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 85, 436-439; Dec. Dig. §§ 54, 212.\*]

## 5. VENDOR AND PURCHASER (§ 228\*) — BONA FIDE PURCHASER—OPTION CONTRACT.

The holder of an option for the purchase of real property has such an interest in the land as will protect him against subsequent purchasers from the vendor with notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.\*]

## 6. PARTITION (§ 17\*) — SCOPE OF RELIEF — QUIETING TITLE—TITLE OF PLAINTIFF.

Rem. & Bal. Code, § 844, provides that the rights of the several parties may be put in issue, tried, and determined in a partition suit. Plaintiff in a suit for partition and to quiet title alleged that he had taken an option for the purchase of an undivided interest in land, and within its terms had paid the full purchase price without receiving a deed therefor, and

that his vendor on the same day had conveyed by quitclaim deed to defendants, who had notice of the option, and concluded with a general prayer for further and different relief. Held, that plaintiff could have a decree quieting his title as against the claim of defendant, as well as for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 53-59; Dec. Dig. § 17.\*]

Department 1. Appeal from Superior Court, Jefferson County; Lester Still, Judge. Action by H. G. Crowley against L. R. Byrne and wife. Judgment for defendants, and plaintiff appeals. Reversed.

Edwin H. Flick, of Seattle, Allan H. Trumbull, of Port Townsend, and C. E. Hughes, for appellant. L. R. Byrne and A. J. Falknor, both of Seattle, for respondents.

PARKER, J. This is in substance an action to quiet title in plaintiff to an undivided one-half interest in a tract of unoccupied land in Jefferson county, and to obtain partition of the land between the plaintiff and the defendants; though counsel for the defendants seem to proceed upon the theory that it is strictly an action to remove a cloud from plaintiff's title to the land and to obtain partition thereof. The trial court sustained the defendants' demurrer to the plaintiff's third amended complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. Judgment of dismissal was thereupon rendered against him, from which he has appealed.

The controlling facts shown by the allegations of the complaint may be summarized as follows: On March 13, 1909, Sarah J. Waits was the owner of the land here involved. On that date she entered into an option contract in writing with appellant for the sale of an undivided one-half interest in the land to him in consideration of the sum of \$1, whereby she agreed to sell and convey to him an undivided one-half interest in the land at any time within two years thereafter, for the sum of \$1,250. Thereafter on January 3, 1910, the contract was filed for record in the office of the auditor of Jefferson county. Thereafter on January 5, 1910, appellant paid to Sarah J. Waits the full amount of the purchase price for the land, as agreed upon in the contract, but did not then receive a deed of conveyance from her. Thereafter on the same day Sarah J. Waits executed and delivered to respondent L. R. Byrne a quitclaim deed purporting to convey to him the entire tract of land. Respondents claim the whole of the land, evidently under this deed. Before Byrne received this quitclaim deed and before he paid any part of the consideration thereof, he had actual knowledge of the existence of appellant's option contract to purchase an undivided one-half interest in the land, and also constructive knowledge thereof by reason of its prior recording, and also had then actual knowledge of the fact that appellant had

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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paid to Sarah J. Waits the full amount of the purchase price of the land under his option contract. Thereafter on March 1, 1911, before the expiration of the two years specified in the contract for the exercising of appellant's option, Sarah J. Waits executed and delivered to him, in pursuance of the option contract, a warranty deed for an undivided half interest in the land. The land is unoccupied. Other facts appearing by the allegations of the complaint, touching an alleged oral agreement made by respondent L. R. Byrne with Sarah J. Waits at the time of receiving the quitclaim deed from her, by which he was to hold an undivided interest in the land in trust for appellant and convey it to him, we need not notice. Some conditions other than those we have noticed were contained in the contract, but they are not material here. We will for argument's sake regard the contract as a pure option. This view of the contract is the most favorable to respondents' contentions.

Our conclusions render it more appropriate to notice the contentions made by counsel for respondents against the sufficiency of this complaint to state a cause of action, than to notice the contentions of appellant to the contrary. Counsel for respondents, proceeding evidently upon the theory that this is strictly an action to remove a cloud only, consisting solely of the quitclaim deed given by Sarah J. Waits to respondent L. R. Byrne, contend that, since there is no allegation of the recording of that deed, it is not such a cloud upon appellant's title as a court of equity will concern itself with removing. The decisions of the courts have heretofore given countenance to the view that there is a substantial distinction between an action to quiet title as against an asserted claim of title by another, and an action to remove a cloud consisting of some specific instrument; and that in the latter case a defendant may successfully defend upon the ground that the instrument constituting the alleged cloud is in fact not a cloud. This doctrine seems to be recognized in *Lemon v. Waterman*, 2 Wash. T. 485, 7 Pac. 899, and *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516, though it seems to have been unnecessary to the decision of either of those cases. There is, however, room for arguing that this doctrine is materially weakened, if indeed not rendered obsolete in this state, by our decisions and statutes relating to actions for the trial of title to land.

[1] However this may be, it is manifest here that this is not solely an action to remove a cloud created by the quitclaim deed of Sarah J. Waits to respondent upon appellant's title, but it is an action to quiet the title of appellant as against the *claim of title* made by respondents under that deed, as well as for partition. It seems clear to us that respondents cannot be heard to say that this quitclaim deed is not a cloud upon appellant's title and at the same time claim

title thereunder, as the allegations of this complaint show.

[2, 3] It has been held both by the territorial court and by this court that a decree quieting title may be had notwithstanding the absolute invalidity of the claim or estate moved against. *Lemon v. Waterman*, 2 Wash. T. 485, 495, 7 Pac. 899; *Watson v. Glover*, 21 Wash. 677, 680, 59 Pac. 516; *McGuinness v. Hargliss*, 56 Wash. 162, 105 Pac. 233, 21 Ann. Cas. 220. It is true that the holdings in those cases had particular reference to actions prosecuted under section 809, Rem. & Bal. Code, and it is insisted by counsel for respondents that the allegations of this complaint are not sufficient to constitute a cause of action under that section. However, the facts pleaded are sufficient to constitute a cause of action under section 785, Rem. & Bal. Code, which provides: "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title." And we think the doctrine announced in the cases cited is of equal force and applicability to actions under this section. *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, is in harmony with this view. Indeed, whatever the rule may have formerly been in an action to remove a cloud, strictly speaking, we think under our present law that the defendant in an action to try title to land, whatever its nature, seldom, if ever, will be permitted to urge in defense of such action that the cloud which the plaintiff is seeking to remove, or the claim which he is seeking to quiet his title against, is not a cloud or is not a valid claim. If this be a defendant's attitude, he can have no possible interest in the action except to avoid the taxation of costs therein against him, and this can readily be avoided by a disclaimer on his part. What right a defendant has, under such circumstances, to say that the plaintiff may not have a decree removing a cloud which he conceives to be such, or a decree quieting his title as against a claim which he conceives may even in the slightest degree impair the full enjoyment of his title, is indeed difficult to conceive of.

[4, 5] Some contention seems to be made by counsel for respondents upon the theory that, at the time of the execution of the quitclaim deed by Sarah J. Waits to respondent L. R. Byrne, appellant did not have title to the land; but only an option to purchase; and that an option to purchase does not create any interest in the land. It is true appellant did not then have a deed, but he had an unexpired option to purchase, upon which he had paid the entire purchase price, which thereby in law became a fully executed con-

tract of purchase upon his part, vesting in him the equitable title to the land as against Sarah J. Waits and respondents, her grantees, who had full notice of appellant's rights. But even if appellant had not at that time paid the purchase price and thereby elected to exercise his option, such option did not expire until March 13, 1911, more than one year thereafter, and within which time he received from Sarah J. Waits a warranty deed, in compliance with the option contract, which of course was an election to exercise the option upon his part within its life, and an acknowledgment on her part that she had received the full purchase price within its life.

In *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522, it is said: "It has been said that an option to purchase land does not before acceptance vest in the holder of the option an interest in the land. *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Gustin v. Union School District*, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361; *Phoenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. *House v. Jackson* [24 Or. 89, 32 Pac. 1027]; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835; *Wall v. Railroad Co.*, 86 Wis. 48, 56 N. W. 367. At any rate, the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Kerr v. Day*, *supra*; *People's Street Ry. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (*People's St. Ry. Co. v. Spencer*, *supra*), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase." We are of the opinion that as between the parties the option contract gave appellant an interest in the land such as respondents were bound by, having notice thereof, even though, at the time they acquired the quitclaim deed from Sarah J. Waits, appellant had not exercised his option or paid any part of the purchase price; and that upon receiving the deed from Sarah J. Waits within the life of the option, thus evidencing the exercise of the option on the part of appellant and the receipt of the purchase price on the part of Sarah J. Waits, the title acquired by appel-

lant related back to the date of his acquiring the option.

[6] Some contention is made by counsel for respondent that an action for partition cannot be maintained where the title of the plaintiff is questioned; in other words, that appellant cannot quiet his title and have partition in the same action. This question has been decided adversely to counsel's contention in *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, and *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. Indeed, our statute relating to partition seems to expressly so provide in section 844, Rem. & Bal. Code, as follows: "The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in such suit." Our attention is called to the case of *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219, as opposed to this view; but a careful reading of that decision will show that the plaintiff failed because he did not state facts showing that he had any interest in the land.

The specific prayer of appellant's complaint might seem to be somewhat more appropriate to an action for specific performance, since it asks that respondents be required to execute him a quitclaim deed for an undivided half interest in the land. This is followed, however, by a general prayer for "such further and different relief as the court may deem meet in the premises." We are of the opinion that, if the allegations of appellant's complaint, which we have briefly summarized, are true, he is entitled to a decree quieting his title to an undivided half interest in the land as against the claims of respondents, and also to partition of the land.

The judgment of the trial court is reversed, with directions to proceed in accordance with the views here expressed.

MOUNT, C. J., and CROW, GOSE, and CHADWICK, JJ., concur.

#### STATE v. HOGG.

(Supreme Court of Oregon. Jan. 14, 1913.)

#### 1. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

An instruction that, if the jury believed there were other people in the immediate vicinity and that prosecutrix made no outcry, there would be a presumption that no rape was committed, "unless she has satisfactorily explained why she did not make an outcry," is incorrect as to the quoted part, where there was no evidence of any explanation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.\*]

#### 2. CRIMINAL LAW (§ 800\*)—INSTRUCTIONS—DEFINITIONS—NECESSITY.

An instruction that, if the jury believed there were other people in the immediate vicinity and that prosecutrix made no outcry, there would be a presumption that no rape was committed "unless she has satisfactorily explained why she did not make an outcry," is incorrect,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



where the jury was not informed as to what would be a satisfactory explanation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.\*]

### 3. CRIMINAL LAW (§ 351\*) — FLIGHT — EVIDENCE.

Although it is competent to prove flight after a crime, yet the fact must be determined by the movements of the defendant, and the admission of evidence as to the travels of a posse who were searching for him is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 920-932; Dec. Dig. § 851.\*]

### 4. CRIMINAL LAW (§ 815\*)—FLIGHT—INSTRUCTIONS.

An instruction that flight is a fact which the jury might consider in determining guilt was faulty, in that it did not advise the jury to consider other facts, where there was evidence of other reasons than fear of arrest for causing the defendant to flee.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.\*]

### 5. CRIMINAL LAW (§ 351\*)—FLIGHT—ADMISSIBILITY OF EVIDENCE.

To explain his departure after an offense, a defendant may show that he was in danger of being mobbed in the vicinity and that a certain person had made threats of violence against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.\*]

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

William Hogg was convicted of rape, and he appeals. Reversed.

Turner Oliver, of La Grande, for appellant. F. S. Ivanhoe, Dist. Atty., of La Grande, for the State.

BURNETT, J. [1] Among others, the court gave to the jury the following charge: "I instruct you, gentlemen of the jury, that if you believe from the evidence at the time of the alleged rape other people were at the same time in the immediate vicinity, who might easily have heard her had she made any outcry, and that she in fact made no outcry at the time the defendant was attempting to have connection with her, these facts will tend to raise a presumption that no rape was committed upon her at the time, unless she has satisfactorily explained why she did not make an outcry or call for help at the time." The instruction was given as requested by the defendant, except the added clause "unless she has satisfactorily explained why she did not make an outcry or call for help at the time." The defendant excepted to this amendment, and it is objectionable on two grounds. The first is that there was no evidence or pretense that the prosecutrix had attempted to explain why she did or did not make an outcry or call for help. After she had been examined and re-examined by both the prosecution and the defense, she finally testified that she hollered several times. Her testimony in part was that the defend-

ant came to her father's residence, which is a short distance from the home of the defendant's sister, who is married, and told the prosecutrix that his sister wanted to see her. She then accompanied the defendant across the fields towards his sister's house instead of going by the road leading from one place to the other. The prosecutrix says that just before arriving at their destination the defendant seized her, pulled her into what she calls a chicken house, a building 165 feet from the sister's dwelling house, laid her upon the ground, and consumed a half of an hour in performing the sexual act. She says, too, that after he let her up she went to the house and asked the defendant's sister what she wanted and was told by that lady that nothing was wanted of her. She then returned to her father's house in company with the defendant, who mounted his horse which he had left there and rode away, and she soon afterwards, at the questioning of her parent, told him what had occurred. The sister, although at home during this time, denied that the prosecutrix had been at her house or that she had seen or spoken to her at all on the occasion mentioned. The defendant utterly denied the charge. As stated, there was no evidence of any explanation by the prosecutrix about making or not making an outcry. In this respect therefore the instruction was an abstract direction not justified by the testimony, and hence, under many authorities in this state, it was erroneous. *Breon v. Henkle*, 14 Or. 494, 13 Pac. 289; *Woodward v. O. R. N. Co.*, 18 Or. 289, 22 Pac. 1076; *State v. Bowker*, 26 Or. 309, 38 Pac. 124; *Anderson v. O. R. N. Co.*, 45 Or. 211, 77 Pac. 119.

[2] Again, the jury was left uninformed as to what would be a satisfactory explanation. If her failure to call for help was induced by fear or force or threats overcoming her will on that subject, it would be satisfactory in point of law. If her explanation were based upon pleasing promises or presents or some other such inducements, it would not be satisfactory. The jury should not have been left to determine this question under the instruction given.

[3] The only remaining error which we will consider is that growing out of the procedure of the court relating to an alleged flight of the defendant. It is related in the testimony that the crime was committed between 12 and 1 o'clock p. m. of Sunday, July 16, 1911, in Union county. The defendant was taken into custody in Baker county three or four days afterwards. W. A. Maxwell, the justice of the peace who issued a warrant for the arrest of the defendant on the charge mentioned, testified that on Tuesday and Wednesday following the occurrence described in the indictment he summoned a posse, and they went out searching for the defendant for the purpose of arresting him.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Over the objection of the defendant on the ground that it was incompetent, irrelevant, and immaterial, the witness was allowed to testify that they "traveled about 35 miles the first day and the second perhaps not over 30, that is with the team, and they walked 8 or 10 miles that day." Although it is competent to prove the flight of a defendant after committing an offense, yet the fact of such an escape is to be determined by the movements of the defendant, and not by those of the ones going to search for him. It was an error to admit the testimony about the travels of Maxwell and his companions, especially as it is shown by the testimony that his posse was not successful in capturing the defendant.

With the aid of the defendant's brother, two men, named Bennett and Draper, went to a point in Baker county where the brother brought the defendant into their presence, and they conveyed him under arrest direct to La Grande without taking him before the magistrate who issued the warrant. On the cross-examination of Bennett on this point the defendant's counsel, referring to the neighborhood in which the prosecutrix lived, asked this question: "On account of the ferocious excitement of the people over there it would not have been good for him to have stopped there?" This was objected to by the counsel for the state as incompetent, irrelevant, and immaterial, and the court sustained the objection. It was contended by the defendant in explanation of his going to Baker county that he went to avoid an altercation with one Burnham. There was testimony tending to show that Burnham and the defendant had quarreled over the affections of a young woman other than the prosecutrix. The father of this damsel, the subject of their altercation, testified that his daughter had discarded Burnham for the defendant and related that the former had made threats against the latter. He was then asked to state whether he told the defendant how Burnham felt toward him. Sustaining the objection of the prosecution, the court refused to allow this question to be answered.

[4] On the question of flight the court gave this instruction: "There has been some testimony introduced in the trial of this case for the purpose of showing that soon after the alleged commission of the crime the defendant fled from the vicinity of where the crime is alleged to have been committed. I instruct you that the flight is a fact and circumstance which you have a right to take into consideration in determining the question of the guilt or innocence of the defendant." The defendant excepted to this instruction as well as the rulings of the court on the admissibility of the testimony already noted.

[5] It was competent for the defendant to show not only that he was in danger of being mobbed in the vicinity, but also that

Burnham made threats of violence against him all for the purpose of explaining his departure from Union county to Baker county. In *Batten v. State*, 80 Ind. 394, the court held that for the purpose of aiding the jury in properly determining the weight to be attached to the circumstance of the defendant's flight it was competent for him to show what was the manner of the persons present at the occurrence complained of and whether they followed him up threatening violence. In *Bradburn v. United States*, 3 Ind. T. 604, 64 S. W. 550, the principle is laid down, as stated in the words of the syllabus, that: "Where on a trial for murder the state proved that the defendant left the state immediately after the homicide which he claimed was in self-defense, it was error to exclude disinterested evidence that he was advised to leave to escape injury from friends of the deceased." *State v. Desmond*, 109 Iowa, 72, 80 N. W. 214; *Evans v. State* (Tex. Cr. App.) 76 S. W. 467. All the circumstances of the supposed flight of the defendant should be allowed to go to the jury, and the instruction should cover not only the theory of the prosecution but also that of the defendant. The direction of the court on the question of flight is faulty in that it does not advise the jury to take this fact into consideration with other facts and circumstances of the case, neither does it authorize the jury to consider the conditions under which the escape was made if made at all. In *State v. Fairlamb*, 121 Mo. 137, 148, 25 S. W. 895, 898, the court says: "It is not every going away from the place of the homicide that raises a presumption of the guilt of the accused, and, when the facts tend to show that the purpose of going away was not to avoid arrest, the instruction should be so framed as to include all the circumstances that the defendant may have the benefit of such explanatory facts." There are precedents, it is true, that sustain the instruction given as a mere platitude; but authorities founded on better reason teach us that the jury should be instructed further to the effect that they must take into consideration the circumstances and all the facts accompanying the departure in connection with other facts proven in the case and determine whether or not the flight was from a consciousness of guilt or from mere cowardice or was a genuine journey in good faith, without reference to the accusation. It may be that an innocent man is dismayed at circumstances which are apparently against him and has not the courage to stand his ground and so takes to flight. It may be, also, that his departure is attributable to an entirely different cause, or to the influence of friends. He is entitled to develop all these circumstances before the jury in explanation of his course, and the instruction of the court should be broad enough to give him the benefit of such testimony if true. The following precedents on this subject may be helpful.

Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474; Alberty v. U. S., 162 U. S. 501, 16 Sup. Ct. 864, 40 L. Ed. 1051; State v. Poe, 123 Iowa, 118, 98 N. W. 587, 101 Am. St. Rep. 307; White v. State, 111 Ala. 92, 21 South. 330.

There are numerous other errors predicated on persistence of the prosecutor in asking questions which were leading, the examination of minor collateral issues immaterial in their nature, and the refusal of the court to grant a new trial; but all these will probably be obviated at another hearing. Hence they are not considered here.

The judgment of the court below is reversed

BEAN, J., concurs in the result.

### MORGAN v. BROSS.

(Supreme Court of Oregon. Jan. 14, 1913.)

#### 1. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—QUESTIONS TO WITNESS.

Error in a personal injury case in overruling an objection to a question calling for remarks which were made by by-standers and not part of the *res gestæ* is harmless where the witness replies that he does not remember any such remarks.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 2. DAMAGES (§ 158\*)—EVIDENCE—EXTENT OF INJURY—COMPLAINT.

Where the complaint in a personal injury case charged that the injury permanently impaired plaintiff's hearing on the left side, the testimony of a doctor that hearing on that side was not totally destroyed was properly admitted, since it tended to establish the allegation of the pleading though it did not go to the same extent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. § 158.\*]

#### 3. NEGLIGENCE (§ 6\*)—LIABILITY OF CONTRACTOR—FALLING OF MATERIAL.

Where a contractor for a building neglected to provide a temporary floor to protect persons working beneath, as required by Laws 1911, p. 16, § 1, and a city ordinance, and a plumber was injured from a falling brick, the contractor was liable, regardless of how the brick happened to fall.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.\*]

#### 4. NEGLIGENCE (§ 6\*)—LIABILITY OF CONTRACTOR—FALLING MATERIAL.

The contractor could not in such case escape liability by showing that a carpenter had agreed to construct the temporary floor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.\*]

#### 5. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—IMPROPER QUESTION—ANSWER NOT RESPONSIVE.

Where an answer to an improper question is not responsive, error in overruling an objection to the question is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 6. NEGLIGENCE (§ 6\*)—VIOLATION OF ORDINANCE—TEMPORARY FLOOR.

The violation of a city ordinance requiring the laying of temporary floors in buildings under construction is negligence per se.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.\*]

#### 7. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR—INSTRUCTION—GROUND FOR REVERSAL.

Under Const. art. 7, § 3, providing that, if the Supreme Court shall find that a judgment is such as should have been rendered, they shall affirm notwithstanding any error below, the giving of an instruction, in a personal injury case, that, if plaintiff was not guilty of contributory negligence, the jury should award him the "full amount of damages" sustained by reason of the hurt was not reversible error where a consideration of the whole testimony and the instructions as preserved in the record and of the verdict, showed that the jury must have understood the quoted phrase to mean the pecuniary loss sustained and not the loss claimed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by A. R. Morgan against Albert Bross. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for a personal injury. The complaint charges generally that the defendant is a contractor and as such was, on March 9, 1911, erecting in Portland the walls of a brick building which had been extended to the fourth story without constructing any temporary floors to protect life and limb of the workmen, as required by and in violation of ordinance No. 21455 of that city, entitled, enacted, approved, and taking effect as alleged; that the plaintiff is a plumber and at the time stated was installing in the building pipes, which labor required him to be about the first floor immediately beneath where the defendant and his servants were then working; that, well knowing the plaintiff to be in such place and that it was dangerous, the defendant wrongfully and carelessly dropped a brick which, falling, struck the plaintiff's forehead, causing a deep wound, shocking his nerves and permanently impairing his hearing on the left side, to his damage, general and special, in the sum of \$4,125, for which judgment was demanded. The answer denied the material averments of the complaint, and for further defense alleged, in effect, that well knowing the defendant and his employes were working on the wall of the fourth story, and having been warned not to go beneath them, the plaintiff disobeyed such admonition and negligently went under the place where such work was in progress, when he was struck by something and hurt, which injury resulted from his negligence, and the place he occupied was a risk which he assumed. The reply denied the allegation of new matter in the answer, and, the cause

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

having been tried, resulted in a verdict and judgment for plaintiff in the sum of \$1,000, and the defendant appeals.

F. S. Senn, of Portland (Rauch & Senn, of Portland, on the brief), for appellant. G. G. Schmitt, of Portland, for respondent.

MOORE, J. (after stating the facts as above). This action is based in part on an alleged breach of duty enjoined by an act, initiated by petition and ratified by a majority of the votes cast in favor of the measure at an election held November 8, 1910. Laws Or. 1911, c. 3. Section 1 of that statute, as far as material herein, reads: "All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction \* \* \* of any building \* \* \* shall see that all \* \* \* floor openings and similar places of danger shall be inclosed; \* \* \* and generally, all owners, contractors, subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, \* \* \* and without regard to the additional cost of suitable material or safety appliance or devices." Upon a conviction for a failure to comply with, or for a violation of, the provisions of such act, the person found guilty thereof is subject to a fine and imprisonment or both, which pecuniary punishment or forcible detention of his person does not affect or lessen his civil liability. Second 3. This action is also predicated in part upon ordinance No. 21455 of the city of Portland which makes it incumbent upon all owners, or their agents, of buildings in the course of construction to provide temporary floors, built of scaffold planks laid close together, or with other suitable materials for the protection of life and limb of the workmen in such structures. In view of these enactments, the errors relied upon to secure a reversal of the judgment will be examined.

[1] James Begg as plaintiff's witness, having testified that he was at the building when the casualty occurred, was permitted, over objection and exception, to be interrogated in chief as follows: "Was there anything said immediately after the accident by any one which had reference to this particular accident?" He replied: "Not that I remember at all." If it be assumed that an observation of a spectator with respect to the cause or effect of the injury was not so inseparably connected with the accident as to be a part of the *res gestæ*, the answer given by the witness shows that no prejudice could have resulted to the defendant.

[2] Dr. J. B. Roth was questioned as to the injury sustained by the plaintiff by reason of the accident as follows: "You would say that the hearing in his left ear is totally de-

stroyed?" The witness rejoined: "No, not totally destroyed." After the answer was given, it was objected to on the ground that it was incompetent, irrelevant, and immaterial, but the objection was overruled and an exception allowed. It will be remembered that the complaint charged that the injury permanently impaired plaintiff's hearing on the left side. The answer of the witness, who was a specialist, did not go to the extent of the initiatory pleading, but it tended, in degree at least, to establish the allegation mentioned, and was therefore admissible.

[3] It is maintained that the testimony offered by the plaintiff, when he first rested, was insufficient to be submitted to the jury, and, this being so, an error was committed in denying a motion for a judgment of nonsuit. It was admitted that the object causing the injury fell from some place immediately above that occupied by the plaintiff, but whether or not it was a brick dropped by the defendant or his workmen, or pushed off the scaffold on which they were standing, or dislodged from the top of the wall, it was impossible for plaintiff's witnesses to explain. As we view the law, the failure particularly to trace the cause of the injury beyond the mere falling of some object which produced a hurt was unimportant, for the enactments to which attention has been called imposed upon the defendant, as the contractor engaged in the construction of a building, the duty of providing a temporary floor composed of such material and laid in such a manner as to have prevented an accident of that kind.

[4] It is contended that an error was committed in not permitting the defendant to introduce evidence to show that the person who had charge of the carpenter work on the building in which the accident happened had engaged to construct the temporary floors therein. The obligations to lay such coverings, in order to protect the life and limbs of persons employed in a building under construction, having been placed by the statute and ordinance referred to on a contractor, the defendant, who sustained that relation to the owner, could not escape liability for a neglect to comply with such requirements by showing that the carpenter had agreed to discharge that duty.

[5] John Bross, as the defendant's witness, having testified on cross-examination that there was danger of material falling from the place where the bricklayers were working when the plaintiff was hurt, was asked: "Well, if your men were careful, they would not drop any brick down there?" An objection to this question having been overruled and an exception allowed, the witness replied in effect that persons, other than masons, who were working on the building might knock a brick off the scaffold. It will be seen that the answer was not responsive to the inquiry, and for that reason no prejudice could have resulted to the defendant if it

were admitted that the question did not come within the strict rule of cross-examination.

[6] In referring to the ordinance requiring the laying of temporary floors, the court told the jury, in effect, that such an enactment had the same force and effect as a state statute, and that a failure to comply with the requirements of municipal law was negligence per se. An exception having been taken to this part of the charge, it is maintained that an error was committed in the use of the language employed. In *Beck v. Vancouver R. Co.*, 25 Or. 32, 39, 34 Pac. 753, 755, the jury were charged as follows: "It is not neglect of the company per se to run their trains faster than the ordinance of the city allows." An exception was taken by the plaintiff's counsel to the language thus employed, but in affirming a judgment rendered for the defendant it was ruled that no error was thereby committed.

The principle thus announced was followed in *Kunz v. Oregon Railroad & N. Co.*, 51 Or. 191, 207, 93 Pac. 141, 94 Pac. 504, where it was held that in permitting a locomotive to be run at the rate of 20 or 30 miles an hour in the city of Portland where the maximum speed for the operation of trains was fixed by ordinance at six miles an hour was a circumstance from which negligence might reasonably be inferred. In that case the injury complained of occurred at a country road crossing, and, though such highway was within the limits of the city, the country at that place was sparsely settled. It was intimated that a municipal regulation prescribing the rate of speed at which a locomotive might be operated within the limits of a city could be so restrictive as to defeat the speedy transportation of passengers and mails, thereby demonstrating that an ordinance of the kind then under consideration might be so unreasonable as to authorize a court to declare it ineffective. In view of such circumstance it was determined that the rate of speed at the place indicated did not afford conclusive evidence of negligence.

In *Peterson v. Standard Oil Co.*, 55 Or. 511, 520, 106 Pac. 337, 341 (Ann. Cas. 1912A, 625), in referring to the doctrine promulgated in *Beck v. Vancouver R. Co.*, supra, Mr. Justice McBride says: "It must be confessed, however, that many courts, and perhaps the majority, draw no distinction between the state laws and city ordinances; but it seems to have been the opinion of this court, in an early case, that a violation of such ordinance does not constitute negligence per se, but is only evidence from which negligence may be inferred." In that case is set forth an excerpt from 1 Thompson on Negligence, § 11, where that distinguished author clearly shows that, as a rule of evidence, no distinction should be made between a state statute and a municipal ordinance commanding or prohibiting the doing of a particular act. The weight of authority supports the legal principle, and it is be-

lieved that reason sustains the rule, stated by the trial court, that a violation of the provisions of the ordinance, requiring the laying of temporary floors in buildings under construction, constitutes negligence per se, and that no error was committed in so instructing the jury.

[7] In another part of the charge the court told the jury, in effect, that, if they found from the evidence that the plaintiff was not guilty of contributory negligence, they should award him the full amount of damages which they considered he had sustained by reason of the hurt. An exception having been taken to the phrase "full amount of damages," it is insisted that an error was committed in using the term. The case of *Rost v. Brooklyn Heights R. Co.*, 10 App. Div. 477, 41 N. Y. Supp. 1069, was an action to recover damages for an injury to a child who had been run over by one of defendant's electric cars. The sum claimed in the complaint as the measure of the injury sustained was \$60,000. In charging the jury the court, referring to the plaintiff, said: "You will give her whatever you find that damage has been. If you decide to give her anything, to the full amount, without any reservation, giving her all that she is entitled to by way of compensation for the pecuniary or money loss she has sustained by reason of the hurt that has come to her." An exception having been taken to the language used, the defendant's counsel observed: "All they can give is an adequate compensation for the injury which this plaintiff has sustained." To this remark the court replied: "What I mean to say is that they are to give full damages that will be adequate to the money loss sustained by this child by reason of the hurt." An exception was also taken to this last expression. In reversing a judgment for the plaintiff, the court said: "Without passing upon the question whether technical error was committed in the charge which was the subject of exception, we are of opinion that the charge as a whole conveyed to the jury the wrong impression as to the extent of what would be adequate compensation, which may have led them to award the very large verdict which they did—a verdict which seems excessive in amount, based upon any fair construction of the evidence." The report of that case does not show the amount of the verdict.

In *City of Peoria v. Simpson*, 110 Ill. 294, 304 (51 Am. Rep. 683), the jury were told, in the trial of an action to recover damages for an injury, that, if they should find from the evidence that the plaintiff had established his case and was entitled to a verdict, it then became their "duty to fix such damages at the full sum that the whole evidence shall prove to be just and reasonable." An exception having been taken to this part of the charge it was ruled, in reversing the judgment, that the instruction was calculat-

ed to create in the minds of the jury the belief that it was incumbent upon them, in case they found for the plaintiff, to fix the damages at the highest possible amount the evidence would justify.

In *Guinard v. Knapp-Stout & Co. Company*, 95 Wla. 482, 489, 70 N. W. 671, 673, the court, in charging the jury on a feature of the case, said: "If you find for the plaintiff, you will bring in such damages as will make him whole in dollars, as far as possible"—and it was ruled that an error had been committed necessitating a reversal of the judgment. To the same effect is the case of *Doherty v. Des Moines City Ry. Co.*, 137 Iowa, 358, 114 N. W. 183.

Though these decisions show that the instruction under consideration is subject to criticism, the jury evidently understood the correct meaning of the phrase "full amount of damages" to be the pecuniary loss sustained, and as not necessarily requiring them to award the plaintiff the sum demanded in the complaint, for they did not give him one-fourth thereof. Under the former practice prevailing in this state that where error appeared prejudice would be presumed, a reversal of the judgment would necessarily result. Where, however, as in the case at bar, it appears from a consideration of the whole testimony received at the trial and from the instructions which were given, and the requests therefor that were denied, which transcript is made a part of the bill of exceptions, that the judgment appealed from was such as should have been rendered in the case, the decision must be affirmed notwithstanding any error committed during the trial. Const. Or. art. 7, § 3.

Other errors are assigned, but, deeming them immaterial, the judgment is affirmed.

BURNETT, J., concurs in the result.

#### FIRST NAT. BANK OF JOSEPH v. RUSK. (Supreme Court of Oregon. Jan. 14, 1913.)

##### PROCESS (§ 24\*)—SUMMONS—DEFECTS—CONSTRUCTION WITH COMPLAINT.

The copy of the summons served on defendant must be read in connection with the complaint attached thereto, in order to explain any apparent ambiguity in the summons, so that the omission to state the county in the summons, and its statement that on failure to answer judgment would be taken as prayed for in the complaint, instead of for a definite sum as provided by the statute, were defects cured by the complaint served with the summons, stating the venue and the sum for which judgment was asked.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 9, 19; Dec. Dig. § 24.\*]

On petition for rehearing. Petition denied. For former opinion, see 127 Pac. 780.

BURNETT, J. In five pages of typewritten ululation, the defendant asks for a re-

hearing of his appeal, criticising our former opinion, reported 127 Pac. 780. The ground of his critique, as he states it, is that "no regard or thought was given of the merits, the justice, or the effect of confirming this appeal; the controlling idea being, it appears, that if the amount involved had been multiplied by ten or a hundred that the result would have been just the opposite of what it actually is now." No additional authorities are cited, but we will re-examine the original briefs and restate our conclusion.

The abstracts disclose that on April 24, 1912, the plaintiff filed in the circuit court of Union county a complaint entitled "In the Circuit Court of the State of Oregon for Union County. First National Bank of Joseph, a Corporation, Plaintiff, v. John P. Rusk, Defendant." This complaint stated a cause of action as follows: "That the plaintiff is now and has been during all the times herein mentioned a corporation duly organized and existing under and by virtue of the national banking laws of the United States; that the defendant is and at all the times herein mentioned was an attorney of the Supreme Court of the state of Oregon; that on or about October 24, 1911, in Umatilla county, Oregon, the said defendant received from one D. H. Mansfield, as the attorney of said plaintiff, the sum of \$87 to the use of said plaintiff, which he, the said defendant, agreed to pay to plaintiff on demand; that thereafter and before this action was commenced the said plaintiff demanded payment thereof from the said defendant; that the said defendant has not paid the said sum or any part thereof, except the sum of \$52.55; that the sum of \$34.45, with interest thereon at the rate of 6 per cent. per annum from October 24, 1911, is now due, owing, and unpaid; wherefore the said plaintiff prays judgment against the said defendant for the sum of \$34.45, with interest thereon at the rate of 6 per cent. per annum from October 24, 1911, until paid, and for costs and disbursements of this action."

On the same day a summons was issued and delivered to the sheriff, which reads thus: "In the Circuit Court of the State of Oregon for the County of ——. First National Bank of Joseph, Oregon, a Corporation, Plaintiff, v. John P. Rusk, Defendant. To John P. Rusk, Defendant: In the name of the state of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled court and cause within ten days of the date of service of this summons upon you, if served within this county, or if served within any other county of the state, then within twenty days from the date of the service of this summons upon you, and if you fail to answer, for want thereof, the plaintiff will take judgment against you as prayed for in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

complaint. [Signed] A. M. Runnells, Attorney for Plaintiff."

On the date of its issuance this summons was returned into the circuit court and filed therein with the following return indorsed thereon:

"State of Oregon, County of Union—sa:

"I, S. P. Childers, sheriff of said state and county, do hereby certify that I served the within summons in the said state and county on the 24th day of April, 1912, on the within-named defendant, John P. Rusk, by personally delivering a copy thereof prepared and certified by me as sheriff, together with copy of the complaint compared and certified to by A. M. Runnells, attorney for plaintiff, to John P. Rusk, personally and in person. [Signed] S. P. Childers, Sheriff of Union County, State of Oregon, by C. P. Newman, Deputy."

It does not appear that the defendant gave any attention to the papers thus served upon him, but appealed from the default judgment entered against him on May 31, 1912. It is not suggested that the defendant was surprised, or was a victim of inadvertence or excusable neglect, and no application seems to have been made to set aside the default or grant leave to answer; hence the validity of the judgment appealed from must be determined from the papers already quoted. The defendant bases his contention here on the grounds that the blank left for the name of the county in the title of the cause as it appears in the summons was not filled, and that he is notified by that document that the plaintiff will "take judgment against you as prayed for in its complaint," in place of saying that the plaintiff would ask judgment for a specific sum of money.

"The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action and the title thereof. It shall be subscribed by the plaintiff or his attorney and directed to the defendant and shall require him to appear and answer the complaint as in this section provided, or judgment for want thereof will be taken against him. If the defendant be served within the county in which the action is commenced he shall appear and answer the complaint within ten days from the date of the service; but if he be served within any other county in the state he shall appear and answer the complaint within twenty days from the date of the service." L. O. L. § 52.

"There shall also be inserted in the summons a notice in substance as follows: 1. In any action for the recovery of money or damages only the plaintiff will take judgment for the sum specified therein if the defendant fail to answer the complaint. 2. In other actions that if the defendant fail to answer the complaint the plaintiff will apply to the court for the relief demanded therein." L. O. L. § 53.

Ever since the adoption of the Code of Civil Procedure in this state, it has been the rule, as declared in section 556, L. O. L., that "upon an appeal from a judgment the same shall only be reviewed as to questions of law appearing from the transcript and shall only be reversed or modified for errors substantially affecting the rights of the appellant." A summons is not a process or writ issuing out of any court, but is a notice promulgated by the plaintiff and addressed to the defendant, requiring him to appear and answer, not the summons, but the complaint filed against him. Apropos to the controversy here, section 545, L. O. L., provides a rule of construction that "a notice or other paper is valid and effectual although defective either in respect to the title of the action or suit in which it is made, or the name of the court or the parties, if it intelligibly refer to such action or suit." In good reason the copy of the complaint delivered with the copy of the summons in the service should be deemed a part of the notice to the defendant, and should be read with the summons to explain any apparent ambiguity in the latter document. It is said by Judge Deady, in *Swift v. Meyers* (C. C.) 37 Fed. 27, 40, "a copy of the complaint having been served at the same time, the defendant was fully informed of the nature of the decree that might be taken against him in case he failed to answer." See, also, *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895, *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375, *Behlow v. Shorb*, 91 Cal. 141, 27 Pac. 546, *Kimball v. Castagnio*, 8 Colo. 525, 9 Pac. 488, and *Miller v. Zeigler*, 3 Utah, 17, 5 Pac. 518, treating of cognate questions. With all the information contained in these two papers in his possession, the defendant could not have been misled as to the nature of the relief demanded, or as to the court in which the proceedings were instituted. Conceding the slips mentioned are errors, they are not such errors as would substantially affect the rights of the appellant, for which only would we be authorized to reverse the judgment, under the terms of section 556, L. O. L.

In *Adams v. Kelly*, 44 Or. 66, 74 Pac. 399, the question was whether a court obtained jurisdiction over the subject-matter of a cause when the court itself was wrongly named. Mr. Justice Wolverton reviews many precedents on this subject, and concludes that "these cases all tend irresistibly to the one conclusion, namely, that the stating of the name of the court in the complaint is a formal and not a jurisdictional matter." The analogy holds good when, as in this case, the mere omission from the heading of the summons of the name of the county in which the designated court is holden is supplied by an accompanying document.

Much reliance is placed by the defendant upon the case of *Smith v. Ellendale Mill Co.*, 4 Or. 70. In that case the complaint was

entitled and filed in the circuit court of Marion county, while the summons served upon the appellant was entitled in the circuit court of the state of Oregon for the county of Multnomah, and required the appellant to appear in the court of the latter county, instead of Marion county, where the judgment was rendered. The summons was served in Marion county. That case is distinguishable from the one at bar from the fact that there it affirmatively appeared that the summons was a notice to the defendant to appear in an entirely different court in another county, and not in the court rendering the judgment. Here no contradiction between the complaint and the summons exists as in that case. The name of the county as part of the court's designation in one of the papers is simply left blank, and this is rationally explained by the terms of its companion paper, to which reference is made in the summons itself.

White v. Johnston, 27 Or. 294, 40 Pac. 511, 50 Am. St. Rep. 726, cited by defendant, was a case where the party sought to be charged by service of the summons was not named in that paper. Eggleston v. Wattawa, 117 Iowa, 676, 91 N. W. 1044, was based upon a summons which required the defendant to appear in a court unknown to the law of that state. In Dix v. Palmer, 5 How. Prac. (N. Y.) 233, no court whatever was named. In Tallman v. Hinman, 10 How. Prac. 89, the court held that a summons not naming any court was only voidable; and hence a judgment rendered on such a summons was not appealable. The conditions noted, as appearing in those citations, in defendant's brief fairly distinguished them from the case at bar.

In addition to what has already been said to the effect that the fault of a summons in not specifying a particular sum of money for which judgment was desired was obviated by the reference to the complaint, where the prayer for judgment disclosed the exact amount, we observe that section 185, L. O. L., provides that in an action arising upon a contract for the recovery of money or damages only the clerk may, upon application, enter a judgment by default for the amount demanded in the complaint. In other actions, including all actions sounding in damages for torts, and opposed to actions on contracts or for debt, the judgment by default must be entered by the court itself, instead of by its officer, the clerk. Taken in connection with section 53, L. O. L., prescribing the notice to be inserted in the summons respecting the amount of the recovery desired, the reason for this distinction is that if the amount is specified in an action for the recovery of a certain sum of money only, and no answer is made, the entry of judgment becomes a mere clerical act, and may as well be performed by the clerk as by

the court; while in other actions the exact amount of the recovery must depend upon a judicial investigation, which can be conducted only by an officer having judicial authority. The reason of the rule fails in that connection when we find, as in this case, that the judgment was rendered by the court, which, if nothing else were shown, would certainly be right under a summons which declared that the plaintiff would apply to the court for the relief demanded in the complaint.

This distinction is pointed out and elaborated in the case of Schuttler v. King, 12 Mont. 149, 30 Pac. 25, where the court explains in substance that, while a clerk can enter a default judgment, where the summons specifies the particular amount to be recovered, in an action on contract and the like, yet the court may enter a judgment in such an action, although the summons makes the general designation prescribed in the second subdivision of section 53, L. O. L.

We adhere to the former opinion.

#### BOARD OF DIRECTORS OF PAYETTE- OREGON SLOPE IRR. DIST. v. PETERSON.

(Supreme Court of Oregon. Jan. 14, 1913.)

WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—ORGANIZATION—ORDER OF COUNTY COURT—CONCLUSIVENESS.

Under L. O. L. § 6168, relating to the organization of irrigation districts, as amended by Laws 1911, p. 380, which provides that on the final hearing the court shall make and enter an order determining whether the requisite number of landowners within the proposed district shall have petitioned for the formation thereof, and whether the petition had been duly published, which shall be conclusive evidence of the facts found, a full and complete order of the county court determining such facts is prima facie sufficient in the circuit court to establish such facts, and to sustain a decree of the circuit court.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

On petition for rehearing. Former opinion modified, and decree of circuit court affirmed. For former opinion, see 128 Pac. 837.

EAKIN, J. By the motion for rehearing attention is called to the amendment of section 6168, L. O. L. (Sess. Laws 1911, p. 380), which provides: "On the final hearing the court shall make and enter an order determining whether the requisite number of owners of the land within such proposed district shall have petitioned for the formation thereof and whether the petition, and notice of the time of presentation thereof, shall have been duly published as hereinbefore provided, and said order as so made and entered shall be conclusive evidence of the facts found by the court." The order of the county court in this case is full and com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plete upon these matters; and we were in error in holding that the order of the county court is not evidence of the facts, and that proof thereof must be produced at the hearing in the circuit court. The amendment above mentioned makes the order of the county court at least *prima facie* sufficient in the circuit court to establish the facts mentioned; and therefore the proof was sufficient to sustain the decree of the circuit court.

The former opinion is hereby modified upon these points, and the decree of the circuit court is affirmed.

#### HILLMAN et al. v. YOUNG et al.

(Supreme Court of Oregon. Jan. 21, 1913.)

##### 1. GIFTS (§ 78\*)—CAUSA MORTIS—PLEADING.

In an action to recover certain personal property as part of a decedent's estate, an allegation that decedent assigned and transferred the property to Y. as trustee to collect the proceeds, and pay over the same to defendant J. as they should be needed, and at decedent's death to pay the remainder to J. after taking out reasonable compensation for Y.'s services, did not allege a gift *causa mortis* for failure to charge that the transfer was made by the decedent in contemplation of death, or that there was any delivery of the property to the beneficiary, or to any one for him.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 151; Dec. Dig. § 78.\*]

##### 2. GIFTS (§ 78\*)—CAUSA MORTIS—DELIVERY TO AGENT OF DONOR.

An allegation that decedent in his lifetime delivered certain property in controversy to Y. as trustee to collect the proceeds and pay over the same to J. as they should be needed, and at decedent's death to pay J. any portion remaining after deducting reasonable compensation for Y.'s services as trustee, showed a delivery to Y. as decedent's agent, and not for the benefit of J., and was therefore insufficient to constitute a gift *causa mortis*.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 151; Dec. Dig. § 78.\*]

##### 3. CONTRACTS (§ 75\*)—VALIDITY—LEGAL OBLIGATION.

Where J. had already agreed with decedent's agent to care for decedent during the remainder of his life, which contract was unknown to decedent, J.'s subsequent agreement with decedent to perform the identical services in consideration of decedent making J. his residuary beneficiary was unsustainable as without consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.\*]

##### 4. EXECUTORS AND ADMINISTRATORS (§ 423\*)—PROPERTY BELONGING TO ESTATE—RECOVERY—RIGHT TO SUE.

In general, only the executor or administrator can sue to recover property belonging to the estate, the title of the distributee passing through the personal representative of the deceased owner, but, where such representative himself obstructs the natural course of law for the transmission of the estate to the distributee, the latter may sue joining the representative and the debtor as codefendants, and recover the property for the benefit of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1660, 1660½; Dec. Dig. § 423.\*]

On rehearing. Modified and affirmed.  
For former opinion, see 127 Pac. 793.

BURNETT, J. In an opinion by Mr. Justice Moore reported in 127 Pac. 793, we affirmed a decision by the circuit court in favor of the plaintiff. In an able petition for a rehearing the counsel for the defendant discussed two questions: First, the rights of the heirs to maintain this suit; and, second, whether or not there was sufficient delivery of the personal property in question as a gift to establish title in the defendant Jones. It is proposed to treat these in their inverse order.

[1] Considering the transaction in the light of the law about *donatio causa mortis* in addition to what has already been said by this court on that subject as reported in the opinion referred to, it is proper to note the pleadings of the defendants Young and Jones in that respect. They allege: "That Samuel E. Hillman, deceased, came to the residence of the defendant W. Franklin Jones about February 12, 1909, for the purpose of making it his permanent home during the remainder of his natural life, and the said Samuel E. Hillman, being desirous that the defendant W. Franklin Jones should receive any portion of his estate which should remain after his death, duly assigned and transferred to the defendant J. P. Young as trustee the promissory notes mentioned in the complaint, and also duly assigned and transferred in writing a mortgage securing the same to the said J. P. Young and instructed the said J. P. Young to collect the proceeds thereof so far as the same should belong to the said Samuel E. Hillman, and pay them over to the said W. Franklin Jones as they should be needed, and at the death of the said Samuel E. Hillman, if any portion thereof remained in the hands of said J. P. Young, trustee, he should deliver the same to W. Franklin Jones, except such sum as should be necessary to pay him a reasonable compensation for his services as such trustee." This allegation falls short of pleading a *donatio causa mortis*, because it does not say that it was made in contemplation of the death of the donor, neither does it aver delivery of the property to the defendant Jones or to any one for him. On its face this portion of the answer makes the ultimate interest of the defendant Jones merely conditional because he is only to receive what may be left of the proceeds of the property after Mr. Young had managed and disposed of it according to the directions of the donor and had paid himself a reasonable compensation for his services.

[2] Further answering the argument for a *donatio causa mortis*, although in our judgment the averment does not support such a gift, it is manifest upon the face of this pleading that Young was to act as the agent and according to the instructions of Hillman, and not according to the directions, or for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the interests, of Jones, except incidentally. These features fairly distinguish this case from that of *Deneff v. Helms*, 42 Or. 161, 70 Pac. 390. In that case the donor was dangerously afflicted in his last illness. He had \$2,000 on deposit in a bank and \$200 in the possession of an individual. His private depositary and an officer of the bank were at his bedside, and he there indorsed to the defendant Helms his certificate of deposit in the bank, and directed its officer to pay the fund to the defendant. He gave the same directions to his individual bailee. On the same day these directions were carried into effect, and the defendant reduced both sums of money to his own possession. The donor died the following day. He had revoked all previous agencies employed in the custody of his money, and expressly directed the same to be paid at once to the donee. In the present case the former agency of Young was continued with directions to manage the property in his possession as before, and expend possibly all of it during the lifetime of the donor on condition that, if anything remained, he was to pay it to the defendant Jones. The transaction was simply a perpetuation of the former relationship between Young and Hillman, and, of course, as an agency terminated at the death of the latter. Nothing remains to be said on the subject of *donatio causa mortis*, the law of which is so clearly pointed out in the opinion of Mr. Justice Moore.

[3] The defendants endeavor to reach the same result of conferring title upon Jones by pleading a contract made by him with the decedent after the latter had come to live with Jones, whereby the latter was to take care of Hillman during his life, in consideration of which Hillman was to convey the property to Young for management substantially as before stated. It will be noted, however, in this connection, as found by the court, that Young by virtue of his authority as agent had previous to this time made a contract with Jones for the performance of substantially the same service mentioned in the defendant's answer, but without any condition making Jones the residuary beneficiary, and that this contract was unknown to Hillman. Having agreed to do the very things which he promised in the contract alleged, the renewed stipulation of Jones to perform the identical services would not constitute any consideration sufficient to support the agreement averred which in turn would not operate to transfer any property from Hillman to Jones. Concerning the indorsement of the notes to Young, it is sufficient to say that equity, regarding the substance rather than the mere form, will hold that the effect of the indorsement was not to pass the absolute title to the property to Young, but simply to lodge it in his hands as the custodian of the same for the benefit of Hillman. It follows that to all intents and purposes, at least from an equitable standpoint, the

notes and mortgage in question belonged to Hillman at the time of his death as before and were properly an asset of his estate. It is plain that when the owner of property *sui juris* parts with the title, whether in contemplation of death or otherwise, neither his personal representatives nor his heirs can recover the same, for they stand in no better position than the donor himself occupied before his demise. An exception to this rule is found in the procedure authorized by sections 1279 and 1280, L. O. L., in which, when so directed by the county court in a proper case, an administrator or executor may sue to set aside a conveyance made by the decedent in his lifetime with intent to defraud creditors. The discussion of this exception in the former opinion did not and was not intended to exclude the right of a personal representative to pursue any remedy afforded him by law or equity to reduce to possession choses in action surviving to him from the decedent. As we have shown, Hillman did not part with his title to the notes involved either as a gift in contemplation of his death or by virtue of the contract averred, so that, when he died, they were proper assets for administration.

[4] Subject to the exception to be mentioned, the general rule is that only the executor or administrator can litigate for the recovery of the property belonging to his decedent's estate. The title to such property inuring to the heir must come through the personal representative of the deceased owner. An exception, however, exists when the representative himself by collusion with the debtor or otherwise obstructs the natural course which the law establishes for the transmission of the estate to the heir. Under such circumstances, the latter may join as defendants both the personal representative of his ancestor and the person from whom is due the debt or duty to the estate, and by a suit in equity reduce to the possession of the person administering the estate the assets thus outstanding, so that they may be included in the process of winding up the affairs of the decedent. Such litigation is in aid and not in derogation of the operation of the law of descents and distribution. In other words, while the personal representative, if he will, may exercise exclusively the power of reducing to possession the effects of the estate, yet, if he will not act, that prerogative may for the time being pass from him to the heir to be used for the benefit of the estate, to the end that the lawful course of descent and distribution may not be hindered or impeded. In *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473, it is said in answer to the contention that the plaintiffs there showed no right of action in themselves because they as heirs or distributees had no title to any property left by their ancestor, all title to such property being vested in the administrator that: "Doubtless the law is so as to the legal title to any specific personal

property. Nevertheless the equitable beneficial interest in all property of a solvent estate is in the legal distributees during the whole period of administration. If that interest is invaded, they must have the right that a court's aid be invoked. Primarily and ordinarily that right is sufficiently protected by the power and duty of the administrator to bring suit to protect or reclaim any property of the estate. When, however, he allies himself with the wrongdoer, and serves as an obstacle to, instead of a protector of, the rights of his cestui qui trustent, courts of equity have no hesitation in recognizing the equitable interests of the latter as sufficient to give them standing as plaintiffs in a suit to accomplish that which the administrator ought with all diligence and good faith to pursue but will not." Again, in *Trotter v. Mutual Reserve Fund Life Association*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887, it is stated that: "As a rule actions to recover debts due an estate must be maintained by the executor or administrator and not by the heirs or creditors; but to this rule there are exceptions, as where there is collusion between the debtor and personal representative, or he is insolvent, or where the circumstances are such that the reason of the rule ceases. When an administrator refuses to bring an action upon a claim due the estate, heirs, creditors, and others interested in its collection should have an adequate remedy. Must they apply to the county court to have the administrator removed and one appointed who will perform his duty? The order of removal may be appealed from, and while the parties are engaged in this idle preliminary litigation the debt may be lost. A new administrator would have to sue in the circuit court. Why cannot those interested in the estate do directly and at once what it is conceded may be done indirectly and after vexatious delays? The debtor cannot complain. It matters not to him who is plaintiff because the court will provide that the proceeds of the judgment shall be distributed according to law, and such judgment will be a bar to another action for the same debt. It is in effect an action for the benefit of the estate brought in the name of heirs or creditors because the personal representative has refused to bring it." This doctrine is also recognized in the following cases: *Wiggins v. Cracraft* (Ky.) 40 S. W. 907; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *McChord v. Fisher's Heirs*, 13 B. Mon. (Ky.) 194; *McLendon v. Woodward*, 25 Ga. 252; *Loyd v. Loyd's Adm'r*, 46 S. W. 485, 20 Ky. Law Rep. 347; *Mason v. Spurlock*, 63 Tenn. (4 Baxt.) 554; *Lacy v. Williams*, 8 Tex. 182; *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Tillery v. Tillery*, 155 Ala. 495, 46 South. 582. Here it is manifest by the allegations of the complaint as well as avowals of the answer of the executor Jones that he was claiming the property in ques-

tion as his own, and would not take any steps to reduce it to the possession of the estate that it might be distributed to the heirs. The case was ripe for the interposition of equity at the suit of the heirs in aid of proper administration of the estate, in order that the course of the descent and distribution laid down by the law might not be hindered or obstructed by the unwarranted assumption of the administrator.

The transaction delineated in the pleadings did not amount to a *donatio causa mortis*, for the reason, among others, that there was no delivery. Considered as a contract for the transfer of the property to Jones, it failed for want of consideration. So far as it was tantamount to a testamentary disposition of the estate, it was vain because it was not executed in conformity to the statute relating to wills. It would have been easy for the testator to execute a new will in favor of Jones or a codicil to the former one for a like purpose; but he did neither, in default of which we cannot dispose of his estate otherwise than as he left it.

We adhere to the conclusion reached in the former opinion, but with this difference, that neither party shall recover costs or disbursements from the other in this court.

#### ZURCHER v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Jan. 21, 1913.)

#### CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—CONTRACT FOR CARRIAGE.

In an action by plaintiff, who claimed to have been injured in attempting to board defendant's car, while defendant claimed that she never became a passenger but was struck by a passing wagon, the refusal of an instruction, that it is necessary to show that not only did plaintiff intend to board the car, but that she gave some notice of her intention to become a passenger, was error.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Rosa Zurcher against the Portland Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The defendant operates a street railway in the city of Portland for the transportation of passengers for hire. The plaintiff alleges, in substance, that about February 10, 1911, she was waiting at the northwest corner of First and Madison streets, in that city, where the defendant's cars usually stop to receive passengers, and signaled the east-bound Hawthorne car, which came to a full stop, for the purpose of allowing her to board it, and she was thereupon invited to become a passenger upon that car. She then alleges that she "started to board the same for said purpose at the usual and proper entrance therefor, said car being at said time stationary;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but before plaintiff had sufficient time to get safely thereupon, and before she had reached a secure position thereupon, and while she was in the act of boarding said car, the defendant, by its agents, negligently and carelessly started said car without any warning whatsoever to plaintiff and in total disregard of her safety, thereby causing plaintiff to lose her balance and to be violently thrown from said car and onto the pavement of said street." After describing her resultant injuries to her damage in a sum named, she charges that the defendant was negligent in starting the car without giving her sufficient time to get aboard safely and in the failure of its conductor to catch hold of her and prevent her falling from the car; he being then in close proximity to her, in reach of her while she was attempting to board the car, and aware that she had lost her balance by reason of the improper start of the car. The answer traversed all the allegations of the complaint except the corporate character and business of the defendant and the fact that the plaintiff had received an injury. The answer also charges that, on the occasion mentioned, while defendant's car was in motion, the plaintiff was walking towards it and somewhere in its vicinity, and by reason of her own negligence and the carelessness of the driver of a passing delivery wagon she was struck by the wagon and thereby injured, this being the same accident referred to in the complaint; that she knew, or ought to have known by the exercise of reasonable care, that the car was in motion; that she failed to keep a proper lookout while on the street or to exercise due care or caution for her safety; and that by reason thereof and of the negligence of the driver she came into collision with the wagon and was in that manner injured, if at all. This new matter alluded to was traversed by the reply. From a judgment for plaintiff succeeding a jury trial, the defendant appeals.

R. A. Leiter, of Portland (Wilbur, Spencer & Dibble and J. C. Simmons, all of Portland, on the brief), for appellant. H. T. Bagley, of Hillsboro (M. B. Meacham, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Mrs. Zurcher and her 13 year old daughter testify, in substance, that the plaintiff stepped upon the car and took hold of the handhold, but before she could safely enter the car it was started with a sudden jerk, whereby she was thrown to the pavement, in which position the delivery wagon spoken of ran over her. One of defendant's conductors on another car and three disinterested bystanders testified that, while the car in question was in motion, the plaintiff approached it at about its middle, and before she reached it she turned around, when the wagon knocked her down; that the car did not touch her; and that she fell away from it. The conductor and motorman in charge

of the car both testified that they did not see her at all and knew nothing of the accident until they were told of it. An inspection of the complaint in this connection shows that it might all have happened just as the defendant's witnesses describe it, and still the narrative of that pleading be true. Indeed, she avers she was in the act of boarding the car, but that might properly include her movement from her former situation on the sidewalk towards the car track in attempting to cross the street. She did not allege that she stepped upon or even touched the car, or that it struck her so as to cause the fall. She says she lost her balance, but how the car caused that result is not explained in the complaint.

Among other assignments, the defendant complains that the court committed error in refusing to give the following instruction requested by the defendant: "Before a person can recover in a case of this kind it is necessary to show that not only did she intend to board the car, but had given some notice to the persons in charge of the car so that the persons in charge of said car knew, or in the exercise of reasonable care should have known, that the person was intending to board said car, and if the persons in charge of said car did not know that the person intended to board the same, and there was nothing reasonable to lead them to believe that the said party was intending to get upon said car, then I must instruct you that the defendant would not be liable." This action is based upon the theory elaborated in the complaint that the defendant offered to transport the plaintiff as a passenger, and that the latter had accepted the offer in such a way as to constitute a contract of carrier and passenger between herself and the defendant. Such a contract, although generally proven by the acts of the parties and attendant circumstances, rather than by any express stipulation, must, like other agreements, result from a meeting of the minds of the parties. Considered as an offer and acceptance, it has often been held that stopping a car at the usual place for receiving passengers is an offer of the carrier to accept passengers, and many cases teach us that even slackening the speed of the car at such a place is likewise such an offer. On the other hand, it is equally well settled that, after the car has stopped, a subsequent starting of the same is a withdrawal of such an offer, so that a futile attempt to board the car will not create the contract of passenger and carrier.

The charge of the court reported in the record elaborates to a degree upon the duty of the defendant as a contracting party, but is silent as to the corresponding duty of the other contracting party, the plaintiff. In good reason, a person proposing to become a passenger on a street car moving along a busy street should perform some act or bring something to the notice of those in charge of the car to distinguish the intending passen-

ger from others of the throng on the street. The gravamen of the charge here is a negligent breach of a contract of passenger and carrier. Under the issues formed, it became necessary to prove that contract by showing not only the offer of the defendant, but also the acceptance of the plaintiff. The design of the requested instruction was to bring to the notice of the jury the latter element of the contract in question and to remind them that unless the agreement alleged was proven there could be no recovery for its breach. In the case of *Schepers v. Union Depot Railway Co.*, 126 Mo. 665, 29 S. W. 712, it is said: "It must be conceded that there is difficulty in many cases in determining when the relationship of carrier and passenger begins and what acts of the parties are sufficient to create it. The difficulty is greater in case the carrier operates a street railway having no regular stations or station agents authorized to make contracts. In respect to such carriers passage must be taken hastily on the street at points prescribed by the rules of the carrier or by the police regulations of the municipality, yet one test applies alike to all, and that is the relation can only be created by a contract between the parties express or implied. There must always be an offer and request to be carried on one side and an acceptance on the other." *Shearman & Redfield, Neg.* (4th Ed.) § 448; *Patt. Ry. Acc. Law*, §§ 210, 214; 2 *Am. & Eng. Ency. Law*, 742. *Duchemin v. Boston El. Ry. Co.*, 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, 1 Ann. Cas. 603, is very similar to the case at bar. The case stated for the plaintiff there was that, as the car approached him, he went toward it for the purpose of entering it, having given the motorman in control notice of his intention so to become a passenger, and as he was about to get on the car the trolley pole fell, striking a sign upon the car, and the pole and sign then both struck him. The case turned upon whether or not there was a contract of passenger and carrier and the degree of care attendant upon such a relation. The court discusses the matter exhaustively and concludes as follows: "So long as he remained a mere traveler on the highway, although upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any other person on the highway. Whether one just has dismounted from a street car or just is about to board it, he does not have the rights of a passenger." A valuable note on this subject is appended to the report of the case in 104 Am. St. Rep.

Without alleging it, the plaintiff, as we have seen, testified that she stepped upon the car while it was stationary, which, under all the authorities, would constitute an acceptance of the defendant's offer to take her as a passenger. On the other hand, the testimony for the defendant tends to show that

the plaintiff did nothing to distinguish her from any other traveler along the street; the deduction being that there was no showing that she gave the defendant any notice of her acceptance of its offer so as to form the contract the breach of which is laid as the ground of damages. The defendant was entitled to have its theory of the case presented by the instruction mentioned, and the court erred in refusing the request of the defendant in that behalf.

It seems that the trial was concluded near the hour of adjournment for the day. The parties agreed that the jury might return a sealed verdict. The court instructed them that three-fourths of the jury might return a verdict under the provisions of the present article 7 of the state Constitution, in which case at least nine of them should sign the verdict; but that if their decision was unanimous it would be sufficient if the foreman alone signed it. See *Laws 1911, p. 7*. The judge also told them that, in the event of reaching a decision, they could either leave the verdict in the custody of the foreman or of the bailiff in charge of the jury, to be returned into court at the beginning of the next session. On the following day, although the jurors were in attendance upon the court, they did not assemble to render the verdict; but it was handed to the court by the bailiff, and, in the presence of the counsel for both parties, was read and ordered filed. It was signed by the foreman alone, but two jurors of the panel made affidavits in purport that in fact the verdict was the decision of only nine of the jurors from which the affiants dissented, and that the decision was a quotient verdict, reached by a division by nine of the sum of all the estimates of the nine jurors participating in the verdict. This procedure was challenged only by a subsequent motion for a new trial, but, as it is not necessary to a decision of the case, we dismiss that feature with the observation that it is safer to proceed in the manner laid down by the statute in the reception and publication of a verdict; that the affidavits of the jurors impeaching the verdict would have more force if made before the publication of the verdict; and, lastly, that it is not safe for parties to take the chance of a verdict and afterwards make complaint.

Other errors are assigned by the defendant, but we deem it unnecessary to consider them.

The judgment is reversed, and the case remanded for further proceedings.

#### STATE v. PULOS.

(Supreme Court of Oregon. Jan. 21, 1913.)

1. GAME (§ 7\*) — REGULATION — POSSESSION OUT OF SEASON — STATUTES.

L. O. L. § 2289 (*Sp. Laws 1909, p. 526*), provides that it shall be unlawful in certain

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

counties, at any time between January 15th and September 1st of any year, to take, kill, injure, destroy, or have in possession any wild duck. *Held*, that such section prohibited the having in possession of the carcasses of wild duck out of season which were killed in season.

[Ed. Note.—For other cases, see Game, Cent. Dig. §§ 6, 7; Dec. Dig. § 7.\*]

## 2. GAME (§ 3½\*)—OWNERSHIP—REGULATION—“PRIVILEGE.”

Since the title to wild game is in the state, and no person has an absolute property right therein while in a state of nature and at large, the taking thereof is not a right, but a “privilege,” which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit; and hence the Legislature may prohibit the having in possession of the carcasses of wild game out of season, though the game was lawfully killed in season.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 2; Dec. Dig. § 3½.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5583-5589; vol. 8, p. 7764.]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

John Pulos was convicted of having wild duck in possession out of season, and he appeals. *Affirmed*.

The defendant was indicted for the crime of unlawfully having in his possession a duck during the season when it was unlawful to kill the same. The indictment alleged that the duck was killed during the season when it was lawful to kill ducks. The defendant demurred generally, and his demurrer being overruled, refused to plead further; whereupon the court directed a plea of guilty to be entered, and fined the defendant \$50, from which judgment he appeals.

F. E. Swope, of Portland, for appellant. Wilber Henderson, of Portland (Geo. J. Cameron, Dist. Atty., of Portland, A. M. Crawford, Atty. Gen., and W. E. Farrell, of Portland, on the brief), for respondent.

McBRIDE, C. J. [1] Section 2289, L. O. L. (Sp. Laws 1909, c. 10, p. 526, § 2), under the provisions of which this indictment was drawn, reads as follows: “It shall be unlawful within the counties of Clatsop, Columbia, and Multnomah of the state of Oregon, at any time between the fifteenth day of January and the first day of September of any year, to take, kill, injure, destroy, or have in possession any mallard duck, wood duck, widgeon, teal, spoonbill, gray, black, sprig-tail, or canvasback, or any wild duck.”

It is conceded that the defendant had in his possession, during the time when it was unlawful to kill the same, one wild duck; in other words, that the act committed by him is within the exact letter of the section quoted, but, on account of an alleged injustice which would result from punishing him for having in his possession a bird which was killed when it was lawful to kill it, we are asked to fish through the statute for something that may be construed to modify the section quoted, and to hold that it does

not mean what it says, but something radically different.

The case principally relied upon by appellant is *State v. Fisher*, 53 Or. 88, 98 Pac. 713, which was a case construing the law that prohibited having deer in possession during the closed season. The syllabus in that case states the contention, the statute, and the holding so tersely that we quote: “Section 2010, B. & C. Comp., as amended by Laws 1907, p. 342, makes it unlawful to hunt, kill, or pursue deer within the state during the closed season, and declares that ‘any person having in possession any deer or carcass, or part of a deer during the season when it is unlawful to take or kill such deer, shall be guilty of a misdemeanor.’ *Held*, that the words ‘such deer’ referred to deer killed during the closed season, and that the section did not prohibit the keeping during the closed season, for food, the flesh of deer lawfully killed during the open season.” The section and language there under consideration referred wholly to the taking, and having in possession, of deer; and no such saving clause is found in our present act, relating to the possession of wild birds.

The objection that the construction of the act insisted on by the state is unjust and absurd is urged with much plausibility, and it is said that it is unjust to permit a man to hunt lawfully on the 29th day of February and to punish him on the 1st day of March for having in his possession the game so lawfully taken on the day previous. If the law compelled him to hunt on the 29th day of February, such a proceeding would be unjust, but he is not compelled to kill ducks on the last day of the open season; neither is he compelled to kill more game in the open season than he and his friends can consume before it closes. He has a choice of mercy to the birds, or of generosity to his friends.

The mischief that this section sought to remedy was the habit that prevailed to some extent among hunters who killed ducks during the closed season, and, when caught with the game in their possession, claimed that it had been killed during the open season. Experience had shown that it was next to impossible, in many instances, to show when the birds were killed, except from the statements of the sportsmen; and, while the veracity of fishermen and hunters is, of course, proverbial, experience had probably demonstrated to the legislative mind that in some exceptional cases a sportsman might possibly prevaricate rather than pay a fine of \$50. This section was passed after the opinion in *State v. Fisher*, supra, was handed down; and, taken in connection with the general game law passed at the same time, it is evidence that the intention of the Legislature was to close up the gap left in the efficiency of the law by that decision, and to make it clear that the possession of game

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—9

during the closed season was absolutely prohibited. This act was passed at the special session of 1909, and did not profess to be an amendment of any previous act; nor did it make any reference to any previous act, except to repeal certain sections of the act of the regular session of 1909, one of which was void by reason of a clerical blunder. The section as it stands is the latest expression of the Legislature on the subject, and the chapter seems to be complete in itself, and was, no doubt, intended to be so.

[2] It is also contended that the duck having been lawfully killed became the private property of the defendant, and could not be taken from him or destroyed. This contention overlooks the well-known principle that title to wild game is in the state, and that no person has an absolute property right in game or fish while in a state of nature and at large; that the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit. *State v. Ashman*, 123 Tenn. 654, 135 S. W. 325; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; *Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345. In this state the privilege of killing and possessing wild game is limited to the open season. The law says to the sportsman: "You may hunt and kill wild game and keep it in your possession during a certain season, but you must not have it in your possession after the season closes." The right to possess is conditional, and ends with the limitation prescribed by law.

The judgment is affirmed.

#### SPERRY et al. v. STENNICK et al.

(Supreme Court of Oregon. Jan. 21, 1913.)

#### 1. FRAUD (§ 47\*)—FALSE REPRESENTATIONS—DAMAGES—TRANSFER OF PROPERTY—"VALUABLE CONSIDERATION."

Where a corporation was induced to purchase an interest in real property by defendant's alleged false representations and thereafter transferred such interest to plaintiffs, an allegation, in a complaint to recover damages for the fraud, that the corporation transferred its interest in the property "for a valuable consideration," did not show that the transfer was for an adequate consideration, so that the corporation had suffered no damage by the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 42; Dec. Dig. § 47.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7171-7173.]

#### 2. ASSIGNMENTS (§ 24\*)—RIGHTS SUBJECT TO ASSIGNMENT—CHOSES IN ACTION—TORTS.

Tortious acts of a party causing damage to another create a right of action which abates with the death of the person sustaining the injury, and therefore cannot be assigned so as to enable the assignee to sue for the wrong inflicted; but a tortious act causing damage to property, or an act of negligence producing injury to a person generally, creates a cause of action that survives, and is therefore assignable.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 42-46; Dec. Dig. § 24.\*]

#### 3. ASSIGNMENTS (§ 24\*)—CAUSES OF ACTION—FALSE REPRESENTATIONS — MONEY RECEIVED.

A right of action for money received arising from defendants' false representations with reference to the purchase of certain land, by reason of which plaintiff's assignor was induced to pay defendants money for an interest in real property, was a cause of action that would survive, and was therefore assignable.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 42-46; Dec. Dig. § 24.\*]

Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Action by Eliza A. Sperry and another against Parker Stennick and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

This is an action by Eliza A. Sperry and Lucile Lemcke against Parker Stennick and L. S. Thomas to recover money. The complaint charges, in effect: That on September 22, 1906, the H. W. Lemcke Company was duly incorporated, and the plaintiffs became the owners of a large number of shares of its capital stock. That about January 22, 1907, the defendants represented to the corporation and its proper agents that as partners they had secured an option for the purchase of a tract of land, 4,300 feet in length, at \$15,600; that being the lowest sum for which the premises could be secured; that they had paid on account of the purchase \$7,000, but were unable to complete their contract, whereupon they proposed that if the corporation would pay \$7,800, or one-half of the consideration, it should receive an unincumbered title to a moiety of the land. That the defendant also represented that various persons were endeavoring to purchase the premises; that the real property was worth \$25,000, and they detailed the contemplated immediate demands for the land by firms and corporations, saying that, unless the title to the real property was secured under the defendants' contract, it could not be obtained for such a small price as they had agreed to pay; and that under the offer then made they were not receiving and would not obtain any commission or compensation for negotiating the purchase or for any services connected therewith. That they further represented that a right of way granted to a railroad company over and along the tract referred to was only 30 feet in width and that the tide lands to be granted in front of the premises extended 400 feet into the river. That the corporation and its agents, believing such representations to be true, and relying thereon, accepted the proposal, whereupon the defendants, on January 28, 1907, acting for themselves and the corporation, secured from Mary W. Newsom and her husband, the asserted owners of the real property, a contract for the purchase thereof for \$8,600, one-half of which sum was to be paid in installments and the remainder to be evidenc-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed by a promissory note secured by a mortgage of the premises, which contract was taken in the name of H. W. Lemcke, the president and general manager of the corporation, in trust, however, for it and the defendants. That on February 9, 1907, the corporation and the defendants, respectively, subscribed their names to a writing declaratory of their several rights in and to the real property, and containing a clause to the effect that, if a title to the premises could not thus be secured, the agreement should be void. Thereupon the corporation paid \$3,000 on account of the installments mentioned, taking as evidence thereof Mrs. Newsom's receipts, which provided that, if a warranty deed failed to convey a good and sufficient title to the land, the money so received would be returned. That further relying upon such representations, and believing them to be true, the corporation paid to the defendants as partners \$7,000 for conveyances of their undivided one-half of the land; they agreeing that if the title to the premises was not perfect the sum of money so received would be repaid. That about October 26, 1907, the plaintiffs surrendered all their interests in the corporation, adjusted and settled their claims against it, and for a valuable consideration received from it a deed of all its right, title, and interest in and to the real property, to the contracts for the purchase of the premises, and to the sums of money paid by it thereon, and ever since that time they have been, and now are, the owners thereof. That the representations so made were false, in that the defendants had never made any payment on account of the purchase of the land. That the estate of Mrs. Newsom and her husband therein was valueless. That neither of the defendants had an option or contract to purchase the real property. That the right of way of the railroad company was 100 feet wide. That all the tideland in front of the premises had been conveyed by a prior owner thereof, and otherwise particularly negating the truth of each of such representations. That on May 2, 1908, the corporate name of the H. W. Lemcke Company was legally changed to that of the John P. Sharkey Company. That on May 14, 1910, the plaintiffs and the corporation first learned that the representations so made were false. That thereupon the plaintiffs immediately elected to rescind the several contracts, and so informed Mrs. Newsom and her husband, and also notified the defendants, tendering to the latter at the same time relinquishments of any interest the corporation or the plaintiffs may have received in or to the real property, and demanded from each of the defendants the sum of money they had so received. That Mrs. Newsom returned the sum of \$3,000, but the defendants refused to make any payments of the money which they had obtained and declined to accept the offered relin-

quishments, whereupon they were brought into court for such parties. That by reason of the premises \$7,000 so paid to the defendants is money had and received by them to and for the use and benefit of the plaintiffs who elect to sue on the implied contract to repay that sum with interest.

The answer denied the material averments of the complaint, and for a further defense averred, as far as deemed material herein, that Stennick secured from Mrs. Newsom an option to purchase the tract of land at the price of \$8,600, on account of which he had paid \$200 and had agreed with Thomas to give him a half interest in the contract, and thereupon the defendants solicited the corporation to become a party to the transaction. The reply put in issue the allegations of new matter in the answer, and, the cause having come on for trial, the court refused to receive any evidence of the alleged false representations, and, when the plaintiffs had otherwise introduced their testimony and rested, a judgment of nonsuit was given, and they appeal.

E. E. Heckbert and M. L. Pipes, both of Portland, for appellants. E. B. Seabrook, of Portland (W. A. Cleland, of Portland, Or., on the brief), for respondents.

MOORE, J. (after stating the facts as above). [1] The testimony so admitted and offered tended to establish each material averment of the complaint, and, such being the case, it is maintained that an error was committed in refusing to submit the cause to the jury. The reason announced by the court for excluding the testimony offered to establish the falsity of the alleged representations was that it appeared from the averments of the complaint that, before this action was instituted, the Lemcke Company had sold to the plaintiffs all its interest in the subject-matter for a valuable consideration, and, as the corporation was thereby uninjured, it had no right of action which it could assign. The conclusion thus reached was evidently based on the decision in the case of *McMillan v. Batten*, 52 Or. 218, 96 Pac. 675, where it was held that the purchasers of corporate stock, when sued for the price, were not entitled by way of a counterclaim to recover the price paid for a portion of the stock because of the alleged fraudulent representations as to the condition of the corporation, where it was shown that on the next day after purchasing the shares defendants sold and transferred them to a stranger for the same amount they had paid for the stock, unaccompanied by any evidence of an obligation on their part to take back the stock, or make good what they had received therefor; they having induced the latter to indorse the stock so that they might make good their pleaded offer to return possession thereof. It was also ruled that evidence tending to prove that defendants, soon after having made the purchase



which they claimed a right to rescind for the sellers' fraud, sold the property to others for the same amount which they had paid, destroyed any inference of damages sustained by them, in the absence of an averment and proof that they were engaged in the business of buying and selling for profit, and had bought the stock for that purpose.

If the initiatory pleading herein had declared that an "adequate compensation" had been received by the corporation for a transfer of its interests in the contracts and of its estate in the premises, the conclusion might have been deduced that the Lemcke Company had sustained no injury by the transaction. When it is remembered that one of the classes of an inducement to a contract is either good or valuable and that the latter consideration is founded upon money or something convertible into or having the value of that medium of exchange, any sum thereof, however trivial, such as \$1, satisfies the asseveration of the complaint in this particular, thus showing a possible loss to the corporation of \$6,799, and showing the determination reached does not legitimately follow from the premises admitted.

[2] The question will be considered whether or not, under the averments of the complaint, any right of action, growing out of the defendants' alleged fraudulent representations, could have been assigned by the corporation to the plaintiffs. The rule is nearly universal that tortious acts of a party causing damages to another creates a right of action which abates with the death of the person sustaining the injury and therefore cannot be transferred so as to confer upon the assignee authority to maintain a suit for the wrong inflicted. *Weller v. Jersey City, etc., Street R. Co.*, 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442. If, however, the wrongful act is of such a character that the damages resulting therefrom will, upon the death of the person injured, survive to his personal representative, the right of action is assignable. A wrong committed upon a person resulting in damages by reason of assault and battery, breach of promise of marriage, false imprisonment, malicious prosecution, slander, etc., are causes which do not survive the death of the injured party, and hence they cannot be assigned so as to create a right of action in another. *Dahms v. Sears*, 13 Or. 47, 58, 11 Pac. 891. A tortious act causing damages to property, or an act of negligence producing an injury to a person generally, creates a cause of action that survives and is therefore assignable. 4 Cyc. 24.

[3] Adverting to the division of wrongful acts referred to a text writer says: "Actions for deceit growing out of frauds which do not properly fall in either of the classes just mentioned have, in some jurisdictions, been said to be assignable, while in others the contrary rule has been laid down." 4 Cyc. 25. Thus in *Zabriskie v. Smith*, 13 N.

Y. 322, 64 Am. Dec. 551, the New York Court of Appeals determined that an action for damages for deceit in falsely representing the credit of a person did not survive and was not assignable. It did not appear in that case that the defendant had received any pecuniary advantage from his alleged fraudulent representations, and an action for money had and received would not lie. Referring to the doctrine announced in *Zabriskie v. Smith*, supra, in a note to 2 Am. & Eng. Ency. Law (2d Ed.) 1024, it is said: "The decision in this case appears to have been made without reference to the New York statutes then in force, and its authority has been somewhat shaken by subsequent decisions in which it has been criticised and disapproved"—citing several animadverting cases from that state. In *Byxble v. Wood*, 24 N. Y. 607, 610, which was an action based on alleged fraudulent representations of the defendant whereby he received from the plaintiff's assignor money which was undertaken to be recovered, it was ruled that the averments of the complaint did not necessarily stamp the action as arising out of tort or show that the cause was not assignable. In deciding that case, Mr. Justice Gould, speaking for the court, observed: "The facts, as found by the referees, are that, by false representations and the alteration of bills and vouchers, the defendant himself received from Marvin large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought. Such facts always raised, in law, the implied promise which was the contract cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another creates a debt; and, wherever a debt exists without an express promise to pay, the law implies a promise; and the action always sounds in contract." To the same effect, see *Pomeroy's Code Rem.* (3d Ed.) § 570.

The legal principle last announced would authorize the maintenance of this action, which, it will be remembered, is predicated on the defendants' implied promise to repay the money which they had received. The corporation transferred, not a claim for damages arising from a personal injury, but a right of property for the redress of which it could have maintained an action, which right was assignable, and an action can be maintained thereon by the plaintiffs for money had and received to their use by the defendants. "It is true as a general proposition, that a distinct right of action for fraud," says Mr. Justice Montgomery in *Howd v. Breckenridge*, 97 Mich. 65, 69, 56 N. W. 221, 222, "is not assignable; but, where

the right to enforce a claim which is in itself assignable depends upon showing fraud incidentally, the rule has no application. The assignment of the claim carries with it the right to employ any remedy which is open to the assignor." In speaking of one of the remedies thus afforded, an author says: "The count for money had and received is a very important one and, in some respects, differs from all other common law actions. It is a sort of a connecting link between law and equity, and, by the use of the very convenient action of an implied promise, this court will lie to recover any money which the defendant has received, or in any manner obtained possession of which, in equity and in good faith and conscience he ought to pay over to the plaintiff. This covers a wide and peculiar range of causes of action. It is limited, however, to cases in which the original cause of action was for money, or something which the parties have agreed to treat as money." Green, Pl. & Pr. Under the Code, § 658.

In the case at bar the complaint sufficiently avers that the defendants received money to which in equity and good conscience they were not entitled, and, such being the case, the pleading is adequate, and errors were committed in refusing to receive evidence of the facts so alleged and in granting the nonsuit.

The judgment is therefore reversed, and the cause remanded for such further proceedings as may be necessary not inconsistent with this opinion.

#### DAVIDSON v. TIMMONS et al. †

(Supreme Court of Kansas. Jan. 11, 1913.)

##### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 690\*)—RULINGS ON EVIDENCE—REVIEW—TRANSCRIPT.

In order to secure a review of rulings of the trial court on the admission of evidence and other proceedings in the case, it is necessary that the appellant shall procure a transcript of the evidence and proceedings upon which the rulings depend; and, in the absence of such a transcript, the Supreme Court cannot settle conflicting claims as to proceedings in the trial court, nor determine whether a ruling on the admission of testimony referred to in the findings of that court may not have been controlled by evidence, admissions, or waivers not preserved in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.\*]

#### 2. TAXATION (§ 827\*)—ISSUES — TAX LIEN — AFFIRMATIVE RELIEF.

Where a party brings an action to quiet his title to land as against a claim of an interest in the land by defendant and asks to have such claim adjudicated, and the defendant answers, setting up a tax lien on the land, and asks the court to protect his right to such lien, the court is warranted in not only adjudicating the right of the defendant to the tax lien, but also in granting affirmative relief to him by

providing for the enforcement of the tax lien found to exist.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1635-1642; Dec. Dig. § 827.\*]

#### 3. JUDGMENT (§ 570\*) — TAXATION (§§ 824, 827\*)—TAX LIEN—PRIOR ADJUDICATION—LACHES—INTEREST.

D., who owned a tract of land and had given a mortgage on it, made default when proceedings to foreclose the mortgage were had which resulted in a sale and deed to L., but which were subsequently determined to be absolutely void. L. paid the taxes on the land and obtained a tax deed under which he took possession of the land and continued to pay the taxes thereon for a number of years until it was judicially determined that the foreclosure proceedings, including the sheriff's sale and deed, were absolutely void, and also that his tax deed was invalid, whereupon he was ousted from possession of the land. L. brought an action claiming a lien for the taxes paid by him which was dismissed without prejudice about the time the present action was brought by D. to quiet his title to the land. Held, under the facts found by the trial court in the action to quiet title, that L. is entitled to a tax lien on the land, that his right thereto had not been adjudicated in the prior action, and that he was not barred or precluded from obtaining relief and the enforcement of his tax lien in this proceeding by reason of lapse of time or his claim of ownership under the void deeds, and further that 12 per cent. was the proper rate of interest on the tax lien awarded to L.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570;\* Taxation, Cent. Dig. §§ 1632, 1635-1642; Dec. Dig. §§ 824, 827.\*]

Appeal from District Court, Kingman County.

Action to quiet title by Samuel E. Davidson against Robert S. Timmons and others. From a judgment for plaintiff for part only of the relief demanded, he appeals. Affirmed.

Campbell & Campbell, of Wichita, for appellant. George L. Hay, of Kingman, for appellees.

JOHNSTON, C. J. This was an action to quiet the title of real estate which was homesteaded by the appellant, Samuel E. Davidson, in 1877. It appears that in 1879 he gave two mortgages thereon, one to secure a loan for \$412 and another for \$150, each bearing interest at 12 per cent. per annum. In 1879 default was made and the mortgages were foreclosed, and later, in 1881, the decree of foreclosure was modified. In 1881 Davidson was adjudged insane and taken to the hospital for the insane where he remained about 13 years. In 1882 the land was sold under the judgment of foreclosure to Kos Harris who shortly afterwards assigned his interest in the land to Geo. H. Lantis. In 1880 the land was sold for the taxes of 1879, and the tax sale certificate was assigned to Harris on May 20, 1882, and was at once reassigned by him to Lantis who paid the taxes on said land for the subsequent years of 1880, 1881, and 1882, and in 1883 a tax deed was issued to him. Upon the issuance of the tax deed Lantis went into

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 15, 1913.

possession of the land and remained in possession of it until June 3, 1903, when he was dispossessed by a special mandate issued by the Supreme Court. In 1894 Davidson began an action to set aside the decree of foreclosure and all of the subsequent proceedings in the foreclosure case, including the sale of the land and the sheriff's deed, and on June 13, 1896, a judgment to that effect was rendered. In the trial of that case it was found that the proceedings were absolutely null and void, and hence were ineffectual to convey the title of the real estate from Davidson to Lantis. It was therefore adjudged that all of the steps in the foreclosure proceedings should be vacated, and that Davidson should be put into the full and undisputed possession of the land. In that controversy no finding or adjudication was made with reference to the validity of the tax deeds nor with reference to the right of subrogation under the mortgages. Error was prosecuted from that judgment to the Supreme Court, where the judgment was affirmed. *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745. In 1901 the appellee Lantis brought an action in which he claimed a lien against the land for the taxes paid, and also asked to be subrogated to the rights of the mortgagees in the foreclosure proceedings which had been set aside as invalid. This case was subsequently dismissed without prejudice for want of prosecution. While the last-named action was pending, Davidson obtained a special mandate from the Supreme Court upon an ex parte application summarily ordering that he be put in immediate possession of the land. The court was not advised of the pendency of the proceedings, nor was it brought to its attention that Lantis had asked the trial court to determine the tax and other liens before surrendering possession of the land. Under that decree Davidson was put into possession. During all the time between April 8, 1899, and June 3, 1903, the land was involved in litigation between Davidson and Lantis in which Davidson was seeking for possession of the land and the recovery of rents and profits thereon, while Lantis had brought a number of injunction suits. On April 10, 1910, seven years after Davidson had gained possession of the land, he brought this action against Lantis and others to quiet his title to the land in controversy. Lantis pleaded that he had an interest in the land by virtue of a tax deed, and that he had paid taxes for a number of years which entitled him to a lien thereon. He also asked to be subrogated to the rights of the mortgagees in the foreclosure proceedings. In his reply Davidson claimed that Lantis was not entitled to any lien for taxes nor to the rights of subrogation, and he further pleaded that these questions had been adjudicated in another action and were not open to further inquiry. Upon a trial of the action in July, 1911, judgment was rendered quieting Da-

vidson's title to the land, subject, however, to a tax lien in favor of Lantis in the sum of \$1,866.64, and which denied any relief to Lantis under his claim for subrogation to the mortgages illegally foreclosed. Davidson complains of that part of the judgment which makes the land subject to a tax lien, while Lantis, in a cross-appeal, complains that the court erred in the computation of the taxes, and he insists that he was entitled to a lien of \$2,016.02, and also that he should have been subrogated to the rights of the mortgagees and awarded a lien for \$3,667.50.

[1] Several errors are assigned by Davidson upon rulings admitting testimony and upon other proceedings had during the trial, but these are not available for the reason that no transcript of the evidence or proceedings have been procured or made a part of the record by appellant. Nothing is before us except pleadings, findings, and judgment. Some statements as to the steps taken in the trial are made in Davidson's abstract and brief, but these cannot be considered for the reason that Lantis has had no opportunity to test the correctness of the statements nor to make a counter abstract showing what actually occurred during the trial. In the absence of a transcript, this court cannot settle conflicting claims as to the proceedings in the trial court nor determine whether rulings referred to in the findings of that court on such proceedings may not have been controlled by evidence, admissions, or waivers not preserved in the record. Civ. Code § 574 (Gen. St. 1909, § 6169); *Baker v. Readicker*, 84 Kan. 489, 115 Pac. 112; *Typewriter Co. v. Andreson*, 85 Kan. 867, 118 Pac. 879.

The special findings which are in the record disclose that a part of the files of the case brought by Lantis a number of years ago to establish tax and mortgage liens against the land, and which was subsequently dismissed without prejudice, were admitted in evidence. Davidson insists that these were not within the issues, and besides the files were not properly authenticated or identified. As the record is brought here, there is no way of determining whether the papers so introduced were properly identified or authenticated, or whether identification and authentication were not rendered unnecessary by the concession or waiver of the appellant. Testimony as to the acts and claims of parties in the earlier litigation may have been pertinent and proper in order to ascertain the equities in the case and to show the extent of Lantis' possession and whether the rights asserted herein were barred by any limitation. At any rate, we cannot state, upon the record before us, that the evidence was improperly received, and, if it were granted that it was not strictly within the issues, it cannot be decided that it was prejudicial to Davidson. There is complaint, too, of certain rulings which excluded offered testimony, but these can-

not be reviewed for the same reasons and the added one that it does not appear from the record that the excluded testimony was produced on the motion for a new trial as the Code requires. Civ. Code, § 307 (Gen. St. 1909, § 5901); *Cooper v. Greenleaf*, 84 Kan. 499, 114 Pac. 1086, 35 L. R. A. (N. S.) 1090; *Greer v. Mercantile Co.*, 86 Kan. 686, 121 Pac. 1121.

[2] Another claim is that the answer of Lantis did not warrant the court in giving him more than he asked; that is, affirmative relief by providing for the enforcement of the tax lien. There is nothing substantial in this claim. Davidson brought the action to have the title to his land quieted, and asked that Lantis be required to set forth the interest which he claimed in the land. Lantis answered by pleading the payment of the taxes, the issuance of a tax deed, and other facts which tended to support his right to a tax lien as well as a mortgage lien by way of subrogation, and then he followed these allegations by asking that his rights under both claims should be protected. In his reply Davidson denied the right of appellee to a tax lien and also to any mortgage lien, and thus we see the question of the right of Lantis to a lien for taxes paid was properly raised. There is very little difference between a prayer to have the rights of Lantis, because of the payment of taxes, protected and a specific request for the foreclosure and enforcement of his lien for taxes. It is the fact stated in the pleadings, rather than the prayer, which determines the nature and extent of the relief which shall be awarded to a party, and the trial court was clearly within the line of duty when it provided for closing up the contentions between the parties by determining the interests and rights of each and ordering the enforcement of the lien adjudged. This tax lien of appellee was sufficiently pleaded, and presumably it was sufficiently proved, and hence it was the duty of the court to provide for its enforcement. Further than that, appellant was not entitled to have his title quieted as against appellee until he had done equity by the payment of the taxes legally charged against the land and by discharging any existing liens held by Lantis. After inviting Lantis to set up his interest and to have it adjudicated, Davidson is hardly in a position to object to a judgment which determined that interest and which directed the enforcement of a lien found to exist.

[3] The claim that the right of Lantis to assert a tax lien is barred cannot be sustained as no statute of limitations was pleaded by Davidson. Aside from that, the claim for a lien had been asserted in litigation which was pending between the parties from 1899 when *Lantis v. Davidson*, supra, was decided until about the time the present action was brought. The trial court found on facts, all of which are not preserved, that

the right to a tax lien was not barred by any statute of limitations. An objection is also made that rents and profits were not set off against the tax lien as equity requires. A finding of the trial court answers this objection where it is stated that no such issue was raised in the case and no proof as to rents and profits was offered. *Olson v. Peterson*, 88 Kan. 350, 128 Pac. 181.

Again it is contended that Lantis was not entitled to a tax lien upon the theory that he was an owner when the taxes were paid. The foreclosure sale and deed were declared to be void, and hence Lantis was not an owner by virtue of such sale and deed; neither can it be said that there was a merger, for, although Lantis entered into possession under the tax deed, it has been expressly found by the trial court that there was no merger of the interest he acquired under the tax deed and the claimed title under the sheriff's deed that was set aside. It appears that Lantis did not obtain a title to the land by either the foreclosure proceedings or the tax deed which turned out to be invalid. The contention that the tax deed was adjudicated in *Lantis v. Davidson*, supra, cannot be upheld, as the court explicitly finds that Lantis' right to a tax lien was not determined in the judgment rendered in that case. Neither can it be held that his right to a lien was concluded by the special mandate which was issued from this court and under which Lantis was dispossessed of the land. It appears that that order was made on an ex parte application, and that the claim of Lantis for a lien for the taxes he had paid was not brought to the attention of the court, and neither was the court advised that Lantis had instituted an action, which was then pending, for the determination of his lien before surrendering possession of the land. The special mandate, therefore, did not operate as an adjudication of the tax lien, nor did it preclude Lantis from setting up the tax lien in this action. Aside from the considerations mentioned, appellant has brought an equitable proceeding to quiet his title in which he brings before the court the validity of the tax and other liens claimed by Lantis. As he is seeking equity, it devolves upon him to do equity, and it is only equity that he should discharge the lien for the taxes legally charged against his land and which had been paid by the opposing party. *Herzog v. Gregg*, 23 Kan. 726; *McKeen v. Haxtun*, 25 Kan. 698; *Richards v. Cole*, 31 Kan. 205, 1 Pac. 647; *Black v. Johnson*, 63 Kan. 47, 64 Pac. 988; *Wagner v. Underhill*, 71 Kan. 637, 81 Pac. 177; *Miller v. Dittlinger*, 81 Kan. 9, 105 Pac. 20, 26 L. R. A. (N. S.) 595, 19 Ann. Cas. 261; *Baldwin v. Gibson*, 85 Kan. 267, 116 Pac. 827.

In his cross-appeal appellee complains that he was not allowed a higher rate of interest than 12 per cent. on the taxes paid; but, as

ownership of the land was in litigation in several courts of the state from the time the tax deed was issued, the rate of interest prescribed in section 282 of the law of taxation applies. It is there provided that: "In case taxes are paid by any party whose lands are in controversy in any of the courts of this state, and the party so paying shall fail to recover said land, he shall be entitled to collect from the parties recovering the taxes so paid, with twelve per cent. interest thereon; and the taxes so paid shall be a lien on any such land." Gen. St. 1909, § 9495.

It cannot be held that the refusal of the court to grant appellee relief under the old mortgages or to give him mortgage liens by way of subrogation is error, as the testimony upon which the decision of the court rests is not in the record.

The judgment of the district court will be affirmed. All the Justices concurring.

#### HUPE v. SOMMER.

(Supreme Court of Kansas. Jan. 11, 1913.)

##### (Syllabus by the Court.)

#### 1. OFFICERS (§ 114\*)—LIABILITY—CONTRACTS.

The language used by a public officer in making a contract in that capacity is not to be construed as imposing a personal liability upon him unless an intention to that effect is clearly shown.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192; Dec. Dig. § 114.\*]

#### 2. TOWNS (§ 31\*)—OFFICERS—LIABILITY ON CONTRACT.

Where a public officer, in entering into a contract in that capacity, promises to make payment immediately upon the completion of the work, he incurs no personal liability (at least in the absence of fraud), although the statute provides that the contractor shall receive his pay from another source and after some delay.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 55; Dec. Dig. § 31.\*]

#### 3. OFFICERS (§ 116\*)—LIABILITIES—FAILURE TO PERFORM DUTY.

A public officer who refuses to perform a duty, without the performance of which a just claim against the public cannot be paid, is personally liable in damages to the claimant, but only to the extent of the actual loss occasioned by such refusal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 193, 194, 196; Dec. Dig. § 116.\*]

#### 4. OFFICERS (§ 119\*)—LIABILITIES—MEASURE OF DAMAGES.

The measure of damages in such a case, where the ultimate collection of the claim has not been defeated, would ordinarily be the interest on the amount for the time payment has been delayed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 197-206; Dec. Dig. § 119.\*]

#### 5. INJUNCTION (§ 212\*)—OFFICERS—PERSONS CONCLUDED.

In an action to enforce such liability, the fact that the performance of the duty in question has been enjoined by a court of competent jurisdiction is not a defense, where the claimant was not a party to the proceeding, or where the

ground of the injunction was the failure of the officer to proceed in a proper manner.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 435; Dec. Dig. § 212.\*]

#### Appeal from District Court, Pottawatomie County.

Action by Henry Hupe against George Sommer. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Maurice Murphy, of St. Marys, for appellant. E. M. Brunner, of Wamego, and Crane & Woodburn Bros., of Holton, for appellee.

MASON, J. Henry Hupe sued George Sommer, alleging that the defendant, as township trustee, had contracted with him for the building of a drainage ditch. He sought to hold the defendant personally liable for his pay. An answer and reply were filed. Upon the case being called for trial, the defendant objected to the introduction of any evidence on the ground that the petition failed to state a cause of action. The objection was sustained, and judgment was rendered against the plaintiff, from which he appeals.

A township trustee, under the statute, has authority to "establish" a drainage ditch. Gen. St. 1909, §§ 2968-2981. When one has been established—that is, when he has determined where it shall be located—he divides it into sections and fixes a time within which the work upon each section may be done by some person whom he designates, obviously the person found to be justly chargeable with its cost; the evident purpose being to have the ditch built, so far as possible, by the persons interested. Section 2972. If any section is not completed within the time set, he "sells" it to the lowest bidder (section 2979); that is, he lets contracts for the completion of the ditch. Upon the letting of a contract, he immediately certifies the amount of the bid, with other costs, to the county clerk, who is required to enter it upon the tax roll against the person to whom it has been apportioned. As soon as the work is finished to his satisfaction, the trustee also certifies the amount due the contractor to the county clerk, who draws an order for its payment "out of the county treasury." At any time before the charge is entered upon the tax roll, the person liable may pay the amount to the trustee, who pays it to the contractor. Section 2980. The section preceding that just cited concludes with the words: "Such trustee shall make a fair and just estimate of the amount of costs made in all such proceedings, to be paid by each person interested in such proposed ditch, drain, or water course, and collect the same as hereinafter provided, and pay out the same in conformity with such statutes." Section 2979.

[1] The petition alleges, in substance, that the defendant promised that the plaintiff should receive his pay from him as soon as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the work was completed. This allegation is not sufficient to charge personal liability upon the defendant, for the petition recites that the incomplete sections of the ditch were sold to the plaintiff—meaning that the contract for their completion was let to him—"according to law"; and the pleadings show explicitly that the plaintiff is relying upon the provisions of the statute referred to. The contract was made with the defendant in his official capacity. The language used by him cannot be construed as imposing a personal liability unless an intention to bind himself clearly appears. 29 Cyc. 1446; *Mechem's Public Offices and Officers*, §§ 805, 806; note, 15 L. R. A. 509; note, 22 Am. St. Rep. 508, 510.

[2] His promise to pay the defendant when the work was complete must be interpreted as an assurance that the public body which he represented—in this instance the county—would be a prompt paymaster. In a sense, the representation was justified, since the county becomes indebted to the contractor upon the filing of a certificate of the completion of the work, unless payment has already been made by the landowner to the trustee, in which case the trustee pays the contractor. The provision of the statute that the trustee shall collect the costs made in such proceedings, "as hereinafter provided," and pay them out to the persons entitled thereto, means merely that he shall perform the duties specifically laid upon him in that connection. But if the trustee, acting officially, went too far and exceeded his authority by promising immediate payment, this did not make him personally liable (at least in the absence of fraud), for the plaintiff could not have been deceived, having the same means of information, and knowing from the statute how payment was to be made. 29 Cyc. 1446, 1447; *Martin v. Schuermeyer*, 30 Okl. 735, at page 738, 121 Pac. 248, at page 249. In the opinion in the case last cited it was said: "The law is that an officer contracting on behalf of a public corporation, and intending to so contract, is not personally liable on his contract, where he has been guilty of no fraud or misrepresentation, and where the person with whom he contracts has the same means of knowing the extent of his authority as he has, though he exceeds his authority, and for that reason does not bind the corporation."

[3] The petition also alleges that the defendant failed and refused to proceed as the law provides for the collection of the money and the payment of the plaintiff, and failed and refused to put in operation the machinery provided by law for the collection of taxes and moneys. These allegations, liberally construed, must be taken to charge that the defendant had wrongfully refused to certify to the county clerk the amount of the bid upon its acceptance, and that he had later wrongfully refused to certify to the clerk that the work under the contract

had been completed to his satisfaction, and that thereby the amount had become due to the contractor. The statute places upon the trustee the duty of performing these acts. As the contractor is the person most directly interested in their performance, the duty is one owed to him. If the defendant without sufficient excuse refused to perform them, he inflicted a wrong upon the plaintiff, and should be liable for whatever loss was thereby occasioned. Where one contracting with a city is to be paid only out of the proceeds of a special tax against the property benefited, and the officers refuse to make the levy, the city becomes immediately liable to the contractor for the full amount out of its general fund. *City of Leavenworth v. Mills*, 6 Kan. 288; *Heller v. City of Garden City*, 58 Kan. 263, 48 Pac. 841; note, 32 L. R. A. (N. S.) 163; 2 *Dillon on Municipal Corporations* (5th Ed.) § 827.

This liability is not based merely on the theory that the city has done the contractor a wrong and must compensate him for his loss thereby occasioned; it is also founded upon the proposition that the city is primarily liable to the contractor and can pay him and reimburse itself through a levy of the special tax. The same reason does not exist for holding the delinquent officers personally liable for the full amount. A public officer who refuses to perform a duty, without the performance of which a just claim against the public cannot be paid, is personally liable to the claimant to the extent of his injury, but the measure of damages in such a case has been a matter of considerable discussion and difference of opinion. In *Clark v. Miller*, 54 N. Y. 528, at page 535, a town supervisor was sued for a refusal to perform the duty of presenting to the county board the plaintiff's claim for damages reassessed for the laying out of a road through his land. The grounds of the decision were thus stated: "The defendant is answerable for the whole amount which, by his refusal to perform his duty, the plaintiff has been unable to obtain. The law will not limit his recovery to anything less than the amount of the reassessment; for such a limit would drive him to a succession of actions, in none of which could he, if the defendant's position is correct, recover more than interest. It cannot be assumed that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not thus to be put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must answer to the whole injury which he has occasioned." Of this doctrine it has been said: "This rigorous severity is exceptional and based on considerations of policy to insure the active diligence of such officers; it is in fact punitive in its nature and object." 1 *Sutherland on Damages* (2d Ed.) § 160. In *Dow v. Humbert et al.*, 91 U. S. 294, 23 L.

Ed. 368, the authorities on the subject are reviewed and the conclusion is reached that the plaintiff's recovery in an action of the class referred to should be limited to compensation for such loss as he has actually suffered from the defendant's neglect of duty. This we think the better rule in reason as well as upon authority. See, also, *Mechem's Public Offices and Officers*, §§ 784-785; 2 *Sedgwick on Damages* (9th Ed.) § 545; *Crane v. Stone*, 15 Kan. 94, 98; *Amy v. The Supervisors*, 78 U. S. (11 Wall.) 136, 20 L. Ed. 101; *Newark Savings Institution v. Panhorst*, 7 Biss. 99, Fed. Cas. No. 10,142.

[4] In the present case a recovery is asked for the full amount of the claim, and no specific grounds of damage are alleged. However, the petition, in view of the only method by which its sufficiency was tested, must be construed with great liberality. If its allegations are true, it necessarily follows that the plaintiff has at least been unnecessarily delayed in the collection of his claim. He cannot recover interest during this time from the county, for the statute does not so provide. *Jackson County v. Kaul*, 77 Kan. 717, 96 Pac. 45, 17 L. R. A. (N. S.) 552. He has therefore stated a cause of action for the recovery of interest at the legal rate from the time he would have received payment if the defendant had complied with the statute.

[8] In his answer the defendant alleges that he certified to the county clerk the amount for which the contract had been let, and that it was entered upon the tax roll; that thereafter he and the county treasurer were by decree of the district court permanently enjoined from collecting the tax. The plaintiff replies with a general denial, admitting the injunction, but stating that he was not a party to the action in which it was granted, and that the ground of it was that the defendant had not proceeded in the matter "as by law provided." If the defendant owed to the plaintiff a duty to take the initial step in a proceeding to levy a tax, he was not relieved of it merely by an injunction in an action to which the plaintiff was not a party. *A. T. & S. F. Rld. Co. v. Com'rs of Jefferson Co.*, 12 Kan. 127. The allowance of the injunction is not conclusive evidence against the contractor that facts existed preventing the collection of the tax; and if the injunction was rightful, because the trustee had omitted some duty he owed to the contractor, it could not be available to him as a defense.

In the plaintiff's brief it is said that, if any one is liable to the defendant, it is the county; that the county's liability does not depend upon the collection of the tax. This is doubtless true. The statute says that, upon the filing of the certificate of the amount due the contractor, the county clerk shall draw an order for its payment out of the county treasury. The payment is not made

contingent upon the collection of the tax. But the liability of the county does not attach until the statute has been complied with. Upon the letting of the contract, the amount is certified to the county clerk, who at once places it upon the tax roll. When the work is completed, a second certificate is filed showing that the amount of the bid has become due to the contractor. Then an order is drawn for its payment by the county. While the collection of the tax is not a condition precedent to the payment, its levy seems to be. At all events, before the contractor can be paid, the trustee must in effect certify that the work has been completed to his satisfaction. The petition alleges that this was not done. Without it the plaintiff could collect nothing from the county. The injunction does not appear to have forbidden it. The petition alleges, in substance, that the plaintiff was entitled to payment from the county, which he could collect only upon the filing of a certificate which the defendant, in violation of his duty, refused to make. These allegations are not modified by the reply. They are sufficient, if proved, to entitle the plaintiff to recover any damage he has sustained.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

#### NASON v. PATTEN et al.†

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. VENDOR AND PURCHASER (§ 78\*) — CONSTRUCTION OF CONTRACT—TIME FOR PERFORMANCE.

Where time is not of the essence of a contract to convey land, but is made essential by performance or tender of performance of one party and a demand on the other, a reasonable time must be given for compliance with such demand.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121-125; Dec. Dig. § 78.\*]

#### 2. JUDGMENT (§ 212\*)—VALIDITY—POWER OF COURT IN VACATION.

A district court is without authority in vacation to render judgment in a case tried in term time and taken under advisement.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 389; Dec. Dig. § 212.\*]

#### 3. JUDGMENT (§ 354\*)—DISPOSITION OF CAUSE—REVERSAL.

A judgment rendered in vacation upon a trial and submission at the preceding term should be set aside, and a judgment should be rendered at the next term.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 681, 691, 701-704; Dec. Dig. § 354.\*]

(Additional Syllabus by Editorial Staff.)

#### 4. VENDOR AND PURCHASER (§ 334\*)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY PAID.

While, as a general rule, a purchaser, who, without fault of the vendor, has failed to fulfill the contract, cannot recover an advance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 15, 1913.

payment, this rule does not prevail where the contract has been abandoned or rescinded by consent of the party not in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

Mason, J., dissenting in part.

Appeal from District Court, Stevens County.

Action by F. M. Nason against J. P. Patten and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

John L. Gleason, of Guymon, and S. W. Smith, of Oklahoma City, Okl., for appellant. C. V. Monatt, of Liberal, for appellees.

**BENSON, J.** This action was brought by the vendee in a contract for the sale of land to enforce specific performance and for damages, and was tried as an action to recover damages only. Judgment was given for the amount of an advance payment.

No conflict appears in the evidence. No default in the contract had been made by the vendor before the suit was brought; but he had conveyed the land to another, who had purchased it in good faith. To sustain the judgment it must be presumed that the recovery was allowed upon the theory that the contract had been rescinded by consent of the vendor—considering the conveyance made by him as an abandonment of the contract, as he thereby disabled himself from performing it.

[4] While it is a general rule that a purchaser, who, without fault of the vendor, has failed to fulfill the contract, cannot recover an advance payment, yet this rule does not prevail where the contract has been abandoned or rescinded by consent of the party not in default. *Hillyard v. Bancher*, 85 Kan. 516, 526, 118 Pac. 67; *Phelps v. Brown*, 95 Cal. 572, 80 Pac. 774; *Richards v. Allen*, 17 Me. 296; *Andrews v. Brown*, 57 Mass. (3 Cush.) 130; *Fry on Specific Performance* (4th Ed.) § 1066.

[1] Time was not of the essence of the contract, but it was made essential by a notice to the vendee that he must pay the balance of the purchase money at a date stated in the notice. The time of performance, according to the terms of the contract, was May 10, 1910. At that time the deed from the vendor was on deposit at a designated bank as provided in the contract, and the abstract likewise so deposited had been received by the vendee. The vendee failed to object to the title or pay the balance of the purchase as agreed, and a notice was served upon him by the vendor on that day, May 10th, that unless such payment was made on or before May 12th at 4 o'clock p. m., the contract would be rescinded. The payment was not made, and on May 18th the vendor conveyed the land to another.

Where time is not of the essence of such

a contract, it may be made essential by performance or tender of performance by one party and demand on the other. *Roberts v. Yaw*, 62 Kan. 43, 61 Pac. 409. But a reasonable time must be allowed to comply with the demand. *Kirby v. Harrison et al.*, 2 Ohio St. 326, 59 Am. Dec. 677; 6 Pomeroy, Equity Jur. § 815. What is a reasonable time is a question to be determined from the circumstances of each particular case. *Martin v. Grimes*, 88 Mo. 478; *Waterman on Spec. Perf.* § 465; 36 Cyc. 715.

The amount to be paid in this instance was over \$3,000. The notice was served on the day the money was due. The notice gave less than two days in which to make payment. Immediately after the time so given had elapsed conveyance was made to another. No reason appears in the evidence, and none is suggested, why such haste was necessary or reasonable, and it cannot be held as matter of law that a finding of the district court that the time given was not reasonable was erroneous. To uphold the judgment it should be presumed that the court so found—and this finding is approved.

[2] The judgment, although not erroneous for any reason already considered, must be set aside. The case was submitted on December 12, 1910, and decision was reserved to be announced at a later date. The term of court was adjourned without day on the 13th day of December. On March 11, 1911, a judgment was entered in vacation against the defendant for \$156.75, the amount of the advance payment with interest. The judge had no power to render the judgment in vacation. *Earls v. Earls*, 27 Kan. 538; *Packard v. Packard*, 34 Kan. 53, 7 Pac. 628; *State v. Start*, 62 Kan. 111, 61 Pac. 394.

[3] A void judgment may be reversed on appeal. *Fleeman v. Railway Co.*, 82 Kan. 574, 109 Pac. 287, 33 L. R. A. (N. S.) 733, 136 Am. St. Rep. 117, 20 Ann. Cas. 278.

As the entry of the judgment recites a submission of the case on the 12th of December, 1910, and the rendition of judgment on the 10th of March, 1911, it is argued that it must be presumed from the record that the court was in session on the latter date. It would be so presumed from this alone, but there was another record—that of the adjournment of the term without day on the 13th day of December, 1910. It is argued that we cannot consider the record of adjournment, because it was not introduced in evidence in the district court on the motion for new trial or otherwise. It was not necessary that the record of its own adjournment should be presented in evidence to that court, since it was a matter of judicial knowledge. Again, it is said that the entry shows that the motion for a new trial was overruled on December 12, 1910, when the case was submitted. We do not so read the record, which recites the rendition of the



judgment on March 10th, and following this is the recital of an order overruling the motion for a new trial. True, the entry recites that the motion was filed on December 12th; but it must be presumed—and the entry is in harmony with the presumption—that action was taken on the motion at the date on which judgment was rendered.

The judgment is reversed, with directions to the district court to enter judgment in term time in pursuance to the submission of the case on December 12th. While the judgment entered in form upon the journal is a nullity, and in the absence of any other order an appeal might be taken after another judgment is entered, still, to end the litigation—all the facts being before this court—the further direction is given to enter judgment for the plaintiff for the amount of the advance payment and interest.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, and WEST, JJ., concurring.

MASON, J. (dissenting in part). I do not think the proposition stated in the second paragraph of the syllabus is involved in this case. The plaintiff does not contend that the judgment rendered in vacation is valid. He denies that it was rendered in vacation, or rather, he asserts that upon the record it appears to have been rendered by the court while in session, and that no sufficient showing has been made to the contrary. In this I think he is right. The record of the judgment imports a distinct declaration that the court was in session on March 10, 1911. After an appeal had been taken from this judgment, there was placed among the files of the case in the district court a certified copy of an order purporting to have been made December 13, 1910, adjourning court sine die. If there is a conflict between the two recitals, there is no reason why that respecting the adjournment should prevail over that contained in the journal entry of judgment. But there is no necessary conflict. A special term of court may have been in session on March 10, 1911, so far as this court can know from what is before it. However, if this were in fact the case, the plaintiff would doubtless have shown it by direct evidence, instead of relying upon the presumption in support of his judgment, as he perhaps had a technical right to do. I do not object to the order of this court being based on the assumption that the judgment was rendered in vacation, because that is probably the fact. But I think the costs of the appeal should be charged to the appellant, for the reason that the ruling of the district court upon the actual matter in controversy is affirmed. The defendant ought not to recover any costs here without showing that the attention of the district judge was in some way directed to the fact that the judg-

ment appeared to have been rendered at a time when the court was not in fact in session. The notice of appeal, given April 8, 1911, expressly described the judgment appealed from as having been rendered at the December term, and a purpose to raise a question on that point did not appear until the abstract was filed, on February 15, 1912. One of the grounds of the motion for a new trial was that the judgment was not rendered during the sitting of court; but as this was filed and (as I read the record) overruled on December 12, 1910, it can hardly be regarded as relating to anything that took place in the following March. If it were necessary in order to protect the plaintiff's substantial rights, I think the record might be interpreted to mean this: The court on December 12th found in favor of the plaintiff, denied the motion for a new trial, and rendered judgment accordingly; but, being in some doubt of the correctness of the decision, deferred entering the judgment until later, in the meantime reviewing the questions involved by the aid of the briefs presented.

#### CHARLES v. WITT et al.†

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. ACTION (§ 45\*)—CAUSES OF ACTION—JOINER.

In an action on behalf of minors against their former guardian for an accounting, allegations of fraud, of waste and mismanagement, of wrongful appropriation of the minors' property by pasturing their lands, and of purchasing their grain at less than its value, are mere matters of inducement, where the petition as a whole shows that all that is demanded is an accounting. Wrongful or tortious acts of the guardian may be waived, and he may be compelled to account for the reasonable value of the property wasted or wrongfully appropriated. There still remains but a single cause of action for an accounting.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-448; Dec. Dig. § 45.\*]

#### 2. GUARDIAN AND WARD (§ 54\*)—MISFEASANCE OF GUARDIAN—LIABILITY—RENTAL VALUE OF LANDS.

Where a guardian, for a period extending over several years, without an order of the probate court leases the lands of the minors for grain rent, and purchases their grain himself, keeping the accounts in such an imperfect and unintelligible manner that in an action for an accounting it is found impossible to ascertain what amount of grain was received for the minors' share or raised on their lands, it is proper to charge him with the cash rental value of their lands for the whole period.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 242-253; Dec. Dig. § 54.\*]

#### 3. GUARDIAN AND WARD (§ 54\*)—MISFEASANCE OF GUARDIAN—ACCOUNTING—COMPOUND INTEREST.

And in such case, where the evidence likewise shows other instances of culpable neglect of the minors' interests and of fraud in the management of their estate, the allowance of interest at 6 per cent. on the yearly balance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Rehearing denied March 15, 1913.

found due, the interest to be added yearly to the principal, will be upheld.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 242-253; Dec. Dig. § 54.\*]

**4. PLEADING (§ 250\*)—AMENDMENT—RELIEF.**

When the sureties of the guardian are parties to such an action, and the petition asks judgment for the amount of the bond, and the court finds a larger sum due from the guardian, the court should permit the petition to be amended to conform to the evidence and should render judgment against the guardian for the whole amount found due the wards.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 730-733; Dec. Dig. § 250.\*]

**5. GUARDIAN AND WARD (§§ 44, 58\*)—ADMINISTRATION OF ESTATE—DIRECTION OF PROBATE COURT—LEASE OF LAND—LOAN OF MONEY.**

Guardians are required to manage the interests of their wards under the direction of the probate court (Gen. St. 1909, § 3975), and may lease the lands of the wards or loan their money, but can do so lawfully only under the direction of the court.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 192-201, 255-260; Dec. Dig. §§ 44, 56.\*]

**6. GUARDIAN AND WARD (§ 163\*)—FINAL SETTLEMENT—CONCLUSIVENESS.**

The final settlement of an administrator, who at the same time is guardian of minors interested in the estate, is not conclusive upon the minors, but is voidable by them or by their representative.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 474, 540-544; Dec. Dig. § 163.\*]

**7. GUARDIAN AND WARD (§ 62\*)—ADMINISTRATION OF ESTATE—CONTRACT WITH HIMSELF.**

A guardian may not trade with himself on account of the ward or use or deal with his ward's property for his own benefit.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 288-293; Dec. Dig. § 62.\*]

**8. COSTS (§ 256\*)—RECORD—COUNTER ABSTRACT—COST OF PRINTING.**

That portion of the cost of printing a counter abstract found to be unnecessary is taxed to the appellee.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 968-971; Dec. Dig. § 256.\*]

*(Additional Syllabus by Editorial Staff.)*

**9. GUARDIAN AND WARD (§ 146\*)—SUBSTITUTED GUARDIAN—ACCOUNTING—RIGHT TO SUE—PARTIES.**

Under the express provisions of Gen. St. 1909, § 3975, authorizing a substituted guardian to sue for an accounting by a prior guardian, such substituted guardian was entitled to maintain such an action without joining his wards as parties plaintiff.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 488-495; Dec. Dig. § 146.\*]

Appeal from District Court, Stafford County.

Action by U. G. Charles, guardian, of the persons and estates of Theodore and Hulda Witt, against Gustav Witt and others. Decree for complainant, and defendant named appeals. Modified and affirmed.

F. L. Martin, of Hutchinson, for appellant. Paul R. Nagle, of St. John, for appellee.

PORTER, J. The appellant Gustav Witt was guardian of the persons and estates of Theodore and Hulda Witt, minors, from the time of his appointment in 1895 until his removal by the probate court of Stafford county in 1908, when U. G. Charles was appointed guardian. This is a suit by Charles on behalf of the minors against the former guardian and his sureties for an accounting, setting up fraud in annual settlements, misappropriations of funds, and waste and mismanagement of the property. The case was sent to a referee who found the facts and law against the former guardian. The court approved the report and rendered judgment accordingly, from which Gustav Witt appeals.

There was a long trial before the referee, and a great mass of evidence was taken covering a multitude of transactions some of which involved the administration of other estates, and necessarily the findings of fact are voluminous. We shall state as briefly as possible the substance of the findings which are deemed necessary to an understanding of the real controversy.

Mary L. and Edward Witt were married in Indiana in 1875. They removed to Texas in 1885, and in the same year Edward died intestate, leaving his widow and two children, Emma and Ida Witt, as his only heirs at law. The widow was appointed administratrix and trustee, and her management of his estate is indirectly involved here and will be mentioned later.

In 1885 Mary L. Witt returned to Indiana and married Theodore J. Witt, brother of her first husband. They came soon afterwards to Stafford county, Kan., and two children were born to them, Theodore and Hulda Witt, in whose behalf this action is brought. Theodore J. died December 16, 1894, leaving his widow and these minors as his only heirs. He left a will devising to the two children one half of his real estate and to the widow all the personal estate, stating in the will that under the law she would take the other half of the real estate. Mary L. Witt, the widow, died four days after her husband, intestate, add leaving as her only heirs at law Emma and Ida Witt, children by her first husband, and Theodore and Hulda, by the second marriage.

The will of Theodore J. Witt named Mary L. Witt as executrix. It was admitted to probate in Stafford county; but no further proceedings were had or taken under it. At the time of his death, Theodore J. Witt was the owner of 532 acres of farm land in Stafford county, about 460 acres cultivated and the remainder in pasture. His brother, Gustav Witt, owns and lives on land adjoining.

On January 12, 1895, Gustav was appointed by the probate court administrator of the estate of Mary L. Witt, and qualified as such, and on the same day was appointed guardi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an of the persons and estates of both sets of children. The children of Edward Witt are not parties to this action and have no interest in the controversy; but it appears that, as administrator of the estate of Mary L. Witt, Gustav received what is referred to in the findings as the "Texas mortgage" for \$4,000, in which a portion of the proceeds of the estate of Edward Witt, deceased, had been invested by Mary L. Witt in her capacity as administratrix. In her application to the probate court of Bexar county, Tex., for such appointment, she set out property amounting to about \$5,500, which she represented to be community property. There was in force in that state a community property law, and the Texas court adjudicated the property left by Edward Witt to be that kind of property. No report or settlement of the community estate was ever made by her in the Texas court.

The will of Theodore J. Witt was not filed for probate until after the death of Mary L. Witt. She was sick at the time of his death, and she made no election under the will, and there is no evidence that she had any knowledge of the existence of the will. As administrator, Gustav Witt received the proceeds of the lands for the year 1894 and the personal property, including the Texas mortgage for \$4,000. He rendered his first account as administrator in January, 1896, his second in January, 1897, and his final account a year later, when he was discharged as administrator. In these settlements there was no person to represent the minors but himself as their guardian. He acted in the double capacity of administrator and guardian, and the settlements were made without notice to the minors. As guardian he never applied to the probate court for an order to lease his wards' lands or to loan or invest their funds, and no such order was ever made.

From 1895 to 1907, inclusive, he leased the lands as guardian for grain rent, but the referee finds that he kept no account of such grain rent, when it was gathered or threshed, and that the partially kept accounts of such grain rent when it was sold "were kept on the inside cover of account books and pocket memorandum books in pencil and in such an imperfect and unintelligible manner that it was impossible to tell from the evidence what amount of grain rent was received by Hulda Witt and Theodore Witt, minors, or how much grain was raised on said land."

The evidence shows that in 1898 Gustav Witt, in addition to farming the place where he lived, engaged in the grain business and kept an elevator and a store. From that time on he purchased the grain raised on the wards' lands, including their shares. The tenants would deliver grain to the elevator, and take the scale tickets to the store, where a daughter, or some member of Gustav

Witt's family, would credit the tenant with two-thirds. The balance was understood by everybody to belong to the wards; but no accurate account was kept, and it was the custom to destroy the scale tickets at the end of one year. On the trial it was found practically impossible for Gustav Witt to show the amount of grain rent received from the lands. The cattle and live stock owned by the guardian were frequently kept on the pasture lands of the wards, and his cattle at times were allowed to eat and destroy grain in stacks which was raised on their lands. The referee finds that it was impossible to ascertain the amount of damages which the estate thereby sustained.

As guardian he filed annual accounts up to 1902. In 1905 his account attempted to give the receipts for rent in a lump sum for three years. In 1907 an account was rendered for two years. In 1908 the probate court, after an investigation of his entire account, removed him as guardian and appointed U. G. Charles in his place. In the inventory as administrator he charged himself with the \$4,000 Texas mortgage. In his first account as administrator he claimed that only \$1,250 of this belonged to the estate and that \$2,750, or two-thirds of the mortgage, belonged to the children of Edward, on the theory that no part of the property ever was community property. At the time he was appointed guardian, Theodore Witt was five, and Hulda was less than three, years old. The minors were taken into the family of the guardian, and in his accounts he charges them for their board and clothing. From the time Theodore was ten he worked on the farm, and the referee finds that from 1900 to 1902 the labor performed by him for the guardian was sufficient to pay for his board and clothing, and that his services from 1903 to 1907, inclusive, were reasonably worth \$100 a year and board. Hulda was required to work not only in the house, but in the fields. The evidence is that she began doing work at nine years of age. From the age of about twelve until she left the guardian's home, when sixteen, she performed all kinds of field work, she ploughed, raked hay, pulled broom corn, sledged ridges, chopped cornstalks, herded cattle, and worked in the elevator dump. She was required to do such work as ploughing for neighbors; her wages being paid to the guardian and never accounted for. Both children were kept from school a large part of each school year in order to work for the guardian. The referee finds that during 1906 and 1907 her services were reasonably worth \$75 per year and board. The referee in general terms found that the evidence established fraud in the management of the estates of the minors, and that the distribution made by the probate court of Stafford county at the settlement of Gustav Witt as administrator was not conclusive or binding upon the minors.

The referee proceeded to restate the administrator's account and to correct the errors shown by the evidence. The account with each of the minors was likewise restated and charges and credits given in accordance with the findings and evidence.

As conclusion of law, the referee held that the adjudication of the probate court in Texas is entitled to full-faith credit, and, that court having adjudicated the property left by Edward Witt to be community property, it vested the Texas property in Mary L. Witt subject to payments of debts and to distribution among the heirs of Edward Witt. The will of Theodore was construed to vest all the personal property in Mary L. Witt; and it was held that upon her death Theodore and Hulda Witt became the owners of one-half of the personal property, and that thereafter each owned three-eighths of the real estate. The referee held that the minors were entitled to interest at 6 per cent. on the yearly balance found to be due, the interest to be added yearly to the principal; that the manner in which the guardian leased and managed the lands constituted a breach of trust; that by reason of his having failed to keep accurate accounts of the rents and profits, and because of the impossibility of determining the amount of damages or the amount of rents or whether they had been accounted for, the referee charged him with the cash rental value of the interest of the minors in the lands from the time when he had assumed the right to manage and control the lands. The conclusions of law are clearly stated and cover all the issues. It is not deemed necessary to recite them in full.

The amount found due Theodore Witt on June 8, 1908, when the former guardian was removed, is \$11,004.45, from which is deducted the sum of \$3,442.76 paid to the present guardian, leaving a balance due Theodore of \$7,561.67. The amount due Hulda Witt after deducting the payment to the present guardian was found to be \$6,870.56. The last conclusion of law by the referee is that plaintiff can only recover the amount alleged in the petition, which was \$11,300, that being the aggregate amount of the two bonds executed by the guardian, and the referee held that this amount should be divided in proportion to the amounts found due each minor. The trial court rendered judgment as recommended. The defendant appeals generally; the appellee has a cross-appeal alleging error in denying an application to amend the petition and in not rendering judgment as against Gustav Witt for the entire amount found due.

[9] The errors of which appellant complains are for the most part purely technical. The petition does not show incapacity of plaintiff to maintain the action. The minors might have been named as plaintiffs suing by their guardian, but the petition clear-

ly shows that the plaintiff sues for them in a representative capacity and not for himself. The statute (section 3975, Gen. Stat. 1909) requires him to prosecute and defend for the ward. The objection is to form rather than substance and furnishes no ground for reversal. *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549.

[1] The petition states a cause of action and but one cause. The demurrer and the objection to evidence were rightly overruled. There was a succession of wrongs alleged, the common purpose of which was to detain moneys belonging to the minors. *Klemp v. Winter*, 23 Kan. 699, 704, 705. The action is one for an accounting. The district court had jurisdiction. *Klemp v. Winter*, supra; *Mitchell v. Kelly*, 82 Kan. 1, 3, 107 Pac. 782, 136 Am. St. Rep. 97; *Hawk v. Sayler*, 83 Kan. 775, 112 Pac. 602.

There was no misjoinder of causes of action even under the strictness of the old Code, in force when the original petition was filed and which had been superseded by the new Code when the petition was amended. In an action on behalf of minors against a former guardian for an accounting, allegations of fraud, of waste and mismanagement, of wrongful appropriation of the minors' property by pasturing their lands, and purchasing their grain at less than its actual value, are mere matters of inducement, where the petition as a whole shows that all that is demanded is an accounting and judgment for whatever sum may be due. Wrongful or tortious acts of the former guardian may be waived, and he may be compelled to account for the reasonable value of the property wasted or wrongfully appropriated. There still remains but a single cause of action for an accounting. *Klemp v. Winter*, supra.

It is claimed that the finding that the guardian was guilty of fraud is too general; that the referee should have stated more in detail the acts and omissions which constituted fraud or breach of trust. We think the findings are sufficient in this respect. Some acts are shown which constitute fraud in fact; other acts and omissions are stated which the law declares constitutes fraud irrespective of the intent or purpose. It is unnecessary to recapitulate. It is doubtless true that the property and estate of the minors suffered far more from mismanagement than from willful misconduct of the guardian, but the evidence and findings show such culpable neglect of duty as to constitute a clear breach of trust.

[2] The course adopted by the referee in charging the guardian with the cash rental value of the minors' interest in the lands was made necessary by the guardian's culpable neglect in failing to keep accounts with his wards. While it may seem to be a harsh rule and to work some hardship in this instance, the principle upon which it is

based is reasonable, and its application to the situation presented here meets with our approval. The fact that the petition contained no allegation as to the cash rental value of the lands and asked for no recovery on that basis is of no importance. It was an action for an accounting, and it became the duty of the court to determine what sums were due from the guardian.

[5] The statute (section 3975, Gen. Stat. 1909) requires guardians to manage the interests of their wards under the direction of the court. The guardian may lease the lands of the wards or loan their money, but can do these things lawfully only under the direction of the probate court. A statute similar to ours has been construed to inhibit by implication the doing of these acts without an order of court. *Easton v. Somerville*, 111 Iowa, 164, 82 N. W. 475, 82 Am. St. Rep. 502.

[3] The allowance of compound interest against the guardian was not error. In *Glassell v. Glassell*, 147 Cal. 510, 82 Pac. 42, the guardian mingled the wards' funds with his own without any authority from the court, and failed to keep an account from which an accounting could be rendered. The court held that it was not error to charge him with compound interest, although he was guilty of no fraud. This rule is applicable alike to guardians and executors as to other trust relations. *Church on Probate Law*, vol. 1, 204; *In re Dow*, 133 Cal. 449, 65 Pac. 890, 892.

[6] The final settlement of the administrator who was at the same time the guardian was not conclusive or binding upon the minors, but voidable by them or by their representative. *Woerner, Law of Administration*, 1128, § 505; *Alexander v. Alexander*, 70 Ala. 212.

[7] If authorities are needed to support the principle that a guardian cannot trade with himself on account of the ward nor use or deal with his wards' property for his own benefit, see *Merket v. Smith*, 33 Kan. 66, 5 Pac. 394; also, 21 Cyc. 101, 102.

The fact that the court approved the report of the referee without having examined the evidence cannot avail appellant, because we have examined the evidence set out in the abstracts and approve the findings as well as the conclusions of law.

[4] The only serious error we find was in the refusal to render judgment against appellant for the full amount found to be due. The petition should be regarded as amended to conform to the facts. The furtherance of justice seemed to require this, and there was an application to amend before the evidence was all taken, which application should have been granted.

[8] The judgment will therefore be modified, and the cause remanded, with directions to render judgment against Gustav Witt for

the whole sum found due. A counter abstract was printed containing 550 pages. There being no occasion for one of more than 15 pages, the cost of printing the excess will be taxed to the appellee. All the Justices concurring.

GLOVER v. FILLMORE et al.  
(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 88\*)—DISTINCTION FROM OTHER TRANSACTIONS—DEEDS.

A widow, owning certain premises formerly her home in another county, entered into an "agreement for maintenance" by which she was to furnish the land for the joint use and occupancy of herself and a distant relative, G., she to have the right to use and make her home in the house during her life, he to occupy and cultivate the land, keep it in reasonable repair, pay the taxes, treat her kindly, and provide for and maintain her in health and sickness in a comfortable manner, and in lieu of clothing to pay her \$100 the 1st of each January. She covenanted that upon her death the agreement should stand for, convey, and vest in G. the fee-simple title as if a good warranty deed upon sufficient consideration had theretofore been made. She retained the option to terminate the contract upon the failure of G. to carry out his part thereof, in which case he was to give her possession. *Held*, to be an agreement executory and testamentary in character, vesting no present estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 208-217; Dec. Dig. § 88.\*]

2. WILLS (§ 67\*)—DISTINCTION FROM OTHER TRANSACTIONS—DEEDS.

Before the land could be occupied, the widow died. G. had assisted for a few weeks in her care, and he brought her remains for burial to the neighborhood where the land is located, paying the medical and funeral expenses. *Held* that, while he might recover from her estate for his services and expenses, his grantee is not entitled to the land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 175-177; Dec. Dig. § 67.\*]

Appeal from District Court, Pottawatomie County.

Action by F. W. Glover against A. C. Fillmore and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

W. R. Hazen, of Topeka, and Challis & Brookens, of Westmoreland, for appellant. E. M. Brunner, of Wamego, and Crane & Woodburn Bros., of Holton, for appellees.

WEST, J. Mrs. Caroline M. Patterson was left a widow in 1907. For some years she and her husband had lived with the plaintiff, F. W. Glover, who was a nephew of her husband, and who had a son, Grover E. Glover. The property in question had been used by Mrs. Patterson and her husband as their home for many years prior to the time they went to live with Mr. Glover. They had no children. After Mr. Patterson's death, Mr. Glover built a small house for Mrs. Patterson near his own residence in Thomas county, but after a time she desired to re-

turn to her former home upon the land in question in Pottawatomie county and desired Grover E. Glover to come back and take care of her, and stated that he was to take care of her as long as she lived and he was then to have the place. She was between 55 and 60 years old and in poor health. The farm had been rented to a tenant who was residing thereon. On May 14, 1907, an "article of agreement for maintenance" was entered into between Mrs. Patterson and Grover E. Glover, which provided, in substance, that she covenanted and agreed to furnish for the joint use and occupancy of the two the land in question, she to have the right to the use and occupancy and to make her home in the dwelling house, maintain and keep house therein during her natural life, he to occupy and cultivate the real estate, keeping the same in reasonable repair, pay the taxes, treat Mrs. Patterson considerately and kindly and suitably provide for her, and in lieu of clothing to pay her \$100 a year on the 1st of each January and maintain her in a comfortable manner in health and sickness according to her social situation and condition of life, and in consideration of such covenants and agreement and the fulfillment thereof of his part in good faith, "the said Caroline M. Patterson, party of the first part, does hereby covenant and agree to and with the said party of the second part that at and upon her death this instrument shall stand for, convey and vest in the said Grover E. Glover the fee-simple title and estate in and to said real estate in the same manner and to the same extent as if the said Caroline M. Patterson had heretofore upon a good and sufficient consideration duly executed and delivered unto said Grover E. Glover a general warranty deed for the said premises." The instrument contained the further provision that, if he should for any cause fail to perform any substantial part of his agreement during her life, "then in such event this contract shall at the option of the said party of the first part cease and determine; and in such event the said Grover E. Glover agrees to give said party of the first part peaceable possession of said premises, and in failing so to do the said party of the first part shall have the right to recover the exclusive possession of the said premises by action at law and as the law provides in the courts of the state." When the agreement was first drawn, it contained a clause that it should not go into effect until March 1, 1908, and that if either party should die in the meantime the contract should cease, and no interest thereunder should pass in or to the real estate; but this provision was, at her instance, stricken out before signing. The instrument was acknowledged. After its execution Mrs. Patterson improved in health and was up and around the house, but later became worse and died July 2, 1907. After her death the plaintiff's son brought her body back to the old home and

paid the doctor bills, funeral, and other expenses. He afterwards conveyed to his father, who brought this action against the heirs of Mrs. Patterson to quiet his title. An agreed statement of facts contained the recital that at her death she owned the land in fee simple and that the fee-simple title descended to and vested in her surviving heirs at law, subject, however, to such right, title, or interest as the plaintiff might have already acquired under the articles of agreement, or the deed thereafter made, and subject also to any debts owed by her at her death. The trial court held the agreement void and that the heirs were entitled to the property.

[1] The plaintiff argues that the instrument disclosed an intention on the part of Mrs. Patterson to vest a present interest in the real estate in the plaintiff's grantor, and that, regardless of technical rules of construction, such intention should be given effect, and control. The defendants insist that the instrument is testamentary in character and void for failure to comply with the statute regarding its attestation, or that it is an executory contract for future possession. We think the agreement itself and the statements shown to have been made by Mrs. Patterson indicate quite clearly her intention that, in case he carried out his part of the contract during her life, the property should then be his, but that it should be hers to all intents and purposes so long as she lived. She might have conveyed the property to him and taken back an agreement for her support, or she might have contracted therefor and made or agreed to make a will leaving the property to him at her death; but what she did was to contract in the way already set forth, and it does not appear that any present estate passed, and, if the instrument is testamentary in character, it cannot be upheld as a will for the reason that the statutory requirements touching execution and attestation were not complied with.

In *Reed, Ex'r, v. Hazleton*, 37 Kan. 321, 15 Pac. 177, the contract provided, among other things, that Ricket should retain full possession of the land during his lifetime and make such improvements as he felt able to make; that Hazleton should properly care for and see to his wants in health and sickness, Hazleton to have his home with Ricket, "and after the death of the said Henry Ricket of the first part the right and title of the north half of the northwest quarter \* \* \* shall vest in said John Hazleton of the second part." This part of the contract was held to be testamentary, the rule being announced that, if the instrument passes a present interest, it is a deed or a contract, although the right of possession may not accrue until some future time; but, if it does not pass any interest or right until the death of the maker, it is testamentary. Another case arising out of the same transaction is *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, 26 Am.

St. Rep. 86, in which the same rule is followed; the decisive question being whether or not the intention was to vest a present interest or that the instrument should not operate until the maker's death. *Lacy v. Comstock*, 55 Kan. 86, 39 Pac. 1024, involved an instrument by which the grantor conveyed and warranted certain real estate, reserving, however, all the rents, issues, and profits arising therefrom during his lifetime, and also the privilege and right to dispose of the land; the instrument expressing that in all other respects it should be a deed of conveyance absolute. It was held that the grantor might thereafter bequeath to another the use of the lands and the rents and profits for a period of time extending two years after his death, and it was said that it was plain that the transfer was not to be effected until the grantor's death. In *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, the instrument purported to grant, bargain, sell, and convey certain land, but contained the subsequent provision that the estate therein was not to vest in the grantees and their heirs until the death of one of the grantors; she reserving to herself a life estate, the grantees to hold after her death. This was held to be a deed and not testamentary, and it was said that it conveyed a present interest but postponed the enjoyment thereof until the death of one of the grantors. *Powers v. Scharling*, 64 Kan. 339, 67 Pac. 820, involved a writing held to be in part a contract and in part testamentary. The contract portion was to the effect that the grantor created, conveyed to, and vested in his daughter a present interest and estate in and to all the estate of which he was then or should at the time of his death be seised to the extent of one-half thereof, subject to the payment of certain debts and legacies and also to a life estate in the grantor. In *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567, a warranty deed contained full covenants which would, standing alone, convey an absolute title in fee simple, but also took back from the grantees, as a part of the transaction, an agreement whereby they covenanted not to sell or dispose of any of the granted premises during the lifetime of the grantor without his written consent, and that all of such property should be under his control and direction during his life with the right to sell and convey it the same as though no deed had been given, and agreeing that the grantee should sign all deeds when so requested by the grantor. It was held that, the granting clause being complete and free from ambiguity, it was not destroyed by the subsequent repugnant provisions, although the court came to the conclusion that by the entire transaction the grantor intended to convey a present interest. It was held in *Vawter v. Newman*, 74 Kan. 290, 86 Pac. 135, that the intention of the grantor or donor should

be determined from the instrument and from the relationship of the parties and the apparent purpose sought to be accomplished. There the instrument was called an indenture and by its terms granted, bargained, sold, and conveyed certain described real estate to the grantee to hold forever to the grantee during his natural life and after his death to his children. The court said that, looking at the deed in this view, no doubt was entertained that the donor intended to convey a life estate with the remainder to the children of the grantor. In *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224, an instrument in the usual form of a warranty deed but with a reservation in the habendum, "except a lifetime lease on said land, in three days after the said party of the first part is deceased this deed shall be in full force," was held to be a deed and not a will; the exception being considered as a reservation of a life estate. Here, as in all the other cases referred to, the effort was to reach the real intention of the person executing the instrument. With the same purpose in view we cannot easily go astray by following the natural meaning of the language used in the article of agreement for maintenance now under consideration. The effect of which has already been indicated.

Counsel cite *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854. There the instrument in the form of a deed conveyed land and reserved a life estate in the grantor, and, following this reservation, contained another giving the grantor the power to mortgage, incur, sell, lease, convey, or otherwise dispose of the real estate. The habendum clause contained a recital and condition that, if the grantee should die before the grantor, then the estate should revert to the latter as if the deed had not been made. This was held to be a deed conveying a present title subject to a life estate in the grantor; the subsequent reservation being regarded as a power to incur or dispose of such life estate. Attention is also called to *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, involving a warranty deed placed in the hands of a third person to be delivered to the grantee at the death of the grantor and providing that it should not take effect until such death, also reciting that it was understood that the grantee should care for the grantor during the remainder of his life. On the day before the grantor's death he gave instructions to deliver the deed after his death provided certain trifling conditions should be complied with, which was done, after which the deed was delivered. After careful consideration the court reached the conclusion that the real purpose, though not expressed in correct terms, was to vest a present title in the grantee, reserving only a life interest.

[2] Plaintiff calls attention to the case of *Bless v. Blizzard*, 86 Kan. 230, 120 Pac.

351, and suggests that the rule therein announced is applicable here. But in that case the plaintiff not only agreed to stay with and care for the testator and did care for him faithfully under the most trying circumstances for several months under an agreement that a will should be left leaving the land to him, but a will was actually made, although afterwards at the instance of other interested parties it was revoked. It was held that, having entered into the contract, and having carried it out so far as he was able during the remaining life of the other party, the plaintiff was entitled to recover; his services being a fair consideration for the land. In *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229, the rule was stated that, when a definite contract leaving property by will has been clearly and certainly established, and there has been performance on the part of the promisee, equity will grant relief, provided the case is free from objection on account of inadequacy of consideration and there are no circumstances or conditions which render the claim inequitable. Had the plaintiff's son moved upon the land with Mrs. Patterson and carried out his part of the contract for such reasonable time as to amount to a reasonable consideration for the property, equity would uphold the agreement as one to leave the property to him at her death. But her death occurred before the lease of the tenant then in possession had expired and before any removal was made to the land and, so far as the record shows, before any services were rendered by the young man, except some assistance of other members of the family in caring for her. The fact that he brought her remains to the old neighborhood and paid the doctor bill and funeral expenses may entitle him to recover what is fairly due him from her estate, but we know of no rule of law or decision which would justify the court in holding that the title to the land vested in him or in his grantee.

The judgment is therefore affirmed. All the Justices concurring.

### ROOT v. CUDAHY PACKING CO.†

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. EVIDENCE (§ 506\*).—EXPERTS—OPINION—SUBJECTS OF EXPERT TESTIMONY.

In this state the opinions of experts are receivable in evidence only on the ground of necessity, where no better evidence can be had, and are not receivable regarding an ultimate fact in issue, where the subject can be presented to the jury so that the jury itself is capable of drawing the ultimate inference.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2309; Dec. Dig. § 506.\*]

#### 2. EVIDENCE (§ 513\*)—EXPERTS—SUBJECTS OF EXPERT TESTIMONY—RELIABILITY OF ELEVATORS.

In this case the opinions of experts were received in evidence to show that it is possible under the principle upon which friction hoist elevators are constructed, for the car to fall in the course of its ordinary use for packing house purposes, although all the appliances were in good mechanical condition; and that such an elevator is unsafe for such use. It had been the business of the experts to construct, inspect, and repair such elevators, with whose operation and use they were perfectly familiar; their experience having been gained in the principal packing houses of Kansas City, where such elevators have been in common use in large numbers for many years. *Held*, the best evidence of the reliability or unreliability of such elevators consisted in the demonstrated results of their use; that with the facts relating to their performances before the jury would have been competent to judge of their safety; and that the opinion evidence was properly received.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.\*]

#### 3. MASTER AND SERVANT (§ 117\*)—INJURIES TO SERVANT—FALL OF ELEVATOR—CARE REQUIRED.

A packing house company using an elevator for the purpose of conveying truck loads of meat, and the employes handling the trucks, from one floor of its packing house to another, owes such employes the duty of using ordinary care to furnish an elevator reasonably safe for such use.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 208; Dec. Dig. § 117.\*]

#### 4. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—FALL OF ELEVATOR—PRESUMPTION OF NEGLIGENCE—RES IPSA LOQUITUR.

The sudden fall of such an elevator in the course of its ordinary use by a truckman, whereby he is injured, does not warrant a presumption of negligence contributing to the injury on the part of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.\*]

#### 5. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—FRICTION ELEVATOR—FALL—EVIDENCE.

The evidence considered, and *held* that the defendant's demurrer to that offered by the plaintiff should have been sustained.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.\*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by Joe Root against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to grant a new trial.

O. C. Mossman, of Kansas City, Mo., and J. E. McFadden, of Kansas City, Kan., for appellant. James F. Getty, of Kansas City, Kan., for appellee.

BURCH, J. The plaintiff, an employe of the defendant, sued for damages resulting from personal injuries occasioned by the fall of an elevator in the defendant's packing house. The plaintiff recovered, and the defendant appeals.

The elevator is of the common friction

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on motion for modification of opinion, see 123 Pac. 1199.



hoist type. In this instance the machinery by which the car is operated is located under a suitable covering on the roof of an adjacent building. The essential parts of this machinery are a friction wheel of vulcanized paper with a face some 12 or more inches in width, a cast-iron bull wheel some 30 or 40 inches in diameter and having a 12-inch face, a wooden brake block fitting the bull wheel, a spool-shaped drum on the same shaft with the bull wheel, and a control lever. The necessary attachments are a cable, which lifts the car, an operating lever inside the car, and a wire cable, which connects the operating lever with the appliances above. One end of the car cable is fastened to a header. It passes thence over a sheave at the top of the well, then down under a second sheave fastened to the top of the car, then up over a third sheave at the top of the well, and then to the drum on the bull wheel shaft. This shaft is located between the friction wheel and the brake block. When the shaft rests at the central point between the friction wheel and the brake block, the bull wheel touches neither of them. The shaft, however, is movable, so that contact may be established between the bull wheel and the brake block on one side of it, or the friction wheel on the other side. The control lever is adjusted to this sliding shaft. On the arm of the control lever is a weight, which bears the lever down in such a way as to push the bull wheel against the brake block and hold it there. This contact can only be broken by means of the operating lever in the car. When the bull wheel is against the brake block, the operating lever points upward at an angle of 60 or 65 degrees. When the lever is pulled down, the wire cable draws the sliding shaft away from the brake block side of the frame in which it rests and toward the friction wheel. If the lever be pulled down far enough, the faces of the bull wheel and friction wheel are pressed together. Power is communicated to the friction wheel, which revolves constantly while the power plant is in operation. To raise the car the operating lever is pulled down until contact is established between the bull wheel and the friction wheel. The friction of their surfaces causes the bull wheel shaft to revolve and wind up the car cable on the drum. To stop the car the operating lever is simply released. The control lever then withdraws the bull wheel from the friction wheel and thrusts the bull wheel back against the brake block, which locks the bull wheel and holds the car stationary. The operating lever returns to its original position. To lower the car the operating lever is pressed down far enough to release the pressure of the bull wheel against the brake block, but not far enough to establish contact with the friction wheel. The car then descends by force of gravity. The elevator is equipped with the usual counter-

vailing weights, and with a safety device intended to arrest the descent of the car, should the cable break.

The elevator is used for conveying loaded trucks of meat, and the men handling the trucks, from upper to lower stories of a department of the defendant's plant. It was operated by a man assigned to that duty, who also opened and closed the elevator gates. On the day the injury occurred, the car was stopped at the fourth floor, and the gates were opened. A trucker named Laskowski placed a truck load of meat in the car, and stood between the handles of his truck on the side of the car next to the operating lever. The plaintiff then pushed a loaded truck into the car beside Laskowski's truck. The car commenced to descend, its progress was not arrested, and when it struck the bottom of the elevator well the impact was sufficient to throw the plaintiff down upon the handles of his truck and to the floor, and severely injure him. His companion was somewhat jarred, but otherwise unhurt. The operator was left at the fourth floor. His account of the affair was that before he could close the gates and enter the car Laskowski pulled the operating lever down, and as the car descended looked up and laughed at him. A trucker who was present also testified that Laskowski pulled the lever down, but Laskowski denied that he did so.

The petition charged two classes of delinquencies on the part of the defendant: First, that the type of elevator was inherently unsafe; and, second, defective parts and want of inspection. No attempt was made to establish liability on the second ground proposed. On the other hand, the proof was that the various parts of the elevator were in proper condition; that regular inspections were made; that the elevator worked perfectly before the incident complained of; that the only result of the fall of the car was to dislodge the cable from one of the sheaves; and that when the cable was replaced the elevator again worked perfectly under severe tests, and has ever since continued to do so. A somewhat indirect charge of overloading under the direction of a foreman was included in the petition, but the plaintiff himself testified that the elevator had carried larger loads many times before; and consequently the theory of too much weight in the car was abandoned.

The faults which, it is claimed, render a friction hoist elevator so dangerous that a reasonably prudent man ought not to adopt it were enumerated in the petition as follows: "(1) There is a point at which the bull wheel touches neither the brake block nor the friction wheel, and consequently a point at which there is nothing to prevent the force of gravity from causing the car to descend. (2) No uniform speed can be maintained. (3) Because no uniform speed can be

maintained, no appliance can be attached insuring safety in case of accident. (4) No air cushion is provided at the bottom of the shaft to receive the car in case of a fall."

Of course, the first criticism vanished before the plaintiff's own proof. There is nothing wrong in allowing an elevator cage to descend by force of gravity, and the principle of this elevator is that the bull wheel can remain at the free point only when the operator holds it there by means of the lever inside the car. If the operating lever be not manipulated, the weighted control lever holds the bull wheel securely against the brake block, and should the elevator be descending it can be stopped without utilizing the brake block, and be made to rise by throwing the bull wheel against the friction wheel. Besides this, the car did not fall because there is a point at which the bull wheel touches neither the brake block nor the friction wheel. The bull wheel was in hard contact with the brake block when the plaintiff says the car commenced to descend.

The undisputed evidence of one of the plaintiff's witnesses (all the evidence on the subject) was that the operator maintains uniform speed for the car by the simple method of regulating the pressure of the bull wheel against the brake block. Besides this, the plaintiff does not claim he was injured because the operator, at the time, was prevented from keeping the car at a uniform rate of speed.

The proposition that no safety device could be attached, because uniform speed could not be maintained, was left without support when complete control of speed was shown to be a feature of the elevator; and the matter of an air cushion at the bottom of the shaft is not referred to in any of the proceedings subsequent to the petition, or in the plaintiff's discussion of the safety apparatus in his brief. So far as the proof shows, it may be that some pneumatic device at the bottom of the shaft prevented the wrecking of the car and the killing of both men.

To the faults of the elevator specified in the petition, the plaintiff now adds some others. This is done by going outside the pleading and by enlarging the pleading itself by interpretation. It is said that the machinery controlling the movement of the car is not permanently connected with and under the control of the power, but only temporarily so when the bull wheel is pressed and held against the friction wheel. There is nothing whatever in the evidence to indicate that this is a fault. No motor is required to drive the car down, or to hold it stationary. Gravity acting on the car does the one kind of work, and gravity acting on the weight attached to the control lever does the other. When other power is needed, the operating lever connects it. Such is the principle of the friction hoist elevator, and the principle

is not unsound merely because another kind of elevator might be built with more complex machinery and using more power. It is said that there is a point, where the bull wheel is midway between the friction wheel on the right and the brake block on the left, when there is absolutely no means of controlling the movements of the car. This statement suppresses from the mechanism the operating lever, whereby the bull wheel may be thrown either against the brake block, or against the friction wheel, and so is contrary to the fact. It is said that when the car is suspended at a height there is nothing to hold it in place and prevent it from falling but the degree of pressure of the bull wheel against the brake block, produced by the weight on the control lever, and that no way is provided whereby the operator can increase this pressure. This is true, and so long as the car is not overloaded nothing more than the weight on the control lever is required to hold the car stationary. If more than ordinary pressure is desired, the weight may be correspondingly adjusted or increased.

The petition contained an allegation that the apparatus for stopping the car, in case the appliances for lowering or raising it, or holding it stationary, should refuse to work, was *insufficient*, worn, and has not been properly inspected or kept in repair. This allegation was interpreted by the petition itself in the statement of the specific causes of the plaintiff's injury. These causes were said to be "defective, faulty, and improper construction" of the elevator, "the old, worn, and unfit condition of the appliances attached thereto for stopping and holding the same," and the lack of an air cushion. There was no charge that some other safety device should have been attached in addition to the one for stopping the cage, if the cable should break; and the plaintiff plainly counted upon nothing in respect to safety devices, except the bad order of the one in use and the lack of an air cushion.

Assuming, however, for the plaintiff's benefit that his petition charged what he now claims, his proof failed to show culpable negligence on the part of the defendant. The purpose of a safety device is to keep the car from falling, and this elevator was already equipped with two safety appliances—the control lever mechanism and the emergency device. Should the cable break, the countervailing weights pull out steel teeth, which catch into the guides at each side of the shaft and so stop the descent of the car. The control lever mechanism is in constant operation at all other times. It even resists the operator, and its opposition must be overcome to permit the car to move at all. Besides this, should the brake block refuse to engage the bull wheel with sufficient tenacity to hold the car, the operator may stop its descent by throwing the bull wheel

against the friction wheel. Under these conditions some evidence of the inherent inefficiency of this type of elevator is essential before the question of lack of ordinary care on the part of a person adopting it arises. The bare suggestion of more safety devices is not enough.

[1] The plaintiff made an effort to supply proof of the character indicated by offering the opinions of three expert witnesses. The plaintiff's master mechanic, John Matthewson, was called. He described the construction and operation of the elevator in detail, and then was asked whether or not the car would fall or run down rapidly, assuming that the appliances were all in good condition, and that the control lever bore a weight proportionate to the load on the car. He answered that it would not. John Larson, a carpenter, who had previously worked at millwright work at the packing houses of Swift & Co., the S. & S. Company, and Ruddy Bros., was called. A millwright is one who erects machinery. Larson had not seen the elevator in question, but was familiar with the class. He was asked whether or not, in his opinion, it was possible for the car to fall or run down rapidly, assuming that all the appliances were in good mechanical condition. He answered that it was possible, because "if the bull wheel would get to starting—get a little bit wet—it won't hold; the brake block won't hold it." Philip Talbot, a millwright out of employment, was called. He had worked for the defendant and at the Armour and S. & S. packing houses, and was familiar with friction hoist elevators. He was familiar with the elevator in question, and was asked whether or not it could be operated safely with a load of two men and two trucks of meat, such as were usual when he worked for the defendant. He answered that, in his opinion, it could not be, but said he was not condemning the elevator directly because it was a friction hoist elevator. He felt that no elevator was safe when overloaded.

None of these answers shows that friction hoist elevators, as a class, are inherently dangerous for the uses to which this one was put, or that this one was defective in any of the particulars relied on for recovery. Larson did not pretend to say that bull wheels in this type of elevator have such a tendency to get to starting, or are so susceptible to moisture that they are unsafe, but considered it possible for the car to run down "if the bull wheel *would* get to starting—get a little bit wet"—a condition not disclosed by the proof. Talbot had no direct imputation of unsafety to make against friction hoist elevators, except such as attends them in common with others—danger from overloading—a matter of mismanagement not in issue.

[2] The expert testimony was duly challenged. It consisted of opinions respecting a matter of mechanical theory and an ulti-

mate fact in the case. Was it possible, under the principle upon which the elevator was constructed, for the car to run down, and was the elevator safe for use by the truckmen of the plant? In the development of the subject of opinion evidence, the court long ago took the position that such evidence is admissible only as a matter of necessity, where it is the best that can be had, as where the facts, situation, or circumstances are such that they cannot be presented to the jury in such a way that the jury itself can draw the proper inference from them; and that such evidence invades the province of the jury, where it relates to an ultimate fact which the jury itself must find from all the evidence in the case, especially if the jury is as capable of drawing the ultimate inference as the witness. *K. P. Ry. Co. v. Peavey*, 29 Kan. 169, 178, 44 Am. Rep. 630; *Erb v. Popritz*, 59 Kan. 264, 269, 52 Pac. 871, 68 Am. St. Rep. 362; *Telephone Co. v. Vandevort*, 67 Kan. 269, 270, 72 Pac. 771, and cases cited in these opinions.

Upon a revision of the Code of Civil Procedure, the Legislature allowed these restrictions upon the admissibility of such evidence to stand; and consequently they form a part of the settled law of the state. In qualifying his experts, the plaintiff disclosed the fact that friction hoist elevators have been in common use in large numbers in all the principal packing houses of Kansas City for many years. The defendant's evidence made the number more definite by showing that there were 92 of them. Take Talbot's testimony. He described the construction and operation of friction hoist elevators in detail, and said: "I have worked at Armour's, Cudahy's, and Schwartzchild's. I think I quit work at Cudahy's about February, 1910, and had worked there three years, off and on. While at Cudahy's, I worked on and about the repair and construction of the friction hoist elevators used at that plant. I worked at Armour's a little over three years, the first two years in the carpenter department. Off and on, when they were short of men, I used to help out in the millwright department, and I know of something like a dozen of friction hoist elevators in the Armour plant. I believe they had three of these elevators at the S. & S. plant. At Cudahy's I worked in the millwright gang all the time. I used to inspect elevators there. I inspected them once every morning. We would inspect the cage and see that everything was tight in and about the cage; then we would go up to the friction house and inspect the frictions and the machinery they are connected with. I did that every morning, and in doing so I rode on the car. I think they have 11 of these elevators at Cudahy's."

It is perfectly manifest that the question which should have been asked of this experienced man was whether or not the bull wheels of these elevators did in fact slip

and permit cars loaded in the usual way to run down. In the opinion in the case of *City of Topeka v. Sherwood*, 39 Kan. 690, 695, 18 Pac. 933, 936, it was said: "When the question of the proper condition or safety of anything constructed is to be determined, evidence tending to show that it served the purpose for which it was designed is always competent, and often the most satisfactory and conclusive in its character."

Six years' observation of the use of these elevators for packing house purposes was sufficient to verify the facts concerning their performances, and the best evidence of their reliability or unreliability consisted in the demonstrated results of such use. Nothing else could possibly be so satisfactory or conclusive. The facts were perfectly capable of narration and comprehension, and with the facts before them the jury could say whether or not the elevators were safe or unsafe.

"Where the claimed defects in a county bridge are described by witnesses who have knowledge of them, and the character and extent of such defects are comprehensible by the ordinary mind, the jury are the judges of the safety of the bridge for travel; and it is not competent for a witness, even though an expert, to give in evidence his opinion as to the safety of the bridge." *Murray v. Woodson County*, 58 Kan. 1, 48 Pac. 554, syllabus.

In the case of *Chandler v. Bowersock*, 81 Kan. 606, 106 Pac. 54, the opinion of a witness was received that the lever of a machine was likely to fall and throw the machine in motion, and that the machine was unsafe. There was some doubt whether the petition made the inherent danger of the machine an issue. It was held that the petition was broad enough to permit evidence to be given on that subject. It was then held that allowing the opinion of the witness to be given in evidence did not constitute prejudicial error, for the following reason: "There was positive evidence that the machine has been in the habit for years of suddenly starting into operation without the lever being moved by any one. Two or three young men, who had been employed at the machine, testified that, in order to prevent the machine from starting itself, they had been obliged to rig up an appliance with weights and strings to hold the lever in position."

In other words, the proved conduct of the machine rendered the opinion of the witness as to how it might act, and whether or not it was safe, so superfluous and lacking in importance that the jury could not have been affected by it. In this case numbers of friction hoist elevators lifted truck loads of meat, and the men accompanying them, day after day, for long periods of time, under the eyes of the experts who constructed, inspected, and repaired them; and what the jury needed to hear was how the elevators actual-

ly worked, instead of opinions regarding the soundness of an application of a mechanical principle.

[3] Whether the elevator be regarded as a place or as an appliance, the defendant owed the plaintiff the duty to supply one which was reasonably safe. The plaintiff argues that he proved a violation of this duty when he proved that the elevator fell with great and unchecked velocity, under the doctrine of *res ipsa loquitur*. It is not necessary to discuss at length this much applied and misapplied phrase. It may be remarked, however, that it does not dispense with proof of negligence in personal injury cases, and that it does not require a presumption of negligence from the mere fact of injury. The phrase expresses an argument in favor of an inference of negligence from the manner and circumstances of an injury. The argument, when expanded, may be stated in the language of the opinion in *Scott v. London Dock Co.*, 3 H. & C. 594, quoted in *Potter v. Rorabaugh*, 83 Kan. 712, 714, 112 Pac. 613, 614 (32 L. R. A. [N. S.] 45): "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Wigmore discusses the subject under the head of "Burden of Proof—Presumptions," and, after stating the considerations which limit the application of the phrase, says: "It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person." 4 Wigmore on Ev. § 2509.

[4] It may be freely granted that the sudden fall of an elevator cage in the course of its ordinary use warrants an inference of negligence. But, as between an employer and one of his employes, it does not raise a presumption of culpable negligence on the part of the former. This limitation on the application of the *res ipsa loquitur* doctrine was clearly stated in the case of *K. P. Ry. Co. v. Salmon*, Adm'x, 11 Kan. 83. An employe was injured by the collision of two trains of the same company. The opinion reads: "The said collision was the only proof of negligence on the part of the railroad company introduced on the trial. A collision always presumptively shows negligence, but whether negligence of the company or negligence merely of some one or more of its officers, agents, or employes is the important question in this case. As between

the railroad company and a passenger, the negligence of any officer, agent, employé, or servant of the company is the negligence of the company itself; but, as between the railway company and one of its employés, the negligence of another employé, a coemployé, is not at all the negligence of the company. *Dow v. K. P. Ry. Co.*, 8 Kan. 642. Therefore, while a collision presumptively proves negligence on the part of the company as between the company and a passenger, yet it never proves negligence on the part of the company as between the company and one of its employés. It is a general rule that one employé does not represent the principal any more than any other employé, and negligence between employés is not at all the negligence of the principal. This rule has its exceptions. As to railroad companies, the general manager, the general superintendent, the general officer for the employment or discharge of the other agents and servants of the railway company, or, indeed, any other general officer, would probably be the representative of the company—in fact, the company—as between the company and all other persons, whether such persons were employés or not. But proof of a collision does not at all show negligence on the part of any one of these general officers. It tends more properly to show negligence on the part of the brakeman, the fireman, the engineer, the conductor, or some other inferior officer, agent, or servant of the company, who has a more close and direct connection with the collision."

This reasoning was approved and adopted in the case of *Railway Co. v. Taylor*, 80 Kan. 758, 57 Pac. 973, in opposition to the contention that knowledge of the defective and dangerous condition of cars in the ownership or control of a railway company should be presumed in favor of an injured employé. The decisions in the cases of *A., T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, and *Railroad Company v. Tindall*, 57 Kan. 719, 48 Pac. 12, are to the same effect.

In the case of *Lane v. Railway Co.*, 64 Kan. 755, 68 Pac. 626, the syllabus reads:

"In an action against a railroad company for the recovery of damages for injuries to an employé occasioned by the alleged faulty construction of a split switch, the plaintiff must show, in order to warrant a recovery, not only the way in which the switch was constructed, but that such construction was not of a proper and approved kind, or, if of a proper and generally approved kind, that the one complained of was of improper and faulty construction."

"In order that a plaintiff may recover in such action, he must show negligence on the part of the company, and, in the absence of a statute making it so, the fact of the oc-

currence of the injury raises no presumption of such negligence."

The principle upon which these decisions are founded is the same, whether applied to the construction and operation of a railway or to the construction and operation of an elevator.

Even in the case of a passenger on a railway train, the mere occurrence of injury does not, of necessity, warrant an inference of negligence on the part of the carrier. *Railway Co. v. Burrows*, 62 Kan. 89, 95, 61 Pac. 439; *Hart v. Railway Co.*, 80 Kan. 699, 102 Pac. 1101; *Brown v. Railway Co.*, 81 Kan. 701, 106 Pac. 1001, 29 L. R. A. (N. S.) 808.

In the last case the syllabus reads: "To sustain an action for damages occasioned by the alleged negligence of another, it is necessary for the claimant, not only to show that the injury occurred, but to produce sufficient evidence to show prima facie that such injury occurred through the fault of the other. It is not sufficient to show circumstances which would indicate that the other party might have been guilty of negligence, especially when the evidence furnished suggests with equal force that the injury might have resulted without fault on the part of the other party."

[5] In this case the so-called fall of the elevator car with its occupants, considered alone, indicates negligence on the part of some coemployé of the plaintiff, as, for example, *Laskowski*, as much as it indicates negligence for which the defendant is responsible. Besides this, the "particular force and justice" of the rule relieving the injured person from showing the cause of the occurrence is wanting here, because the plaintiff explained the cause of his injury fully in his petition. "If the plaintiff possesses knowledge of the facts, and is able to plead them specifically and in detail, the reason for the rule disappears and with it the rule itself." *Orcutt v. Century Building Co.*, 201 Mo. 424, 443, 99 S. W. 1062, 1066 (8 L. R. A. [N. S.] 929), fall of an elevator.

A criticism upon the phraseology of an instruction relating to the defendant's duty toward the plaintiff is answered in the case of *Kamera v. Boiler Works*, 82 Kan. 432, 106 Pac. 806.

It follows from what has been said that the opinion evidence received by the court ought to have been excluded, and that the demurrer to the plaintiff's evidence ought to have been sustained. It is not necessary to consider other matters discussed in the briefs.

The judgment of the district court is reversed, and the cause is remanded, with direction to grant a new trial. All the Justices concurring.

## STATE v. HOERR.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

## 1. JURY (§ 99\*)—CHALLENGES TO JURORS—OPINIONS.

Where the fact that a burglary had been committed in robbing a bank was notorious and unquestioned, opinions of persons called as jurors that the bank had been broken into and robbed did not disqualify them from service on the jury in the trial of one charged with the crime.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 438-448; Dec. Dig. § 99.\*]

## 2. JURY (§ 99\*) — CHALLENGES TO JURORS—OPINIONS.

The facts that a person has read newspaper reports of a burglary, and heard general talk about it, do not necessarily disqualify him for jury service, if he has no settled conviction of mind nor opinion of a positive and fixed character upon a material disputed fact or issue to be determined, and he is free from prejudice, bias, or interest.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 438-448; Dec. Dig. § 99.\*]

## 3. CRIMINAL LAW (§ 427\*)—CONSPIRACY—EVIDENCE.

Where a burglary is committed by several persons some of whom may have actively participated at the time and place, others counseling, aiding, and abetting, and one alone is on trial, evidence of his association with others tending to show a guilty combination or conspiracy, when limited to a reasonable time before the burglary, is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. § 427.\*]

## 4. CRIMINAL LAW (§ 422\*) — EVIDENCE — CONSPIRATORS.

Evidence of the identification of such associates and the presence of some of them at or near the place of the burglary was competent, and the fact that some of these associates were identified as persons afterwards seen in jail, being an incident of their association and identification, is not objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

## 5. ADMISSION OF EVIDENCE — SUBSTANTIAL RIGHTS NOT AFFECTED.

Several items of testimony erroneously admitted are considered and found to be unimportant, and it is held that the substantial rights of the defendant were not affected by the admission of such testimony.

## 6. WITNESSES (§ 393\*)—IMPEACHMENT—STATEMENTS INCONSISTENT WITH TESTIMONY.

It is competent to contradict a witness in a criminal case by reading a statement from his deposition previously taken and filed after properly calling his attention to the statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.\*]

## 7. CRIMINAL LAW (§§ 778, 1172\*)—APPEAL—TRIAL—INSTRUCTIONS—PARTIES TO OFFENSE—HARMLESS ERROR.

Instructions which require the state to prove that the defendant, if not personally present when a crime was committed, counseled, aided, or abetted in its commission, by actually helping, confederating with, and assisting others in the plan and purpose, and knowingly concealing the crime and aiding the escape of the perpetrators, place an unnecessary burden on the state. Proof of concealment is not essential to a conviction where the accused has counseled, aided, or abetted in the commission of a crime

(Code Cr. Proc. § 115 [Gen. St. 1909, § 6691]), but the defendant was not prejudiced by the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1857, 1960, 1967, 3154-3163, 3169; Dec. Dig. §§ 778, 1172.\*]

(Additional Syllabus by Editorial Staff.)

## 8. CRIMINAL LAW (§ 412\*)—EVIDENCE—STATEMENTS BY DEFENDANT.

In a prosecution for burglary, where it was shown that defendant objected to having his name mentioned, as he said, "with a bunch of crooks," whereupon the police judge remarked that he did not see him do any work, the admission of evidence of defendant's reply that he kept a boarding house and was boarding the kind that had money was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-972; Dec. Dig. § 412.\*]

## 9. BURGLARY (§ 37\*) — EVIDENCE — ADMISSIBILITY.

In a prosecution for a burglary in November, testimony that in August defendant threw a flash light on persons sitting at night in the rear of his premises, at the same time having a revolver in his hand, was properly admitted.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 92, 93; Dec. Dig. § 37.\*]

## 10. CRIMINAL LAW (§ 428\*)—EVIDENCE—ADMISSIBILITY.

Where a burglary was committed by several persons, evidence, on a trial of one of them, as to a conversation with him concerning the manner in which nitroglycerin could be extracted from dynamite, and evidence as to buried dynamite sticks and dynamite found in other places, a cap and fuse found at a chicken ranch rented by defendant, a receipted bill for groceries furnished to defendant's associates, a price list for Oakland cars, and other articles found at the chicken ranch, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.\*]

## 11. CRIMINAL LAW (§ 422\*)—EVIDENCE—ADMISSIBILITY.

Where several persons committed a burglary, evidence was admissible, on the trial of one of them, of the arrest of others at his home, that he went to the jail where they were taken offering to procure counsel for them, and afterwards, when they were taken to another place, that he went there on the same errand, and that he told the sheriff he had written in answer to a letter received by them while in jail; such evidence being offered, not to show defendant's participation in the other crime, but to show his associations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

## 12. WITNESSES (§ 269\*)—CROSS-EXAMINATION—SCOPE AND EXTENT.

On the cross-examination of defendant in a prosecution for burglary, the admission of evidence as to a note made by him several years previously and his letter to the payee promising payment and the admission of the note and letter was not proper, where there was nothing in his testimony in chief referring thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

## 13. CRIMINAL LAW (§ 1169\*) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a burglary was committed by several persons, error in the admission of evidence as to the sale of a coat and a pair of trousers by defendant several months before the burglary, improper cross-examination of defendant as to a debt contracted several years previously, and testimony of one of the associates that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

skeleton keys in his possession were watch charms, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

**14. CRIMINAL LAW (§ 1169\*) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Where a burglary was committed by several persons, the admission of evidence, on the trial of one of them, of statements of one of his associates that he went under other names, was not prejudicial where that fact had been proven already.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

**15. CRIMINAL LAW (§ 434\*)—BOOKS OF ACCOUNT—CORRECTNESS.**

In a prosecution for a bank burglary, an objection to the testimony of the cashier to the correctness of ledger entries showing the amount of money in the bank when burglarized, based on the fact that he did not personally make the entries, cannot be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 434.\*]

**16. WITNESSES (§ 379\*) — IMPEACHMENT — STATEMENTS INCONSISTENT WITH TESTIMONY.**

Evidence of statements by a witness in rebuttal of his testimony is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.\*]

**17. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS.**

The refusal of a general instruction, that it is the policy of the law that it is better that a guilty person should escape rather than that an innocent man shall be convicted, is not error, where the jury was fully instructed on the presumption of innocence and the necessity of proof of guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**18. CRIMINAL LAW (§ 893\*)—VERDICT—CONSTRUCTION.**

A verdict finding defendant guilty of burglary and larceny in the second degree was properly interpreted as a conviction of burglary in the second degree and larceny.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2089; Dec. Dig. § 893.\*]

**19. CRIMINAL LAW (§ 59\*)—EVIDENCE—SUFFICIENCY.**

Where a burglary was committed by several persons, it was not necessary on the trial of one of them to prove his personal presence at the time and place of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

Appeal from District Court, Marshall County.

Henry Hoerr was convicted of breaking into and stealing from a bank, and appeals. Affirmed.

This appeal is from a conviction for breaking into and stealing from the Beattie State Bank. The crime was committed a little before 3 o'clock on the morning of November 8, 1910, by five armed men, who broke into a rear door of the building, blew open the safe, and took away about \$3,500 in money. A part of the burglars stationed outside the building kept up a fusillade with firearms

while others worked inside. Several explosions occurred. The evidence tended to prove the following facts: After the firing ceased, the robbers were seen going northward; one carrying a bag. They were tracked to a gap in the hedge at the road side, a mile and a half from the bank. Just inside the gap tracks were found showing that an automobile had passed in, turned around, and indicating that it had stood for some time near the hedge and had passed out into the road. The tracks were those of nobby tires; that is, of tires having raised diamond-shaped nobs upon them, leaving indentations in the tracks. The left rear wheel made what is termed a wobbly track. This and the diamond-shaped indentations enabled the pursuers to follow the track, which they did, in a general northerly course, then west through Wymore, Neb., and on northeasterly past a place called the chicken ranch. About four miles beyond that ranch the car carrying the pursuers broke down and the track was lost. A little after 6 o'clock on the morning of November 8th a red car carrying five men was seen in the vicinity of Wymore going at the rate of 35 or 40 miles an hour. It left diamond-shaped indentations in its tracks. A car carrying three men was seen about 6:15 or 6:30 o'clock on the same morning going past the chicken ranch. It swung in toward the entrance of the ranch, but whether it stopped there the witness could not tell, because of an intervening obstruction of the view. Other witnesses saw a red car in this vicinity between Kinney and the chicken ranch also going at the rate of 35 or 40 miles an hour. Two men were in the front seat and one in the rear, but it was too dark to distinguish faces. One witness describes the tracks of this car as indented with diamond-shaped nobs. A little after 8 o'clock the same morning a red car of the same general description was seen coming from the west which turned in before the barn on Alex Muenard's farm about two miles south and east of Wymore, and two or three men were seen working around it.

The defendant is a resident of Wymore, where he had lived for over three years with his wife and five children in their own dwelling. In the early part of the summer of 1910 he worked in a stone quarry, but had no visible employment after some date in July. He associated with a group of men consisting of Dan Carney, called "crippled Dan," and sometimes known as "Grant Shirley," and also as "Joe Fisher"; Mulcahy, also called "Ryan"; Watson, designated as "Red," "Edwards," or "Black," called "Blackie" by some; Carlisle, otherwise known as "Crawford" or "Clyde Crawford"; Wheeler; Jackson; and perhaps some others. These men, or some of them, were frequently with the defendant at his home, on the streets, and at saloons in Wymore in the summer and fall

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of 1910. They were sometimes designated as "John Boys." Carney was lame. In July, 1910, Dan Carney and two others of those associating with the defendant were seen going toward the railroad bridge at Wymore carrying a spade and something heavy which appeared to be a suit case. They returned in two or three hours. In the latter part of July a place was found where digging had been done under a tree near the bridge, and near by a new shirt was found which had been torn up and the sleeves torn out. Digging down at this place, the residue of dynamite sticks was found—the remnants remaining after the nitroglycerin had been extracted—wrapped in pieces of paper. Some time in October the defendant said, in talking about dynamite, that "a fellow could take rain water and heat it and separate this from dynamite and get nitroglycerin on top and pour it off." A box of dynamite was found under a box car near the stone quarry at Wymore in October or early in November. The defendant was told of its presence there, and the request was made that one of the boys should take it away. He made no answer. The next day it was gone, and soon afterwards a like box of dynamite was found in the quarry covered over with manure in a hole in the sand.

On November 4, 1910, the defendant rented from the owner the chicken ranch, consisting of about two acres of land with a dwelling house adjacent to Wymore. He was accompanied by two men whose identity does not appear. A written lease was given for one year at \$10 per month. Two days afterwards three men were found at the ranch, but the defendant was not there. A red automobile was seen by the side of the barn on the ranch. It was seen there at other times before November 7th. About November 25th, two or three men were found at the place by the owner. One of the men was Mulcahy. The owner was taking a harness from the barn, when Mulcahy came out with another man and asked, "What are you doing?" Before the month was up the defendant informed the owner that the distance was too great for his children to walk to school, and gave up the lease. The ranch was three or four blocks from the defendant's home in town. Early in November Watson purchased bacon and other provisions of a grocer. The receipted bill for these goods was found in the house at the chicken ranch after the burglary. Three men, one of them being Mulcahy, were seen at the ranch on November 7th. A small load of furniture was hauled from the ranch going south toward the defendant's house. On the 3d day of November, the defendant, with Watson, Mulcahy, and Crawford, came into Wymore from the north in an Oakland 40, red, two-seated automobile with top, Crawford driving, and placed it in a storeroom adjoining O'Donnell's saloon. A door opened from the rear room of the saloon

to the storeroom. The men were in the saloon on Saturday, November 5th. On the 4th or 5th of November, Watson, Carney, Blackle, Mulcahy, Crawford, Joe, and the defendant were in the storage room. Crawford was fixing something on the front end of this car. The defendant was seen to unlock the door at different times and pass from the saloon into this storage room. Sometime early in November, Dan Carney and Alex Muenard rode in Muenard's wagon a little way out of Wymore and met the defendant riding around in a circle on a bicycle. Carney alighted, talked with the defendant, Muenard said, "Good-bye, Joe (to Carney), don't get hurt," and drove away.

On November 11th, at the defendant's residence a bill of sale of an Oakland 40 automobile was executed by Crawford to the defendant, stating a consideration of \$1,000, witnessed by his wife and two other persons. The defendant then went to O'Donnell's saloon and asked the proprietor to sign his name also as a witness, which was done. Another person was also asked for his signature as a witness, and he testified that the defendant then said that he wanted "to fix it with me so that it would be all right when the time came," and that a conversation was held indicating a plan of the defendant to have the amount and kind of money and the persons present fixed up to explain the purchase of the automobile. The witness testified that he refused to sign the bill of sale when requested in the circumstances stated. His signature nevertheless appears upon it, which he explained by saying that he did sign another paper listing his place for sale, which the defendant represented that he wanted to show that he was in the real estate business. After this bill of sale was made, the defendant assigned it in writing to his wife and gave an order to Mr. Muenard for the car described in it, and it was brought to Wymore from Muenard's barn and placed in a garage. He tried to sell it for a less sum than \$600, and also offered to trade it for other property. It was afterwards examined and found to have diamond-studded tires and an axle so bent as to make a wobbly track. While the car was still at Muenard's, the defendant requested a witness to take it out further in the country to the premises of a brother of the witness and cover it over with hay at the side of a stack, but this was not done. The top of the car was found at the chicken ranch some time after the burglary.

A dynamite cap and fuse, a revolver, and a box of cartridges, caliber 45, were found at the chicken ranch, together with a price list issued by the Oakland Car company, also a covering for the eyes used by automobile drivers, and a suit case containing shirts and ties. Some articles of clothing and pieces of furniture were also found in the house.

Dan Carney and Wheeler were seen in Beattie in company with another stranger on the 4th or 5th of November. Carney was



selling lead pencils. On one of these days Carney and two other strangers purchased a box of cartridges, caliber 45, at a store in Beattie. On the same day a person identified by the storekeeper as the defendant came with two others into the store and had a conversation with a local candidate who offered them his card. The defendant said, "I am a stranger here." A bullet fired by the burglars in Beattie was picked out of a building where it had lodged and found to be caliber 45. The box containing the cartridges sold to Carney was found empty near the place where the automobile had stood within the gap in the hedge. A torn piece of wall paper was found at the same place of the same pattern as the wall paper in the house on the chicken ranch some of which had been torn off.

Testimony on the part of the defendant tended to show that he was seen in Wymore on the evening of November 7th as late as 10 o'clock, and the next morning about 6 or 6:30 o'clock. A witness, who was present in the hardware store in Beattie when the man identified by the proprietor as the defendant came in, testified that he was the candidate referred to as being present; that he saw the man and offered him his card, which he declined; and that the defendant was not that man. In his own behalf the defendant testified that he had never been at Beattie and denied having anything to do with the burglary. He testified that he let Mr. Edwards have the use of the chicken ranch because he had no place to go, and that Edwards let him have some furniture which was moved from there when he left. It was given up because the distance was too far for the children to go to school. He explained his presence at O'Donnell's and other saloons by the fact that he was electioneering for a Nebraska candidate for state office, and using election money in furnishing beer for the boys on the day before the election and for some time before. He denied having a key to the storage room door opening from the saloon, but said he once used a nail in opening it for another man to go in for trucks to move a piano. He testified to the purchase of the car from Crawford and that he paid \$600 for it. His wife testified that she had kept boarders, among them Crawford and three others of the men referred to as her husband's associates. She testified to the purchase of the automobile and the making of the bill of sale, and said that she furnished about \$400 of the \$600 paid for it, part of which was from the sale of her home. She explained that, as they had sold their home, they needed a place to move into when the chicken ranch was rented, but that she knew nothing about the lease until after it was made, when she objected because it was too far for her children to walk to school. She said her husband was at home the 7th and 8th of November, 1910, and was at home the night of the

7th. She knew that the car was out at Muenard's when purchased, and she had ridden in it with Crawford and her husband.

L. W. Colby, of Beatrice, Neb., for appellant. Jno. S. Dawson, Atty. Gen., and James B. Van Vleet, of Barrett, for the State.

BENSON, J. (after stating the facts as above). [1] The appellant presents 56 assignments of error. Eight of these assignments are upon rulings made on challenges to jurors. Several jurors stated their belief that the bank had been robbed. This was a notorious fact that citizens of the county must necessarily have believed, accompanied as it was by a fusillade and explosions. It was not disputed in the evidence and was proved beyond possible doubt. An opinion that the burglary had been committed did not therefore disqualify. *State v. Spaulding*, 24 Kan. 1; *State v. Stewart*, 85 Kan. 404, 409, 116 Pac. 489; *State v. Olsen*, 88 Kan. 136, 141, 127 Pac. 625.

[2] The examination of the jurors concerning their opinions upon other incidental matters showed that, while they had read newspaper reports and heard considerable talk, they were not disqualified within the principles stated in *State v. Morrison*, 67 Kan. 144, 72 Pac. 554, *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047, and more fully in *State v. Stewart*, supra. It does not appear that there was any settled conviction of mind or opinion of a fixed and positive character upon a material disputed fact or issue to be determined, or that there was any bias or prejudice against the defendant, or that the court did not exercise a just discretion.

Objections were made to the indorsement of names of witnesses upon the information after the case was called for trial. It is unnecessary to refer to the rulings in detail. They were all within the discretion of the district court, which was fairly exercised. The views of this court relating to this subject, recently stated in *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090, are applicable to this case, and are followed.

[3] Error is assigned upon remarks of the prosecuting attorney in his opening statement, and many others are predicated upon the admission of testimony relating to evidence showing the association of the defendant with Carney, Mulcahy, and others mentioned in the preceding statement of facts. No error is perceived in these rulings. The burglary was committed by several. Two of these associates were identified by witnesses as being at Beattie three or four days before the crime was committed. A witness testified that the defendant himself was in Beattie at the same time that the others were seen there. The criminals escaped in an automobile traced to the defendant's possession afterwards. Several of these associates were seen with him using and fixing this car a

short time before the burglary. He rented the chicken ranch, and it was occupied just before the burglary by some of these men. The automobile top was found there. One of these men and the defendant entered into the transaction wherein the bill of sale was given with unusual formalities and accompanying suggestions as to the kind of money and the persons present indicative of a purpose to prepare available proof for use when needed. In view of these and other circumstances, testimony showing the defendant's close association with these men for a reasonable time preceding and continuing down to the date of the crime was admissible. It was proper to show the defendant's employment, conduct, whereabouts, and associations.

[4] It appears that some of these men were brought to Kansas and were in jail at Marysville when they were identified by witnesses. This testimony is objected to as tending to prejudice the defendant by showing their incarceration in jail and prosecution for crime. The objection cannot be sustained. The evidence was admissible for purposes of identification. Their whereabouts is not of particular importance, but it is impossible to produce such evidence wholly apart from time and place.

[8] A witness was allowed, over defendant's objection, to testify that defendant had said that he was boarding the kind of men that had money. This occurred in this wise: After a trial of Mulcahy on some charge, the defendant objected to having his name mentioned, as he said, "with a bunch of crooks." The police judge remarked that he did not see him do any work and thereupon the defendant said that he kept a boarding house and was boarding the kind that had money. The men, or some of them, already mentioned, were among his boarders. In the light of the circumstances, and as part of the conversation, the remark objected to was admissible. It was the defendant's own explanation of his associations.

[9] Testimony is also objected to showing that along in August the defendant threw a flash light upon persons sitting at night in the rear of his premises, at the same time having a revolver in his hand. This is not very important evidence, but it shows the defendant's possession of the instrumentalities referred to, and was admissible in connection with all the circumstances proven.

[19] The conversation of the defendant concerning the manner in which nitroglycerine could be extracted from dynamite, although objected to, was admissible, as also was the evidence relating to the buried dynamite sticks, the dynamite found under the box car, and in the stone quarry, the cap and fuse found at the chicken ranch, the receipt for groceries and price list of Oakland cars and other articles found at the same place, with the evidence of the other facts and events preceding the crime con-

tained in the preceding statement. Some of these matters bear very remotely on the case, but are admissible when considered together to show a guilty combination tending to prove the defendant's complicity in the crime charged.

[11] Special reference ought perhaps to be made to the admission of evidence concerning the arrest of Black, Jackson, and Watson, to which an objection was made. These men were arrested at Hoerr's home in July, 1910, for stealing silks. Complicity of the defendant in the alleged theft was not shown, nor does any connection appear between the larceny then charged and the crime now under investigation. The evidence relating to that matter, however, did not close with the arrest. Hoerr went to the jail where the men were taken, offering to procure counsel for them, and afterwards, when they were taken to Concordia in this state, it appears that he went there on the same errand. While at Concordia the next day after the arrest, he told the sheriff that he had written to Dan Carney in answer to a letter received by these men while in jail. This evidence was not offered to prove another crime or the defendant's possible participation in it. For such purpose it was not admissible, but it was permissible in the discretion of the trial court to further show the defendant's associations.

Matters of evidence of doubtful admissibility will now be referred to. Testimony was admitted of the sale of a coat and pair of trousers by the defendant in July, 1910. It is not indicated how this circumstance is connected with anything material to the case.

[12] On the cross-examination of the defendant, who was a witness in his own behalf, he was shown a promissory note made by him in Louisiana in the year 1903, and his letter to the payee promising payment, and was asked if he had received a letter from a bank in Wymore asking him to call and pay the note. The note and letter were received in evidence. Nothing in his testimony in chief referred to this note, or warranted the cross-examination. No reason is given for it except the suggestion that it tended to rebut his statement that he had money to pay for the automobile which he claimed to have purchased.

[13, 14] Dan Carney was arrested in Oregon "recently," the sheriff said in giving his testimony, but the time is not shown. The court admitted his statements to the officer that he went under various aliases and that skeleton keys in his possession were watch charms. These statements, made months after the burglary, were erroneously received. The keys were also erroneously admitted in evidence. These items of evidence which we have characterized as doubtful were improperly admitted, but we do not find that any of it was prejudicial. The transaction concerning the sale of clothing ap-

peared to be entirely innocent, and we must presume was so considered. The cross-examination about the note revealed nothing except that the defendant was in debt, which was of no consequence, and it cannot be presumed that a jury would draw any unfair conclusion from it. The statements of Dan Carney that he went under other names was not prejudicial, for that fact had been proven already. The statement that the skeleton keys were used for watch charms was his little joke which could have no weight. The production of the keys was of no more consequence than his statement about them. Probably in producing the mass of evidence presented in this case these particular items of testimony were admitted upon the belief that some connection would be shown to make them entirely competent. The failure to do so cannot be grounds for reversal under the Code of Criminal Procedure, which requires this court to disregard errors which do not affect substantial rights. Code Cr. Proc. § 293 (Gen. Stat. 1909, § 6867); State v. Morton, 59 Kan. 338, 52 Pac. 890; State v. Connor, 74 Kan. 898, 87 Pac. 703; State v. Hammon, 84 Kan. 137, 146, 113 Pac. 418.

[15] An objection that the cashier, who testified to the correctness of ledger entries showing the amount of money in the bank when burglarized, based upon the fact that he did not personally make the entries, cannot be sustained. The evidence was admissible; besides, the amount is not material. Breaking with intent to steal is sufficient to sustain a charge of burglary.

[6] The defendant took the deposition of one Owen, but did not read it, as Owen was present and testified. His testimony was to the effect that a witness who had related the occurrences at the defendant's house when the bill of sale was made out was not present there. His attention was called to his deposition in which he had stated that the witness was present, and on rebuttal that part of his deposition was read. Of this the defendant complains, but without cause. He could be thus contradicted by his written statements as well as by oral ones.

[16] Some testimony offered in rebuttal purporting to repeat statements made by Muenard concerning his possession of the automobile is objected to. It appears, however, that this testimony was received in rebuttal of Mr. Muenard's statements as a witness for the defendant, and for this purpose it was admissible.

[7] The defendant predicates error upon instructions given and refused. The subjects covered by the requests were fairly treated in the instructions given, and covered every correct proposition fairly. Instructions requested relating to the defense of alibi were properly modified in accordance with the statute, which provides that: "Any person who counsels, aids or abets in

the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal." Gen. St. 1909, § 6691 (Code Cr. Proc. § 115).

The following instructions were given, which it is insisted were erroneous:

"(2) You are instructed under the law of Kansas any one who aids, abets, or assists another or others in the commission of any crime either by conspiring or confederating together, counseling and advising in the commission of such crime and preparation thereof, or by counseling, aiding, or assisting in the commitment thereof, or by knowingly concealing the crime and its results, is equally guilty with the one actually committing the crime; and you are therefore instructed in this case that should you find beyond a reasonable doubt that the defendant conspired and confederated with other persons for the commission of the crime alleged in the information, and that he did in any way aid, assist, or abet in its commission, either by counsel or concealment, then he is guilty as though he had himself without assistance committed the crime.

"(3) Your attention to the last instruction stated leads to the understanding that the field of inquiry in this case divides itself in two sections, each of which should receive the careful and conscientious consideration of the jury: First. Did the defendant in person, at the time and place charged, beyond a reasonable doubt, actually and physically break into and rob the Beattie State Bank in manner set forth in the information? Second. If you should fail to be satisfied from the evidence beyond a reasonable doubt that the defendant actually and in person was at Beattie at the time and place stated, and in person physically by himself or with the assistance of others, broke into and robbed said bank as charged, then the inquiry under the law would be whether or not the defendant, beyond a reasonable doubt, was guilty as charged by reason of the fact that he, though not actually present at the time and place of the commission of the crime, had guilty knowledge of the intent and plan and preparation to commit such crime, and did, though not present, actually help, plan, counsel, aid and abet others, conspiring and confederating with others in the plan and purpose, and in the preparation and carrying out of such common plan and purpose and knowingly concealing the crime, and aiding, assisting, and facilitating the escape of the actual participants in the burglary. \* \* \*

It is argued that the parts of these instructions relating to concealment are erroneous. It should be observed, however, that in the instruction numbered 2 the jury were informed that one who aids, abets, or assists in the commission of a crime by counseling and advising in the commission, or by knowingly concealing the crime, is equal-

ly guilty. Not that he is guilty of the offense if he conceals it, but if he aids in its commission (among other things) by concealing it, he is guilty. No. 3 was given as an explanation of No. 1, informing the jury that one may be guilty if present in person doing the deed alone or with others, or he may be guilty if he, having guilty knowledge of the plan, did actually help, plan, counsel, aid, and abet others by aiding, assisting, and confederating with them in carrying out such plan and purpose *and* knowingly concealing the crime *and* aiding and assisting the escape of the perpetrators. The instruction, it will be seen, not only required the state to prove that the defendant aided, counseled, or abetted in the crime, but that he also concealed it, and facilitated the escape of the others. The instructions on this subject were unnecessarily full, and the references to concealment might have been omitted; but their inclusion placed upon the state a greater burden than was necessary, and, if properly understood, as we must presume they were, the defendant has no just ground for complaint.

[17] The court was asked to give a general instruction that it is the policy of the law that it is better that a guilty person should escape rather than that an innocent man should be convicted. It is doubtful whether juries are assisted by such general observations, after being fully instructed as they were in this instance, upon the presumption of innocence and the necessity of proof of guilt beyond a reasonable doubt before a verdict of guilty can be found. The rights of the defendant were fairly safeguarded in the instruction given.

[18] Objection is made to the form of the verdict finding the defendant guilty of burglary and larceny in the second degree. If the defendant was guilty of burglary at all, it was burglary in the second degree. The instructions in effect so stated. If also guilty of stealing any amount, the offense of burglary in the second degree and larceny was established. This must have been the finding of the jury, and their verdict was rightly so interpreted, and sentence pronounced, accordingly (under the indeterminate sentence law), at imprisonment from five to ten years as prescribed for burglary in the second degree. Gen. St. 1909, § 2550.

[19] It was not necessary to prove the personal presence of the defendant at the time and place of the crime. It is sufficient if he counseled, aided, or abetted in its commission. But the fact, if it be a fact, as testified to by several witnesses, that he was at Wymore at 10 o'clock on the evening of the 7th of November, and also at 6 or 6:30 in the morning of the 8th, does not prove that he was not at Beattie between 2 and 3 o'clock in the morning when the bank was broken into. The distance is not shown,

but it was approximately 40 miles. It was in evidence that an automobile could make the run between Wymore and Beattie in an hour and a half or two hours.

While the evidence is wholly circumstantial, its weight was for the jury. We find it sufficient to sustain the verdict.

No prejudicial error being shown, the judgment is affirmed. All the Justices concurring.

# CLIFTON v. MEUSER.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 714\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where one who has received money from another contends that it was given him under an express contract, in consideration of services which he afterwards performed, but is defeated in that contention in an action brought against him for the recovery of the money, he is not thereby precluded from maintaining an action upon an implied promise to pay the reasonable value of such services as he had rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 714.\*]

Appeal from District Court, Miami County.

Action by Amanda R. Clifton against Charles T. Meuser, as executor of the estate of Sarah E. Potts. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

L. S. Harvey, of Kansas City, for appellant. Sheridan, Meuser & Sheridan, of Paola, for appellee.

MASON, J. On October 1, 1903, Sarah E. Potts, while seriously ill, delivered to Amanda R. Clifton a sum of money. On December 7, 1903, she began an action for its recovery on the ground that it had been delivered merely for the purpose of having it deposited in a bank to her credit, and that Mrs. Clifton had converted it to her own use. Mrs. Potts died on December 16, 1903, and the action was revived in the name of her executor. Mrs. Clifton answered, alleging, in substance, that the money had been given her in consideration of an express contract that she was to nurse and care for Mrs. Potts during her lifetime, and to pay the expenses incident to her sickness and funeral; and that she had performed her part of the agreement so far as she had been permitted to do so. A trial was had upon the issue so presented. The court instructed the jury, in substance, that unless they found both that such agreement had been entered into, and that Mrs. Clifton had performed her part of it, they must find against her. A general verdict was returned in favor of the executor, no special findings being made, and a judgment was rendered upon it. Later Mrs. Clifton filed a claim against the estate for the

reasonable value of her services in nursing and caring for Mrs. Potts, which was allowed by the probate court. The executor appealed, and upon trial the district court directed a verdict in his favor upon the ground that the matters sought to be litigated had been adjudicated in the former action. The plaintiff appeals.

The right of Mrs. Clifton to recover from the estate the reasonable value of her services to Mrs. Potts cannot be regarded as having been adjudicated in the first action. The verdict in that case may possibly have been against her because the jury believed she had performed no services, but the record does not affirmatively show that to have been the ground. The hypothesis is equally tenable that the jury were of the opinion that no agreement had been made by which she was to become the owner of the money delivered to her. "A judgment which may have resulted from a determination of either one of two or more separate issues does not constitute an adjudication as to either, where it is not shown upon which it was in fact based." *Routh v. Finney County*, 84 Kan. 25, 113 Pac. 397 (syl. § 2).

The issues in the two actions were not identical. In the first the question was whether an express agreement for the passing of the title to the money had been made and performed. In the second the question was whether services had been rendered under such circumstances that the law implied a contract to pay their reasonable value. It is suggested that the present controversy should be regarded as concluded by the result of the prior action because it might have been there litigated. That principle applies only where the cause of action is the same in the two proceedings. *Stroup v. Pepper*, 69 Kan. 241, 76 Pac. 825. In the action brought against her, Mrs. Clifton might perhaps have pleaded an implied contract to pay the reasonable value of her services as a defense or partial defense, or as a counterclaim or set-off, but she was not obliged to do so. Formerly a failure to use as a counterclaim or set-off a claim available as such deprived a party of the right to recover costs in a subsequent action upon it (Gen. Stat. 1901, § 4530), but even that provision is omitted from the present Code. The same petition may include, in separate counts, a claim based upon an express contract to pay an agreed sum for services and one based upon an implied contract to pay their reasonable value. *Berry v. Craig*, 76 Kan. 345, 91 Pac. 913. Each count states a complete cause of action. Proof in support of one is not admissible under the allegations of the other. 9 Cyc. 749. The causes of action are not the same. They are distinct and different, although not wholly independent, being connected by this tie; there may not be a separate recovery upon each. It follows that a plaintiff who sues upon an express contract,

without adding a count upon a quantum meruit, waives nothing, and, if defeated, is not thereby barred from maintaining a subsequent action upon an agreement arising by implication of law. This is the effect of the decisions as shown by the following excerpts:

"It is a familiar practice where A., under special contract, has done work for B., \* \* \* being apprehensive that he may not have come up to the full measure of the requirements of the contract, he may, in a suit for the enforcement of the contract, add a second count in quantum meruit. There is under the Code practice, extant in the state of Kansas, no legal incompatibility in counting separately on the two causes of action. \* \* \* It would be an abuse of discretion on the part of the court to deny the plaintiff the right to take the opinion of the jury on both issues, under proper direction that the plaintiff is not entitled to recover on both counts. \* \* \* As each count would constitute a separate cause of action, we know of no established rule of procedure that would compel the plaintiff to embrace them in one action. \* \* \* The authorities abundantly support the proposition that, when judgment goes for the defendant in an action on express contract on the ground that the contract had not been completed by the plaintiff, 'such judgment is not a bar to a second action to recover the reasonable value of the same services.' " *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 44, 45, 90 C. C. A. 547, 550, 551 (19 L. R. A. [N. S.] 219).

"If, in an action to recover the contract price of services rendered, defendant recovers judgment on the ground that the contract has not been completed, such judgment is not a bar to a second action to recover the reasonable value of the same services. To constitute *res judicata*, the former suit must be founded on the same cause of action as the latter." *Rossman v. Tillyen*, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247, headnote of editor Am. St. Rep.

"A judgment in a former suit on an express contract is not a bar to a second suit on a quantum meruit for the same services, when it takes different evidence to establish the two causes of action." *Buddress v. Schafer*, 12 Wash. 310, 41 Pac. 43 (syl. § 2).

"The fact that recovery in an action against a bank on a contract for services was denied because of the want of authority in the receiver of the bank, who executed it, to agree to pay a fixed amount is not conclusive of the right to sue on a quantum meruit." *Henrietta Nat. Bank v. Barrett* (Tex. Civ. App.) 25 S. W. 456 (syl. § 2).

"An adverse decree in a suit for a share of the profits of partnership business, as compensation for services rendered to a firm, is not a bar to an action upon a quantum meruit for the value of such services." *Kirk-*

patrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647.

"A judgment for defendant, in an action on a special contract for machinery built for defendant, the petition in which (answer being but a general denial) set out the contract, performance by plaintiff, and nonpayment by defendant, will not preclude the plaintiff from instituting a subsequent suit on the implied contract of defendant to compel him to pay the reasonable value of such machinery; the same having been retained by him." *Fritsch Foundry & Machine Co. v. Goodwin Mfg. Co.*, 100 Mo. App. 414, 74 S. W. 136 (syl. § 2).

*Borin v. Johnson*, 4 Kan. App. 211, 45 Pac. 968, is cited as having a contrary tendency. There the question was one of pleading; an answer being held sufficient which alleged in set terms that the particular matter sued upon had been adjudicated in a former action. It appeared that a claim for the services for which payment was asked had been previously sued upon, allowed, placed in judgment, and paid. Of course there may not be two recoveries for the same services, one upon an express, and the other upon an implied, contract.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

# CITY OF EMPORIA v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. Jan. 11, 1912.)

## (Syllabus by the Court.)

### 1. MUNICIPAL CORPORATIONS (§ 63\*)—RAILROADS (§ 98\*)—CROSSING STREETS—CHANGE—MUNICIPAL REGULATIONS—VALIDITY.

The courts have no general supervisory power over the policy of municipal legislation. The extent to which the welfare of a city and of the traveling public will be promoted by opening a city street through a railway embankment which wrongfully obstructs it, leaving the railway tracks upon a viaduct, is not a judicial question. The power of the city over the subject is legislative; and the courts can interfere in such cases only because of some constitutional impediment or lack of legislative authority on the part of the city, or because the conduct of the city is so arbitrary, capricious, unreasonable, and subversive of private right as to indicate an abuse rather than a bona fide exercise of power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63; \**Railroads*, Cent. Dig. §§ 291, 292; Dec. Dig. § 98.\*]

### 2. RAILROADS (§ 98\*)—MAINTENANCE—MUNICIPAL REGULATIONS—VALIDITY.

The pleadings examined, and held to present no valid objections to the enforcement of an ordinance requiring the defendant to open a street, which it obstructs in the manner stated, by the construction of a subway under its tracks.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 291, 292; Dec. Dig. § 98.\*]

## (Additional Syllabus by Editorial Staff.)

### 3. CONSTITUTIONAL LAW (§§ 241, 297\*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW—MAINTENANCE OF RAILROADS.

An ordinance requiring a railroad to open a street through an embankment wrongfully obstructing the street, and leaving the railroad tracks upon a viaduct, does not deprive the railroad of its property without due process of law, or deny it the equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 700, 701, 832-834; Dec. Dig. §§ 241, 297.\*]

Action by the City of Emporia for mandamus to the Atchison, Topeka & Santa Fé Railway Company. Peremptory writ allowed.

Ed. S. Waterbury, of Emporia, and T. F. Doran, of Topeka, for plaintiff. W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for defendant.

BURCH, J. The city of Emporia asks for a peremptory writ of mandamus against the defendant in aid of an ordinance to open one of the streets of the city.

The petition states the plaintiff's case. The answer admits certain allegations of the petition, contains a general denial, and alleges matter which, it is claimed, renders the ordinance void. The plaintiff moves for judgment on the pleadings. Consequently only the uncontested portions of the petition and the facts stated in the answer can be considered.

The passage of the ordinance and the physical conditions described in the ordinance itself are not disputed. The ordinance reads as follows:

"An Ordinance to Open Congress Street Through Third Avenue as a Public Highway for Common Travel.

"Be it ordained by the board of commissioners of the city of Emporia, Kansas:

"Section 1. Congress street in said city shall be opened for ordinary travel as a street through its intersection of Third avenue, and made available as a public highway, by the removal therefrom of so much of the earth embankment, which supports the tracks and switches of the railroad, known as the Atchison, Topeka & Santa Fé Railroad, as now constitutes an obstruction to such use of said street at said intersection. Such obstruction shall, by the corporation operating said railroad, be removed and cleared away from the north side to the south side of said avenue to a width of not less than thirty feet, east and west, and the opening, tunnel, or subway for the passage of said street through said avenue shall at no place be less than twelve feet in height above the grades provided for said intersection in the ordinance of said city passed on the 25th day of April, A. D. 1912, entitled 'An ordinance to change and establish grades at certain points on Congress street and State street and other adjacent streets and contiguous

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

places between Fourth avenue and South avenue.'

"Sec. 2. The work of providing a support for the tracks, switches and trains of said railroad over said intersection of street and avenue other than said earth embankment which is now such obstacle to public travel, and of making such opening, tunnel, subway or passageway for Congress street through Third avenue at the aforesaid grades, shall be commenced and vigorously prosecuted by said railroad corporation, and shall be so far completed on or before the 1st day of September, A. D. 1912, as to be ready for the construction, pavement and improvement of said Congress street through Third avenue as such highway of common travel at that time. Approved and passed this 30th day of April, A. D. 1912."

It will be observed that the ordinance is not one to compel the defendant to build a subway at a crossing used in common with the public. The defendant blockades Congress street with an embankment, and the city merely desires that this street be opened for travel by the removal of the embankment, leaving the railway upon a viaduct. It is claimed that the city is without lawful power to require the defendant to proceed in the manner proposed.

It is elementary that the power in question is legislative in character, and that the Legislature may confer authority upon the municipality to exercise it instead of doing so directly. The Legislature has granted the city express power to open, widen, extend, and improve streets, avenues, alleys, and lanes (Gen. Stats. 1909, §§ 1374, 1399), to prevent encroachments upon such thoroughfares (section 1400), and to regulate crossings of railway tracks and make provisions to prevent accidents at such crossings. Section 1409. Besides this, the statutes permitting the defendant to construct its road across Congress street require the restoration of the street to such a state that its usefulness shall not be materially impaired. Priv. Laws 1859, c. 47; Gen. Stat. 1868, c. 23, § 47. Therefore it required no ordinance to create the obligation to open Congress street for public travel, and the city is clearly suffering from no lack of statutory authority to prescribe, by ordinance, the conditions under which the obligation shall be discharged.

[1] The defendant claims the ordinance is unreasonable, unjust, and confiscatory for the following reasons: The defendant's general manager has been conferring with the mayor and commissioners of the city, with the Commercial Club, and with a large number of citizens interested in the welfare of the city, and in such conferences the opinion almost unanimously expressed was that a subway should be constructed at State street, one block west of Congress street. Such a subway would accommodate the street railway, as the proposed opening of Congress street

would not; and the defendant is disposed to consider joining with the street railway in constructing a subway at the logical place on State street. The construction of a subway on Congress street would accommodate but few people, and would be of no great value to the city of Emporia and its inhabitants. The construction of the proposed subway would involve an expenditure by the railway company of more than \$10,000, which is entirely disproportionate to the benefits accruing to the city therefrom.

Streets are intended for the use of the public at large, as well as for the benefit of residents upon them and other inhabitants of the city. The extent to which the growth, welfare, and prosperity of the city and the safety and convenience of the traveling public will be promoted by the proposed improvement is not a judicial question. The duty to conserve the public welfare in the premises is vested in the mayor and commissioners of Emporia. Their power is legislative, and discretionary in the legal sense. The Commercial Club and the citizens with whom the defendant's general manager conferred are not charged with official responsibility in the matter, and the court is not permitted to substitute their judgment or its own judgment for that of the governing body of the city. The courts have no supervisory power over the policy of municipal legislation. They can only interfere to curb action which is ultra vires because of some constitutional impediment or lack of antecedent legislative authority, or because the action is so arbitrary, capricious, unreasonable, and subversive of private right as to indicate a clear abuse rather than a bona fide exercise of power. These principles are all too well understood to need bolstering by citations of authority.

[2] There is no charge in the answer that the mayor and commissioners are actuated by malice or bad faith, and it is conceded by the defendant that some public benefit would result from opening the street. It is not unreasonable to require a barricade, maintained in violation of law and prohibiting all use of the street, to be removed for the benefit of even a minor portion of the traveling public. The natural result of the removal of the obnoxious fill down to the established grade of the street is an overhead crossing, and the details of the proposed plan for the crossing are not criticised. The interests of the street railway located upon another street are not material. The defendant had no right to appropriate the street to its exclusive private use. It should have secured a vacation, or, failing in that, should not have impaired materially its usefulness. It is now called upon merely to obviate in a reasonable and practicable way the consequences of its own wrong, and consequently is not in a position to complain of the cost.

It is said that the city has made no pro-

vision for the removal of a sewer which forms an obstacle to the construction of the subway, and the case is cited in which a change of grade by ordinance was a condition precedent to the building of a viaduct. *State v. Mo. Pac. Ry. Co.*, 33 Kan. 176, 5 Pac. 772. In this case a sewer ordinance is not a prerequisite; and it may be presumed that the city will take care of the sewer when the defendant's excavation reaches it, should a sewer exist, which the city denies. It is also said that the time limited by the ordinance for the construction of the subway has elapsed, and consequently that the ordinance has spent its force. The ordinance merely fixed a reasonable time for doing the work, after which the defendant, in case of nonperformance, would be in default and subject to compulsory process.

[3] The various objections to the ordinance are summed up in support of an allegation that the defendant is deprived of property without due process of law, and is denied the equal protection of the laws, contrary to the Constitution of the United States and the amendments thereto. For the reasons already stated, this contention is overruled.

The peremptory writ is allowed. All the Justices concurring.

**CITY OF HUTCHINSON v. DANLEY.**†  
(Supreme Court of Kansas. Jan. 11, 1913.)

*(Syllabus by the Court.)*

**1. WORDS AND PHRASES—"ADJACENT."**

The ordinary meaning of the word "adjacent" is close, lying near to, but not actually touching (citing 1 Words and Phrases, p. 184).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7565-7566.]

**2. DEDICATION (§ 65\*)—OPERATION AND EFFECT—ABANDONMENT OF RIGHTS—"ADJACENT."**

In section 5 of chapter 190 of the Laws of 1877, an act relating to the vacation of town sites and parts thereof, it was provided: "The alleys, streets or other public reservations so vacated shall revert to the owner or owners of lots adjacent or abutting thereto, according to the frontage of said lots or land." *Held*, that the word "adjacent" as there used applies to and includes lots fronting on a vacated park which is surrounded by streets, and under that provision the park, when so vacated, reverted to the owners of such lots.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 108; Dec. Dig. § 65.\*]

*(Additional Syllabus by Editorial Staff.)*

**3. DEDICATION (§ 53\*)—OPERATION AND EFFECT—TITLE ACQUIRED.**

Under Gen. St. 1909, § 5523, the execution and recording of a plat by the owner of land in which a block was reserved for a park vested the fee in the county in trust for use by the public as a park.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.\*]

**4. DEDICATION (§ 65\*)—ABANDONMENT OF RIGHTS—"ABUTTING."**

In Laws 1877, c. 190, § 5, providing that alleys, streets, or other public reservations,

when vacated, shall revert to the owners of lots adjacent or abutting thereto, the term "abutting" implies a closer proximity than the term "adjacent," and is an apt term to use as applied to a reversion where there is a vacation of a street or alley, but is not appropriate to express the idea that lots are lying near to, but do not actually adjoin, the vacated reservation.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 108; Dec. Dig. § 65.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 50-51.]

Appeal from District Court, Reno County.

Action by the City of Hutchinson against John T. Danley, substituted for Clinton G. Hutchinson. From a judgment for plaintiff, defendant appeals. Affirmed.

F. Dumont Smith, of Hutchinson, and C. B. Smith and Samuel Barnum, both of Topeka, for appellant. F. L. Martin, of Hutchinson, for appellee.

**JOHNSTON, C. J.** The ownership of a block of ground which has been used as a park for many years is involved in this action. In 1872, C. C. Hutchinson laid out the city of Hutchinson, and the block of ground in controversy was then dedicated as a public park and has since been known as "Base Ball Park." In 1877 a creek, which ran through the park, was straightened by the city. In it was a swimming pool and fishing place to which the public has resorted ever since the plat was filed. The block has been used as a common and as a playground for children. In 1888, on the application of Hutchinson, the board of county commissioners made an order by which they undertook to vacate the park. The ground stated in the application, which was signed alone by Hutchinson, was that the city had not planted trees and beautified and adorned the park as he intended and supposed that the city would do when the dedication was made. This proceeding to quiet title was brought about 21 years ago. A petition and bond for removal to the federal court was at once filed by Hutchinson, but in 1895 the case was remanded back to the state court. No one appears to have recognized the existence or pendency of the action from that time until 1907, and then it was found that all of the original files of the case had been lost. In 1910 John T. Danley came into the case, alleging that he had acquired the interest of Hutchinson, and in his cross-petition alleged that the park had been vacated, and that, by virtue of the conveyance from Hutchinson, he was the absolute owner of the block, and he therefore asked to have the title quieted in him. The park, it appears, was never assessed for taxation nor placed on the tax roll until 1908, when some one caused it to be entered on the tax roll, but no taxes were ever paid upon the tract. In 1902 an organization of women who lived in the vicinity formed a park association, and, with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 15, 1913.



the consent of the city authorities, made permanent improvements on the park. Entertainments were held there by the women, and with the money derived from this source, as well as some which was donated, the park has been beautified and improved. The trial court held against the claims of Danley, the cross-petitioner, and he appeals from the judgment.

Much argument has been made in regard to the claimed abandonment of the action, the bar of the statute of limitations, and the invalidity of the order of vacation on the ground that the petition was not signed by the owners of the abutting or adjacent land or those who had a right to petition for vacation, and also because the grounds upon which vacation was asked are insufficient to give the board authority to make a vacation; but it will be unnecessary to consider these questions. The judgment of affirmance will be placed on the ground that under the conceded facts, and granting there was a valid vacation, the property did not revert to the original dedicator or his grantee, and therefore the appellant had no interest in or title to the block.

[3] The execution and recording of the plat by C. C. Hutchinson, in which the block in question was reserved for a park, operated as a conveyance and vested the fee of the block in the county in trust and for use by the public as a park. Gen. Stat. 1909, § 5523. It has been said that under such a dedication "the fee passes from the owner beyond power of resumption and vests absolutely in the county, forever, in trust for public use." *Gadari v. City of Humboldt*, 87 Kan. 41, 42, 123 Pac. 764.

[1, 2] There was a statutory dedication of the block, and there was a statute governing the vacation of improved town sites and portions thereof and the reversion of the same when the vacation proceedings relied on by appellant were had. It was there provided that: "The alleys, streets or other public reservations so vacated shall revert to the owner or owners of lots adjacent or abutting thereto, according to the frontage of said lots or land." Laws 1877, c. 190, § 5. It is not denied that the Legislature had the power to provide for the reversion of a public reservation in case of a vacation, but it is contended that, when the vacation proceedings occurred in this instance, there were no lots abutting on or adjacent to the park whose owners could claim title by reversion. The park was, as we have seen, surrounded by streets which are still devoted to the use of the public, and the contention is that, as no lots touched the park on either the ends or sides thereof, none were adjacent to or abutted thereon, and hence there was no one to whom the title of the park might revert by statute. For that reason it is insisted that the common-law rule of reversion must govern. There would be much stronger reasons for this view if the term "adjacent"

had not been used by the Legislature. Although that term is sometimes employed in the sense of adjoining or abutting, its ordinary meaning, as defined by lexicographers, is close, in the neighborhood of, lying near to, but not necessarily touching. That was the meaning given to the word as employed in a statute authorizing the consolidation of cities adjacent to each other. *State ex rel. v. Kansas City*, 50 Kan. 508, 31 Pac. 1100. A like meaning was attributed to the term in an act authorizing boards of education to annex adjacent territory to the city for school purposes. *Board of Education v. Jacobus*, 83 Kan. 778, 112 Pac. 612.

[4] In its primary meaning "abutting" implies a closer proximity than does the term "adjacent," and whether the latter is to be interpreted as lying near to or actually adjoining depends largely on the context in which it is used and the purpose which the Legislature was seeking to effect. As the Legislature employed both terms, effect is to be given to each according to its ordinary meaning, if there is room for the application of such meanings. 1 Words & Ph. Jud. Def. p. 184; 1 Cyc. 764; 1 A. & E. Encycl. of L. 633.

"Abutting" is an apt term to use, as applied to a reversion, where there is a vacation of a street or alley, for in such a case lots touch or adjoin them, but it is not appropriate to express the idea that lots are lying near to but do not actually adjoin the vacated reservation. "Adjacent" is a suitable term to use when lots face upon a park or public square and there is a street intervening between them. Recognizing that there were degrees of proximity of the vacated portion to the surrounding lots, and that as lots would adjoin a vacated street or alley the word "abutting" was used, and as the lots fronting on a vacated reservation or park would not be in actual contact with it, the Legislature chose to use the term "adjacent," and thereby provided for reversion of the park to the owners of lots which faced upon but did not touch the park. That the owners of lots facing upon public reservations have a peculiar interest in such reservations, one of which they cannot be deprived either by the dedicator or by the Legislature, was determined in *Com'rs of Franklin Co. v. Lathrop*, 9 Kan. 453. There the owners of a town site dedicated a part of it as a courthouse square, and it was accepted and used for county purposes. Lots facing upon the square were sold by the owners of the town site to others who made valuable and lasting improvements thereon, and the lots were greatly enhanced in value by reason of their fronting on the public square. The commissioners of the county obtained the passage of an act authorizing the sale of this block in order that the proceeds of it might be used for the construction of a courthouse, and the board was proceeding to dispose of the property when the adjacent

lot owners obtained an injunction against the sale. It was decided and stated in one paragraph of the syllabus that: "Individuals purchasing from the town proprietors lots facing on such public grounds, subsequent to their dedication, and making lasting and valuable improvements thereon, when lots are enhanced in value by their position, and would be made of less value by a change of such grounds from public to private use, have a vested interest in the trust which no Legislature can abridge or destroy. And the repeal of a statute under which a right has vested does not divest or destroy that right." 9 Kan. 454, Syl. p. 6.

The court did not interpret the section of the statute relating to reversion, but it did point out that the owners of lots facing on a park or other public grounds can acquire an interest in the trust arising from the dedication, and it is a fair inference that the protection of this interest induced the enactment of a provision that, upon a vacation of such reservations, they shall revert to the owners of the adjacent lots or lands. The park, therefore, did not revert to the original dedicator, Hutchinson, nor to his grantee, the appellant, and, assuming that there has been a valid vacation of the park, the appellant has no interest in it nor any right to complain of the decision against him.

The judgment is affirmed. All the Justices concurring.

#### DENNIS v. PERKINS et al†

(Supreme Court of Kansas. Jan. 11, 1913.)

##### (Syllabus by the Court.)

#### 1. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—REVOCATION.

Reconciliation and the resumption of marital relations do not necessarily avoid a separation agreement previously made by the parties; such effect depending on the question whether the provisions of the contract and the conduct and circumstances show an intention to treat the agreement as no longer in force.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

#### 2. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—REVOCATION.

Such reconciliation and resumption do not warrant the court in deeming such contract avoided any further, if at all, than its terms, taken in connection with the situation and conduct of the parties, indicate their intention to avoid it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

#### 3. DESCENT AND DISTRIBUTION (§ 62\*) — RIGHTS OF SURVIVING SPOUSE—EFFECT OF SEPARATION AGREEMENT.

The right of inheritance in the property of the wife is not to be denied the husband, unless such purpose be express or clearly inferable.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 186-189; Dec. Dig. § 62.\*]

#### 4. WITNESSES (§ 159\*)—COMPETENCY—TRANS-ACTION WITH PERSON SINCE DECEASED.

In a suit by the husband to quiet his title to property of his deceased wife against her children, both parties claiming to inherit from her, he is prohibited by section 320 of the Civil Code (Gen. St. 1909, § 5914) from testifying to transactions and communications had personally with her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.\*]

Appeal from District Court, Reno County.

Action by D. T. Dennis against Guy Perkins and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions to grant a new trial.

F. L. Martin, of Hutchinson, for appellants. Smith & Malloy, of Hutchinson, for appellee.

WEST, J. March 30, 1901, the plaintiff, D. T. Dennis, married Hattie G. Perkins, a widow, who had two sons, the defendants, by a former marriage. Their conduct worried their mother, and she was heard to complain that they would not see her or accept her presents, and to say that she did not want any of her property after her death to go to them. The plaintiff had been married before, and the answer alleged that trouble arose by reason of his solicitude for his first wife and her children. Certain it is that he and his second wife failed to live harmoniously, and in August, 1909, they executed a marriage settlement, which was duly acknowledged and recorded. This instrument was in the following terms:

"We, D. T. Dennis and Hattie G. Dennis, husband and wife, of Reno county, Kansas, fully realizing that we are incompatible and cannot live together and have any peace of our minds, and that the conditions of our bodies and the state of our health have made it necessary for us to separate, and inasmuch as we have also heretofore agreed upon a separation, we now agree further and as follows: The title of all the property herein mentioned stands in the name of the husband, D. T. Dennis, and the wife, Hattie G. Dennis, does not own any property in her own separate right, but for the love and affection that he yet has for his wife and for other good and valuable consideration here-in mentioned he hereby grants, sells and conveys to Hattie G. Dennis the dwelling house, lot 48 feet wide and 150 feet long, and all the appurtenances thereon, the said property being in the city of Hutchinson, Reno county, Kansas, and known as No. 120 B West in said city; and he further agrees that he never will at any time claim any further interest in and to said property, nor in any other property that she may hereafter acquire; and he here agrees to abide by any will that she has or may hereafter make, and that she is hereby released of any

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† Rehearing denied February 15, 1913.

claims that he might make to any of her property at any time by reason of being her husband, and she is hereby authorized to dispose of the said property, or any other property she may have at any time, free from all claims by descent or otherwise upon his part, and that she may do this without consulting him. He further agrees that he will sign any and all conveyances made by her at any time when called upon, and do so without remuneration. He further gives to her in consideration of what she does hereby \$500 in cash, the receipt of which is hereby acknowledged, and all her clothing, jewelry and such other articles as she may choose from the household goods. And Hattie G. Dennis hereby accepts the above property as her equitable and fair division thereof, and releases her husband, D. T. Dennis, from all further obligations towards her support, and in consideration of the above Hattie G. Dennis, the wife of D. T. Dennis, hereby grants, sells and conveys to D. T. Dennis all her right, title and interest in and to lots one, two, three and four in block five in Handy's East Side addition to the city of Hutchinson in Reno county, Kansas, and all the appurtenances thereto; the said property being known as Nos. 501 and 503 East Sixth street in Hutchinson, Kansas. The foregoing described properties being all the real property owned by either party hereto. And in consideration of the relinquishments herein made by D. T. Dennis and the payment of the said \$500 in cash, Hattie G. Dennis hereby agrees that she never will at any time claim any interest in and to any portion of the said property above conveyed and relinquished to D. T. Dennis, nor in or to any other property, real or personal, that he may hereafter acquire; and she here agrees to abide by any will that he may hereafter make, and that he is hereby released of any claims that she might make to any of his property at any time by reason of being his wife; and he is hereby authorized to dispose of his property above described, or that he may hereafter acquire, free from all claims by descent or otherwise upon her part, and that he may do this without consulting her. She further agreed that she will sign any and all conveyances for the said property or other property he may acquire at any time when called upon by him, and that she will sign and acknowledge the same without remuneration. This is intended as a fair, full and complete settlement of all the property now owned by us or either of us, it being understood that the personal property, which consists mostly of household goods, and not taken by Hattie G. Dennis, is to remain the separate property of D. T. Dennis, and that neither party shall ever make any further claim of any kind on each other after this is signed and acknowledged, and this is done also to avoid the expense of litigation. Given under our name this the

2d day of August, 1909. D. T. Dennis. Hattie G. Dennis."

On the same date a deed was executed conveying to Hattie G. Dennis the land set apart to her in the settlement, reciting \$500 and "other considerations mentioned in a certain postnuptial contract of even date herewith."

Mrs. Dennis had suffered from ill health before the separation, and thereafter she went to her sister's in Indiana. Her health continued bad, and she suffered both physically and mentally and grew worse until in January, when her condition became such as to require her removal to a hospital, where she passed away February 1st. November 28th she wrote Mr. Dennis, apparently in answer to a letter received from him, expressing sorrow for what she had done, declaring her love for him, and insisting that he let her come back to him, or she would lose her mind. December 19th another letter, still more affectionate and intense, was written by her, and this was followed by one on the 26th, evincing great concern for him, and expressing the wish that they were living together, and another on the 29th of similar import. On January 1st Mr. Dennis wrote to a relative of his wife, recounting some of the troubles of the former relation, and stating that he thought it better for his wife to remain where she was, as he could not live there, and could not bring her to Hutchinson; that he was planning to leave the state; and that if he should ever live with her again it would not be in Kansas or Indiana, but when he should find a new place, if she still desired to live with him, the matter could be considered. He asked for definite information as to her health and condition. January 14th in response to a telegram from this relative, having refused to come as suggested by letter, he went to Indiana and joined his wife. They stayed together one night at her sister's, and the next day, Saturday, went to a house which she had rented and remained there until a week from the following Sunday, when she was taken to the hospital. They occupied the same room and bed, and he cared for her; she being unable to dress herself, or to prepare food. During the first Sunday evening she said to him: "You have always been good to me and waited on me, and I want you to live with me and be man and wife." One witness testified that when he came he said he was going to take care of his wife, and if she got well they were going back to their home in Kansas; that she said "the property they had bought it and worked for it, and when she was done with it it should go back to him." When she was taken to the hospital, he went to visit his sister, being gone about 48 hours, and then returned and was with her while she lived. He attended the funeral and made all the arrangements and paid all expenses, using money

which she had on deposit, and a small balance remaining after the expenses were paid be retained.

This action was brought by Mr. Dennis to quiet his title in the land deeded to his wife against her children, the defendants. It was alleged that the marriage settlement became void upon the resumption of marital relations, which he alleged took place in Indiana and continued during the remaining days of her life; that thereupon the consideration for the contract failed, and it should be set aside. The answer averred that when the plaintiff reached Indiana his wife was in a state of semiunconsciousness and mental collapse, totally unable to care for herself, and that immediately upon his arrival she became uncontrollable; that the property descended to the defendants, and prayed that their title be quieted. The jury returned a verdict in favor of the plaintiff, and in answer to special questions found that Mrs. Dennis had sufficient mental capacity to understand the contract when made, and to resume her marital relations with the plaintiff. Judgment was returned accordingly, and the defendants appeal.

[1] It is frequently said that reconciliation and resumption of the marital relation will render a contract void. This is a loose and inaccurate statement of a supposed rule. Courts cannot make or unmake contracts, but can only determine the effect of express or implied agreements made by those competent to act for themselves. Rescission or abrogation is as volitional as the act of contracting. And as the words used may be judicially construed to constitute a contract, so conduct may be so significant and conclusive as to justify conviction and determination that rescission was actually intended. When husband and wife, united for life, find it in their hearts to agree to a separation and arrange their property matters accordingly, and, after having experimented for a time with the conditions so brought about, are found living together, to all intents and purposes as if no trouble had arisen, the courts endeavor to ascertain how the parties themselves regarded the agreement formerly made and apparently set aside; and as the conduct indicated naturally signifies an intent to deem the separation agreement ended, and the courts have so many times taken this view, it has become usual to say, in effect, that the law makes a perfect equation between resumption and abrogation. The truth is, and the law is, that having entered into a valid separation agreement the courts cannot and will not deem such contract avoided, unless the conduct of the parties impels to the conclusion that they themselves so regarded it. *O'Malley v. Blease*, 20 L. T. Rep. 899; *Rowell v. Rowell*, 81 L. T. Rep. N. S. 439; *Nicol v. Nicol*, 31 Ch. Div. 524; *Carson v. Murray*, 3 Paige (N. Y.) 483; *Heyer v. Burger et al.*, 1 Hoff. Ch. (N. Y.) 1; *Hughes v. Cumming*, 36 App. Div. 302,

55 N. Y. Supp. 256; *Hitner's Appeal*, 54 Pa. 110; *Zimmer v. Settle*, 124 N. Y. 37, 26 N. E. 341, 21 Am. St. Rep. 638; *Roberts v. Hardy*, 89 Mo. App. 86; *Kefauver v. Kefauver* (Ky.) 57 S. W. 467; *Sackman v. Sackman*, 143 Mo. 576, 45 S. W. 264; *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *James v. James*, 81 Tex. 373, 16 S. W. 1087; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353; *Bulke v. Bulke*, 173 Ala. 138, 55 South. 490; *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814; *Kehr v. Smith*, 20 Wall. 31, 22 L. Ed. 313; *Daniels v. Benedict*, 97 Fed. 367, 38 C. C. A. 592; *Wells v. Stout*, 9 Cal. 479.

[2] A necessary corollary to this principle is that when the contract contains provisions for the wife which might with equal propriety have been made had no separation been contemplated, and others which would have otherwise been idle, the coming together again of the parties and their conduct may be such as to show an intention to avoid the latter and not the former. This principle is illustrated by such cases as *O'Malley v. Blease*, *Lackman v. Lackman*, *Luttrell v. Boggs*, *Bulke v. Bulke*, and *Walker v. Walker*. In the *Nicol Case* it was said by Bowen, L. J.: "I think that the true principle is that a renewal of cohabitation would put an end to all or any of the provisions of a separation deed, so far as the language of the deed, properly construed by the light of surrounding circumstances, shows that its provisions were only intended to take effect whilst the separation lasted. \* \* \* Separation deeds are often very complicated, and some provisions may be intended to apply even in the case of a reconciliation, while others may be quite inapplicable to such a state of things; and I should prefer to construe each deed by the light of its surrounding facts, rather than to lay down a crystallized rule." In the *Walker Case*, in holding that a trust remained, regardless of the reconciliation, the court said: "There is no good reason why effect should not be given to the intention of the parties on the subject. \* \* \* It is clear, then, that this trust was operative during the life of the wife, and that a court of equity will enforce it."

If the contract and circumstances be such that the permanent resumption of the relation of husband and wife would naturally and presumptively imply the abrogation of certain of its terms only, there is no reason why such effect should not be given.

The court instructed the jury, in substance, that they should find for the plaintiff if the parties became reconciled and resumed their marriage relations and duties towards each other, and continued to live together as husband and wife for a time prior to the death of the wife. That this was the theory on which the trial court acted appears more plainly from instruction No. 7, which was to the effect that, if the wife was mentally

competent to execute the contract and receive the deed, "then your verdict should be for the defendants, unless you further find that said contract was subsequently revoked and annulled, either by the agreement of the parties, or their reconciliation to each other and the resumption of their marital duties and relations as husband and wife."

In their brief plaintiff's counsel say: "There remains but one question in the case—that is a question of law—whether the resumption of the marital relations \* \* \* avoids the written contract."

When this relation was resumed, if it was, she was the owner of the property in question, not only by contract, but by deed, which with perfect propriety might have been made had no separation been had or contemplated; and we think it clear upon principle and upon authority that the effect of the relations and conduct of the parties depended upon the intention in their minds, which intention is to be ascertained from the conduct and circumstances as a question of fact, and that mere reconciliation and resumption do not, as a matter of law, avoid such contract. The common-law doctrine of coverture, with all its incidents, has been relegated to the past by modern legislation and decisions, and no longer stands in the way of permitting husband and wife to deal with each other as they see fit regarding their real or personal property. *Butler v. Butler*, 21 Kan. 525, 30 Am. Rep. 441; *King v. Molohan*, 61 Kan. 693, 60 Pac. 731; *Harrington v. Lowe*, 73 Kan. 1, 84 Pac. 570, 4 L. R. A. (N. S.) 547.

[3] It is suggested by counsel for the defendants that at most the plaintiff could claim a right to inherit. If it should be determined that the contract was not avoided, this right would depend upon its provisions; and under the rule deduced from former decisions, in order to preclude such right, an intention so to do should be expressed or clearly inferable from the terms of the instrument. *Kistler v. Ernst*, 60 Kan. 243, 56 Pac. 18; *King v. Molohan*, 61 Kan. 683, 60 Pac. 731; *Rouse v. Rouse*, 76 Kan. 311, 91 Pac. 45; *Casey v. Casey*, 84 Kan. 380, 113 Pac. 1047.

[4] Complaint is made that the husband was permitted to testify concerning transactions had personally with the wife, in violation of section 320 of the Code. The abstract shows that he testified as to the fact of occupying the same room and bed; and it is stated in the brief, without contradiction, that he was permitted to state that he cared for her as a husband, and that the subject was gone into in detail concerning the days during which they were together. The tendency of this and other courts is to carry the terms of the statute no further than their necessary meaning. It can hardly be said that under the circumstances shown the mere fact that the husband occupied the same

room and bed with his invalid wife amounts to a transaction. It might more properly be said to be one item in a course of conduct possibly amounting to the general transaction of resuming the marital relation. But certainly to go to the extent stated in the brief of testifying in detail as to caring personally for the wife is beyond the letter and spirit of the statute, the philosophy of which is that generally one in this sort of case cannot be heard to give his version of a transaction or communication, when the lips of the other party thereto are closed by death.

The judgment is reversed and the cause remanded, with instructions to grant a new trial. All the Justices concurring.

### MARSH v. WELLS FARGO & CO. EXPRESS.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. REWARDS (§ 11\*)—PERSONS WHO MAY RECEIVE—PUBLIC OFFICERS.

Where a suspected felon is arrested without a warrant by a deputy sheriff of a county other than the one wherein the arrest is made, he is not debarred from recovering a reward therefor merely because he is such officer.

[Ed. Note.—For other cases, see *Rewards*, Cent. Dig. §§ 14, 15; Dec. Dig. § 11.\*]

#### 2. REWARDS (§ 15\*)—PERFORMANCE—EVIDENCE.

It is held, that the evidence in this case tended to prove a substantial compliance by the plaintiff with the terms of a reward offered for the arrest and conviction of a criminal and that the district court did not err in overruling a demurrer thereto.

[Ed. Note.—For other cases, see *Rewards*, Cent. Dig. §§ 21-24; Dec. Dig. § 15.\*]

Appeal from District Court, Marion County.

Action by Charles H. Marsh against Wells Fargo & Company Express. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, of Topeka, for appellant. C. M. Clark, of Peabody, and W. H. Carpenter, of Marion, for appellee.

**BENSON, J.** This is an action to recover a reward offered for the arrest and conviction of a criminal. The appeal is from a judgment for the plaintiff on a demurrer to evidence.

On or about March 29, 1908, an express messenger on a west-bound train on the Atchison, Topeka & Santa Fé Railway in Marion county was killed. The defendant offered \$1,000 reward for the arrest and conviction of the party who killed the messenger. The plaintiff learned of this offer early on March 29th, from the agent at Peabody, who called him in and showed him a telegram containing it. He immediately went to work on the case, and called up Newton giving notice of two men he suspected, but they were not implicated in the crime. Two special agents of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the defendant came to Peabody, where the plaintiff lived, and conferred with him about the case. He suggested that an alarm be turned in to notify the members of the anti-horse thief association, which was done. A report came in of a suspicious character out in the country, and the plaintiff went out and investigated, and found the suspected men to be innocent. In the afternoon a telephone call from Wagner, a nearby station, informed the plaintiff that a bloody hatchet had been found near the railroad. The plaintiff went out and took possession of the hatchet. The special agents then requested the plaintiff to watch that end of the line and report if anything was found. The plaintiff suggested that it was foolish to be looking for a hobo; that in his opinion the crime was committed by some express messenger who had been discharged or some one who knew as much about the business as the murdered man. On Tuesday morning the plaintiff went to Newton on a message from one of the two special agents or from Mr. Germain, a secret service officer of the railway company who was acting with them in the matter. He had worked with these special agents before and supposed that he was wanted in connection with the case. He was a deputy sheriff of Marlon county and city marshal of Peabody. On reaching Newton the plaintiff arrested Carr, the suspected murderer, in a billiard hall there. He described the arrest in his testimony: "I had no warrant. That was in Harvey county. I took him into custody as the offender in the matter wherein it was alleged that somebody had murdered Oscar Allen Bailey. I alone took Carr into my charge. I went into the building and fetched him out alone. There was a crowd around there, a big crowd both in the back of the hall and in front of it; at least in front of it. At that time it was not known where Mr. Oscar Allen Bailey was killed. I brought him from there (Newton) to Marlon county and put him in jail. \* \* \* I didn't know Carr up to the time I arrested him. Cummings, of Newton, I think, pointed him out to me. Mr. Long went as far as the stairway. I did not suggest to these people that Carr was the man to be arrested. I could not say who suggested the propriety of arresting Carr for this murder. I had all my talk with Mr. Germain, chief special agent of the Santa Fé road, who was working on the case. Q. Up to the time you arrested Mr. Carr, which you say was Tuesday in the afternoon, what evidence had you personally gathered up against him? A. As much as the rest of them. Q. What evidence had you gathered against him? A. All that any of them knew, that he was in Kansas City and came back that night to Newton. Q. Did you furnish that information to them? A. That was the talk. All the talk I had with anybody at Newton up to the time the arrest was made was with Germain. I had

never seen Carr before that. Somebody pointed him out and I arrested him."

The plaintiff had no warrant, but took Carr into custody, told him he was charged with murder, and took him at once to Marlon county and placed him in jail. Afterwards a complaint was made and a preliminary examination was held, Carr was tried twice in the district court, and at the last trial was convicted of the murder of the express messenger. The plaintiff was a witness for the state at the preliminary examination, and upon each trial consulting with Mr. Germain and the public prosecutors about the conduct of the case, and was active in procuring evidence for which he received no compensation. He produced the hatchet at these trials, and it was put in evidence. At the last trial he procured two boys to go to Kansas City and ride to Florence, one on the rods and the other on the blind baggage, and produced them in court as witnesses to show their dirty and grimy condition. This was done at the instance of the defendant's representatives upon consultation with one of the prosecuting attorneys to rebut the claim of Carr that he had journeyed from Kansas City on the outside of the car; it being further shown that he was neat and clean when he alighted from the car. The plaintiff procured clothes for the boys, accompanied them to and from Kansas City, looked out for them at each stop, and took them in a carriage from Florence to the courtroom. His expenses were paid by the prosecuting attorney, presumably for the defendant. During the trials, and in the interval between them, the plaintiff was looking out for evidence and held several consultations with the prosecuting attorney. As deputy sheriff he had an arrangement whereby he was to receive one-half the fees upon papers sent to him for service. He has received nothing in the Carr case. He testified that his one-half for the arrest of Carr was coming to him.

The defendant offered on the cross-examination of the plaintiff to prove by him that the express company brought in witnesses from other states who testified. The court excluded the offer on the ground that it was not proper on cross-examination.

[1] The defense is based: (a) Upon the proposition that it is against public policy to permit a deputy sheriff to recover a reward in such a case; and (b) that the plaintiff did nothing to entitle him to receive it.

It is contrary to public policy to allow an officer to recover a reward for the performance of an official duty. *Matter of Russell's Application*, 51 Conn. 577. 50 Am. Rep. 55; *Bank v. Edmund*, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; *United States v. Mathews*, 173 U. S. 381, 19 Sup. Ct. 413, 43 L. Ed. 738; 34 Cyc. 1753. On the other hand, no rule of public policy forbids such recovery where the officer is under no obligation arising from his

official character to perform the service. *Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324; *Russell et al. v. Stewart et al.*, 44 Vt. 170; 34 Cyc. 1755; 24 Am. & Eng. Encyc. of L. 953.

The general duties of a sheriff are stated in the following statute: "It shall be the duty of the sheriff and undersheriffs and deputies to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner and constable, may call to their aid such person or persons of their county as they may deem necessary." Gen. Stat. 1909, § 2197. Another statute provides that: "If any person against whom a warrant may be issued for an alleged offense committed in any county shall, before or after the issuing of such warrant, escape from or be out of the county, the sheriff or other officer to whom such warrant may be directed may pursue and apprehend the party charged in any county in this state, and for that purpose may command aid and exercise the same authority as in his own county." Gen. Stat. 1909, § 6613 (Code Cr. Proc. § 39).

The right and duty of sheriffs to make arrests without warrant for crimes committed in their presence, and for past felonies in certain circumstances, which need not now be defined, may be conceded. 1 Bishop on Criminal Procedure, § 183; *Bank v. Edmund*, supra. But we know of no rule of law which makes it the official duty of a deputy sheriff of a particular county to arrest a supposed felon in another county without a warrant in the circumstances here shown. In the *Edmunds Case*, cited above, a constable who had made such an arrest was denied the right to recover a reward, but he was acting within the limits of his territorial jurisdiction. The court said: "A constable, in this state, is, by virtue of his office, a conservator of the peace, and whenever he has knowledge, or specific information, that a felony has been committed at a particular locality within his jurisdiction, it is clearly his duty to take diligent and prompt measures for the arrest and apprehension of the perpetrators of said crime, and where he does this, and secures their arrest, the law will not hear him say, or permit him to claim, that an arrest thus affected, pursuant to official duty, was made by him in his individual capacity as a private citizen." *Bank v. Edmund*, 76 Ohio St. 396, 404, 81 N. E. 641, 643 (11 L. R. A. [N. S.] 1170, 10 Ann. Cas. 726).

In *Harris v. More*, 70 Cal. 502, at page 503, 11 Pac. 780, a recovery of a reward by a deputy sheriff was affirmed in a case quite similar to this. The court said: "As the

plaintiff had no legal duty to perform, by virtue of his office of deputy sheriff, in regard to discovering the evidence and causing it to be produced, having no writ to execute, and the offense having been committed and the trial had out of his county, we do not think the policy of the law forbade his receiving the compensation."

In *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012, it appeared that an arrest of a bank robber had been made by a city marshal within the city limits. A statute made it the marshal's duty to arrest without process any person found violating any law of the state. It was held that the marshal was not debarred because of any official duty resting upon him from recovering a reward offered for the arrest of the robber.

A similar decision was made in Indiana, in *Bronnenberg v. Coburn*, 110 Ind. 169, 11 N. E. 29.

It was held in *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315, that a deputy sheriff, who had in his own county arrested a person who had broken jail in another county, was entitled to a reward offered for the capture of the prisoner. That case was cited and followed in *Russell et al. v. Stewart et al.*, 44 Vt. 170, where it appeared that an arrest was made without warrant by a deputy sheriff. The report does not state whether the deputy made the arrest in his own county or in another. See, also, *Kasling v. Morris*, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; and notes in 11 L. R. A. (N. S.) 1170, and 10 Ann. Cas. 729.

It is concluded that the fact that the plaintiff was a deputy sheriff of Marion county when he arrested Carr—the arrest having been made in Harvey county—does not preclude him from recovering the reward.

[2] Concerning the claim that the plaintiff did nothing which would entitle him to the reward, it should be observed that upon the demurrer to the evidence the question was whether the evidence tended to prove a performance of the services stipulated for in the offer; that is, an arrest and conviction. The arrest was made by the plaintiff alone and is undisputed, and the conviction followed. It cannot be said that in a strict literal sense any particular person or persons convicted Carr. That was accomplished through the co-operation of the plaintiff, the special agents of the company, and the prosecuting officers. The court, jury, and witnesses also performed appropriate functions in bringing about the result. It was said in *Elkins v. Wyandotte County*, 86 Kan. 305, 120 Pac. 542, of an arrest as a condition of recovery of a reward: "Since it is not within the power of any citizen, literally, to do, by himself or his agents, the things specified in the statute and in the published offer, it is held that if he substantially accom-

plishes the full objects of the offer, aided by the officers of the law in the orderly performance of their official duties, he has met the conditions of the contract and earned the reward." Syl. par. 2. This language is quite as applicable to a conviction as to an arrest. Offers must, in such cases, be liberally construed in the sense in which they are ordinarily understood and acted upon and the purposes for which they are intended. A substantial compliance is sufficient. *Crawshaw v. City of Roxbury*, 7 Gray (Mass.) 374; *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254.

It is held that the evidence tended to prove the plaintiff's cause of action and that there was no error in overruling the demurrer thereto. If it should be conceded that the district court ought to have received the evidence offered upon the cross-examination of the plaintiff, which was excluded, the result would not be changed, for, considering the part rejected as though received, the evidence would still tend to prove a cause of action.

The judgment is affirmed. All the Justices concurring.

#### FOWLER v. TITLE GUARANTY & SURETY CO.

(Supreme Court of Kansas. Jan. 11, 1913.)

##### (Syllabus by the Court.)

#### 1. INSURANCE (§ 141\*)—INDEMNITY INSURANCE—BOND—WAIVER OF CONDITIONS.

A bond issued by an insurance company for the purpose of indemnifying an employer against loss by the fault of an employé will not be held invalid because not signed by the employé, although the bond expressly so provides, when the bond has been delivered by an agent of the company to the insured and the premium collected, and when the company has a separate writing, signed by the employé, which imports the same undertaking by the employé as would his signature to the bond; on the contrary, the condition will be held to have been waived.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 253-262; Dec. Dig. § 141.\*]

#### 2. INSURANCE (§ 646\*)—INDEMNITY INSURANCE—INVALID CONDITIONS—WAIVER.

When such a bond, containing a condition which renders it void at its inception, is delivered to the insured, and the premium is collected by an authorized agent, it will be presumed that the company waived the condition rather than that it intended to perpetrate a fraud.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1645-1668; Dec. Dig. § 646.\*]

Appeal from District Court, Johnson County.

Action by Leavenworth Fowler against the Title Guaranty & Surety Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

E. C. Fletcher and H. M. Beardsley, both of Kansas City, Mo., for appellant. Guthrie, Gamble & Street, of Kansas City, Mo., for appellee.

SMITH, J. The appellant was, during the times referred to in the action, a grain merchant residing at Kansas City, Mo. During 1904, 1905, and 1906 he had places of business at Pine Bluff, Ark., and other places. W. P. Cook was in his employ, and he had charge of his business at Pine Bluff. In 1904 one Nesbit of Kansas City was a solicitor of insurance employed by Mastin, Drennon & Schafer Company, who were agents for the appellee company. On June 9, 1904, appellee, through Nesbit, delivered to appellant a bond, No. 18876, guaranteeing the fidelity of Cook. The amount of the bond was \$10,000, the premium paid \$40, and the term expired May 1, 1905. This bond, among other provisions, contained the following: "This bond \* \* \* will be invalid and of no effect unless signed by the employé. \* \* \* And the said employé does hereby for himself, his heirs, \* \* \* covenant and agree \* \* \* that he will save, defend and keep harmless the said company, from and against all loss and damage \* \* \* for or by reason or in consequence of the said company having entered into the present bond." The bond was signed by Cook and the appellee company. At the time of the making of the bond, Cook signed an application containing interrogatories and the answers made thereto by him, and also the following agreement: "I hereby agree for myself, my heirs and administrators, in consideration of the Title Guaranty & Surety Company becoming surety for me and issuing bond applied for, or any renewal thereof, or any further or other bond hereby issued by the said company on my behalf in my present or any other position in this service, to protect and indemnify the said company against any loss, damage or expense that it may sustain or become liable for in consequence of such guarantee on my behalf by said company," etc.

Under date of April 20, 1905, appellee executed a bond, No. 25420, like the one above described, expiring April 1, 1906, but Cook did not sign in the blank left for his name. At the same time the appellee company executed a number of other bonds, guaranteeing the fidelity of a number of other employés of the appellant, none of which were signed by such employés. Except for such signatures, all of these bonds were fully signed and on the same printed form. Under date of March 22, 1906, the appellee company executed the following continuation certificate: "In consideration of the sum of forty and no/100 dollars \* \* \* hereby continues in force bond No. 25420 (the one issued on W. P. Cook of date April 20, 1905, as above set out) \* \* \* for the period



beginning the 1st day of April, 1906, and ending on the 1st day of April, 1907, subject to all the covenants and conditions of said original bond." Appellee also issued like renewal policies on other employes of appellant. All of the premiums were paid by the appellant and received by appellee, and the bonds and renewal certificate delivered to appellant by Nesbit were put in his safe by appellant without being read by him. The appellee, through its agents, solicited appellant to secure such bonds, brought the documents to appellant, and said nothing to appellant on delivery thereof indicating that anything remained to be done with them to perfect or complete them. Appellant received the same, believing them to be completed contracts.

There is no evidence that any other application was asked from Cook except the one asked and given when the first bond was issued in 1904. It appears that appellee was notified promptly when the loss was discovered, and that appellee wrote its agent in Kansas City in November, 1906, as follows: "I inclose you a copy of the employer's statement which was furnished us with bond No. 18876, which was issued, our bond No. 25420 having been executed as a renewal of the first one." The court found as a legal conclusion that the instrument issued was not a valid, binding contract for lack of the signature of Cook, and that such signature thereto was not waived by the appellee.

[1] The transaction in question in this case does not differ in principle from fire insurance and perhaps other kinds of insurance. The appellee, through its agents prepared a bond, which for comparison answers the purpose of a fire insurance policy, and also prepared all other papers and delivered them to appellant as complete to meet the purposes of the transaction. The appellant received them, paid the money demanded therefor, and put them in his safe, supposing that he had an indemnity bond. Had no loss occurred, the appellee might have continued indefinitely to deliver and the appellant to receive and pay for indemnity contracts not signed by the employe, which, if the appellee is now correct, would have been absolutely worthless and would have imposed no obligation upon the appellee, and the appellee would probably not have offered to return the premiums, as it also believed the contract valid, and that it had fairly earned the premium. In short, the appellee would be selling something supposed to be of value and to impose obligations on its part when, in fact, there was no obligation created. However honestly intended, this would constitute a legal fraud. For the appellee to deny the validity of the contract after it has received the consideration, for the reason only that the employe, Cook, did not sign the bond, savors of fraud. The only purpose of his signing the bond was to indemnify the appellee from any loss suffered on his account. This Cook had done by

signing the application at the issuance of the first bond as fully as if he had signed the second bond or the extension certificate thereto.

In a similar case (*General Ry. Signal Co. v. Title G. & S. Co.*, 203 N. Y. 411, 96 N. E. 736) it is said: "While it might be argued that the authority of these agents of the defendants was sufficient to waive the condition of the bond in question in delivering it as it was and by receiving the premium, upon the same principle that insurers have been held bound by the acts of their agents in waiving conditions of a policy (*McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 396 [33 N. E. 475]), we have a broader basis of facts and circumstances in this case, upon which a waiver may securely rest. It might be said that the objection to the enforcement of this bond went a little further in principle, in that it went to its completion as an instrument, and waiver, therefore, needed fuller proof in the facts. However it may be, it is not necessary to decide the point, for a waiver by the defendant need not rest upon the fact alone of the delivery of the bond. The legal presumption of a waiver may rest upon the further fact that the defendant had in its possession, at the time of the delivery, the agreement signed by Ellis, which was to the same effect as in the bond, and quite as comprehensive as an indemnification of the defendant against any loss by reason of going upon the bond. The application on behalf of the plaintiff was made a part of the bond; but that of Ellis was not. He was brought into it by supplementing the usual provisions of the bond by an agreement on his part. Acting for their principal, we must assume that the defendant's agents had its interests in view, and that they considered them as well protected by the separate covenant of Ellis as if he had subscribed to it upon the bond. To have insisted upon such subscription by him had become unnecessary, for the covenant in the bond had ceased to be of importance. All of the facts and circumstances, therefore, conclusively support the finding of a waiver. \* \* \* While the defendant required the employe's signature to the bond as a condition of its validity as an obligation, as it had the right to do in holding it estopped from now insisting upon the condition, it loses nothing but a technical defense, which, if suffered to prevail in the face of facts and circumstances of the case, would mean the lending of the aid of the court to the perpetration of a fraud. Jealous as the law is of the rights of a surety, the limit of its protection is reached when the surety invokes its aid to defraud." -

The language is applicable to this case; the defense in this case is purely technical. The addition of Cook's signature would give the appellant nothing that he does not possess under his original contract. The appellant correctly contends that, by delivering the bond and extension certificate and col-

lecting the price thereof, the appellee waived Cook's signature and cannot now be heard to deny such waiver.

[2] When a policy of insurance contains a condition which renders it void at its inception, and this result is known to the insurer at the time of the delivery of the policy, as the appellee, through its agents, knew of the condition in this case, it will be presumed to have intended to waive the condition and to execute a binding contract rather than to have deceived the insured into thinking that he had a contract of indemnity, when in fact he had not, and to have taken his money without consideration. The knowledge of appellee's soliciting agents of the conditions at the time of the delivery of the bond was the knowledge of the appellee. *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 149; *Athens Mut. Ins. Co. v. Ledford*, 134 Ga. 500, 68 S. E. 91.

The judgment of the court is reversed, and the case is remanded, with instructions to vacate the judgment and to render judgment in accordance with the finding of fact in favor of Fowler and against the company for \$3,002.24, with interest and costs. All the Justices concurring.

**BLACKWELL v. BLACKWELL et ux.†**  
(Supreme Court of Kansas. Jan. 11, 1913.)

*(Syllabus by the Court.)*

**1. TRUSTS (§ 1\*)—REAL PROPERTY.**

A trust in real estate implies a holding of the legal title by one for the benefit of another, who holds the equitable title.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7119-7124.]

**2. TRUSTS (§ 96\*)—IMPLIED TRUST—CREATION.**

A conveyance absolute in terms cannot be defeated by a mere verbal promise to reconvey; and when the circumstances attending such conveyance and agreement fail to show an intent by the grantor to retain the equitable title no trust arises by implication of law.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 148; Dec. Dig. § 96.\*]

**3. TROVER AND CONVERSION (§ 32\*)—PROCEEDINGS—PLEADING.**

An allegation that personal property was by a defendant converted to his own use indicates a right to recover damages for such conversion, and not a right to an accounting.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 191-202; Dec. Dig. § 32.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. LIMITATION OF ACTIONS (§ 32\*)—PROCEEDINGS—CONVERSION.**

Where the complaint alleges the conversion of personalty in 1902, the action therefor in 1910 is barred, though there is a prayer for an accounting.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 143-145; Dec. Dig. § 32.\*]

Appeal from District Court, Lyon County. Action by George Blackwell against James M. Blackwell and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Strother & Campbell and J. G. Hutchison, all of Kansas City, Mo., and W. A. Randolph, of Emporia, for appellant. Hamer & Harris, of Emporia, for appellees.

WEST, J. The petition alleged, in substance, that the plaintiff and the defendant James L. Blackwell, his brother, were, on and prior to January 28, 1895, the joint owners of a half section of land in Lyon county; that the defendants were husband and wife, with whom the plaintiff, not married, was making his home on this land, farming and cultivating the same, and using the proceeds for their support and that of the parents of the two brothers, who also lived with them; that on the date mentioned plaintiff executed and delivered to the defendants a warranty deed for his undivided half of the N. E.  $\frac{1}{4}$  of the section, and on the 20th day of April, 1897, a like deed for the N. W.  $\frac{1}{4}$ ; that on January 28, 1895, plaintiff was intending to go to South America, and desired that in case of his failure to return the defendants should have his property, and entered into a verbal agreement with them, by which he agreed, without consideration, to convey to them his interest in the N. W.  $\frac{1}{4}$ , provided they would agree to reconvey if he should at any time request it; that they so agreed, and pursuant to such agreement the deed to the N. W.  $\frac{1}{4}$  was made; that he remained with them until April 11, 1902, when he went away, and when about to leave, in order that the defendants should have his property if he should fail to return, and also in order that they might renew a mortgage shortly to fall due on the premises, he verbally agreed with them that he would convey to them his undivided half interest in the N. E.  $\frac{1}{4}$  upon their verbal promise and agreement that they would reconvey if he should so request; that at the time of this conveyance there was a mortgage on both quarters for about \$2,500, soon to become due, and it was agreed that defendants should execute a new mortgage in order to pay it off; that he went away and did not return until 1907, when he requested a reconveyance, which the defendants refused; that ever since the conveyance the defendants had been in possession of the land, receiving the rents and profits.

The second cause of action included the allegations of the first, and alleged that there was left on the premises about \$1,500 worth of personal property, the result of the joint efforts of the plaintiff and his brother, in equal shares; that defendant James M. Blackwell took possession thereof and converted it to his own use about April 11, 1902; and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 15, 1913.

that the plaintiff had never received any part thereof or proceeds therefrom.

The third cause of action adopted the allegations of the first and second causes, and alleged that afterwards the defendants executed a mortgage on the premises, amounting to \$5,922, which was a lien on the lands, leaving a balance on hand, after paying off the former incumbrance, of \$3,422, which they converted to their own use on March 7, 1910. Plaintiff prayed for an accounting and for judgment for the amount found due him, and that he be declared the owner of an undivided half of the land, and for partition. The defendants demurred to each of the three causes of action, which demurrer was sustained, and the plaintiff appeals.

He argues that the facts stated in the first cause of action show the creation of an equitable trust, which need not be in writing, under section 9694 of General Statutes of 1909; that, as there was already a joint ownership of the land and a joint obligation to support the parents, and a like obligation to take care of the mortgage, having received his conveyance, and having refused to reconvey upon his request, the presumption arises that the defendants took it with fraudulent intent and purpose, and therefore ought not to be heard to assert that the absence of a written agreement precludes the plaintiff from obtaining relief. The defendants insist that the situation comes squarely within the provision of the statute referred to, and that the plaintiff cannot be heard to claim a trust, unless he can show written evidence thereof.

As to the second cause of action, the defendants assert that the bar of the statute of limitations precludes recovery; while the plaintiff contends that by making the first cause a part of the second a personal trust was alleged, upon which a cause of action would not accrue until demand and refusal; that the action was not in tort, but on an implied contract, and having been begun within three years was in time.

As to the third, the plaintiff argues that the action was begun within two years after the alleged conversion, and that the \$3,422 is really a part of the land in controversy, and therefore depends upon his right to recover upon the first cause of action, which dependence is conceded by the defendants.

The language of the statute is: "No trust concerning lands except such as may arise by implication of law shall be created, unless in writing signed by the party creating the same, or by his attorney thereto lawfully authorized in writing." Gen. Stat. 1909, § 9694.

[1] What is a trust? "A trust has been variously defined as \* \* \* a holding of property, subject to a duty of employing it, or applying its proceeds, according to directions given by the person from whom it was derived; a right of property, real or personal, held by one party for the benefit of

another; and an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. \* \* \* In its simplest elements a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter. It implies two estates or interests, one equitable and one legal, and is said to exist where the property is conferred upon and accepted by one person on terms of holding, using, or disposing of it for the benefit of another." 39 Cyc. 17.

In *National Bank v. Ellicott, Assignee*, 31 Kan. 173, 175, 1 Pac. 593, it was said that a trust is an equitable right, title, or interest in property, real or personal; the legal title being in some other person. Express trusts in real estate are those created by direct and positive act of the parties, evidenced by some writing. *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804. Implied trusts are those which are deducible from the transactions of the parties. *Caldwell v. Matthewson*, 57 Kan. 262, 45 Pac. 614. Bouvier defines an implied trust as one deducible from the nature of the transaction as matter of intent, or which is superinduced upon the transaction by operation of law as matter of equity, independent of a particular intention. 3 Words and Phrases Jud. Def. 2611, 2612.

In *Newell v. Newell*, 14 Kan. 202, the grantee, by false and fraudulent representations, obtained the deed, which was made with the understanding that the grantee was to sell sufficient to pay grantor's debts, and then to reconvey the remainder to him; the grantor being about to enter the military service of the United States. It was held that under the facts shown the conveyance should be set aside because obtained by fraud, and for the further reason that it was without consideration, and that the defendant had lost nothing by the transaction.

It was said, in *Bartholomew v. Guthrie*, 71 Kan. 705, 710, 81 Pac. 491, that the conveyance was presumably made to facilitate some compromise of a pending suit; the understanding being that the grantee, their attorney employed to protect their interests, should institute and prosecute a certain suit and pay over to the grantors the fruits of the litigation. It was held in that case that the law would imply a trust so long as the title was held by the grantee, or any of the proceeds when it was converted.

In *Lehrling v. Lehrling*, 84 Kan. 766, at page 770, 115 Pac. 556, at page 557, the children wrote to the father, who had gone to Germany, to convey the land to them, in order that they might borrow the money necessary to make a certain settlement arising out of divorce proceedings between him and his wife, which was done. After he had returned and been in possession of the land about 15 years, it was held that he could

quiet his title, for the reason that the grantees took the legal title in trust to raise the required money for the father's use, and that such trust arose by implication from the circumstances shown. It was said: "The letter and deed, however, in connection with all the circumstances, are sufficient to show a trust by implication of law. The appellants having asked for the conveyance for the purpose stated in their letter, and their requests having been complied with, a trust might fairly be implied to hold the legal title for the purposes named."

In *De Mallagh v. De Mallagh*, 77 Cal. 128, 19 Pac. 256, an agent intrusted with a farm for sale received the proceeds of the produce thereof, and redeemed or purchased a lot belonging to his principal, and it was held that he should be deemed a trustee. *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428, is another case of a conveyance being made to an agent, whereby a trust was implied, although not expressed in writing.

In *Koefoed v. Thompson*, 73 Neb. 128, 102 N. W. 268, the parties had been partners, and had jointly purchased the land in question, each contributing one-half of the first payment, then afterwards borrowed money to complete the payment, taking a joint deed, giving two notes secured by mortgage. The defendant went into sole possession, and the plaintiff left with him a considerable amount of personal property to be sold and applied to the payment of his half of the mortgage debt, and then went on a visit. When the balance of the debt became due, he executed a quitclaim to the defendant for the sole purpose of enabling him to renew the mortgage, upon a verbal agreement that he would secure the money and redeem the land from the mortgage foreclosure for their joint benefit and account for one-half the rents and profits, and in due time reconvey to the plaintiff his half interest. It was held that this series of transactions involved not only a trusteeship, but an agency, and that the plaintiff was entitled to recover; that the betrayal of the confidence reposed by the plaintiff was sufficient to raise the presumption that the defendant intended from the first to defraud his partner out of his interest in the land, and to give rise to a constructive trust.

In *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, a husband was the owner of property on which there was a mortgage, and in order to raise money to pay it off he determined to go to Arizona and engage in business, and desired to make a will, so that the property should go to his wife; but, influenced by her wish to save the expense of probate proceedings and relying upon her parol promise that she would reconvey upon request, he made a deed to her. It was alleged that he was induced to make the deed by her promise, which was made with intent on her part to deceive, and did deceive him. It was held that he was en-

titled to a reconveyance; the court finding that the promise was made without any intention of performing it, and was thereby a species of actual fraud.

[2] The foregoing are the cases mainly relied on by the plaintiff, and, except the last one, are all instances of the conveyance of the mere legal title with no intention that the actual ownership should pass. A careful examination of the petition now under consideration shows that the plaintiff made an absolute conveyance to the defendants upon the verbal agreement to reconvey if he should so request, which, technically speaking, amounts to a conveyance upon verbal condition subsequent. While he pleads that he desired the defendants to have the property in case he should not return, still he alleges the agreement to have been that they were to reconvey if he should so request. There is no allegation that it was the intention or understanding that the property should remain his equitably, and that they should hold the mere legal title until something was done or some condition fulfilled. The relations were as confidential on one side as on the other; and while it is suggested, though not alleged, that the parents were dependent on the parties for their support, and that the refusal to reconvey indicates an original intention to defraud the plaintiff, it might with equal consistency be regarded as a decision on the part of the brother to go to another country to seek his fortune, and by turning the property over to the defendants relieve himself from further care of the parents and further responsibility for the mortgage debt. So that there is nothing in the circumstances alleged which shows any duty to reconvey, except the mere verbal promise. This, of course, is insufficient as a basis for an express trust (*Gee v. Thrallkill*, 45 Kan. 173, 25 Pac. 588), and also insufficient, in and of itself, to raise an implied trust. The *Brison* Case last cited, while giving considerable support to the plaintiff's contention, is dissimilar as to the facts. There the land originally belonged to the husband, and his intention to make a will, so that it would all go to the wife at his death, was changed by her request to make a deed and her promise to reconvey, all of which showed an intention and desire on his part to retain the real title to the property during his life. Here the land was owned jointly by the parties, and seemingly without any solicitation by the defendants plaintiff saw fit to convey his share to them, in view of his intended departure, so that the entire property should be absolutely theirs, unless and until he should at some future time return and request a reconveyance. We must hold, therefore, that the demurrer was properly sustained as to the first cause of action.

[3, 4] If, as the plaintiff alleges, the personal property was converted by the defendants in 1902, the action begun in 1910 was barred.

Had the plaintiff alleged and relied upon a continued partnership ownership of this personality and simply prayed for an accounting, a different rule might apply; but, having elected to treat his share of the personal property as converted by the defendants more than three years before the suit, it must be held to have been begun too late. The prayer at the close of the petition for an accounting may have been intended to refer only to the money raised by the renewal mortgage, but if intended to ask for an accounting as to the personal property it was inconsistent with the allegation of its conversion, which would mean an action for damages, and not one for an accounting. There is no allegation that a demand for a share of the personal property was ever made or refused, or that any promise, agreement, or demand was made concerning anything but the land. Hence making the first cause of action a part of the second did not help the situation.

The third cause of action being bound up with the first, there was no error in sustaining the demurrer to the entire petition.

The judgment is affirmed. All the Justices concurring.

#### COWLES v. SCHOOL DIST. NO. 88, SHAWNEE COUNTY.†

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—BONDS—AUTHORITY TO ISSUE—PETITION—SIGNATURE—WITHDRAWAL.

Under chapter 257, Laws of 1911, which authorizes the voting and issuance of bonds for the building of schoolhouses in cities and school districts in excess of the amount permissible under limitations in force when the act was passed, provision is made that the permission to vote an excess amount must be obtained from the board of school fund commissioners of the state through a petition of one-half of the electors of the district, asking the board of education or school district board to apply to the state board for the desired permission; and it is herein *held* that the purpose of the petition of the electors has been subverted when it has been presented to the school district board, and the prayer of the petition is granted; and it is also *held* that the electors who signed the petition asking the school district board to make the application to the state board have no right to withdraw their names from the petition after it is presented to and final action has been taken thereon by the school district board.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—EXCESS BONDS—AUTHORITY TO ISSUE—SIGNATURES—ATTACHMENT BY AGENT.

Signatures to such a petition may be legally attached by an agent of the petitioner.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

#### 3. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—SCHOOL BUILDING BONDS—ISSUANCE—EXCESS—PETITION TO SCHOOL FUND COMMISSIONERS.

In the petition and order of permission herein, the full amount of additional bonds permissible under the act of 1911, c. 257, was asked for and allowed substantially in the language of the statute; and they are *held* to be sufficiently definite as to the amount of bonds desired and to be voted upon, and also that the proceedings up to and including the vote upon the bonds were in substantial conformity with the statutory requirements.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

Appeal from District Court, Shawnee County.

Suit by H. B. Cowles against School District No. 88, Shawnee County, to restrain a bond issue. Judgment for defendant, and complainant appeals. Affirmed.

W. H. Cowles, of Topeka, for appellant.  
Stone & McDermott, of Topeka, for appellee.

JOHNSTON, C. J. This was an unsuccessful attempt to obtain an order enjoining the issuance of school district bonds. The appellant's attack on the execution and sale of the bonds proposed to be issued was based upon the claim that the initial steps had not been regularly taken. The district adjoins the city of Topeka, has a property valuation of \$447,850, and contains about 213 qualified electors. A movement to secure the building of a new schoolhouse, to cost about \$10,000, was started. Under the law (Gen. St. 1909, § 7631) the issue of bonds was limited to 1½ per cent. of the taxable property of the district, unless permission to vote a larger sum was obtained from the board of school fund commissioners of the state. By a recent act of the Legislature (Laws 1911, c. 257) that board is empowered to grant to a city or school district the authority to issue bonds for the erection of school buildings "to an amount of not more than fifty per cent. in excess of and in addition to the amount of bonds that may be voted under laws now in force." Under the general limitation of 1½ per cent. of the taxable property of the district, the appellee could issue bonds to the amount of about \$6,700. To enable the district to vote and issue the necessary amount to build a schoolhouse costing \$10,000, the electors presented a petition to the school district board on April 24, 1912. They asked that board to apply to the school fund commissioners for permission to issue bonds for the building of a new schoolhouse in "an amount not more than fifty per cent. in excess of and in addition to the amount of bonds that may be voted under the laws now in force." The petition, which contained 119 names, was received and granted by the school district board, and that board, on May 1, 1912, made a formal application to the board of school fund commissioners for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 15, 1913.

authority to issue bonds in excess of the amount provided for under the general limitation. After the petition of the electors had been granted and the application of the school district board was pending before the state board, a number of electors presented a protest against the granting of permission to issue the additional bonds, and some of those protesting had previously signed the petition to the school district board. The state board appears to have treated the petition to the school district board as if it had been addressed to the state board itself, and names were permitted to be added to and withdrawn from the petition at the request of electors. Some of those who attempted to withdraw their names from the petition at a later time asked to have them reinstated, and some who had not signed the petition originally asked to have their names added to it. At the end of the parley the state board considered the wants and necessities of the district, and subsequently made a finding that the existing conditions warranted the granting of the permission asked for; and it thereupon authorized the calling of an election for the issuance of bonds in an amount not exceeding the limitation fixed in chapter 257 of the Session Laws of 1911, under the provisions of which the order was granted. Under this order a call was issued for an election to vote bonds in the amount of \$10,000, and on June 15, 1912, the election was held, and the result was that 109 electors voted in favor of the proposition and 91 against it.

In this proceeding an attack was made upon the sufficiency of the petition to the school district board, in which that board was asked to apply to the state board for permission to issue bonds in excess of that allowed under the general limitation. First, it is claimed that it was not legally signed by the requisite number of electors. In chapter 257 of the Laws of 1911 it is provided that the petition to the school district board shall be signed by at least one-half of the electors. A petition was presented to that board which, on its face, appeared to be sufficient. It was presented and allowed without challenge of its sufficiency or opposition of any kind.

[2] There is an attack on the petition because a number of the signatures were not autographic. Some of the names attached to the petition were signed by the husband or wife or some other agent of the petitioner, and were signed in the presence of the petitioner, or by his verbal authority. The statute does not require that each petitioner shall perform the physical act of attaching his name to the petition, and in the absence of such a requirement no reason is seen why a person may not cause his name to be attached to such a petition by another. Indeed, we have a statute which contemplates that the names of persons will be signed to petitions addressed to officers, courts,

and Legislature by others, and therein it is made an offense to do so without authority from the person whose name is signed. Gen. St. 1909, § 2849. Of course, those signed without authority or ratification are without effect, but under the provision in question it is enough if the signing was done by an agent with the authority of the petitioner, and in such a way as to be his act; and it devolves on those who allege a lack of authority to prove the claim. *People ex rel. Brownell v. Assessors*, 193 N. Y. 248, 86 N. E. 466; *People ex rel. Holler, Agt., v. Board of Contract, etc., of the City of Albany*, 2 How. Prac. (N. S.) 423; *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509; *Bd. of Improvement Dist. v. Offenhauser*, 84 Ark. 257, 105 S. W. 265; *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, 93 N. W. 231; *City of Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Tibbetts v. Street Ry. Co.*, 153 Ill. 147, 38 N. E. 664; *Merritt v. City of Kewanee*, 175 Ill. 537, 51 N. E. 867; *Day v. Fairview*, 62 N. J. Law, 621, 43 Atl. 578; 28 Cyc. 977.

After final action upon the petition had been taken by the school district board, and the application was pending before the state board, an attempt was made, as we have seen, to withdraw and add names to the petition; but it was not then open for withdrawals and additions. The initiatory step is taken by the electors, and their petition is addressed to the school district board, and not to the state board. The action of the state board is invoked by the application of the school district board, and notice of the filing of that application is required. The state board does not base its finding and judgment on the petition to the school district board, but it fixes a day for a hearing; and upon the evidence then offered, under rules which it prescribes, the application is either granted or denied. The purpose of the petition is to move the school district board to make the application to the state board and that purpose had been subserved when the prayer of the petition was granted and the application made. At that time no petitioner had added or withdrawn his name from the petition; nor had any protest been made against the making of the application.

[1] In regard to the time within which a petitioner who has changed his mind may withdraw his name from a petition, there is a difference of judicial opinion. In some cases it has been held that withdrawals may only be made while a petition is in circulation, and before it has been filed or presented for action. Some hold that withdrawals may be made until the petition has been filed and jurisdiction has attached, but that withdrawals will not be allowed which would defeat jurisdiction. A greater number of the authorities apply a more liberal rule, which permits a petitioner to withdraw his name at any time before final action is taken upon

the petition by the officer, board, or tribunal to which it is presented. In a number of the cases the right of withdrawal is regulated by statutory enactment; and consequently there are cases which fix the termination of that right at a point intervening between the presentation of the petition and final action thereon. *Grinnell v. Adams*, 34 Ohio St. 44; *Selbert v. Lovell*, 92 Iowa, 507, 61 N. W. 197; *Orcutt v. Reingardt*, 46 N. J. Law, 337; *Bordwell v. Dills*, 70 Ark. 175, 66 S. W. 646; *State ex rel. Hawley v. Board of Sup'rs of Polk County and Another*, 88 Wis. 355, 60 N. W. 266; *Noble v. Vincennes*, 42 Ind. 125; *Webster v. Bridgewater*, 63 N. H. 296; *Littell v. Board of Supervisors of Vermillion Co.*, 198 Ill. 205, 65 N. E. 78; *Snedeker v. Matter Drainage District*, 124 Ill. App. 380. In case note to *Sim v. Rosholt* (16 N. D. 77, 112 N. W. 50), 11 L. R. A. (N. S.) 372, a great number of authorities on the subject are collected.

In *State ex rel. v. Eggleston*, 34 Kan. 714, 10 Pac. 8, a question of the right to withdraw names from a petition for the removal of a county seat was considered; and it was said to be the duty of the board of county commissioners to strike from the petition the names of all signers who asked for such withdrawal before final action was taken on the petition. This view accords with most of the authorities. Following that rule, it is clear that the right of a petitioner to withdraw his name could not be exercised after the school district board, to which the petition was presented, had taken final action thereon. It is unnecessary, therefore, to consider the regularity of the changes that were made while the matter was pending before the state board. It may be said, however, that after the changes had all been made by withdrawal, addition, and reinstatement of names during the pendency of the application before the state board it still contained the names of more than one-half of the electors of the district.

[3] There is a contention, too, that the petition was defective, because it did not ask the school district board to apply for permission to issue a definite amount of bonds, and also that the permission itself, which was granted by the state board, did not state a definite amount. As we have seen, the petitioners used the statutory language, and asked for the additional 50 per cent. authorized by the act of 1911. It is said that in asking for an excess of the amount "that may be voted for by the laws now in force" they, in effect, asked for an issue of \$15,000; that is, 50 per cent. in excess of the amounts authorized under both the general and the exceptional limitations. It is reasonably clear from the use of the language of the act of 1911 they intended that the application should be made for 50 per cent. more than could be voted under the general limitation

which was in force when the later statute was enacted. The natural interpretation of the petition, as well as the order of the state board, was that the request for the permission, as well as the permission itself, fixed the maximum amount authorized by the act of 1911. Without that act only \$6,700 could have been voted by the appellee, but under its provisions and the permission of the state board authority was given to increase the issue by adding to the \$6,700 derivable from the 1½ per cent. of the taxable valuation 50 per cent. of that sum, which is substantially \$3,300; and the two together constituted the amount which the district determined, at its annual meeting, should be expended on the new schoolhouse. That was the view taken by the school district board in making its application to the state board, when \$10,000 was named as the amount of the proposed issue of bonds, and in the same document that sum was designated as the cost of the proposed new building. In the contest before the state board both the advocates and opponents of the additional issue of bonds proceeded on the theory that the total amount of the proposed issue was \$10,000. In the petition for an election to vote the bonds, as well as in the notice of that election, the amount of the proposed issue was specified as \$10,000. We think the petition, order of permission, notice and call of election, all indicated with reasonable certainty the amount of bonds to be voted for and used in the building of the new schoolhouse. There was no necessity for two elections, one under the general limitation and the other on the issuance of the additional amount. The statute evidently contemplates that after permission to vote the added amount has been obtained the proposition to be submitted is whether the whole amount authorized under both limitations shall be issued.

There are some other criticisms of the proceedings, but in all the preliminary steps there appears to have been a substantial compliance with the statutory requirements; and therefore the judgment of the district court will be affirmed. All the Justices concurring.

**E. W. SMITH LUMBER CO. v. ARNOLD et al.**

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

**1. MECHANICS' LIENS (§ 18\*)—RIGHT TO LIEN—TITLE TO PROPERTY.**

A purchaser of vacant lots under an oral contract by which he agreed to pay part of the purchase price in cash, the balance when deed was delivered, with the understanding that he was to erect houses on the lots, took possession before making the cash payment, and contracted for labor and material which were used in erecting the houses. *Held*, that he acquired

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the equitable title and that a lien for the labor and material attached thereto.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 19; Dec. Dig. § 18.\*]

2. ESTOPPEL (§ 93\*)—EQUITABLE ESTOPPEL—GROUNDS.

In such case, under the facts shown in the evidence and stated in the opinion, it is held that the vendor is estopped by his conduct to claim, as against persons contracting with the purchaser for labor and material used in erecting the houses, that the cash payment was a condition precedent to the vesting of the equitable title.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 264-275; Dec. Dig. § 93.\*]

Appeal from District Court, Sedgwick County.

Action by the E. W. Smith Lumber Company against F. J. Arnold and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Dale & Amidon, B. F. Hegler and Jean Madalene, all of Wichita, for appellant. H. G. Ruggles, of Wichita, for appellees.

PORTER, J. Action to foreclose a mechanic's lien. The defendant F. J. Arnold is the owner of two residence lots in the city of Wichita which he authorized a real estate agent to sell for him. They were vacant lots, and the price at which they were listed was \$250. The agent showed the property to D. F. Sutton, a building contractor, who made an offer to take them and to pay \$100 in cash and the balance in 40 days. He told the agent that he wanted the lots to build houses on; that he wanted to build right away. The agent saw the owner and informed him of the offer. The owner said it was all right and the agent told Sutton that the arrangement was satisfactory. There was no contract in writing. Sutton at once began the erection of two houses on the property and contracted with the plaintiff lumber company for the material. He saw the agent several times within the next month and asked for an abstract of title which the owner had agreed to furnish. The agent went to see the owner about the abstract and was told that Sutton could have no abstract until he made the cash payment. On the same day the owner and the agent went to the property and saw the houses which were in process of building. Sutton was then informed by the agent that the owner would not furnish an abstract until a payment was made. No express authority was given by the agent to Sutton to take possession of the lots, nor was any demand made for the cash payment until the owner was told that the abstract was asked for. Up to this point there is no dispute as to the facts. Arnold testified that he had no knowledge that the houses were being built until he went to the property with the agent four weeks after accepting the oral offer. A witness for plaintiff testified that he put in the founda-

tion for both houses; that while at work on the second foundation he saw Arnold at the property "looking around"; that some time before the lien of the lumber company was filed he went to Arnold to see about getting pay for his labor and material; that Arnold said he had been at a good deal of expense and trouble and wanted to know how much witness would settle for; that after some conversation Arnold offered him 75 per cent. of his bill, which he accepted, and Arnold paid him; that he had made an offer to Arnold to pay him all expenses and the purchase price of the lots and take up Sutton's contract. This offer, it appears, was not accepted. The attorney of appellant testified that he went to Arnold and asked him to pay the account of the lumber company for the material it had furnished, and that Arnold said he had no fault to find with the lumber company except that their bill was too high, and that he had fooled around with Sutton long enough, that Sutton had never paid a cent, and that he was going to start suit to put Sutton off the property. The bookkeeper of the lumber company testified that before the lien was filed Arnold came to the office of the company and said the bill was too high. Mr. Stanley, a lawyer, testified that he went to Arnold when the houses were nearly completed and told him that Sutton had made arrangements to raise the money and pay for the lots and inquired how much cash he wanted; that Arnold said he would take \$50 down; that the witness then went and got a check for that amount which he offered to Arnold and asked for the abstract; and that Arnold said he would see about it. Witness saw him again about the matter, and Arnold said that he had decided not to furnish an abstract, that the houses were built on the lots, and he could hold them and would do so.

[2] There was evidence of another offer made to Arnold by a man named Adams, who claimed to have a contract with Sutton for the purchase of the houses, and who testified that he went with Sutton to Arnold after the houses were nearly finished and made an offer to take up Sutton's contract and pay the purchase money, and that the offer was refused. Soon afterwards Arnold brought an action in ejectment against Sutton and procured a restraining order enjoining the defendants in the action from removing the houses from the property. On March 14, 1910, judgment for possession was rendered in his favor, and a permanent injunction was granted restraining Sutton and all persons claiming through or under him from removing the houses or any part thereof from the premises. On the trial of this action to foreclose the lien of the lumber company the court sustained a demurrer to plaintiff's evidence. The question for determination is whether Sutton obtained such an interest in



or title to the property as will support a lien for the material furnished under a contract made with him by the lumber company. A mechanic's lien can attach to an equitable estate or interest in lands.

"Taking the whole of the law together, and it undoubtedly means that a mechanic's lien shall operate upon the whole of the estate which the persons procuring the labor and materials may have in and to the property for which he procures the same, whatever may be the character of that estate, but that such lien cannot operate upon anything more than such estate, and that, so far as it does operate, it is the paramount lien upon the enhanced value given to such estate by the labor and materials." *Seitz v. U. P. Railway Co.*, 16 Kan. 133, 140.

In *Drug Co. v. Brown*, 46 Kan. 543, 26 Pac. 1019, it was held that one in possession of real estate under a verbal agreement for a conveyance to him becomes the equitable owner within the meaning of the mechanic's lien statute and that the lien of the materialman attached to such interest. If the interest owned by the person who makes the contract is less than a fee-simple estate, the lien is upon the lesser estate. *Hathaway v. Davis & Rankin*, 32 Kan. 693, 696, 5 Pac. 29; *Choteau et al. v. Thompson & Campbell*, 2 Ohio St. 114.

"It is generally held that a party in possession under a contract of purchase, and who is to be invested with full title upon compliance with certain conditions, is regarded as an owner under the mechanic's lien laws." *Phillips on Mechanics' Liens*, § 69; *Lumber Co. v. Osborn*, 40 Kan. 168, 172, 19 Pac. 656.

An equitable title is sufficient. *Mortgage Trust Co. v. Sutton*, 46 Kan. 166, 26 Pac. 406. The facts in the present case distinguish it from the cases of *Huff v. Jolly*, 41 Kan. 537, 21 Pac. 646, and *Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592, where it was held that no lien was acquired by materialmen because possession of the real estate was taken under the conditional agreements which were never performed, and therefore no interest or title passed to which a lien could attach. In *Huff v. Jolly*, the agent had authority to negotiate for a sale at a stipulated price, part cash and balance on time, and the contract was not to be effective until the payment was made and the contract approved. The proposed purchasers knew of these terms and agreed to take the lot. They never made any payment, and no written contract was entered into; but they erected a building on the premises. It was held that they had no interest or estate in the property and could create no lien on the lot or building for labor and material furnished. In the *Schweiter* Case the contract was in writing, and, while the purchaser was to take possession and erect a building, it was expressly stipulated that the conveyance should not be made until the house was

inclosed, and that then the purchaser should mortgage the property for a specified amount, that until the deed and mortgages were made the legal and equitable title should remain in the grantor, and until that time the grantee should not create any lien upon the property for labor or material. The material furnished by the plaintiff was purchased before the execution of the deed and mortgage. It was said in the opinion (45 Kan. 207, 211, 25 Pac. 592, 593): "The only claim which Jones (the purchaser) had upon the land was derived from his contract with the owner, and any one who relies on the contract to establish ownership in Jones must be governed by the limitations and conditions therein named."

In *People's Savings, Loan & Building Association v. Spears et al.*, 115 Ind. 297, 301, 17 N. E. 570, 572, it was held that "something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property."

The position Arnold takes in respect of the payments made to other materialmen is that those payments were made long after plaintiff had contracted with Sutton to furnish material; therefore it is said no estoppel arises to benefit plaintiff. It is argued that he wanted no houses erected, that all he desired was to sell the lots, further that he had no assurance that all the material included in the lien statement was ever used in the construction of the houses, and he claims, moreover, that they were poorly constructed.

The plaintiff relies upon the fact that the lots were purchased under an offer to the agent in which it was expressly stated that Sutton wanted them to build houses on at once, that they were begun at once, and no objection to their being built was made until more than a month afterwards; and our attention is directed to the evidence showing that, when the defendant was informed by the agent that Sutton was asking for the abstract, he placed his refusal solely upon the ground that no cash payment had been made, and he made no claim or assertion to the effect that Sutton was not rightfully in possession, that in fact he permitted the plaintiff to continue to furnish material for the houses for several weeks after he was fully informed that they were being constructed. We think that Sutton, under his verbal contract, accompanied by possession and the making of valuable improvements, acquired the equitable title, and that he might have maintained a suit for specific performance upon a tender of the purchase money, or have set up the same claim by a cross-petition in the ejectment action. *Everett v. Dille*, 39 Kan. 73, 17 Pac. 661; *Drug Co. v. Brown*, 46 Kan. 543, 26 Pac. 1019. The possession appears to have had the essential qualifications of being open, notorious, exclusive, and in pursuance of the contract. *Baldwin v. Squier*, 31 Kan. 283, 1

Pac. 501; Baldwin v. Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957.

[1] It is true, as suggested, that a lien for labor or materials can only attach by virtue of the statute as applied to the facts, and that no lien of this kind can be created by force of equitable rules. At the same time courts are established for the purpose of doing justice, and not to assist a party to obtain an unconscionable advantage; and in a case like this slight circumstances might be considered sufficient evidence that the holder of the legal title acquiesced in the purchaser taking possession of the lots and in contracting for the material. If he permitted the purchaser to take possession under the oral contract and to make the improvements, he ought to be estopped to deny that the purchaser obtained the equitable title. By obtaining a judgment in ejectment and an injunction forbidding the purchaser and those claiming under him from removing the houses or any part thereof, the defendant foreclosed whatever equitable rights the purchaser had acquired and the equitable merged in the legal title. At the time of the merger the plaintiff's lien had attached to the equitable title. The payment of the \$100 was not made a condition precedent to the passing of the equitable title, as in Huff v. Jolly and in the Schweiter Case, supra. It was in the power of the defendant as vendor to make the cash payment, such a condition at any time before the rights of third persons intervened; but it was too late for him to fall back upon that provision of the contract after having permitted possession to be taken under the oral agreement and the improvements to be made which enhanced the value of the property.

Applying these principles to the facts, we hold that plaintiff is entitled to a lien upon the equitable title acquired by Sutton, and that the decree should provide for a sale of the property, giving to the defendant the first lien upon the proceeds for the purchase money and interest and the plaintiff a second lien thereon.

The judgment will be reversed, and the cause remanded, with directions to overrule the demurrer to the evidence. All the Justices concurring.

# STEWART v. HENNINGSEN PRODUCE CO.†

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

## 1. SALES (§ 214\*)—CONTRACT—CONSTRUCTION—VESTING OF TITLE.

The prima facie rule of construction of a contract for the sale of goods not in existence, but to be produced by the seller, is that the parties intended that the property vested in the buyer and the right to the price in the seller as soon as the contract came to relate to specific ascertained goods; and the inquiry in such a

case must always be whether there is any sufficient indication of a contrary intention.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 571-573; Dec. Dig. § 214.\*]

## 2. SALES (§ 201\*)—SUBJECT OF CONTRACT—RISK OF LOSS—ATTACHMENT.

Where the goods contracted for are an entire quantity and there is nothing in the circumstances of the case to indicate a contrary intention, the risk of loss attaches to the quantity of goods only when completed and ready for delivery, and not to each separate installment as completed and ready for delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. § 201.\*]

## 3. SALES (§ 200\*)—CONTRACT—CONSTRUCTION—RISK OF LOSS.

Plaintiff agreed to sell, and defendant to take, at specified prices, 10,000 pounds each of "whites" and "yolks" of eggs. The product known as "egg meats" was to be put up by plaintiff in 50-pound cans from No. 1 "candled" eggs; the cans as filled to be placed in cold storage and delivered "f. o. b." plaintiff's station as ordered out by defendant. The contract was entered into in April, and the plaintiff was to pay all charges up to January 1st for "storage, insurance and interest." The quantity bargained for was not completed and stored until October 12th. The whites were all shipped on defendant's order, received in good condition, and paid for. The yolks were ordered out in the following March and were found to be rotten and unfit for consumption. In an action for the price of the yolks, it is held that the contract was entire and indivisible; that the property passed October 12th, when nothing remained to be done by plaintiff to put the goods in a deliverable state; and that any loss occurring after that time was the defendant's.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524-528; Dec. Dig. § 200.\*]

## 4. SALES (§ 199\*)—CONTRACT—CONSTRUCTION—DUTY TO INSURE.

While a provision that either party shall insure the goods contracted for is some evidence that the risk of loss was assumed by him, it is not controlling either in the determination of that question nor the question when the title to the property passes. In this case it is held that the stipulation that the seller should pay the cost of insurance up to January 1st, although made at the buyer's instance, was intended to be for his benefit only from the time the property passed and he acquired an insurable interest, and that the stipulation does not indicate that until January 1st the seller should retain the title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516-523; Dec. Dig. § 199.\*]

## 5. EVIDENCE (§ 542\*)—EXPERTS—EXPERIENCE.

A person who has had nine years' experience as manager of a cold storage plant, and who has had occasion to observe the condition of frozen products kept in storage, is qualified to state his opinion whether a product such as egg meats, having been once solidly frozen, will thaw in a temperature lower than the freezing point.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2355; Dec. Dig. § 542.\*]

## 6. TRIAL (§ 356\*)—SPECIAL VERDICT—EQUIVOCAL ANSWERS.

Where the jury return evasive and equivocal answers to special questions, the court should, on motion of the party submitting the questions, require the jury to make answers definite and unequivocal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849-854; Dec. Dig. § 356.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.

Appeal from District Court, Cloud County.

Action by John Stewart against the Henningsen Produce Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Plaintiff and defendant entered into a contract, through letters and telegrams, whereby defendant agreed to purchase from plaintiff 10,000 pounds each of whites and yolks of eggs. Pursuant to this contract, plaintiff put up 10,995 pounds of whites and 9,576 pounds of yolks. All of the whites were shipped to defendant and paid for. Fifty cans of the yolks were also shipped, but defendant refused to pay for them, or for those remaining on hand, claiming they were rotten and unfit for use. This action was brought to recover the contract price of the yolks. The jury returned a verdict for plaintiff. From the judgment the defendant appeals.

The contract was made in April, 1909. The plaintiff commenced the separating, canning, and storing of the eggs in May, and continued until October 12, 1909, at which time he had put up the quantities above mentioned. The product thus manufactured is known to the trade as "egg meats." It is prepared by separating, by hand, the whites from the yolks of eggs, placing the whites in one can and the yolks in another, and freezing the contents. After each day's work in separating, the egg meats were taken in cans to the plant of the Concordia Ice & Cold Storage Company.

The first shipment was made by plaintiff on October 2, 1909, upon request of the defendant, to the Schallinger Produce Company at Spokane, Wash., and consisted of 60 cans of whites. This shipment reached its destination in good condition, and the contents of the cans were fresh and marketable. The second shipment was made to the same concern on November 17, 1909, and consisted of 60 cans, all intended to be whites. One of the cans, however, proved to be one containing yolks, and the contents of that can were rotten and unfit for use. The whites were in good condition. The third shipment consisted of 102 cans, supposedly whites, but among which was found one can of yolks. The whites were in good condition, but the can of yolks was rotten. These shipments disposed of all the whites. Early in March, 1910, at the request of defendant, three cans of the yolks were shipped to a commission firm in Chicago. One can proved to be in fair condition, and two were rotten. On March 16, 1910, 50 cans of yolks were shipped to the Schallinger Produce Company, at Spokane. Forty-six of these cans, being rotten and putrid, were condemned by the State Dairy Food Department, and by order of court were hauled to a crematory and destroyed. The remainder of the yolks was not shipped, and was in the possession of the cold storage company at Concordia when this

action was tried in April, 1911. All of the shipments reached their destination in a solidly frozen condition. Plaintiff drew upon defendant for the price of each shipment when it went forward. On March 1, 1910 for the first time, he invoiced the remaining yolks on hand to defendant, and rendered a statement of the balance claimed to be due. He paid the storage charges to January 1, 1910, and paid the insurance premiums; the insurance being carried in his name.

Pulsifer & Hunt, of Concordia, for appellant. F. W. Sturges, Sr., of Concordia, and T. F. Garver and E. D. Garver, both of Topeka, for appellee.

PORTER, J. (after stating the facts as above). The letters and telegrams comprising the contract show a proposal by the plaintiff to "contract any quantity you (defendant) may need, all this stock to be put up out of No. 1 candled eggs." The acceptance was shown by a letter and telegram to the effect that the defendant would take 10,000 pounds of each product at the prices named "f. o. b. your station, all charges paid up to January 1st, namely, storage, insurance and interest." Plaintiff was to place the product in cold storage with the Concordia Ice & Cold Storage Company, and, as defendant ordered shipments made, plaintiff was to load the same on board cars free of charge at that station. The answer alleged that the product was to be and remain the property of plaintiff until January 1, 1910, unless sooner taken out of cold storage and settled for by the defendant; and further alleged that the product was not put up from No. 1 candled eggs and was not in first-class condition when put into storage, but that the same was rotten and of no value. In substance the findings are that the product spoiled while in the cold storage plant; that in each instance when loaded into cars at Concordia it was in a frozen condition; that it was placed in cars properly iced; and that it arrived at destination in a frozen condition. There is a finding that while in cold storage the egg meats spoiled and became rotten by the variation of the temperature of the room where they were kept, and that the temperature at some time exceeded 15 degrees above zero.

The principal contention is that under the contract the title to the product did not pass to defendant until January 1, 1910, or at least until October 12th, when the stipulated amount had been prepared and stored by plaintiff. The trial court instructed that any loss that occurred after delivery to the cold storage company was the defendant's loss. The court gave the proper construction to the terms of the contract if the title to each can of the product passed to defendant at the moment it was delivered at the cold storage plant. On the other hand, if, as contended,

the title to none of the product passed until January 1, ———, or if the title to no portion of it passed until the whole amount contracted for had been produced and stored, the court erred in the interpretation of its terms.

The whole controversy turns upon the intention of the parties. That always controls. *Bailey v. Long*, 24 Kan. 90; *Shepard v. Lynch*, 26 Kan. 377, 382; *Howell v. Pugh*, 27 Kan. 702; *Kingman v. Holmquist*, 36 Kan. 735, 14 Pac. 168, 59 Am. St. Rep. 604; *Barber v. Thomas*, 66 Kan. 463, 71 Pac. 845; *Clarkson v. Stevens*, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139, 35 Cyc. 300. When the intent must be arrived at from conflicting evidence, it is a question for the jury. When it turns upon the construction of a writing, it is a question of law for the court. *Caywood & Co. v. Timmons*, 31 Kan. 394, 2 Pac. 566; *Bailey v. Long*, supra.

[1] Here the intent of the parties was for the court to determine from the correspondence comprising the contract viewed in the circumstances and situation of the parties. The universal rule is that "a contract for the sale of an article not in existence, but to be manufactured, is an executory contract, under which no property in the article will pass during the progress of the work nor until the article is completed and ready for delivery, unless a contrary intention clearly appears." 35 Cyc. 299. And it is a general rule in sales of goods that the title passes to the buyer when the selection, separation, and appropriation is complete and nothing remains to be done to complete the contract. Separation and appropriation are not always necessary. *Kingman v. Holmquist*, supra. It is competent for the parties to agree that the property in the goods shall pass to the vendee notwithstanding something remains for the vendor to perform before actual delivery. In *Bailey v. Long*, supra, the contract was for the sale of a certain number of bushels of corn to be gathered out of the field, and it was held that title remained in the vendor until the corn was gathered; but in the opinion the court recognized the rule that the intent controls, and that the parties might have contracted for a passing of the title at once, notwithstanding there remained certain things to be done by the vendor.

The question in the present case is not free from difficulty. The intention of the parties must be gathered from the language of the contract viewed in the light thrown upon it by the situation of the parties and the circumstances shown by the evidence. The Supreme Court of the United States, in the *Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863, reviewed the English cases and approved Lord Blackburn's two rules (*Blackburn on Sales* [2d Ed.] 235, Canadian Ed. p. 184), and the third rule laid down by Benjamin (restated in *Benjamin on Sales* [5th

Ed.] 319). These rules, which have been substantially adopted by the English Sales Act (section 18), are as follows: First. "When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." Second. "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted." Third. "Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." 22 Wall. page 188, 22 L. Ed. 863.

[2] The Supreme Court of the United States applied these rules to a contract for a sale of certain crops of cotton "numbering about 2,100 bales" to be delivered at a certain landing and to be paid for when weighed, the buyer to furnish bagging, rope, and twine necessary to bale the cotton unginmed, the cotton to be from the date of the contract "at the risk" of the buyer. At the time of the making of the contract the cotton baled was stored under cover. About 20 bales (not baled) were in a ginhouse 10 miles from the landing. The buyer at once employed and paid a person to watch and care for the cotton, who performed his duties until the cotton was seized by the United States authorities. Notwithstanding the provision that the cotton should be at the buyer's risk from the time the contract was entered into, the court held that the contract was executory only, and that no title passed to the buyer. In the opinion the court referred to the fact that some of the American courts have refused to follow the English courts in respect of the requirements of the second rule supra, and hold that specification of the goods is sufficient to pass the property, though the obligation still rests upon the seller to ascertain the exact price by weighing before delivery. *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498, where sale of a specific grain consisting of part of a larger bulk was held to pass the title without actual separation or delivery. And this court, in *Howell v. Pugh*, 27 Kan. 702, held that a sale of a crop of wheat in stacks undivided, and of

other crops growing in the field undivided, passes the title to the buyer, where such was the intention of the parties. Again, in *Kingman v. Holmquist*, 86 Kan. 735, 14 Pac. 168, 59 Am. St. Rep. 604, the contract was for the sale of 25,000 hedge plants tied up in bundles each containing 250 plants. The sale was out of an ascertained lot of 82,000. It was held that a selection and a separation were unnecessary, and that the property passed to the buyer. In the opinion, referring to the rule laid down by Benjamin in his treatise on Sales, it was said that "the weight of recent American authority sustains the proposition that, where property is sold to be taken out of a specific mass of uniform quality, the title will pass at once upon the making of the contract, if that appears to be the intention of the parties." The case is cited by the editor of the A. & E. Encycl. of L. with others from New York, New Jersey, Minnesota, Iowa, and Florida, holding that, where the sale is of a certain quantity of goods which constitutes a portion of a designated and uniform mass, the title will pass without a separation or appropriation; but the editor declares that "this view is supported neither by principle nor the weight of authority." 24 A. & E. Encycl. of L. 1055. In the opinion in the *Elgee Cotton Cases*, supra, the court declined to rest the decision merely on the ground that the cotton was not weighed or delivered, and expressly held that it was unnecessary to decide that question. The ground of the decision that no title to the cotton passed to the buyer was that when the loss occurred all the property contracted for was not in a deliverable state. In the opinion it was said that the buyer "was not bound to receive any unless the whole was ginned, baled, and bagged. The contract was entire." 22 Wall. page 189, 22 L. Ed. 863.

The defendant urges that the stipulation for insurance of the egg meats by the plaintiff at the latter's expense warrants the inference that until January 1st the title to the goods was in the seller. The inference to be drawn from the assumption by one of the parties of the risk of loss before delivery of the goods has frequently been considered by the courts. In *Martineau v. Kitching*, L. R. 7 Q. B. 436, the contract provided that the goods were to be "at the seller's risk for two months." The goods had been paid for in advance of being weighed, the amount to be adjusted and settled when the goods came to be weighed on delivery; and the purchaser had taken part of them. The residue was destroyed by fire after the lapse of two months and before being weighed. Cockburn, C. J., held that the property passed to the buyer because the goods were specific, and the intention clearly was that the property should not depend upon the weighing. The fact that the contract expressly provided that the goods should be at the seller's risk for two months was held to raise the presumption

that the property should be in the buyer, as otherwise such a provision would be unnecessary. Commenting upon that case, the editor of Benjamin on Sales (5th Ed.) 504, uses this language: "It is a fair inference from the judgment of Cockburn, C. J., that where the risk is assumed by a party who is at the time of the contract the owner of the goods, as a seller who had agreed to sell, this fact is evidence that it is not intended that he shall remain the owner; that the property is intended to pass. Otherwise such a provision would be unnecessary as the risk *prima facie* attaches to the ownership." Page 504.

And in the *Elgee Cotton Cases*, supra, the United States Supreme Court expressly approved the reasoning of Cockburn, C. J., in *Martineau v. Kitching*, and, as we have seen, applied it to the case of a buyer who assumed all risk, and from this fact the court drew the inference that it was the intention that the property should not pass to him. In the opinion it was said: "It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another. But it needs no agreement that the buyer shall take the risk, if it is intended the ownership shall pass to him. Hence the stipulation that the cotton should be at the risk of Lobdell after the date of the contract, instead of showing an intention of the parties that the right of property should pass to him, seems rather to indicate a purpose that the ownership should remain unchanged. Else why introduce a provision totally unnecessary?" 22 Wall. page 194, 22 L. Ed. 863. With respect of insurance there seems to be much diversity of opinion, although it is difficult to discover any ground for a different inference than would arise from an assumption of the risk of loss. It is said in Benjamin on Sales (5th Ed.) 404, that "the fact that one party or the other is to insure the goods is material to the determination of the question on whom the risk is to fall." Page 404.

The leading English case is *Anderson v. Morice*, 1 App. Cas. 713, Ex. Ch. L. R. 10, C. P. 609. Much of the reasoning is applicable here because the effect of insurance was considered and the contract was for the sale of an undivided quantity of goods. The plaintiff sued to recover the value of a cargo of rice which he had bought and insured with the defendant. The memorandum was: "Bought the cargo of Rangoon rice per Sunbeam, at 9 s. 1½ d. per cwt. cost and freight. Payment by seller's draft on purchaser at six months' sight, with documents attached." The Sunbeam had taken on board 8,878 bags of rice, the remaining 400 bags which would have completed the cargo being on lighters alongside

when she sank, and the portion of the cargo on board was lost. A fair illustration of the difficulty which courts experience in determining the ownership of goods sold under contracts similar to the one in the case at bar is illustrated by the diversity of opinion which arose over the facts in the cited case. The House of Lords was evenly divided, and the decision in the Exchequer Chamber was affirmed, and it was held, reversing the unanimous opinion of the Common Pleas: (1) That as plaintiff had contracted to buy a complete cargo, the property did not pass till the cargo was completed so that shipping documents could be made out; this being one of the things to be done by the seller to put the goods in a deliverable state. (2) That apart from the question of the title to the property, plaintiff had no insurable interest in the part loaded because he had only assumed the risk of that which he had contracted to buy, which was the complete cargo. The reasoning of Blackburn, J., in the judgment of the majority in the Exchequer Chamber, is authority against the holding of the trial court in the present case that the property in each can of product passed to the buyer at the time it was placed in the cold storage plant. Having stated that it was conceded that, if the rice on board the lighter had perished before it was put on board the Sunbeam, the buyer would have sustained no loss; and that it was at least the plain intention of the parties that the buyer would have been bound to pay for the cargo, even though it was lost by reason of subsequent disaster either in port or on the way home, provided the lading was complete and the shipping document either prepared, or, if matters were in a situation where they could be prepared, the opinion proceeds: "But there remains the disputed question whether each separate bag was at the risk of Anderson from the time it was put on board the Sunbeam, or whether it remained at the risk of the sellers until the whole intended loading was complete, and the shipping documents were ready, or at least everything was done to enable them to make out the shipping documents. This we think depends entirely on the intention of the parties to the contract, as appearing from it. There is nothing to prevent the parties from agreeing that, as the goods are shipped bag by bag, each bag shall be at the risk of Anderson, though the payment be postponed till the whole is on board; and, if they have sufficiently expressed such an intention, then *Castla v. Playford*, L. R. 5 Ex. 165, L. R. 7 Ex. 98, is an express authority in this court that Anderson must bear the loss, though it occurred before the stipulated time for payment arrived. In that case, the words of the contract were express. \* \* \*

On the other hand, *Appleby v. Myers*, L. R. 2 C. P. 651, is an express authority that, if from the contract it appears that the inten-

tion of the parties is that the payment is to be only on the completion, nothing can be recovered, though that completion is prevented by an accident for which neither party is to blame. Both decisions are binding on us, even if we disapproved of them, but we agree with them." Page 406.

Because of the rule that, when anything remains to be done by the seller to put the goods into a deliverable state, the property does not pass, it was held to be the intention that the risk should become the risk of the buyer when and not till the whole lading was complete, and that there was nothing in the contract to rebut this *prima facie* rule of construction or to show a different intention. It should be observed that the question the court had before it was not, strictly speaking, in whom did the property vest, but, upon whom was the risk? However, the reasoning upon which the judgment was placed is precisely the same.

[3] On principle, and on what we regard as the weight of authority, we think that the property in the egg meats passed when the plaintiff had completed the entire amount of the product contracted for and had placed the same in the cold storage plant. Until then he had not done the things that the contract required of him to put the goods into a deliverable state; and the defendant was not liable for its price and had no property in any part of it that might be in storage, except a contingent interest provided all was completed as contracted for in amount and quality. Otherwise, if the property to each can of product passed to the buyer at the time it was placed in storage, the buyer would be bound to accept and pay for one can, or ten cans, or any number stored, notwithstanding the failure to furnish the residue. The contract as in the *Elgee Cotton Cases*, *supra*, was entire. It seems to be conceded that October 12, 1909, was the time when the entire amount or substantially the amount named in the contract was completed and stored. It is true that one shipment was ordered out on October 2d, and was received and paid for by the defendant. The property in this shipment, of course, passed when the plaintiff delivered it to the common carrier; but the property in the residue must be held to have passed on October 12th, when nothing remained to be done by the seller except to place on board cars as ordered.

A recent case in point upon the entirety of the contract is *Walt v. Gaba*, 160 Cal. 324, 116 Pac. 963. There the agreement was for the sale of clipped and unclipped wool, the spring wool of 1906 at 18 cents per pound; the fall wool of 1906 at 14 cents. The fall wool, being stored, it was to be delivered at a railway station with the spring wool when that was clipped. A deposit of \$250 was made on the sale. The stored wool was destroyed by fire before the spring wool was clipped from the backs of the sheep. The question was which party sustained the loss. The court

held the contract to be entire and that no title to any part of the wool passed.

For additional authorities holding that a contract of this nature is entire and indivisible, that each party has the right to insist upon full performance, and that the contract remains executory until the quantity or amount bargained for has been ascertained and is in condition for delivery, unless the contract shows a contrary intent, see *Pope et al. v. Porter et al.*, 102 N. Y. 866, 7 N. E. 304; *Thompson & Petty v. Conover*, 30 N. J. Law, 329; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; *Johnson v. Hibbard*, 29 Or. 184, 44 Pac. 287, 54 Am. St. Rep. 787; *Sempel v. Northern Hardwood Lumber Co.*, 142 Iowa, 586, 121 N. W. 23; *Hendricks v. Mocksville Furniture Co.*, 156 N. C. 569, 72 S. E. 592; *Slade v. Lee*, 94 Mich. 127, 53 N. W. 929; *Haynes v. Quay*, 134 Mich. 229, 95 N. W. 1082; *Gibbons v. Robinson*, 63 Mich. 146, 29 N. W. 533; *Meechem on Sales*, §§ 753, 757; Dec. Dig. §§ 200, 201; 35 Cyc. 299; 24 A. & E. Encycl. of L. 1063.

The contract in this case was for the sale of something not in existence, but which the seller was to manufacture, and we find nothing in the terms of the contract nor in the circumstances or situation of the parties to indicate an intention contrary to that which is presumed from the general rule governing the sale of an article or quantity of articles to be manufactured or produced which is that the property will not pass during the progress of the work or until the specified amount of the produce contracted for has been produced and is in a condition where it can be delivered according to the contract. The parties are at liberty to contract with a different intent. "We do not deny that a person may buy chattels in an unfinished condition and acquire the right of property in them, though possession be retained by the vendor, in order that he may fit them for delivery. But in such a case the intention to pass the ownership by the contract cannot be left in doubt. The presumption is against such an intention." *Strong, J.*, in the *Elgee Cotton Cases*, 22 Wall. 180, 193 (22 L. Ed. 863).

The contention that no property in the goods passed until January 1, 1910, or what amounts in this case to the same thing, that the risk of loss by deterioration prior to that time was intended to be assumed by the plaintiff, cannot be sustained. The prima facie rule of construction is that the parties intended that the property in the egg meats vested in the buyer and the right to the price in the seller, in the language of *Blackburn, J.*, in *Calcutta Company v. De Mattos*, 82 L. J. Q. B. 322, "as soon as it (the contract) came to relate to specific ascertained goods"—that is, on the completion of the quantity of product contracted for and its storage in a deliverable state subject to the orders of the buyer—and the inquiry in such a case always

"must be whether there is any sufficient indication of a contrary intention." We approve the principles stated in *Benjamin on Sales* (5th Ed.) that: (1) "A provision that either party shall insure the goods contracted for is strong evidence that the risk of loss was intended to be assumed by him." And that (2) "When the goods contracted for are an entire quantity, it is a question depending upon the terms of the contract and the circumstances of the case whether the insurance covers, and the risk accordingly attaches to the quantity of goods when completed only, or also each separate installment when delivered." Page 409.

[4] The language of the provision upon which defendant bases the contention is "f. o. b. your station, all charges paid up to January 1st, namely storage, insurance and interest." This provision was inserted at defendant's suggestion. If, as contended, the property remained in the plaintiff until January 1st, what reason was there for the stipulation? The defendant would have no insurable interest until the property passed. The evidence shows that the parties expected the entire product to be put up in the spring and early summer of 1909, and doubtless some of it in the ordinary course of dealing would have remained in storage until the 1st of January following. The defendant, however, had the right to order out a part or all at any time after the quantity contracted for was ready for delivery, but was not to be chargeable with interest on the price or for cost of storage or insurance until January 1st. After the specified quantity had been produced and stored, the insurance would be for defendant's benefit, because the property then passed, and in the ordinary course of business the policy would then be transferred to defendant. Such is the construction which we think carries out the presumed intention of the parties; and, as stated, we are unable to find in the contract or the situation of the parties evidence sufficient to rebut the presumption. The jury should have been instructed that any loss occasioned prior to October 12th was the plaintiff's whether it resulted from his fault or that of the cold storage company.

[5] It is claimed that the court erred in refusing to permit an offer of proof to be made. Without deciding whether the defendant lost the right to a ruling upon this claim of error by failing to set out the testimony by affidavit in support of the motion for a new trial, it is sufficient to say that the character of the testimony is indicated by the question to which objections were sustained which occasioned the offer of proof; and, as another trial must be ordered, the point will be considered. The only ground for the objection to the questions was that the witness had not shown himself qualified to answer. The witness had been for nine years the manager of the cold storage plant

where the egg meats were stored and testified to an experience in the business sufficient to qualify him to state his opinion whether a product like egg meats after having been solidly frozen will thaw in a temperature below 32 degrees.

[6] To a number of special questions submitted at the request of defendant the jury gave evasive and equivocal answers. Asked to state whether 46 cans of frozen yolks were destroyed by order of court in Spokane, they answered, "There probably were some cans destroyed." Equally evasive answers were returned to no less than eight or nine other questions. Whether this resulted from a reluctance of the jury to find facts in favor of the defendant notwithstanding the evidence, we cannot say. But the court should have sustained the motion to require the jury to return definite answers. Not infrequently cases arise where it becomes the duty of the court to set aside the verdict and grant a new trial because the answers are so evasive and unsatisfactory as to suggest that the defeated party has not had a fair and impartial trial. *U. P. Ry. Co. v. Fray*, 31 Kan. 739, 3 Pac. 550; *St. L. & S. F. Ry. Co. v. Clark*, 48 Kan. 321, 29 Pac. 312; *S. K. Ry. Co. v. Michaels*, 49 Kan. 388, 396, 30 Pac. 408; *A. T. & S. F. R. Co. v. Wells*, 56 Kan. 222, 42 Pac. 699.

The judgment will be reversed, and a new trial ordered. All the Justices concurring.

#### CITY OF EMPORIA v. EMPORIA TELEPHONE CO.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. REHEARING — FORMER OPINION — ADHERENCE TO PRIOR DECISION.

The conclusion stated in the syllabus in *City of Emporia v. Telephone Co.*, 87 Kan. 465, 124 Pac. 895, that the provisions of the old ordinance remain in force, including the rates prescribed therein, is upon rehearing adhered to.

#### 2. MUNICIPAL CORPORATIONS (§ 78\*)—RATES—CONTRACT BETWEEN MAYOR AND COUNCIL AND TELEPHONE COMPANY — POWERS OF CITY OFFICERS.

The mayor and council of cities of the second class have no authority to contract for rates for a term of years for telephone services to be furnished to the inhabitants of the city after the state by direct legislation or through a commission, or other lawfully delegated authority, has acted upon the subject.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 182; Dec. Dig. § 78.\*]

#### 3. TELEGRAPHS AND TELEPHONES (§ 33\*)—RATE ORDINANCE—OBJECTIONS—ULTRA VIRES—ESTOPPEL.

The principle of estoppel applicable to a public service corporation claiming that its contract with a city was ultra vires the municipal corporation is considered and applied.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.\*]

#### 4. TELEGRAPHS AND TELEPHONES (§ 33\*)—RATE ORDINANCE.

The rates for telephone charges prescribed in an ordinance adopted and accepted in the year 1900, and agreed to by an assignee of the privileges granted by such ordinance in the year 1906, as a condition of the municipal consent to the transfer (such consent being necessary under the terms of the ordinance), will govern until action is taken by the state or by its authority.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.\*]

On rehearing. Denied.

For former opinion, see 87 Kan. 465, 124 Pac. 895.

BENSON, J. It was held in the former opinion that the provisions of the old ordinance prescribing rates for telephone service, accepted and long acquiesced in by the company, should be upheld against the company which continued in the full enjoyment of the privileges granted by its terms. This conclusion was challenged in a petition for rehearing, which was allowed. When the opinion was written, it was believed that the appellee relied principally upon the claim that the new ordinance was in effect, and the proposition submitted for rehearing was treated only briefly. While still adhering to the conclusion referred to, further reasons will now be stated.

[1] The facts taken as true in deciding the motion for judgment on the pleadings appear in the statement and opinion included in the former report of this case. It is there stated that, "among the new conditions prescribed when the new company succeeded to the franchise, it was provided that no attempt should be made to change the rates." 87 Kan. 467, 124 Pac. 896. In this connection it is deemed proper to state now that the additional fact appears from the abstract that the resolution, consenting to the transfer to the new company, provided that, in consideration of the payment of the arrearages of the 2 per cent. of gross receipts due the city from the old company on September 1, 1904, and certain additional services, the city would receipt to Mr. Finney, the manager of the company, for the 2 per cent. referred to "from year to year so long as he shall remain manager, \* \* \* and said company makes no attempt to change the present rates for service." These conditions were accepted by the new company, the appellee. The fact should also be stated that the old ordinance contained a provision "that, before any transfer or assignment under the rights of this franchise shall become binding on said city, a copy of such transfer or assignment shall be filed with the city clerk, and said assignment consented to by the mayor and city council. \* \* \*"

By chapter 121 of the Laws of 1905 (Gen. Stat. 1909, §§ 752, 753), cities of the sec-



ond and third classes were given the control of streets and alleys, and it was provided that, before any person or corporation should enter upon the streets or alleys for the construction of any railways, sewerage system, or telephones, the right to do so must be obtained by ordinance. Thus it appears that a right of way for the construction and operation of telephones in city streets after February 11, 1905, when that act became effective, must be obtained by municipal action. If the old company was unaffected by this change in legislation, it might have continued to the end of the 15 years' term without any grant of a right of way from the city, its successor had acquired no such right, and enjoys the use of the streets only through the consent of the city to the transfer which was upon the condition, among others, that it should not change the rates prescribed for its predecessor. The city might have withheld its consent to the transfer and passed a new ordinance with this condition. The parties undertook to accomplish the same end by resolution, which, for the purposes of this case, may be given the same effect; the appellee having enjoyed the same privileges.

It is not necessary to define the precise powers of regulation vested in the city over telephone companies using city streets under the legislative grant of right of way previous to the act of 1905. Nor is it necessary to delimit the additional powers given by that act. There was, in the first place at least, the power of regulation concerning the location of poles, height of wires, and to provide rules for safety and convenience in the use of streets, and, after the act of 1905, there was the additional authority to grant the right of way also, which implies a right to impose reasonable conditions upon which it may be exercised. These privileges were deemed of consequence to the original company and to its successor, the appellee. Each company sought and obtained action by the mayor and council purporting to grant privileges upon conditions to which they assented. Contracts were accordingly made by an ordinance and resolution duly accepted, and the lines were operated for many years in accordance with the terms agreed to. Presumably such action deterred other companies from occupying the field. The city has kept faith, and the appellee has been undisturbed in the use of the streets, the patronage of the public secured through such action, and the pursuit of business incident to such use. But it is said that, because of a want of power to make a binding contract to fix rates, the appellee is not bound by the agreement, and may summarily increase the rates, subject only to correction in case they should be found unreasonable.

[2] The power to prescribe rates to be charged by public service corporations for such service for a fixed period by contract, although referred to in the former opinion,

was not decided. Since then the subject of municipal power in such matters has been considered in *State ex rel. v. Wyandotte Gas Co.*, 88 Kan. 165, 127 Pac. 639, where it was held that the power to contract for rates for furnishing water, light, heat, or power to a city or its inhabitants is a governmental power which may be delegated to the mayor and council of a city, but must be specifically granted or absolutely essential to the exercise of powers expressly conferred. Syllabus 3. In that case it appeared that the state had legislated upon the subject by an act declaring that rates should not be greater than the charges fixed by the lowest schedule of rates on the 1st day of January, 1911, without the consent of the Public Utilities Commission (Laws 1911, c. 238, § 30), and the attempt to increase the rates above that standard had been made without the consent of the Commission. Following that case, it is held that the mayor and council of cities of the second class could have no authority to contract for rates for telephone service to be furnished to the inhabitants of the city for a fixed term of years, after the state by direct legislation or through a commission, or other lawfully delegated authority, had acted upon the subject.

The contention of the appellee is that the contract for rates was absolutely void, and that acquiescence, however long continued, cannot operate to prevent the proposed action to increase charges above the stipulated rates. It is said that the *Wyandotte Gas Case* necessarily leads to this conclusion. This claim will now be considered. There was nothing morally wrong or opposed to public policy in imposing the condition prescribing rates in the ordinance, or in the resolution consenting to the transfer. Such conditions were common in many like grants in many cities. Franchises, so called, embracing schedules of rates for services in furnishing water, light, and the like, were sought and accepted and acted upon. The power attempted to be exercised was not prohibited by the act regulating cities of this class or by other statutes. It remained vested in the Legislature, subject to delegation as might be deemed proper, but the Legislature had not acted. In such a situation, it has recently been held in another jurisdiction that a contract between a city and public service corporation will be in force between the contracting parties until the state exercises its paramount power to fix rates. A city in Wisconsin granted by ordinance the right to operate an interurban railroad upon certain streets. One of the conditions imposed was that the passenger fare between that city and another city should not exceed 10 cents. The grantee accepted the conditions and constructed the road. The defendant traction company afterward succeeded to his rights, and by another ordinance, passed at the instance of the traction company, it was granted the same rights that had

been previously given to the first grantee, and subject to the same conditions which were accepted. The traction company continued the stipulated fares for a time, and then gave notice of an increase to 15 cents. The action was brought to enjoin the proposed increase and to compel the traction company to abide by its contract. The defense was that the city had no authority to exact the condition, and that the part of the ordinance fixing fares was ultra vires. In the course of the opinion it was said: "That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law and was inimical to public policy, is clear enough. By so doing it could not forestall the state and prevent it from exercising its governmental function regulating rates. But, until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory. In order to have a binding contract, there must be mutuality of obligation, and whatever doubt arises on the branch of the case we are considering arises in reference to the right of the city to make the particular contract before us." *Manitowoc v. Manitowoc & Northern T. Co.*, 145 Wis. 13, 19, 20, 129 N. W. 925, 927 (140 Am. St. Rep. 1056).

It was held that there was no law inhibiting the making of the contract fixing rates. Neither was there any law authorizing it, and the court said: "Statutes granting to cities the right to make long time contracts binding on the public, and fixing a rate to be charged by a public service corporation, are not looked upon with favor, and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls." 145 Wis. 27, 28, 129 N. W. 930, 140 Am. St. Rep. 1056. This is in entire accord with the *Gas Company Case*, but the court proceeds to say: "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere, whenever the public weal demanded, was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and this extent only, is the contract before us a valid subsisting obligation." 145 Wis. 28, 129 N. W. 930, 140 Am. St. Rep. 1056. The court, after examining the statutes, held that the state had not exercised the power to modify or abrogate the contract; that the railroad commission, although vested with such power, had made no determination; and that, until such determination, the contract remained in force. In that case the company also contended that the fare stipulated in the ordinance was unreasonable, and the trial

court found that it was unreasonably low. Concerning this feature of the case, it was said: "The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it." 145 Wis. 30, 129 N. W. 931, 140 Am. St. Rep. 1056. The defense that the rates are unreasonable was also interposed in this case, but there was no finding; the judgment having been rendered upon the pleadings wherein the allegation of unreasonableness is denied.

[3] It is true that the Wisconsin statutes, as appears from the opinion, gave the city control of the streets and the right of way over them. In this respect the situation is like that existing in this state, since the passage of the act of 1905, vesting such control in the city, but unlike that existing when the old ordinance was adopted. However, as the appellee sought for and obtained the consent of the council to the transfer after the act of 1905 took effect, and accepted the conditions imposed at that time in giving such consent (a consent to such transfer being necessary under the terms of the ordinance), its rights should be considered with reference to the power of the city under that statute. The company received and still retains a right of way—certainly a substantial benefit, even if there were no other—and should be held to the condition to which it agreed until the state acts in the matter or some right to relief is shown.

In harmony with the decision in the *Manitowoc Case*, but proceeding upon a somewhat different course of reasoning, other courts have reached the same result by applying the principle of estoppel. In New Jersey, in an opinion by Judge Pitney, in a case relating to the validity of license fees imposed upon a street railway company by an ordinance accepted by the company permitting the use of streets for its tracks, it was held that, although the city had no power to impose the condition stipulated in the ordinance, the company having accepted the condition and constructed its lines and operated its trains under the ordinance, the want of power in the city was unavailing. The court said: "In fact, the ordinances were accepted by the company, subject to those conditions, and the lines were constructed by it and have since been maintained and operated by it and its successors, including this defendant. It is now too late for the defendant to set up that the de facto contract thus entered into and acted upon, and from which benefits have thus accrued to the defendant and its predecessors, was ultra vires the municipal corporation." *Jersey City v. North Jersey St. Ry. Co.*, 72 N. J. Law, 383, 391, 61 Atl. 95, 98. The same court, in a case involving the same principle, said: "But in our view it is not open to the traction company to raise

the question that the grant of its local privileges and franchises was ultra vires the municipal corporation, while at the same time the company retains and uses and enjoys those privileges and franchises. The plea of ultra vires is not admitted in such circumstances, except where it is practicable to restore the status quo ante, and we therefore think the present respondent is estopped from setting up that plea." *Rutherford v. Hudson River Traction Co.*, 73 N. J. Law, 227, 235, 63 Atl. 84, 87.

In a similar situation, the Supreme Court of Illinois declared: "We are also of the opinion that, even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract." *Chicago Gen. Ry. Co. v. City of Chicago*, 176 Ill. 253, 259, 52 N. E. 880, 882 (66 L. R. A. 959, 68 Am. St. Rep. 188).

In another case, also relating to the franchises of a street railway company, the Illinois court said: "In the absence of the ordinance, the respondent company had no power or right to enter upon the streets of the village and erect poles, string wires thereon, and construct and operate its roads by electricity upon and along such streets. These privileges constitute ample consideration, if any could be deemed necessary. The privileges granted the respondent company by the terms of the ordinance have been and are being fully enjoyed by it. It cannot be permitted to take and retain all advantages and benefits of the ordinance and escape performance of duties to the public upon which its rights to such advantages and benefits are predicated upon the ground the ordinance and the duties imposed by it are ultra vires both the village and the respondent company. The plea of ultra vires will not, as a general rule, prevail when it will not advance justice, but will, on the contrary, accomplish a legal wrong; and it is a general rule that undertakings, though they be ultra vires, will be enforced against quasi public corporations if said corporations retain and enjoy the benefits of concessions granted on condition such undertakings should be performed." *People v. Suburban R. R. Co.*, 178 Ill. 594, 607, 53 N. E. 349, 352 (49 L. R. A. 650).

In *City of St. Louis v. Davidson*, 102 Mo.

149, 14 S. W. 825, 22 Am. St. Rep. 764, it was held that a contract made by a city, although ultra vires, is not illegal if not prohibited by its charter, and that one who had received benefits under a contract with the city was estopped from setting up the plea of ultra vires to escape liability upon the contract while retaining its benefits. The general principle of estoppel, applied to a business corporation acting ultra vires where the contract has been executed, is stated in *Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569, thus: "A corporation which has enjoyed the benefits of a contract cannot plead that it was ultra vires where no fraud is intended or has been committed." Syllabus, par. 1.

The application of the principle of estoppel to a public service corporation, acting without legislative authority, where the condition was agreed to by the company, is denied in *Farmer v. Telephone Co.*, 72 Ohio St. 526, 74 N. E. 1078, and also in *Wright v. Glen Telephone Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85. The latter case was an action by an individual claiming the benefit of a rate fixed by an agreement contained in an ordinance. The court cited the *Farmer Case* in Ohio and other decisions, and said: "If this be sound law, the franchise can in no way be a contract binding upon the defendant as a compensation for service for lack of consideration. The defendant cannot be estopped because it has complied so far with terms with which it was not required legally to comply. No harm has been done this plaintiff or the municipality, and I can see no element of estoppel in any act done by the defendant under the terms of the so-called franchise." 112 App. Div. 747, 99 N. Y. Supp. 87.

Referring to conflicting decisions on this subject, it is stated in *Beach on Public Corporations*, vol. 1, at section 218, that the great weight of authority supports the proposition that, when the contract is wholly beyond the express or implied powers of the corporation, it is absolutely void and cannot be ratified by performance or acceptance of benefits. At section 1229, vol. 3, in *Dillon on Municipal Corporations*, this subject is discussed, and reference is made to the fact that in some jurisdictions such a condition, not authorized by law, is regarded as a mere nullity, not however impairing the validity of the grant or franchise, but the author also says: "But in other jurisdictions the principle of estoppel appears to be applied, and it is held that a railroad company or other public service corporation, which has accepted the benefit of a grant or consent with a condition attached thereto, is estopped to contest the validity of the condition either as ultra vires the municipality, or as beyond its own powers, and is bound thereby." 3 *Dillon on Municipal Corporations* (5th Ed.) § 1229. The learned author does not appear to give his own views upon this particular subject.

Decisions of this court are cited to uphold the contention that municipal action, which is *ultra vires* in the strict sense of that term, cannot be made valid by ratification, but the precise question now under consideration has not been determined here. It was held in *City of Leavenworth v. Rankin*, 2 Kan. 362, that a municipal corporation can exercise only powers conferred by law. In making contracts, they must act within the limits of such powers, and no subsequent act of the corporation can cure the defect. These are statements of general principles frequently cited and followed. In *Re Pryor*, Petitioner, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398, 49 Am. St. Rep. 280, it was held that an ordinance, passed after the grant of a right to lay and maintain gas pipes in a city of the second class fixing maximum rates, is inoperative as to the assignees of the right theretofore granted by an ordinance in which rates were not fixed. It will be seen that there was no contract or consent to the rates involved in that case, but only a question of power to fix maximum rates. The court said in the opinion: "Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not inquire." 55 Kan. 728, 41 Pac. 959, 29 L. R. A. 398, 49 Am. St. Rep. 280. Passing by the absence of any consent of the company in that case, it will be seen that an estoppel could not possibly be involved.

In the course of the opinion in *O'Leary v. Street Railway Co.*, 87 Kan. 22, at page 31, 123 Pac. 746, at page 749, it was said: "Inaction, acquiescence, tacit consent, and the like, on the part of city officials, cannot be invoked to justify private invasions of public property or rights, and lapse of time cannot bar remedies appropriate for the protection of public interests. Nor can estoppel be invoked in cases where the city was powerless, under the law, to do the disputed thing in the first instance. But no such questions are presented here." That case is cited as opposed to the application of estoppel here, but it does not sustain the contention. It was only held that the city was not estopped by failing to act or by giving consent when it had no authority to do either.

[4] It is not necessary to decide that the principle of estoppel applies here as fully as it was held to apply in some of the authorities cited. It is sufficient to say that the rates prescribed in the ordinance should govern until some action is taken by the state or by its authority. Nothing said in the opinion in the *Wyandotte Gas Company Case* is at variance with this conclusion, which is reached by a consideration of matters not involved in that case.

The appellee suggests that it is now claim-

ed that the former opinion precludes the defendant from "presenting its evidence in support of the defenses raised by its answer," and asks for further directions. The directions given seem reasonably plain, and no difficulty in construing the opinion is anticipated. The question presented in this court was whether the district court erred in giving judgment for the defendant upon the pleadings. We held that it did so err, reversed the judgment so rendered, and directed the district court to overrule the motion of the defendant, and this is still the conclusion of the court. Further proceedings should be in accordance with the views expressed in this and the former opinion. All the Justices concurring.

### CAREY COAL CO. v. BEEBE CONCRETE CO.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

#### 1. BAILMENT (§ 31\*)—VALUE OF USE OF PROPERTY—EVIDENCE.

Upon an issue as to what the use of an article is reasonably worth per day, where it does not appear that there is any absolute standard by which such value may be determined with definiteness and certainty, it is not error to admit evidence of the value of the article itself, to be considered with other circumstances in determining the value of its use.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 124-131; Dec. Dig. § 31.\*]

#### 2. BAILMENT (§ 31\*)—VALUE OF USE OF PROPERTY—EVIDENCE.

In that situation it is not error to admit evidence of the price at which the owner subsequently sold the article.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 124-131; Dec. Dig. § 31.\*]

Appeal from District Court, Reno County.

Action by the Carey Coal Company against the Beebe Concrete Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr W. Taylor, of Topeka, and Geo. A. Neeley, of Hutchinson, for appellant. Prigg & Williams, of Hutchinson, for appellee.

MASON, J. The Carey Coal Company, an individual doing business under that name, sued the Beebe Concrete Company, a partnership, upon an account. There was no controversy over this, but a trial was had upon a cross-demand. The defendants had furnished for the use of the plaintiff a secondhand steam engine. They assert that this was done under an agreement that they were to be paid a reasonable price for its use; that it was used for 230 days; and that its use was worth \$5 a day. The plaintiff contends that the agreement was that he was to have the use of the engine in consideration of repairs he made upon it; that it was not used for more than 90 days; and that its use was not worth the amount named. The jury

awarded the defendants \$125 on the claim, thereby in effect finding that there was an agreement to pay what the use of the engine was reasonably worth, and that it was reasonably worth that amount. The defendants appeal on the ground that the allowance was too small. The only question presented is whether prejudicial error was committed in the admission of certain evidence introduced as having a bearing upon the value of the use of the engine.

[1] The plaintiff was permitted, over the objection of the defendants, to ask a witness what the engine itself was worth. The question for the determination of the jury was, of course, what the *use* of the engine was worth—not the value of the engine itself. The trial court fully recognized this distinction, but allowed this inquiry explicitly upon the theory that the value of the thing itself was a circumstance that might be considered in determining the value of its use. We think, under the facts of this case, that view was correct. A situation may, perhaps, be imagined where, upon an issue as to the usable value of an article, evidence of what the article itself was worth might have a tendency to mislead the jury. But here the article in question was a much-used piece of machinery, more or less out of repair. It cannot be presumed, and the evidence did not conclusively show, that it had a definite, usable value that could be arrived at with reasonable certainty by the opinions of witnesses upon that precise matter. One witness for the defendant estimated the usable value at \$10 a day; another at from \$5 to \$7. Witnesses for the plaintiff testified that one of the defendants had said that \$3 a day would not be out of the way, and had sent in a bill on the basis of \$2 a day. No exceptional conditions were shown such as to give peculiar value to the use of the engine at the time it was lent. Evidence of its general condition and state of repair was admitted without objection, and was obviously competent. We think estimates of the value of the engine might be of some aid in arriving at a fair charge for its use.

There seems to be little direct authority upon the question. In *Alling v. Cook*, 49 Conn. 574, cited in 13 Enc. of Evidence, 597, a ruling was approved which excluded evidence of the value of a chattel; the issue being what the parties had agreed should be paid for its use. This is obviously a different question from that here presented, although there may be some analogy between them. In *Cohoon et al. v. Kineon*, 46 Ohio St. 590, 22 N. E. 722, the exclusion of evidence as to value of real estate was held not to be error, where the inquiry was as to its rental value. The court said: "Proof of the value of the fee simple could hardly aid in ascertaining rental value. The converse of the proposition might be true; indeed, would be. But it is a matter of common observation that

many tracts of real estate of great value have no actual rental value. The evidence would have been misleading, and was, we think, properly excluded." 46 Ohio St. 591, 22 N. E. 722.

In such a situation as that suggested, evidence of the value of the property might be prejudicial; but it would be going too far to say that evidence of the value of real estate could never be of aid in ascertaining what it ought to rent for. Where property is capable of immediate use for the ordinary purpose to which it is adapted, there will naturally be some relation between its value and the value of its use. And where the rule is applicable at all, it ought to work both ways. True, proof of the value of a vacant city lot could not greatly aid in arriving at a fair charge for its use in raising vegetables; but, on the other hand, neither would proof of its rental value for that purpose be of much help in determining its reasonable worth.

In *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, at page 187, 62 S. E. 150, at page 152, 19 L. R. A. (N. S.) 155, this language was used, which exhibits the theory upon which evidence of full value may be deemed to affect, although not to control, the question of usable value: "It is quite possible to arrive at the fair rental value of cotton ginnery for a cotton season. \* \* \* In making proof of the rental value of a gin- nery which had been operated in past seasons, evidence may be offered not only of the cost and physical condition of the property, but of all the conditions which surround it, including its patronage, and success and hazards in the past, and any change for better or worse in such conditions. All of these, and, perhaps, other matters, would be inquired into by those contemplating the renting of the property, and they are therefore factors entering into the determination of the market rental value; but neither the past success indicated by the profits, nor any other single factor, is to be taken as controlling. Evidence of all these factors, along with other competent evidence, is admitted in order to arrive at the fair rental value."

[2] The answer of the witness to the question objected to was, in substance, that the engine was worth nothing at all in the condition it was in before the plaintiff repaired it. This was little more than a general depreciation of the property—an exaggerated form of stating its bad condition. It could hardly be regarded as of enough importance to justify a reversal, even if its admission were held to be erroneous. But the same question as to the admissibility of evidence is raised by another objection. Complaint is made of a ruling requiring one of the defendants to state, upon cross-examination, the amount for which they subsequently sold the engine—\$400. We think the testimony was competent upon the ground that evidence of the value of the engine had some bearing

upon what its use was worth, and that evidence of what it sold for had some bearing upon its value. The sale was made by the defendants; they were not denied an opportunity to show the circumstances under which it was made; there is nothing to suggest any unfairness. The price is therefore some evidence of value. *Hardwick v. Can. Co.*, 113 Tenn. 657, 88 S. W. 797; *Harrow v. St. Paul & D. R. Co.*, 43 Minn. 71, 44 N. W. 881; *Watson and Others v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332, 15 N. W. 468; *Railway Co. v. Searles*, 71 Miss. 744, 16 South. 255; *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 81 N. E. 1032; 16 Cyc. 1143; 3 Elliott on Evidence, § 2619, note 113.

The judgment is affirmed. All the Justices concurring.

# WOOD v. UNION PAC. R. CO.

(Supreme Court of Kansas. Jan. 11, 1913.)

(Syllabus by the Court.)

## 1. RAILROADS (§ 411\*)—KILLING STOCK—STATUTES—CATTLE GUARDS.

A. and B. own farms separated by a public highway. A railroad runs across both farms. The horses of A. escaped from his premises, went across the highway, over a cattle guard, and upon the railroad right of way, where they were killed by a train. Such cattle guard is located where the railroad enters the fenced land of B. *Held*, that the railroad company is not liable to A. by virtue of any provision of the cattle guard act of 1869 (Gen. St. 1909, §§ 7008-7010).

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

## 2. NEW TRIAL (§ 60\*)—GROUNDS—FINDINGS—CONFLICT.

When the findings of the jury are incapable of being harmonized, and some of them are inconsistent with the general verdict, a new trial should be granted.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 126; Dec. Dig. § 60.\*]

Appeal from District Court, Riley County.

Action by Thomas Wood against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

R. W. Blair, B. W. Scandrett, and C. A. Magaw, all of Topeka, for appellant. John E. Hessin and Jno. C. Hessin, both of Manhattan, for appellee.

WEST, J. The plaintiff sued to recover for two horses killed by one of the defendant's trains. The stock left the land of its owner, went upon the highway, and entered upon an adjoining farm over a cattle guard; this farm being fenced according to the finding of the jury. The trial was expressly confined to the allegations of the petition touching the cattle guard, which the testimony showed and the jury found was out of repair. They were instructed that the plaintiff could not recover unless they should find

from the evidence that a cattle guard could reasonably be constructed and put into use which would more effectually than the one in question prevent cattle or horses from passing upon the track. The jury returned a verdict in favor of the plaintiff. An objection to testimony under the petition, a demurrer to the evidence, a motion for judgment on special findings, and a motion for new trial were overruled.

[1] The defendant contends that, as counsel by clear and express declaration confined the plaintiff's right of recovery to the cattle guard statute, the circumstances fail to show any violation of duty respecting the plaintiff. It is argued that the only purpose of the cattle guard provision was to protect the owner of improved or fenced land through which the railroad runs, and that this protection does not extend to an adjoining landowner. It appears from the record that upon the trial the following occurred: "Mr. Magaw: We would like to have it definitely settled whether the plaintiff is claiming under what is known as the railroad stock law of 1874, or whether he is relying on what is known as the cattle guard law at railroad crossings, which is sections 7008 to 7010, inclusive, of the General Statutes of 1909. The Court: Are you making any contention, Mr. Hessin, that you are proceeding under any other law than that? Mr. Hessin: No, sir; I am not, and I have not. I think I made that pretty plain in the opening statement. The Court: You are proceeding under the railroad crossing law; that is, the cattle guard law? Mr. Hessin: Yes, sir."

Cases are cited to the effect that, when railroad companies are required by law to maintain fences and cattle guards, they will be liable for injuries to animals entering upon the highway by reason of defective guards or wing fences; but we know of no statute which affirmatively requires railroads in this state to maintain cattle guards except where they leave or enter fenced or improved land, and, while they are liable for injuries to stock where the railroad is not inclosed with a fence, they are so liable by virtue of the act of 1874, and not by the act of 1869. The first section of the latter act (General Statutes 1909, § 7008) provides that: "When any railroad runs through any improved or fenced land, said railroad company shall make proper cattle guards on such railroad when they enter and when they leave such improved or fenced land." Section 2 provides that any railroad company failing to comply with this requirement shall be liable for all damages sustained by any one by reason of such neglect and refusal. Under this statute no demand is required and no attorney fee is allowed, and it is manifest that it was not the intention to protect the owners of live stock from damage thereto by the operation

of trains, as was the object of the act of 1874. In *Mo. Pac. Ry. Co. v. Manson*, 31 Kan. 337, 2 Pac. 800, it was held that: "The intention of the statute \* \* \* is to protect the owners and possessors of improved or fenced land, over which a railroad is constructed, against the depredations of domestic animals." Syllabus 1. In *C., K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, at page 187, 25 Pac. 576, it was said in the opinion: "We think that the duty of making proper cattle guards by a railroad company, when its road enters and when it leaves any improved or fenced land on its right of way, is a duty to the landowner from the railroad company." It has been held that the landowner may recover for his services in driving out and herding the stock. *St. L. & S. F. Ry. Co. v. Sharp*, 27 Kan. 134. A company is bound by the agreement of its roadmaster to erect a cattle guard at a place where the landowner should rebuild his fence. *Mo. Pac. Ry. Co. v. Lynch*, 31 Kan. 531, 3 Pac. 372. A landowner may recover for a crop destroyed, and also for time and labor in protecting his property. *St. L. & S. F. Ry. Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533. The duty rests upon the railroad company itself, and cannot be avoided by the claim that a contractor neglected to put up proper guards. *C., K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, 25 Pac. 576. A landowner may recover for the value of his services and the services of his children in driving out and herding stock to prevent further damages. *Mo. Pac. Ry. Co. v. Ricketts*, 45 Kan. 617, 26 Pac. 50. Also for a cow which strayed away and mired, if the neglect to erect cattle guards was the proximate cause. *C., K. & N. Ry. Co. v. Hotz*, 47 Kan. 627, 28 Pac. 695. See, also, *C., K. & N. Ry. Co. v. Behney*, 48 Kan. 47, 28 Pac. 980. A railway company may be compelled by mandamus to construct cattle guards where its road enters or leaves improved or fenced land, in an action by the owner. *Railway Co. v. Billings*, 77 Kan. 119, 93 Pac. 590.

Section 5 of the stock law of 1874 (Gen. St. 1909, § 7005) excepts from the operation of that act any railway company whose road is inclosed with a good lawful fence to prevent animals from being on the road. As it is impracticable, if not impossible, to fence across the railroad track, it has frequently been held that the inclosure of the track is complete when the fences on either side are connected at proper places with wings and cattle guards sufficient to prevent the animals from going upon the track, but, in such instances, under that statute a cattle guard is deemed a portion of the fence, and the failure to provide a sufficient guard is equivalent to the failure to provide a sufficient fence.

In states which require railroad companies to fence their tracks, a failure to perform

this duty may give a cause of action to others than an adjoining landowner; the duty being one to the public required by the state in the exercise of police power. Thus in *A., T. & S. F. R. Co. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768, it was held by the Court of Appeals of the Eighth Circuit that a brakeman, injured by the derailment of a train caused by an animal getting on the track through the failure of the company to erect and maintain a sufficient fence, was entitled to recover. Mr. Justice Brewer in the opinion distinguished this from the *Berry*, *Johnson*, and *Peddlicord* Cases hereafter referred to, and held that the statute requiring railroads to be fenced was not only for the protection of contiguous landowners, but to protect the traveling public also. In *Berry v. St. Louis, Salem & Little Rock R. R. Co.*, 65 Mo. 172, a statute similar to the act of 1869, but broader, was held to be for the benefit of adjoining proprietors, and not for the benefit of strangers. The court, speaking through Henry, J., said: "The duty of fencing the sides of their roads through inclosed and cultivated fields is imposed upon railroad companies for the benefit of the owner or proprietor of such fields and inclosures." The holding of the court in *Brooks v. N. Y. & E. R. Co.*, 13 Barb. (N. Y.) 594, to the effect that "the cattle of a stranger, which are on the premises of the adjoining proprietor without right, are not within the protection of this clause of the statute," was quoted with approval, and cases to the same effect were cited from Vermont, New Hampshire, and Massachusetts. In *Harrington v. Chicago, Rock Island & Pacific Railroad Co.*, 71 Mo. 384, this doctrine was reiterated. In *Johnson v. Missouri Pacific Railway Co.*, 80 Mo. 620, it was ruled that before a railroad company would be held liable for killing the horse of the plaintiff, who was not an adjoining proprietor, and which horse escaped from a pasture not coterminous with the right of way and through the inclosed fields of an adjoining proprietor, it must be shown that the horse was in the adjoining proprietor's field by authority, or that such field was not protected by a lawful fence; also that the trial court erred in refusing to instruct that the duty to fence was one which the railroad owed only to adjoining proprietors. In *Peddlicord v. Mo. Pac. Ry. Co.*, 85 Mo. 160, a similar ruling was made, and the *Berry*, *Harrington*, and *Johnson* Cases were referred to and followed.

The very terms of the act of 1869 indicate that this requirement of a cattle guard, where the road enters or leaves inclosed or improved land, was to protect the owner of such land, for without such cattle guard the land would no longer be inclosed either actually or theoretically. The stock law of 1874 was enacted for an entirely different purpose, and, if we should consider the case

as resting entirely on the former statute, it would be impossible to hold that the defendant owed any duty to the plaintiff under the facts shown.

[2] There is another matter, however, requiring that the judgment be reversed. The jury found, among other things, that the cattle guard was of the same type of construction of those in general use on the defendant's road and on the roads of two other companies; also that the evidence did not show that there was any other type of cattle guard in general use by railroad companies which would more effectually prevent stock from passing upon the right of way. Following this was a finding that the evidence did not show that a cattle guard can be constructed which would more effectually turn stock than the one over which the plaintiff's horses passed, and which would not increase danger in the operation of the trains. They also found that the guard in question was not a proper one, that it was worn, rotten, and not properly spiked, and that it was defective at the time; also that there was no evidence that the horses were breachy, and that no cattle guard shown by the evidence would have prevented them from going upon the right of way. It can be easily deduced from these various findings that the cattle guard in question was defective, worn, rotten, and not properly spiked, and that the horses were not breachy, and yet that no other cattle guard and no other type thereof would effectually turn stock or prevent these horses from going on the right of way, although it was expressly found that a reasonably good fence would restrain them. Certain of the findings, taken by themselves, would warrant a verdict for the plaintiff, while others, taken alone, would clearly warrant one for the defendant. They are so conflicting that harmonizing them is practically out of the question, and some of them are clearly inconsistent with the general verdict, which, under such circumstances, cannot stand. *Harvester Works Co. v. Cummings*, 28 Kan. 367; *Shoemaker v. St. L. & S. Ry. Co.*, 30 Kan. 359, 2 Pac. 517; *Mo. Pac. Ry. Co. v. Holley*, 30 Kan. 465, 474, 1 Pac. 130, 554; *Insurance Co. v. Smelker*, 38 Kan. 285, 16 Pac. 735; *Aultman v. Mickey*, 41 Kan. 348, 21 Pac. 254; *Kansas City v. Brady*, 53 Kan. 312, 36 Pac. 726; *Bank v. Miller*, 59 Kan. 743, 54 Pac. 1070; *Francis v. Brock*, 80 Kan. 100, 102 Pac. 472.

The petition appears to have been drawn with reference to the stock law only; there being no allegation that the land where the injury occurred was either improved or fenced. Notwithstanding counsel's expressed reliance upon the cattle guard act alone, the testimony, the instructions, the findings, and the verdict seem to have been given and reached upon the theory that the defendant owed some duty to the plaintiff respecting

the cattle guard, which duty, if any, we now see must have arisen under the later, and not under the earlier, statute. This theory, while within the allegations of the petition, cannot be allowed to form the basis of the judgment, on account of the inconsistency of the findings.

The judgment is therefore reversed, and the cause remanded, with directions to grant a new trial upon the allegations of the petition. All the Justices concurring.

#### STATE v. SPIKER.†

(Supreme Court of Kansas. Jan. 11, 1913.)

CRIMINAL LAW (§ 37\*)—WITNESSES (§ 102\*)—DEFENSES—ENTICEMENT.

That purchases of liquor were made by persons seeking to ascertain if the seller was engaged in the unlawful sale thereof constitutes no defense to the charge, nor does it render their testimony incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. § 37;\* Witnesses, Cent. Dig. §§ 403-414; Dec. Dig. § 102.\*]

Appeal from District Court, Sumner County.

Grant Spiker was convicted of unlawfully selling liquor, and appeals. Affirmed.

F. A. Dinsmoor, of Caldwell, C. E. Elliott and W. T. McBride, both of Wellington, for appellant. John S. Dawson, Atty. Gen., and Harold W. Herrick, of Wellington, for the State.

PER CURIAM. Grant Spiker, who owned and operated a hotel at Caldwell, was convicted of several sales of intoxicating liquors, and also for maintaining a nuisance. He challenges the sufficiency of the testimony, but it is found to be ample to show that some sales were made by appellant directly, and also to connect him with those made by the porter of the hotel. The fact that purchases were made by persons seeking to ascertain if appellant was engaged in the unlawful sale of intoxicating liquors constitutes no defense to the charge, nor does it render the testimony incompetent. The weight of their testimony was a question for the jury. As to the matter of interest in the prosecution, it appears that these witnesses were not employed as detectives and had no pecuniary interest in the result. The court, in its general charge, advised the jury that, in determining the credibility of a witness, they might consider his bias and prejudice, his interest in the result, or any circumstance which would affect his credibility, hence there was no error in refusing the special instruction on that subject requested by appellant. There was no reason to specially caution the jury as to the testimony of the two principal witnesses in behalf of the state. No error was committed in the admission of testimony.

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 15, 1913.



**CARROLL v. KANSAS BUFF BRICK  
& MFG. CO.**

(Supreme Court of Kansas. Jan. 11, 1913.)

**1. MASTER AND SERVANT (§ 278\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—UNSAFE PLACE TO WORK.**

Evidence, in a servant's action for injuries alleged to have occurred through the negligence of the master in not providing a reasonably safe place to work, *held* sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.\*]

**2. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—REFUSAL.**

In a servant's action for injuries, the refusal of an instruction as to the master's duty to furnish a safe place to work was proper, where the court by another instruction defined such duty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260;\* Carriers, Cent. Dig. § 1407.]

Appeal from District Court, Wilson County.

Action by Walter E. Carroll against the Kansas Buff Brick & Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Glen L. Brunner and Jos. S. Brooks, both of Kansas City, Mo., Frank C. Wade, of Fredonia, and L. C. Boyle, of Kansas City, Mo., for appellant. E. D. Mikesell, of Fredonia, for appellee.

**PER CURIAM.** This action was brought by the appellee to recover damages for personal injuries alleged to have occurred to him through the fault of appellant in failing to provide for appellee a reasonably safe place to work while the appellee was wheeling brick for and as employé of appellant.

[1] The first contention of appellant is that the evidence of the appellee was not sufficient to support the verdict; and that the court should have instructed the jury to return a verdict for the defendant. The appellee had been at work but a few hours for the appellant when the accident occurred, and, it appears, had little opportunity to observe

whether or not the place over which he was required to cart the brick with a wheelbarrow was a reasonably safe place in which to do that work. It does appear from the evidence, however, that other workmen had made complaint shortly before the accident to the wheeling boss, in charge of the work being done by the appellee, as to the condition of the runways, and that the boss would not permit the workmen to stop and adjust them. But the boss told complainants that, if they did not like the job, they could quit or simply laughed at the complaint, and asked one if he had life insurance; that the witness also made complaint to the superintendent, and no change was made until after the accident to appellee occurred; that after the accident in question repairs and changes were made.

[2] Again it is contended that the court erred in instructing the jury that it was the duty of appellant to furnish appellee a reasonably safe place to work, but that the instruction should have been that it was the duty of appellant to use reasonable diligence to furnish the appellee a reasonably safe place to work. In the third instruction given by the court, the exact language contended for is used as an express limitation upon the liability of appellant. It reads as follows: " \* \* \* A corporation is only required to exercise reasonable and ordinary care and prudence in providing the employes places and instrumentalities reasonably safe to work with or at. And it will be presumed in the first instance, in the absence of anything to the contrary, that the corporation has done its duty in that regard." This removes the basis of appellant's criticism. *Kamera v. Boller Works*, 82 Kan. 432, 108 Pac. 806.

The usual questions in cases of personal injuries, viz., assumption of risk, contributory negligence, and fault of fellow servant, have all been urged by the appellant. We have examined each of the claims, and think there is no error in the proceedings or judgment. The judgment is affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

LAWSON et al., Board of County Com'rs, v. MEYER.

(Supreme Court of Colorado. Jan. 6, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 47\*)—PUBLIC SCHOOLS—SUPERINTENDENT OF SCHOOLS.

Plaintiff was elected superintendent of schools for Arapahoe county for a term of two years from January 1, 1902, but within that time Const. art. 20, was adopted, terminating such office, and providing that the officers of the city and county of Denver should be such as provided by charter, and under the charter the city designated the office of superintendent of schools of the city and county at a salary of \$900 per annum, and in May, 1904, plaintiff was elected to such office, which, in addition to its own duties, devolved upon him the duties of county superintendents generally under the state law. *Held*, that plaintiff during his service was not superintendent of schools under the state law, but was only superintendent under the charter, and not entitled to compensation under the state law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 93-99; Dec. Dig. § 47.\*]

2. JUDGMENT (§ 714\*)—CONCLUSIVENESS—MANDAMUS BY SCHOOL SUPERINTENDENT.

An adjudication compelling the executive officers of a city and county to certify salary warrants in favor of a county superintendent of schools was not res judicata of the question involved in the superintendent's subsequent mandamus proceeding after he had been elected superintendent for the city and county under its charter after termination of his office as county superintendent, since, in addition to different parties, different subject-matter, and different issues from those in the former case, the election under the charter changed the entire situation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 714.\*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Mandamus by Emma Herey Meyer against William Lawson and others, constituting the Board of County Commissioners of the City and County of Denver. From a judgment making the writ final, defendants bring error. Reversed and remanded, with directions to dismiss the complaint.

Fred W. Parks, of Denver, for plaintiffs in error. Yeaman & Gove, of Denver, for defendant in error.

BAILEY, J. This is an action in mandamus to compel defendants, as a board of county commissioners, to audit and allow, and cause to be issued and delivered to plaintiff, a warrant for a balance alleged to be due for salary, under the state law, as county superintendent of schools of the city and county of Denver. To a judgment making the writ final defendants bring error.

[1] The facts are not in dispute. The record shows that at the general election in November, 1901, plaintiff was chosen to the office of superintendent of schools for Arapahoe county, and that she qualified and enter-

ed upon the duties of her office in January next thereafter. Under the provisions of the Constitution as it then stood, her term of office was for two years and would have expired in January, 1904. At the general election in November, 1902, article 20 of the Constitution was adopted and became effective the following December by proclamation of the Governor. On March 29, 1904, pursuant to the provisions of article 20, the city and county of Denver adopted a charter, which, among other things, designated the office of county superintendent of schools of the city and county of Denver, with a salary of \$900 per annum. In May, 1904, at a general city and county election, plaintiff was elected under the charter to, and on June 1st following qualified for, that office, and served and received the salary, as provided for by the charter, for seven and one-half months, the period involved in this action. The plaintiff now claims that for this period she was entitled to compensation at the rate of \$2,800 a year, under the state law, or \$1,711.08, less the sum of \$550, which she had received as salary under the charter, leaving a balance due of \$1,161.08.

This question has been, by this court, frequently determined contrary to the contention of plaintiff. Her term of office as county superintendent of schools for Arapahoe county was expressly terminated by article 20 on December 1, 1902, when it went into effect. She never was county superintendent of schools, under the general laws, for the new entity, "the city and county of Denver." No such county office ever has existed in that territory, and naturally there could not have been an occupant of that office. Plaintiff was, at the May election in 1904, under the charter, chosen to the office of county superintendent of schools for the city and county of Denver. As such officer it became and was her duty; in addition to discharging the duties of superintendent of schools, under the charter, to also discharge, for the same salary, the duties therein which devolve upon county superintendents of schools generally under the state laws. During this period the only salary plaintiff was entitled to have was that provided by the charter. This she has already received. On no theory is she entitled to get more. The following authorities are conclusive upon the foregoing propositions: *McMurray v. Wright*, 19 Colo. App. 17, 73 Pac. 257; *Uzzell v. Anderson et al.*, 38 Colo. 82, 89 Pac. 783, 1056; *Orahod v. City and County of Denver*, 41 Colo. 172, 91 Pac. 1116; *Alchele v. City and County of Denver*, 120 Pac. 149; *People ex rel. v. Casiday et al.*, 50 Colo. 503, 117 Pac. 357; *Dixon v. People ex rel.*, 127 Pac. 930, decided October 25, 1912; and *Elder v. City and County of Denver*, 127 Pac. 949, decided November 11, 1912.

[2] It is urged that whether plaintiff was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county superintendent of schools, as claimed in this suit, has been determined in her favor in an action in the district court of the city and county of Denver, brought by her against William A. Hoover et al., the executive officers of the city and county of Denver, to compel them, and in which they were adjudged, to draw and certify salary warrants in favor of the plaintiff, as such officer, for the six months' period immediately prior to that involved in this suit. That judgment is in direct conflict with numerous decisions of this court, some of which are cited above, notably the *Cassiday*, the *Elder* and the *Anderson* cases, wherein the precise questions upon which plaintiff here relies to support a recovery, although between different parties and affecting the status of different county officers, were determined contrary to the conclusion reached in the Hoover case. Under such circumstances, it may well be doubted whether this court would be bound by a decision of a nisi prius court, on a question of res judicata, even if all the elements were there present to make such decision applicable here on that theory.

This record, however, shows that after the Hoover decision plaintiff was elected county superintendent of schools for the city and county of Denver under the charter, qualified and acted as such during the full period covered in this controversy. When she was so elected and qualified, then by charter designation she became the officer or agent to discharge in that territory, if it was intended by article 20 that there should ever be such an officer therein, all duties appertaining to that office, under the general law. Whatever difference of opinion there may be as to whether plaintiff was, prior to her election under the charter, county superintendent of schools in that territory under the state law, after the adoption of article 20, either de jure or de facto, clearly after such election and qualification she was only an officer therein under the charter. So that, in this suit, in addition to having different parties, different subject-matter, and different issues from those in the Hoover case, a thing has intervened, to wit, the election of plaintiff as county superintendent of schools under the charter, which changes the entire situation, and therefore, in no event, can the decision in the Hoover case be held to be res judicata of the questions at issue in this case.

It failing to appear from the case as made by plaintiff that there was any duty upon the defendants to audit, allow or draw warrants for her claim, the judgment so directing was wrong and is reversed, and the cause remanded with directions to dismiss the complaint.

MUSSER and WHITE, JJ., concur.

**TOWN OF LYONS v. CITY OF LONGMONT.**  
(Supreme Court of Colorado. Jan. 6, 1913.)

**1. EMINENT DOMAIN (§ 28\*)—PROPERTY SUBJECT—STREETS OF TOWN.**

Const. art. 16, § 7, providing that all persons and corporations shall have a right of way across public, private, and corporate lands for "ditches, canals, and flumes" for the purpose of conveying water for domestic, irrigation, mining, and manufacturing purposes and for drainage, upon payment of just compensation, authorized a city to condemn a right of way through the streets of a town for a pipe line to carry water for domestic and other purposes for the inhabitants of the city.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 75; Dec. Dig. § 28.\*]

**2. CONSTITUTIONAL LAW (§ 33\*)—SELF-EXECUTING PROVISIONS.**

The constitutional provision is self-executing, being complete, and in itself conferring the right given and prescribing the terms of its exercise.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 34; Dec. Dig. § 33.\*]

**3. CONSTITUTIONAL LAW (§ 29\*)—SELF-EXECUTING PROVISIONS.**

Constitutional provisions are self-executing if it appears that they are intended to take immediate effect and ancillary legislation is not necessary to put them into complete effect.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 32; Dec. Dig. § 29.\*]

En Banc. Error to District Court, Boulder County; James E. Garrigues, Judge.

Action by the Town of Lyons against the City of Longmont. Judgment for defendant, and plaintiff brings error. Affirmed.

The town of Lyons and the city of Longmont are located on the St. Vrain, the former near the point where the stream emerges from the foothills, and the latter about nine miles below. The city of Longmont commenced an action against the town of Lyons and a number of private owners of property in the town to condemn a right of way for a pipe line to carry water for domestic and other uses and purposes for the inhabitants of the city through and under certain streets and alleys of the town, and also through certain parcels of land owned by the individual property owners. The water supply for this system is taken from the north fork of the St. Vrain some distance above the town of Lyons. It is not necessary to notice in detail the averments of the petition filed by the city, as its sufficiency is not challenged, if the city has the right to condemn a right of way for its pipe line through the streets of the town of Lyons. To the petition the respondents filed their joint and several demurrers on the ground that the court was without jurisdiction of the proceedings or to grant possession of the premises described in the petition, and generally that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled. The city then applied for an order granting it possession of the premises described in its

petition to enable it to proceed with the construction of its pipe line, which was granted. Thereafter, for the purpose of saving time and expense to the parties, and in order to hasten the disposition of the case, a stipulation of facts was entered into between the parties, by which it was agreed that an answer need not be filed by respondents, and that the case should be considered at issue, without any further plea; that a board of commissioners need not be appointed, nor jury summoned; that the findings of the court should be as valid and effective as if a board of commissioners had been appointed and returned their report and appraisal; that the value of the land or property actually taken was \$1 for each tract or parcel; that there were no damages to the residue, and no benefits to any of the land of respondents not taken. It was further stipulated that the route described in the petition through the town of Lyons from petitioner's intake dam is the most practicable, feasible, and least expensive route, and that, if a line was constructed which did not pass through the town of Lyons, it would involve a greatly increased cost and engineering questions of getting the line over hills and cliffs which are not involved in the line going through the town of Lyons; that the town of Lyons lies between the diversion or intake dam of the city of Longmont, and the corporate limits of the latter, and that the pipe line did not pass through cultivated or improved land in the town of Lyons, and that no building or improvement was interfered with or damaged. It was also stipulated, as alleged in the petition, that the line was to be a "flow line"—that is, a pipe line in which the water flowed by gravity, and not by pressure—and that the line through Lyons should be, and was, a concrete and steel pipe, laid several feet below the surface, with every joint cemented or leaded, and fitted so closely together that water would or could not leak from the line; and that the city, as stated in its petition, only sought to obtain the right of way through the town of Lyons for the purpose of conducting water through its pipe line, subject to all reasonable rules and regulations which then existed or might thereafter be enacted by the town with respect to the laying and maintenance of the line within its boundaries.

The line had been laid through the town before the cause was tried. At the trial it appeared without dispute that the pipe had been laid through the town of Lyons at a depth of from four to ten feet; that no improvements of the town had been interfered with; that the water line of the town of Lyons had been crossed twice, Longmont's pipe going underneath; and that the pipe had been laid through the town with extra care and expense so as to make it absolutely safe, the line having been surrounded with concrete, so that it would never break, no

matter how heavy the travel over the streets might be. It appears, from the stipulation of the parties and the testimony, that the use of the streets by the town of Lyons, through which the pipe line passes, is not in any manner interfered with.

On these facts the court entered judgment awarding the city of Longmont a right of way over, upon, and through the parcels of land and streets mentioned in its petition for its pipe line for the conveyance of water to its waterworks system; and that upon payment of the damages, as fixed by the stipulation of the parties, the city of Longmont should become seised in fee of the right of way through such streets and parcels of land. The town of Lyons brings the case here for review on error, and contends the judgment is erroneous for the following reasons: "(1) The streets and alleys of the town of Lyons are public property and no right exists, and the courts of this state have no jurisdiction to condemn a right of way for a water pipe line by one municipality through the streets and alleys of another municipality. (2) The statutes of Colorado specifically prohibit the laying of any pipe line in any street or alley of a town or city without the consent of such town or city. (3) Towns and cities of this state have exclusive jurisdiction over the use of their own streets, and the judgment of the district court herein deprives the town of Lyons of such jurisdiction, and also results in giving jurisdiction to two municipalities over a portion of the streets and alleys of one of said municipalities at the same time and for the same purpose." In support of this proposition, the following statutory provisions of the Revised Statutes of 1908 are relied upon: Section 6519; subdivisions 58, 67, 68, 70, and 74, and paragraphs 1, 4, 7, 8, 9, of subdivision 7, of section 6525; section 6815; the Eminent Domain Act, §§ 2415, 2416, 2458, et seq.; and sections 6676 and 6588.

Based on these provisions and the facts, the argument of counsel for the plaintiff in error is that the streets and alleys of the town of Lyons are public property; that the Constitution and statutes of the state only confer the right to condemn private property; that a pipe line cannot be laid in any street or alley of a town without its consent; that towns and cities have exclusive jurisdiction over the use of their streets; that the judgment confers jurisdiction on two municipalities over the same streets, and deprives the town of Lyons of the use of its streets for water, gas, sewer pipe line, and other municipal uses.

The contention of counsel for the city of Longmont is that the eminent domain act gives the city a right to condemn a right of way through the streets of the town of Lyons, or, if it does not, that this right is conferred by section 7 of article 16 of the Constitution, which is as follows: "All persons

and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation." For a reply to this argument, counsel for plaintiff in error contend that the section is not applicable, for the reason that it is part of an article confined to the subject of "mining and irrigation," and was not intended for a municipal water supply; that it only applies to "ditches, canals and flumes," and does not apply to a "pipe line" for carrying water underneath the surface; that the streets and alleys of the town of Lyons are not "public lands" within the meaning of this provision; and that it is not self-executing.

Schuyler & Schuyler and Henry Trowbridge, all of Denver, for plaintiff in error. Grant E. Halderman, of Longmont, and Horace N. Hawkins, of Denver, for defendant in error.

GABBERT, J. (after stating the facts as above). [1] The sole question involved is whether the city of Longmont has the right to condemn a right of way for its pipe line through the streets and alleys of the town of Lyons. Independent of statutory provisions cited by counsel for plaintiff in error, we think this right is conferred by the constitutional provision above quoted. It declares that all persons and corporations shall have the right of way across public, private, and corporate lands, for the purpose of conveying water for domestic purposes. The intent of a constitutional provision is the law. Manifestly the intent of the provision under consideration was to confer upon all persons and corporations the right of way across lands, either public or private, by whomsoever owned, through which to carry water for domestic purposes, and necessarily embraces a municipal corporation seeking a right of way for such purposes. It covers every form in which water is used, domestic, irrigation, mining, and manufacturing, and its object is to be ascertained from its language, and not from the title or heading the compiler of the Constitution has given the article in which it is found. It does not mention a pipe line, but its evident object was to permit a right of way for a conduit through which to convey water for the purposes designated, and hence the kind of conduit employed and utilized is of no material moment, so far as any question in the case at bar is involved.

[2] It does not merely declare principles.

On the contrary, it is complete in itself, and by its own terms confers a right and prescribes the rules and conditions by means of which such right may be enforced. It employs no language to indicate that the subject with which it deals is to be referred to the Legislature for action. A constitutional provision is a higher form of statutory law which the people may provide shall be self-executing; the object being to put it beyond the power of the Legislature to render it nugatory by refusing to pass laws to carry it into effect.

[3] Constitutional provisions are self-executing when it appears that they shall take immediate effect, and ancillary legislation is not necessary to the enjoyment of the right thus given, or the enforcement of the duty thus imposed. In short, if a constitutional provision is complete in itself, it executes itself. *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; *Cooley on Const. Lim.* (6th Ed.) 99; 6 Am. & Eng. Ency. 912; *Kitchin v. Wood*, 154 N. C. 565, 70 S. E. 995; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. To summarize: The constitutional provision under consideration confers a right and prescribes the rule by means of which, in an appropriate action in a court of competent jurisdiction, that right may be enforced without further legislation, and is therefore self-executing.

In so far as the statutory provisions cited by counsel for plaintiff in error are in any sense applicable, the rights thereby conferred upon cities and towns are subject to this constitutional provision. The judgment in no sense deprives the town of Lyons of jurisdiction over its streets and alleys, as it retains authority to prescribe all reasonable and necessary rules and regulations which the city of Longmont must observe in maintaining its pipe line through such streets and alleys, and all rights which it may exercise over its line within the corporate limits of Lyons are therefore subject to such control. It affirmatively appears that the judgment of the district court does not deprive the town of Lyons of the use of its streets for any purpose whatever, either present or future, and it is therefore unnecessary to consider whether a right of way for the purposes mentioned in the Constitution would be granted when the effect would be to deprive a municipality of all use of its streets through which such right of way was sought.

The judgment of the district court is affirmed.

Judgment affirmed.

CAMPBELL, C. J., and GARRIGUES, J., not participating.

**SHEELY v. PEOPLE**

(Supreme Court of Colorado. Jan. 6, 1918.)

**1. BRIBERY (§ 2\*)—STATUTE—CONSTRUCTION.**

Rev. St. 1908, § 1720, making one guilty of bribery who gives any sum to any ministerial or judicial officer, etc., with intention to influence him, should be strictly construed as against the state and liberally in favor of the accused, consonant, however, with ascertaining the legislative intent.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 1; Dec. Dig. § 2.\*]

**2. STATUTES (§ 194\*)—CONSTRUCTION—EJUSDEM GENERIS.**

Where a statute deals with a particular class, following which it uses general words, the class first mentioned is deemed the most comprehensive, and the general words are treated as referring to matters of the same kind within such class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. § 194.\*]

**3. STATUTES (§ 193\*)—CONSTRUCTION—DOUBTFUL WORD.**

The meaning of a doubtful word may be ascertained by referring to the meaning of words associated with it in the statute referable to the same subject-matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 271; Dec. Dig. § 193.\*]

**4. COUNTIES (§ 47\*)—COUNTY COMMISSIONERS—DUTIES.**

The duties of county commissioners are to administer the affairs of the county, to exercise the powers expressly given them by statute, and such implied powers as are reasonably necessary to execute their express powers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. § 47.\*]

**5. COUNTIES (§ 47\*)—COUNTY COMMISSIONERS—NATURE OF DUTIES—"ADMINISTRATIVE OFFICERS."**

Since the general scope of the duties of county commissioners is the administration of the county affairs, they are "administrative officers" rather than judicial or legislative officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. § 47.\*]

For other definitions, see Words and Phrases, vol. 1, p. 198.]

**6. OFFICERS (§ 1\*)—NATURE—NEITHER JUDICIAL NOR LEGISLATIVE—"EXECUTIVE OFFICERS"—"ADMINISTRATIVE OFFICERS."**

Officers that are neither judicial nor legislative necessarily belong to the executive department of government, and are "executive" or "administrative" officers; those terms being equivalent.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 1, 4; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2568-2569.]

**7. STATUTES (§ 188\*)—LEGISLATIVE INTENT.**

The legislative intent should be sought in the ordinary meaning of the words of the statutes, construed in view of the connection in which they are used and of the evil to be remedied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267; Dec. Dig. § 188.\*]

**8. STATUTES (§ 241\*)—CONSTRUCTION—PENAL STATUTES.**

The giving to statutory words their full meaning in the connection in which they are

used does not violate the rule requiring strict construction of penal statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

**9. WORDS AND PHRASES—"MINISTRATION"—"MINISTER"—"ADMINISTER"—"MINISTERIAL."**

Webster's Dictionary defines "ministration" as the act of administering, and defines "minister" as meaning to "administer," giving those two words as synonyms; and defines "ministerial" as pertaining to administration or to the executive part of government.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 195-197; vol. 5, pp. 4522-4523.]

**10. WORDS AND PHRASES—"MINISTERIAL."**

In addition to being used in contradistinction to the word "judicial," the word "ministerial" is often used as synonymous with "administrative" or "executive."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4523-4525; vol. 8, p. 7722.]

**11. BRIBERY (§ 1\*)—COUNTY COMMISSIONERS—"MINISTERIAL OFFICERS."**

Rev. St. 1908, § 1720, provides that any person who shall directly or indirectly give any sum or sums of money to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general, or prosecuting attorney, mayor, alderman, or member of the city council or legislative assembly, or "other officer, ministerial or judicial," with intent to influence such officer, shall be deemed guilty of bribery. *Held*, that a county commissioner was a "ministerial officer" within the statute, so that one bribing a county commissioner could be prosecuted thereunder.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4526; vol. 8, p. 7722.]

En Banc. Error to District Court, Weld County; Neil F. Graham, Judge.

Charles G. Sheely was convicted of bribing a public official, and he brings error. Affirmed.

M. B. Waldron and B. B. Laska, both of Denver (Geo. Q. Richmond and O. N. Hilton, both of Denver, of counsel), for plaintiff in error. Benjamin Griffith, Atty. Gen., Charles O'Connor, First Asst. Atty. Gen., and Geo. A. Carlson, Dist. Atty., of Ft. Collins (John T. Jacobs, of Greeley, of counsel), for the People. Chas. B. Ward, amici curiæ.

MUSSER, J. The plaintiff in error was sentenced for a term in the penitentiary for bribing one of the county commissioners of Weld county. The information was based upon section 1720, Rev. Stat., which, so far as is material to this review, is as follows: "If any person shall directly or indirectly give any sum or sums of money \* \* \* to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general or prosecuting attorney, mayor, alderman or member of city council, member of the legislative assembly, or other officer, ministerial or judicial (but such fees as are allowed by law), with intent to induce or influence such officer to \* \* \* the person

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so giving and the officer so receiving any money, \* \* \* with intent or for the purpose or consideration aforesaid, shall be deemed guilty of bribery, and on conviction. \* \* \* It is the contention of the plaintiff in error that a county commissioner is not included within the section, and that, therefore, the information did not charge an offense against any law of this state. To determine the question presented, it is necessary, as it is in the case of any statute, to ascertain the intention of the Legislature in enacting the law. For this purpose, such rules of construction as are favored by the courts and that may aid in reaching a correct determination may be employed.

[1] At the same time it must be remembered that this is a criminal statute, and should be strictly construed as against the state and liberally in favor of the accused, but the strictness to be employed or the liberality to be indulged must not be such as will confine the operation of the statute within limits narrower than those intended by the Legislature or destroy the intention of the lawmaking body. Counsel for plaintiff in error have called to our attention certain well-known rules of statutory construction, and insist that they should be applied to determine the intention of the Legislature with respect to the statute in question. They are the rules of *eiusdem generis*, *noscitur a sociis*, and *expressio unius est exclusio alterius*. We have no quarrel with these rules, nor the authorities cited with respect to them. They can be used only to aid the courts in ascertaining the legislative intent; and, when they are to be used for that purpose, they, of course, must be applicable and afford aid. If they do not afford any aid, they are not to be resorted to.

[2, 3] The first two of the rules mentioned are closely related. The one is: "Where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *eiusdem generis* with such class." *State v. Krueger*, 134 Mo. 262, 35 S. W. 604. The second is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; that is, "by considering whether the word in question and the surrounding words are in fact *eiusdem generis* and referable to the same subject matter." *Brooms' Leg. Max.* (7th Ed.) p. 439. It is plain from the statement of these rules that, before they can be of any aid, it must clearly appear that the Legislature was thinking of a particular class of persons or objects. Now it does not appear that the Legislature had in mind any particular class of officers when we read the section under consideration. The words are, "any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general or prosecuting attorney, mayor, al-

derman or member of city council, member of the legislative assembly, or other officer, ministerial or judicial." Here are enumerated executive, legislative and judicial officers; state, county, and municipal officers; some that possess ministerial qualities in varying degrees; some that are alone in their office; others that are members of official bodies. It cannot be said that those mentioned are all of one particular class, so as to make the general words referable to a class. The other rule, that the mention of one thing is the exclusion of the other, is equally inapplicable. Specific enumeration of the officers mentioned does not exclude county commissioners if the general words that follow will fairly include them. It follows that these maxims or rules are not aids in the construction of this statute. If the statute relates to a county commissioner, it must be because that officer is fairly included in the words, "or other officer, ministerial or judicial." In the general scope of their duties commissioners are not judicial officers.

In *Merwin v. Boulder Co.*, 29 Colo. 169, 67 Pac. 285, this court held that passing on claims against the county, which is one of the duties of a county commissioner, is not a judicial act. Yet such an act requires the exercise of discretion and the ascertainment of facts. So in many other matters the county commissioners are vested with large discretionary powers. Some of them may approximate judicial powers, may be called quasi judicial powers, but most of them are not really judicial. The commissioners are the agents of the county. When they act, it is the county acting through them. Whatever they do is in the management and administration of the affairs of the county. They do not sit like a disinterested judge to hear and determine controversies between two parties, but they hear and determine the case of the county that they represent. They, in effect, ascertain facts and employ their discretion largely in their own cases, and determine them similar to the way any business man will do in the management of his own affairs. These are administrative acts, rather than judicial.

[4] County commissioners represent their county, and have charge of its property and the management of its business concerns. Their duties are to administer the affairs of their county, and in that behalf to exercise such power as is expressly conferred upon them by the Constitution and the statutes of the state, and such implied power as is reasonably necessary to the proper execution of the express power. *Roberts v. People*, 9 Colo. 458, 13 Pac. 630; *Merwin v. Boulder Co.*, supra.

[5] The general scope of their duties being the administration of the affairs of the county, they must be administrative officers, and though vested with a large amount of discretion, which this court has many times

said cannot be controlled by the courts, yet it is administrative discretion, rather than judicial. Nor are they legislative officers. They do not make law, but are themselves wholly subject to the Constitution and the statutes, and are concerned only in the administration of the business of the county as therein directed.

[6] If they are neither judicial nor legislative officers, they must fall within the executive department, the administrative branch, and are to be classed as executive or administrative officers, as these terms are used interchangeably. *State v. Loechner*, 65 Neb. 814, 91 N. W. 874, 59 L. R. A. 915.

[7, 8] So we come to the real question in the case. Did the Legislature intend to cover county commissioners by including them within the designation of other ministerial officers? A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in the light of the mischief to be remedied. While there is a rule requiring the strict construction of a penal statute, that rule is not violated by giving to the words their full meaning in the connection in which they are employed. *Woodworth v. State*, 26 Ohio St. 196. The mischief sought to be remedied by the statute is the bribery of public officers. Every one must admit that it is just as necessary to prevent the bribery of a county commissioner as that of any other official, and that the bribery of a county commissioner is as much within the mischief sought to be remedied by this statute as the bribery of any other officer. A reading of the authorities discloses that the word "ministerial" is used with various shades of meaning. The plaintiff in error, by giving the word the very narrowest meaning it ever has, asserts that county commissioners are not embraced in that meaning. This may be true, but the meaning of the word in the statute under consideration is much more comprehensive than the one given it by counsel. Its precise meaning in any sentence depends upon the connection in which it is used. In the section under consideration the word "ministerial" is used in connection with the word "judicial." The words are used in opposition to one another, and the word "judicial" includes officers that the word "ministerial" does not. It is our duty, then, to ascertain the ordinary meaning of the word "ministerial" in the connection in which it is used in the section under consideration; that is, in opposition to the word "judicial." Used in this way, it is said in *People v. Jerome*, 36 Misc. Rep. 256, 73 N. Y. Supp. 306, that the act of every public official is either ministerial or judicial. One of the definitions of "ministerial" given in Webster's New International Dictionary is as follows: "Of the nature of those acts or duties belonging to the administration of the

executive function; designating, or pertaining to, an act that a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without regard to or without the exercise of, his own judgment upon the propriety of the act done; opposed to judicial." In *State v. Governor*, 25 N. J. Law, 331, it is said at page 350: "As contradistinguished from judicial duties all executive duties are ministerial." The same classification that is made in these authorities with respect to acts and duties must be made with respect to officers. Those officers whose duties are judicial in their general scope are judicial officers, and those whose duties are executive to the same extent are executive officers. It therefore follows that as contradistinguished from judicial officers all executive officers are ministerial. The management of the executive department of the government is the administration thereof, and those who are engaged in such management or administration are executive or administrative officers, and are themselves referred to as the administration. 1 Bouv. Dict. (Rawle's Rev.) 56.

[9] "Ministration" in Webster's Dictionary is said to be "the act of ministering," and "minister" is defined to mean "administer." And in the same dictionary one of the synonyms of "administer" is "minister," and "administerial" is defined as "pertaining to administration or to the executive part of the government." Now the fact that these executive, administrative, or ministerial officers may and do exercise discretion and judgment in varying degree in the discharge of their administrative duties does not make them the less ministerial; for, if it did, there would be few administrative or ministerial officers. Most of them would be excluded, and would have to be placed in a class that has not yet been defined by the authorities. The administration of government often requires in a large degree the exercise of discretion and judgment. In *People v. Walter*, 68 N. Y. 403, the court, at page 410, uses the word "ministerial" in opposition to "judicial," and speaks of ministerial officers as exercising judgment and discretion, and treats town commissioners as being in that class, notwithstanding that they were given discretion and judgment in the discharge of their duties. It follows from all this that county commissioners who are charged with the administration of the county government and the management of its affairs naturally fall into the class designated as "ministerial" in the classification made in the statute under consideration. It is only by giving to the word the very narrowest meaning with which it is ever used—a meaning designated often in the authorities as purely ministerial—that an officer can be excluded from the ministerial class because he may exercise discretion in the performance of his duties, and



it is very plain that the meaning intended in the statute is much more comprehensive than the narrow one sought to be put upon it by the plaintiff in error.

[10] Aside from its connection with the word "judicial," "ministerial" is often used as synonymous with "administrative" or "executive," and is used to refer to acts requiring the exercise of discretion. In *People v. Salsbury*, 134 Mich. 537, 98 N. W. 936, it is said: "The character of the act does not depend on the amount of discretion confided to the officer. There is much reason for saying that under our Constitution all administrative or ministerial duties are executive in character, as they not only can be nothing else under the Constitution, but they are all acts in the conduct of the government; i. e., the administration of public affairs through and under the regulations prescribed by law." In *State v. Loechner*, supra, the statute under consideration provided that "any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, prosecuting or district attorney, or any ministerial officer" who was guilty of certain acts should be fined, etc. A member of a board of education of a school district in a city was held to come under the provisions of the statute as being a ministerial officer. The duties of a member of the school board, as related to his district, were analogous to the duties of a county commissioner in this state, as related to his county, as is shown by the following quotation from the opinion: "The members of the school board are unquestionably regarded by statute as the servants or agents of the corporation, selected for the purpose of conducting and managing its affairs in the manner and under the restrictions pointed out by statute. They are an administrative body charged with the duty of administering the law governing the public schools within the city composing the school district of which they are officers. It is their duty to administer the affairs of the corporation as directed by statute in the exercise of such powers and authority as are vested in them. Doubtless in many instances in the performance of their duties they may exercise a discretion or judgment, quasi judicial in character, but this fact alone cannot determine the class to which they belong, or bring them in the category of judicial officers." From this the court held that the member was an administrative officer, and proceeded to show that the word "ministerial" in the statute meant the same thing as "administrative," and that, therefore, the defendant belonged to the class of officers designated as "ministerial," and came within the statute.

[11] Enough has been said to demonstrate that a county commissioner is not only fairly but plainly a ministerial officer in the

sense intended by the statute in question, and therefore the judgment is affirmed.

Judgment affirmed.

CAMPBELL, C. J., not participating.

# COLORADO TELEPHONE CO. v. WILMORÉ et al.

(Supreme Court of Colorado. Jan. 6, 1913.)

## 1. TELEGRAPHS AND TELEPHONES (§ 34\*) — OPERATION — EXCHANGE — SERVICE — DISCRIMINATION.

Plaintiffs, living just outside the boundary of the city, but geographically in its telephone zone, had been receiving telephone service from defendant company out of the main exchange of the city for many years. Thereafter defendant established a telephone zone outside of the city limits and gave notice of the termination of contracts with the plaintiffs and required them to connect with such outside exchange, whereby they were compelled to pay an extra charge for the city service. *Held* that, while the specific contracts under which service had been furnished could be lawfully terminated on compliance with the conditions thereof as to notice, the service could not be terminated by defendant at will, or the character or quality changed so as to make it inferior to and more expensive than that furnished to other users similarly situated in the telephone zone of the city, so long as plaintiffs were ready to receive and pay for it, on the same terms and conditions as others in that territory.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

## 2. CONSTITUTIONAL LAW (§ 70\*) — JUDICIAL POWER—ENCROACHMENT ON LEGISLATURE.

In a suit by patrons of a telephone company to restrain the company from discriminating against plaintiff by changing the character of the service which they had been enjoying, the court has no power to fix the rates of service, as that is a purely legislative function.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

## 3. TELEGRAPHS AND TELEPHONES (§ 34\*) — INJUNCTION—MODE OF FURNISHING SERVICE — POWER OF COURT.

In a suit by subscribers of telephone service to restrain defendant from discriminating against them by changing the character of the service so as to make it inferior to that then furnished to other users similarly situated and more expensive, the court has no authority to prescribe the particular exchange to which plaintiffs shall be connected.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

## 4. TELEGRAPHS AND TELEPHONES (§ 34\*) — INJUNCTION—PREVENTING DISCRIMINATION.

Where a telephone company cannot legally refuse to furnish plaintiffs the same grade of service at the same price as it furnishes to other patrons similarly situated, an injunction to prevent it from removing plaintiffs' telephone instruments, or forcibly requiring plaintiffs to connect with another exchange, which would be less convenient and more expensive, will issue.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

Error to District Court, City and County of Denver; Frank T. Johnson, Judge.

Suit by William W. Wilmore and others against the Colorado Telephone Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions.

Milton Smith, Charles R. Brock, and Schuyler & Schuyler, all of Denver, for plaintiff in error. Toney & Toney, of Denver, for defendants in error.

BAILEY, J. [1] Defendant below, plaintiff in error, the Colorado Telephone Company, is a corporation engaged in the business indicated by its name, with its principal office in the city and county of Denver. Plaintiffs, defendants in error, reside in Jefferson county, with places of business and residences just over the line dividing that county from the city and county of Denver, but immediately tributary to the latter territory. On August 29, 1901, a contract was made between the defendant and Wilmore, one of the plaintiffs, under the terms of which the defendant has ever since been, and still is, furnishing him telephone service from its Denver system to his place of business. Similar contracts were also made between the other plaintiffs and the defendant, at different times thereafter, prior to the institution of this suit, under which they also have had like telephone service, both for business and social purposes. Each of the contracts contains an express provision making it subject to termination, at the option of either party, upon thirty days' notice in writing. When these several contracts were entered into there were only a few people located in the neighborhood of plaintiffs. Since that time, however, the community in the vicinity of their residences and places of business has grown in population, so that the number of residents therein, who demand, require, and are entitled to telephone service, has increased correspondingly, and it became necessary for the company to establish an exchange at the town of Arvada, situate some three or four miles north and west of the several respective locations of plaintiffs, from which to serve the people of that town and vicinity. The main purpose of the exchange at Arvada was to give service to and between those living in and near that village. The town, however, is connected by trunk lines with the Denver system, just as, for example, are the towns of Golden, Boulder, and other state towns. Subscribers to, and those receiving service from, the Arvada exchange, in order to communicate with the users of telephones connected with the Denver system, must do so over toll lines and are subjected to a toll charge therefor, like, for example, subscribers in the Golden or Boulder exchanges. The testimony establishes, and the court in substance found, that, geographical-

ly, the plaintiffs are in a territory immediately tributary to Denver, and are, and can be, more readily and naturally connected with the Denver telephone system than with the Arvada exchange.

After the new exchange had been established notice was given to each of the plaintiffs, agreeable to the provision contained in the several contracts between them and the defendant, that the particular contracts would be terminated at the expiration of thirty days, when, if the plaintiffs, or any of them, so desired, other contracts would be made by which telephone service would be furnished to them through the Arvada exchange, at the same rate, with like facilities, and of the same character and quality as that furnished to other users in that neighborhood connected with that exchange.

Upon receipt of this notice plaintiffs brought a common suit to enjoin the defendant from exercising its option under these respective contracts to terminate them, or any of them, and to compel it to furnish each of the plaintiffs with telephone service at the same rate, in the same manner and through the same exchange as had previously been done, and for general relief. The real object of the action, as is clearly apparent from the averments of the complaint considered as a whole, is to prevent threatened discrimination between users of telephonic service similarly situated. While plaintiffs were not entitled to the specific relief prayed and given, still there is sufficient alleged in the complaint, accepted as true, to afford, under the general prayer, relief from proposed discrimination by defendant between plaintiffs and others of its patrons, all entitled to like service on the same terms.

All purely technical objections urged will be disregarded, and matters affecting the merits of the controversy only will be considered and determined, that there may be an end to litigation.

The record shows that plaintiffs have for years been receiving telephone service from the defendant company, out of its main exchange in the city of Denver, under special contracts, which could by their terms be terminated by either party on thirty days' notice. The plaintiffs were, for all these years, recognized, and furnished service, as being in the Denver telephone zone, and according to the proof are geographically well within the limits of the local business of the defendant, as carried on in and about the city of Denver. They are, therefore, because of their established and settled status in that zone, and geographically, entitled to continue to have, as in the past, telephone service upon the same terms and conditions, in all particulars, which others, like or similarly situated in that particular territory, have and receive it; no more, no less, so long as that service is fair, just and reasonable.

It may be admitted that the specific con-

tracts, under which service has been furnished by the company and received by the plaintiffs, can be lawfully terminated, upon compliance with their conditions as to notice; but the question here is not one of termination of contract, but termination, or change of character and quality, of service. The service to plaintiffs may not be terminated at will by the defendant, or the character or quality of it changed, so as to make such service essentially different from, inferior to, and more expensive than, that which is now being furnished to other users, like or similarly situated in the Denver zone, so long as they are ready to receive and pay for it, after the same manner and upon the same terms and conditions that others in that territory do. In other words, plaintiffs are entitled to have direct connection with the Denver system, through some exchange in that recognized telephone zone, so that they may reach all users of the service out of the main and all other exchanges in the Denver system, just as other subscribers therein do.

It is clear that the claim of the plaintiffs to the right of direct connection with the main or central switchboard is untenable, and can neither be upheld nor enforced. But the attempt in this case is to put plaintiffs into the Arvada exchange, where a toll charge is made, both to them, when they call a person in Denver, and also to any one in Denver calling them. This is clearly an inferior service to that which has been, and yet is being, furnished plaintiffs, and admittedly would be greatly more expensive; and it is also inferior to, and more expensive than, that which is still furnished, to other users of like service in the Denver zone, to which latter territory plaintiffs belong, because of the past recognition of and established service to them by defendant, from its main exchange of the Denver system, and also because of their geographical position. In other words, they have for years been recognized, accepted and given service by the defendant, as belonging to that territory, and a status for them has been created in that respect; so that the company will not now be heard to say otherwise, or to discontinue service to them from some exchange of the Denver system, unless replaced by some other service equally advantageous. The defendant may put plaintiffs in any exchange in Denver which gives them like service, upon the same terms and conditions, with other patrons in the same telephone zone. It may also make the same charge therefor, so long as that is a just and reasonable one, which it makes to its other Denver patrons like circumstanced. It is within the discretion of the defendant to connect these plaintiffs with any Denver exchange, the Gallup, the Hickory, or any other exchange, which will give them like service to that given to its other Denver patrons, from the York, the Champa, the

South, or any other of the exchanges of the Denver system. That plaintiffs happen to be located just across the line which divides the territory of the city and county of Denver from Jefferson county is immaterial. Such lines are purely artificial, and the duties and obligations which the defendant owes to its patrons remain precisely the same, whether such patrons live and have their places of business on the one side of such a line or the other.

The fundamental difficulty in the case arises from an attempt to erroneously classify plaintiffs as users of telephone service. The defendant seeks to treat them as being in the Arvada zone, or system, and entitled only to such service, upon the same terms and conditions, that its patrons receive who are properly located in that zone for that purpose; while in fact the pleadings and proofs show that plaintiffs are in and belong to the Denver zone or system, and entitled to all the rights and privileges in that behalf which other users of the service in that territory have and enjoy.

The defendant has no more right to put the plaintiffs out of the Denver zone, and disconnect them from that system, and give them an inferior and more expensive service, than it has to do the like with a subscriber in the York, Champa, or any other Denver exchange. If what is here attempted may be done, then a subscriber in the York exchange, in the outskirts of that territory, might be disconnected from his old exchange and connected with an exchange in Aurora, with an inferior and more expensive service, necessitating a toll charge when communicating with any one in the city of Denver. That clearly would be a discrimination between him and other Denver subscribers, and manifestly could not be lawfully done over his protest. This example serves to illustrate the discrimination which is sought to be made between plaintiffs and other subscribers in the Denver system, with whom, in the past, plaintiffs have been served on the same footing, enjoying with them precisely the same telephonic privileges and service under equal conditions. Just as a user of the service in the York exchange has a status, which entitles him to connection, through that exchange, with all other subscribers in the Denver system, and just as the company would be prohibited from discriminating against him, as between other subscribers in that zone with a like status, either as to rates, kind and quality of service, or otherwise, so is the company prohibited from doing the like with plaintiffs, because their status with and relation to the company are identical with that of other Denver subscribers. It is of no concern to plaintiffs that they be connected with the Arvada exchange; that would be of no benefit or advantage to them. They have no business interests there; their business and their patrons

are in Denver, where they have always had direct communication, which privilege they now seek to retain in order to preserve their business and protect themselves against financial loss. For practical purposes plaintiffs might just as well be connected with defendant's Golden or Boulder exchange, and the company has just as much legal right to make that connection, and compel plaintiffs to communicate with Denver through one of those sources, as it has to put them through the Arvada exchange, in the manner, and upon the terms and conditions, which admittedly it is its purpose to do.

[2, 3] The decree rendered is too broad in practically every particular, and must be reversed. The court had no authority to fix rates; that is purely a legislative and not a judicial function; it had no authority to perpetuate the contract between the parties as it attempted to do; and it had no authority to compel the defendant to give service out of the central or main exchange, to the exclusion of all other exchanges in the Denver system.

[4] However, plaintiffs, not perhaps in the most approved and faultless manner, appear to have stated a cause of action which, if supported by proofs, will entitle them to an order restraining the company from removing its telephone instruments from their places of business and residence; also from connecting them with the Arvada exchange, unless it gives a service therefrom at the same rate, on the same terms, in all respects, and of the same quality that it does to Denver patrons, from Denver exchanges, like, for illustration, that out of the York or Champa exchange; and also from disconnecting them from its main exchange, until it is prepared, ready and willing to connect them with some other exchange, which will furnish the same class and quality of service, for the same pay, and on the same general terms and conditions, under which other users of the service in the Denver system receive it. The mere fact that plaintiffs prayed for and got relief which the court could not properly give, ought not, on any theory, to put them out of court, when in their complaint facts are stated which may entitle them to equitable relief, although different in character from that actually decreed.

To hold that plaintiffs have now no action in equity, to prevent the consummation of a situation from which they would be clearly entitled to relief, when that situation is effected, would be to sacrifice substance to form, a thing which should not be encouraged.

In our view of the matter, the conclusions here announced adjust this controversy along lines so evidently in harmony with common fairness, reason and justice, that we deem it unnecessary to cite authorities to support them. Our attention has been called to none which are in any way in conflict with the conclusions here reached.

The judgment and decree is reversed, and the cause is remanded with directions to the trial court to permit plaintiffs to amend their complaint generally, if they shall be so advised, and for further proceedings in conformity with these views. Former opinion modified. Petition for elimination therefrom denied.

GABBERT, J., by special opinion, concurs in the conclusion for a reversal of the judgment, but holds that the action should be remanded with directions to dismiss; also, that the petition for elimination of certain portions of the original opinion should be allowed. CAMPBELL, C. J., not participating.

GABBERT, J. (concurring in part). I fully concur in the reversal of the judgment, but in my opinion questions are discussed, and apparently determined, which are not involved. Besides, the judgment of this court does not go far enough. In addition to reversing the judgment below, the cause should be remanded, with directions to dismiss. The sole purpose of the action instituted by plaintiffs was to obtain a decree compelling the telephone company to continue the service theretofore furnished these parties at the same rates, and from the same exchange, through which such services had been enjoyed, under special contracts. A decree to this effect was rendered. Very properly it is said in substance, in the opinion of Mr. Justice BAILEY, that this is erroneous; that the claim of plaintiffs to this relief is not tenable; that the trial court had no authority to fix rates or perpetuate contracts between the parties, or to compel the telephone company to give them service out of its central, or main, exchange. This, in my opinion, is unquestionably correct, for the reason that the exchange through which service shall be furnished is a matter within the control of the telephone company. The courts have no authority to control or manage its affairs in this respect. Matters of detail must be left to the management of the company; hence the action should be dismissed. The opinion, however, does not stop with determining the only questions presented by the pleadings, or the theory upon which the case was tried below by the respective parties, but proceeds to state that plaintiffs are within the Denver zone; that they are entitled to telephone service upon the same terms and conditions which others similarly situated in that territory receive; that plaintiffs are entitled to have direct connection with the Denver system through an exchange in that territory—a declaration totally at variance with the proposition that the details of service must be left to the control of the telephone company. In the opinion of Mr. Justice BAILEY it is then said that if the telephone company connects plaintiffs with the so-called Arvada exchange, it must give them a service on the same terms in all respects and

of the same quality that it does other Denver patrons from Denver exchanges.

In my judgment, none of these questions are presented for determination, and I therefore decline to express any opinion upon them at this time. The court having determined that the plaintiffs were not entitled to the relief demanded and given, that the exchange through which the plaintiffs were given service was a matter within the control of the telephone company (a conclusion in which I fully concur), the other questions discussed and intended to be decided should not be determined in an action, the real and sole purpose of which was nothing more or less than to compel the telephone company to continue in force and effect the several contracts theretofore entered into with the plaintiffs. They are not now presented for consideration, and the decision, to the extent pointed out, is not only premature, but in a case where, under the issues presented, they are not involved and, according to the views of Mr. Justice BAILEY will not be, except the complaint be amended.

#### On Petition for Rehearing.

Since the foregoing was written the original opinion has been modified in a respect with which, under the pleadings, I do not agree. As above stated, questions were discussed and determined in the original opinion which were not involved. In this respect the modified opinion is open to the same objections. The sole purpose of the case was to perpetuate the contracts theretofore entered into between the company and plaintiffs. The fact that the latter prayed for general relief did not entitle them to any further or different relief than that to which the action they instituted entitled them. This, according to the complaint, was whether or not they were entitled to have their contracts perpetuated. In the modified opinion, it is still said that plaintiffs, by the averments of their complaint, are entitled to a service on the same terms, and of the same quality, enjoyed by others similarly situated. This, I submit, is entirely without the issues tendered by their complaint. The cause of action originally set up by plaintiffs was based exclusively on their contracts. If, upon the complaint as it now stands unamended, they are granted the relief which the court now says they may be, if supported by competent proof, then the cause of action upon which such relief would be granted is entirely different from that pleaded. A case entitling them to such relief can only be made by amending their complaint so as to permit a new cause of action which would require a consideration of questions of both law and fact, entirely different from the one originally pleaded. It is settled beyond controversy that an amendment to a complaint will not be allowed when its effect is to substitute for the original cause of action a new and different one. The court

having decided that the plaintiffs were not entitled to the relief given on the case as made by their complaint and evidence, and it appearing, in my judgment, that the other questions discussed and determined can only be presented by an amendment which will state a new and different cause of action from that originally pleaded, the cause should be remanded, with directions to dismiss.

#### HILL v. LOFGREN-HARRIS MERCANTILE CO. et al.

(Supreme Court of Colorado. Dec. 9, 1912.)

#### SPECIFIC PERFORMANCE (§ 14\*) — CONTRACTS ENFORCEABLE.

Partners in a mercantile business employed a third person to carry on the business for such time as might be necessary to pay firm debts, to advance his own money to pay firm debts, and to repay himself out of the receipts of the business. Subsequently the partners contracted to exchange the stock of merchandise for real estate of plaintiff. There was nothing to show that the firm debts had been paid, or that the third person had been repaid the money advanced by him, or that he had violated the contract of employment. *Held*, that plaintiff could not compel specific performance of the contract by compelling the partners to transfer the stock before a settlement with the third person.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 33; Dec. Dig. § 14.\*]

Error to District Court, Weld County; Neil F. Graham, Judge.

Action by Charles S. Hill against the Lofgren-Harris Mercantile Company and others. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

Albert L. Moses, of Alamosa, for plaintiff in error. R. G. Strong, of Greeley, for defendants in error except Thompson.

MUSSER, J. In the court below, the plaintiff in error filed his complaint in February, 1911, against the defendants in error. A general demurrer was sustained to the complaint and the action dismissed. The action of the court in sustaining the demurrer is brought here for review.

The following are, in substance, the allegations of the complaint, which can in any way, proximately or remotely, be material:

In April, 1910, Lofgren and Harris, partners, entered into a contract with Thompson, wherein it was provided that he was to take possession of the stock, fixtures, and book accounts of the company and carry on the business as though it were his own for such reasonable time as might be necessary to clear it of debt. He was only to purchase such merchandise as was necessary to keep up the staple lines and was not to materially increase the stock. He was to advance from his own funds such an amount of money as might be necessary to pay the debts of the company listed in the contract as they were demanded. Out of the collections and re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ceipts of the business he was to repay himself such money as he might advance and pay the remainder of the listed debts, if any, and necessary expenses and bills incurred in carrying on the business. He was to receive as compensation for the money advanced by him and for his services an amount equal to 12½ per cent. of the money paid out by him for the firm and 12½ per cent. of the market value of the assets remaining on hand after the listed debts were paid and the stock was ready to be disposed of or turned over to the owners. Thompson was to retain the possession and control of the business and assets until all the listed debts were paid and he was repaid the advances of his own money. His interest in the business was to be the amount he advanced and his compensation. All other values in the stock and book accounts were to revert to the company, but this reversion was not to take place until Thompson had repaid himself out of the business for his advancements. So that, at the time the value was to revert, Thompson's interest would be the amount of his compensation. At that time, it is not clear what was to be done with the stock. It was to be disposed of or turned back to the owners. There was a provision for an arbitration of the value of the fixtures and accounts at the time the stock was to be disposed of or returned to the owners, in case of a disagreement as to such value in fixing Thompson's compensation.

Under this contract, Thompson took possession of the business, stock, and fixtures, and from thence to the commencement of the action carried on the business, a period of about 10 months. After several months, for some reason not disclosed, the partners became dissatisfied with the manner in which Thompson was conducting the business. They could not obtain from him any definite statement as to the amount of stock on hand or the amount due him under the contract or the condition of the business. About this time, the partners entered into negotiations with Hill, who was the owner of a tract of land in Kentucky, which culminated in an offer, accepted by Hill, to sell to the latter, at the actual cost price, the stock of merchandise and fixtures referred to in the contract with Thompson. The invoice was to be taken by three persons to be selected. The partners were to accept, in payment for the stock of merchandise, land in Kentucky at \$4 per acre. Hill was to furnish an abstract showing good title in him and he was to pay Thompson whatever the latter might be entitled to under his agreement with the partners, and, in the language of the accepted offer, Hill was "to be repaid such sum as he may pay to the said Thompson hereunder by a note signed by the undersigned (Harris and Lofgren) and secured by a mortgage upon the lands above described." Hill was to pay all expenses necessary to

get possession of the stock and to bring Thompson to an accounting. As soon as this offer was made and accepted, Hill went to Kentucky and procured an abstract of the lands and tendered it to Lofgren and Harris. They refused to accept or to comply with their agreement in any way. He then called upon Thompson and endeavored to obtain some information as to the amount of stock on hand and as to what, if any, sum Thompson claimed was due him; but Thompson refused to make any statement as to the amount due him or as to any matter connected with the business. Thompson gave him the privilege of going into the store and making an estimate of the value of the stock, but refused to permit an invoice to be taken. Hill was unable to obtain any definite statement from the partners or Thompson as to the amount due Thompson. Lofgren was about insolvent. Harris might have been able to have responded in damages to some extent, but the complaint says he might not be held liable for damages. The land was worth \$4 an acre, and Hill stood ready at all times to perform his part of the contract and convey the land. The complaint prayed for the appointment of a receiver for the assets of the business; that the receiver should take a complete inventory of it; that an accounting be had between Thompson and the other defendants to ascertain what amount was due Thompson; that Hill be permitted to pay that amount; that Lofgren and Harris be compelled to transfer and assign to Hill the stock of merchandise and fixtures after the settlement is made with Thompson; and that they be required to execute and deliver to Hill their promissory note for whatever amount it was necessary for him to pay Thompson.

It is to be seen that the action set forth in the complaint involved the taking of the stock and business away from Thompson by force of a contract between Hill and the others with which Thompson had nothing to do. When Hill and the partners entered into the agreement to exchange the stock for land, they knew that without Thompson's consent the stock could not be delivered until the time had arrived, when, under Thompson's contract, the stock was to be disposed of or be returned to the partners. Lofgren and Harris could not maintain an action against Thompson to account to them or to recover the stock or its value until that time had arrived, and certainly their complaint in such an action would have to contain allegations showing that the business had reached the condition in which it was to be when the time for accounting arrived. Their vendee, or, as in this case, Hill, who seeks to be made their vendee, can be in no better position than the partners themselves. Assuming, but not deciding, that the action in the form it was attempted might have been maintained under certain circumstances, it could not be

maintained under the circumstances outlined in the complaint. There was no allegation on information and belief or otherwise that all the listed debts had been paid; that Thompson had been repaid all the money he had advanced; that the amount due him at the commencement of the action would include all the compensation he might earn under the contract. He was to advance money to pay the debts as demanded and was to receive as compensation a certain percentage of all money paid out by him for the firm. There is nothing alleged to show that payment of the debts had been demanded and that all the money had been advanced that was necessary. For aught that appears, Thompson may not have been called upon as yet to advance any money at the time the case was commenced, for it may not have been demanded. In such a case, the whole of his compensation for advancing money may not have been earned. So that what was due him at the time the complaint was filed may have been only a small part of the profit he might make out of his contract. It was not alleged that Thompson had violated the contract. He was to put the business on the basis contemplated in his contract in a reasonable time. It was alleged that he had been in charge about 10 months. It was not shown that this was an unreasonable time, nor can it be said that 10 months is more than a reasonable time to put a failing business on a sound basis, when all of the money, to put it on that basis, was finally to come out of the business itself. The complaint was not drawn on the theory of recovering damages from Lofgren and Harris, nor are there allegations that would support such an action.

The complaint, therefore, did not state sufficient facts to authorize a court of equity to wrest the property from the possession of Thompson, take an accounting between him and the partners, and turn the property over to a third party who claimed rights therein under a contract with which Thompson had nothing to do. This seems so plain that it is not necessary to say anything more about it, and the judgment is therefore affirmed.

Judgment affirmed.

CAMPBELL, C. J., and GARRIGUES, J.,  
concur.

TUCKERMAN et al. v. CURRIER et al.  
(Supreme Court of Colorado. Dec. 9, 1912.  
On Extension of Opinion, Jan. 6, 1913.)

1. WILLS (§ 439\*)—CONSTRUCTION—EXECUTION.

The true intent and meaning of a testator, derived primarily from the language of the will itself, will be given effect if it is not con-

trary to some positive rule of law or against public policy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

2. TRUSTS (§ 156\*)—CONSTRUCTION—EXECUTORS—DUTIES AS TRUSTEES.

Testator by the sixth paragraph of his will bequeathed the residue of his estate to his executors, and to the survivor of them, and their successors to hold, manage, and dispose of any trust for uses specified. In paragraph 7 he gave to his executors full power to manage the estate, sell property belonging to it, invest and reinvest the proceeds, and distribute the income. By paragraph 8 he imposed on them and their successors as executors the duty of final distribution; paragraph 10, providing for a continuance of the board of executors, and the filling of vacancies by appointment by the county court. *Held*, that though duties not devolving primarily on the executors, but more properly pertaining to trustees, were imposed on the executors, the will should nevertheless be construed, not as designating the executors as trustees and imposing on them personally the title to the property as trustees, but rather as attaching additional duties to the office of executors, and providing for the continuance of such office, until the estate was finally settled.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.\*]

3. TRUSTS (§ 156\*)—TESTAMENTARY TRUSTS—EXECUTORS AND TRUSTEES—DESIGNATION—TERMINATION OF OFFICE.

Where a person is expressly named as executor and also as trustee in a will, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but where powers and duties are conferred on a person appointed as executor which do not pertain to that office, but rather to that of a trustee, the executor by virtue of his appointment becomes a trustee by operation of law, in which event the revocation of his appointment as executor, or his resignation as such, revokes his power to act as trustee, and the duties and powers thus conferred on him as an incident to his appointment as executor terminate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.\*]

4. TRUSTS (§ 156\*)—TESTAMENTARY TRUSTS—ADMINISTRATION.

Executors nominated by a will and their successors legally appointed may hold and administer testamentary trusts as such executors, if the will so provides, either *ex officio* or by virtue of their office.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.\*]

5. TRUSTS (§ 169\*)—SUCCESSORS—APPOINTMENT.

A testator, having imposed trust duties on his executors, had power to provide a system for the selection of successors in case of vacancy, giving to such successors the same powers as those designated in the will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 222-224; Dec. Dig. § 169.\*]

6. TRUSTS (§ 156\*)—TERMINATION OF OFFICE—ACTS OF TRUSTEES.

Where a testator imposed certain trust duties on his executors, but the language of the entire will indicated that the executors named or their survivor or successors should be continued and act as executors until the purposes of the will had been fully executed, it would not be assumed, from the fact that their ordinary duties as executors had been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fully performed, that they acted as trustees only in the further administration of the estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 9\*)—SUBSEQUENT EXECUTORS—COUNTY COURTS.**

Const. art. 6, § 23, confers on county courts original jurisdiction in all matters of probate, and Mills' Ann. St. § 4720, provides that where letters of one or several executors or administrators are revoked, or one or more executors or administrators die or become disqualified, the county court in its discretion may join others in their stead or place, and in case letters of all shall be revoked, or all shall depart this life before final settlement and distribution of the estate, administration with the will annexed or "as the case may require shall be granted to the person next entitled thereto," etc. This section, when incorporated into the Revised Statutes of 1908 as section 7121, was amended by adding the words "subsequent executor" and providing that such subsequent executor, guardian, or conservator shall have power to maintain suits against any former executor, administrator, etc. *Held*, that on the death, resignation, or removal of prior executors, the jurisdiction of the county court was not limited to the appointment of an administrator with the will annexed, but that it had power to appoint successors as subsequent executors with all the powers given to the original executors by the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 21; Dec. Dig. § 9.\*]

**8. EXECUTORS AND ADMINISTRATORS (§ 35\*)—POWERS—DEFENSE OF WILL.**

Where both the appointment of substitute executors on whom trust duties were imposed by the will and the performance of their duties were attacked, they were justified in incurring any necessary and legitimate expense in attempting to have the validity of the entire will, together with their appointments and the good faith of their conduct, sustained, and to an allowance out of the funds of the estate of a reasonable amount necessarily expended to that end.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**9. LIFE ESTATES (§ 15\*)—INCREASE—DISTRIBUTION.**

Where, by the terms of a will, testator's sons were entitled not only to the income of the residue, but also to the increase thereof, if any, during their lives, the question whether there had been an increase of the estate should be determined by considering the whole estate in *solido*, and not by ascertaining whether there had been an increase in the value of particular parcels of property belonging thereto.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.\*]

**10. EXECUTORS AND ADMINISTRATORS (§ 455\*)—AWARD TO LIFE TENANTS—RIGHT OF EXECUTORS TO APPEAL.**

In general, executors have no personal interest in a decree awarding certain increase of an estate to the life tenants, as against the residuary legatees, and are not entitled to appeal therefrom.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1929-1940; Dec. Dig. § 455.\*]

**11. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL—ISSUES.**

Where, in a suit for removal of certain substituted executors for alleged maladmin-

istration, complainants alleged a loss to the principal estate amounting to \$25,000 by reason of the mismanagement of the executors, and demanded a personal judgment against them, which loss the executors denied, and the court found that instead of being a loss there had been an increase in certain of the property belonging to the estate, a decree awarding such increase to the beneficiaries for life in accordance with the terms of the will was not within the issues.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 25.\*]

White, J., dissenting.

**On Extension of Opinion.**

**12. WILLS (§ 728\*)—CONSTRUCTION—TESTAMENTARY TRUST—INCREMENT OF ESTATE.**

Testator, having bequeathed the residue of his estate to his executors in trust, provided that the executors in their discretion might sell all or any part of the property, reinvest the proceeds in productive securities or improved productive real estate, and then directed that they distribute the total net annual income and "increment" to the persons and in the same manner as provided so as to avoid accumulation in their hands of property and assets in excess of the total value of the property and assets which should originally come to the beneficiaries under the will. *Held*, that the beneficiaries for life, entitled to the income of the estate, were also entitled to any increment thereof, when all of the property considered in *solido* contained an increase over the total value of the assets which originally came into the hands of the executors.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759-1780; Dec. Dig. § 728.\*]

En Banc. Appeal from District Court, Weld County; Louis W. Cunningham, Judge.

Suit by Mary B. Currier and others against James Tuckerman and another to compel defendants' removal as executors and trustees of the estate of Warren Currier, deceased, for the construction of the will, and for other relief. From a decree in favor of complainants, defendants appeal. Reversed and remanded.

James W. McCreery, of Greeley, for appellants. Charles D. Todd, of Greeley, R. T. McNeal, and Charles R. Brock, of Denver, for appellees.

HILL, J. The pleadings as well as the evidence in this case are voluminous. In disposing of it, in addition to hearing oral arguments, we have read and considered over 6,500 folios of record, in excess of 500 pages of printed briefs, and have considered the questions involved in over 550 cases cited, claimed to support the different contentions of counsel. Owing to the uncertainty of the title to such a large amount of property and the importance of the other questions raised, we are not prepared to say that the greater part of counsel's efforts was not justified; but, when the extent of such an amount of labor placed upon this court is realized, it is regrettable that many thoughtless people (including some members of the profession), who criticise appellate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



courts for their apparent delay in the number of such cases disposed of, are not familiar with these conditions.

We shall not attempt to set forth even the substance of all the issues, but only such as are controlling of the principal contentions. The record discloses, without contradiction, that upon July 25, 1892, Judge Warren Currier died, leaving surviving his widow (Lydia M.), two sons (George W. and Henry F.), their wives, and certain grandchildren (the sons and daughters of George W. and Henry F.). The deceased was possessed of a large estate, real and personal. He left a will which provides:

First, for the payment of debts.

Second, devises certain personal property to his wife.

Third, gives to his son George the use for life of the Greeley homestead, on certain conditions.

Fourth, gives to his son Henry the use for life (rent free) of certain real estate.

Fifth, provides for the adjustment of certain advancements made by deceased to the above sons.

The sixth, seventh, eighth, and a part of the tenth paragraphs, which are the cause of these contentions, read as follows:

"(6) I give, devise and bequeath all the rest and residue of my estate, real, personal or mixed, and wherever situated, to my said executors, to wit, Bruce F. Johnson and Charles H. Wheeler, both of Greeley, and to the survivor of them and their successors to hold, manage and dispose of in trust for the uses and purposes following, to wit:

"(a) Two thousand dollars on the net annual income therefrom to be collected by my said executors and paid over annually as an annuity to my said wife, in quarter yearly installments of \$500 each during her natural life, the same to be accepted by her in lieu of dower and in full of all claims upon my estate not hereinbefore specified and provided for; all such payments to be made upon her separate personal receipt and not otherwise.

"(b) All the rest and residue of the total net annual profit and income that shall be derived from my said estate shall be collected by my said executors and by them annually paid over in equal parts to my two sons (they being my only surviving children), to wit, said George W. Currier and Henry F. Currier, during their natural lives, one-half thereof to each and upon the separate personal receipt of each. In case of the death of either the share of the other (he still surviving) shall continue and be paid over to him during his natural life. But the share of the one deceased shall from the time of his death be distributed and paid over to his widow if then surviving, and to his then surviving children in equal parts to each, share and share alike; and such payments shall continue during the natural life of my son then surviving. The annual pay-

ments aforesaid shall be made in quarter yearly installments and upon the separate personal receipt of the party entitled to receive the same, and not otherwise.

"(c) If either of my said sons shall die without leaving issue surviving him, the share of the annual income from my said estate of such deceased son shall go to and vest in and be paid over to his surviving brother in quarter yearly installments as aforesaid. If either of my said sons shall die leaving issue surviving him, such issue shall take the part and share of his or her father, and where there are several surviving children they shall share and share alike in said net annual income.

"(7) It is my will that my said executors shall carefully collect and take care of said estate and that they shall by proper sale or sales thereof convert such parts of it into cash as they shall judge, to be for the best interest of my said wife and sons and other beneficiaries herein named or described, and to that end I give to said executors and to the survivors of them and to their successors, full power and authority to sell and convey said estate or any part thereof in fee simple, and to make all proper deeds and other conveyances thereof, reinvesting the proceeds of such sale or sales in such productive securities or improved productive real estate, as they may judge to be safe and remunerative, having primary reference to the safety thereof. I enjoin upon my said executors to distribute fully and carefully the total net annual income and increment of my estate to the persons and in the time and manner herein provided and so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that shall originally come to them under this will.

"(8) Upon the death of both of my said sons, said George and Henry, said executors and the survivor of them and their successors are hereby empowered and directed to convey by proper deeds and other conveyances and in fee simple any and all estate, real, personal or mixed which shall then remain in their hands or subject to their control under the provisions thereof to the heirs at law of my said sons George and Henry respectively, the children of each taking one half of said estate per stirpes in absolute ownership and in exclusion of all other persons; and I hereby give and bequeath to said children all the said estate so then remaining in the hands of my said executors, each family of children taking an inheritable estate therein in fee as the heirs at law of my said sons respectively, and taking the same per stirpes and not per capita, each family of children taking one-half thereof."

"(10) It is my desire that said board of executors shall be continued until the purposes of this will are fully accomplished, and the trusts herein created are fully executed; and it is my will that any vacancy

arising in said board shall on the application of any beneficiary herein named be filled by the appointment of the county court of said Weld county, Colorado, meaning the court in said county which shall have at the time jurisdiction of probate matters in Weld county."

The closing, unnumbered paragraph in the will reads: "I hereby appoint Bruce F. Johnson and Charles H. Wheeler of said Greeley in said county of Weld to be the executors of this my last will and testament."

The will was probated September 6, 1892, in the county court of Weld county, and the executors named in the will, Bruce F. Johnson and Charles H. Wheeler, were given letters testamentary thereon. They qualified September 14th, same year, and acted as the executors from that date until May 23, 1893, when Charles H. Wheeler tendered his resignation, which was accepted by the county court and an order made appointing Horace G. Clark as his successor. Johnson and Clark continued to act until January, 1897, when they tendered their resignations to the county court, which, on January 30, 1897, made an order accepting the resignations and appointing the plaintiffs in error, James Tuckerman and William Mayher, as their successors. These last-named appointees have continued to act as such executors, and by virtue of such official capacity have also performed the duties of trustees as provided for by the will, from the date of their appointment until the present time.

This action was instituted by the grandchildren of Warren Currier, the residuary legatees of the principal estate, against all former executors, Johnson, Wheeler, Clark, Tuckerman, Mayher, the two sons of the deceased (George W. and Henry F.), their wives, and the widow (Lydia M. Currier). The complaint charges numerous acts of maladministration and breach of trust against all of the five persons who had acted as executors and performed the duties of trustees. It charges fraud, mismanagement, and misconduct whereby it is alleged that the principal estate sustained great losses and was then being depleted by the fraudulent and illegal acts of its alleged trustees, in some of which the life beneficiaries George and Henry Currier are alleged to be parties. It denied the right and jurisdiction of the county court to appoint subsequent executors to fill vacancies caused by the resignation of Johnson and Wheeler, or its jurisdiction to recognize the rights of such persons to perform the duties of trustees, or to in any particular supervise the administration of the trust created by the will. It alleges that the title to the property was still in Johnson and Wheeler as trustees. It prays for a construction of the will to include a declaration that the county court was without jurisdiction to appoint successor executors and that the tenth paragraph attempting to confer such power be declared void. It also prays for the re-

moval of Tuckerman and Mayher, the appointment of proper trustees, for a conveyance by Johnson and Wheeler of the trust property to such newly appointed trustees, and for the appointment of a receiver, etc.

George W. and Henry F. Currier (fathers of the plaintiffs) filed answers to the bill admitting all allegations against the executors and part of those against themselves. These answers embrace cross-complaints in which they attempt to set up independent causes of action against the executors; they make further charges of unfaithfulness on the part of the then executors and their predecessors. They allege the conversion and misapplication of large sums of money, both principal and income, and ask for the discharge of the executors, for an accounting, the appointment of a receiver, for new trustees, and for money judgments in their favor for large amounts.

Demurrers filed by Johnson, Wheeler, Clark, Tuckerman, and Mayher, which challenged the jurisdiction of the district court, were sustained. This ruling was reversed by our former Court of Appeals and the cause remanded with leave to all parties to amend. *Currier v. Johnson*, 19 Colo. App. 94, 73 Pac. 882. For other cases involving some phase of these contentions between some of the parties, see *Currier v. Johnson*, 19 Colo. App. 245, 74 Pac. 340; *Currier et al. v. Clark*, 19 Colo. App. 250, 75 Pac. 927; *Currier v. Clark*, 19 Colo. App. 257, 75 Pac. 1132; *Currier v. Johnson*, 19 Colo. App. 453, 75 Pac. 1079; *Currier v. Johnson*, 31 Colo. 126, 72 Pac. 55.

Thereafter, the present and all past executors filed answers denying all acts of maladministration, breach of trust, fraud, mismanagement, and misconduct, and denied that the principal estate had sustained great or any loss, or that it was then, or had been, depleted by the fraudulent acts of its trustees, etc., or at all. Trial was to the court. The findings, in substance, exonerate all the executors from any intentional wrong or fraud or for any act of maladministration, breach of trust, mismanagement, or misconduct for which they were to be held accountable in this action, except as hereinafter designated. The action was dismissed against Johnson, Wheeler, and Clark, except it was decreed that they execute quitclaim deeds to the new trustees to be appointed for the original property or any thereafter acquired by them as such officials. The material findings against Tuckerman and Mayher, in substance, are: That the county court assumed to appoint them as the successors to Johnson and Clark, who relinquished control of the estate to them; that they have ever since held possession and have assumed to administer the trust created by the will; that the county court did not appoint or assume to appoint them as administrators with the will annexed; that neither Wheeler nor Johnson, on relinquishing possession,

conveyed or released the title of the property to those to whom they surrendered it; that Mayher and Tuckerman while in charge have assumed to purchase with trust funds certain real estate (naming it); that by order of the county court they paid from the income of said trust funds certain fees and costs to Wheeler, Johnson, and Clark on account of fees and costs paid by them to counsel for defending this suit after the reversal of said cause by the Court of Appeals, a portion of which was never paid back; that they paid counsel fees and costs in defending a suit in the county court against them, brought to compel them to keep separate accounts of principal and income funds; that since the decision of the Court of Appeals they have continued to file reports in the county court and paid court costs in connection therewith from the income of the life beneficiaries, including large amounts for filing and recording their reports and for having them examined and passed upon; that they have retained from the income certain amounts for their salaries as executors, also have paid large amounts for counsel fees and costs in defending this litigation; that the property belonging to said trust estate is now, by reason of improved financial conditions and the prosperity prevailing in the city of Greeley and vicinity, materially increased in value and is now of a value in excess of its actual and inventoried value at the death of Warren Currier, in the sum of at least \$10,000.

The conclusions of law necessary to consider are: That by said will the legal title to said estate was vested in defendants Wheeler and Johnson in trust for the beneficiaries named therein; that such legal title did not thereafter wholly or partially or at all devolve upon or become vested in Clark, Mayher, or Tuckerman; that in accepting the resignations of Wheeler and Johnson, and in assuming to appoint Clark, Mayher, and Tuckerman as successors, the county court of Weld county was without jurisdiction, right, or authority to do so; that, in so far as the tenth paragraph of the will attempts to confer upon said court power or jurisdiction to appoint trustees to administer said trust, the same is void and inoperative; that neither of defendants, Mayher nor Tuckerman, has any lawful title to, or right or interest in, the property belonging to said estate. The decree removes them because not legally appointed and for other reasons as it is alleged. In addition to their removal, personal judgments were entered against the defendants, Tuckerman and Mayher, in favor of George W. and Henry F. Currier (the life beneficiaries) in the sum of \$10,626 for certain moneys paid out by them as aforesaid. The decree further provides that the trustees of said estate distribute to the life beneficiaries George W. and Henry F. the increment or increase as found to exist in the sum of \$10,000, under

certain arrangements not necessary to consider. The defendants Tuckerman and Mayher bring the case here on appeal.

[1] In the execution of wills the cardinal rule is to have due regard to the directions of the will and the true intent and meaning of the testator to be derived primarily from the language of the will itself, and, if the same is not contrary to some positive rule of law or against public policy, to give it effect just as written. In *re Shells' Estate*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Platt v. Brannan*, 34 Colo. 125, 81 Pac. 755, 114 Am. St. Rep. 147; In *re Shapter's Estate*, 35 Colo. 578, 587, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1082; *Murphy v. Carlin*, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699; *Gordon v. McDougall*, 84 Miss. 715, 37 South. 298, 5 L. R. A. (N. S.) 355; *Redfield on Wills*, p. 385; *Nangle v. Mullanny et al.*, 113 Ill. App. 457; *Kennedy v. Kennedy et al.*, 105 Ill. 350.

[2] With this object in view we will proceed to consider the questions presented in their historical order. The first relates to the capacity in which Johnson and Wheeler were appointed. The appellants contend that the testator intended to and did appoint them as executors, only, of his will, but, by attaching to the office of executor certain trust duties, it made them, by operation of law, ex officio, his trustees during the period they held the office of executor; that the title was vested in the persons from time to time who held the office, and not in the persons first named as executors. The appellees contend that a proper construction of the entire will discloses that he not only appointed them as executors, but, by the language used, he also designated them personally as the trustees of the trust thus created, and that the title went to them personally as such trustees and is still in them.

In construing a will it must be presumed that the testator knew the law. *Nangle v. Mullanny et al.*, 113 Ill. App. 457. This presumption is unnecessary in the case at bar. The testator was conceded to have been learned in the law, admitted to have once been a justice of the Supreme Court of Missouri, and, unless the language in the will indicates to the contrary, we must presume that he used the word "executor" advisedly; that had he intended to appoint Johnson and Wheeler personally as trustees, and, to devise his property to them in personam in trust, he would have used language sufficient to convey that intention. We fail to find such an expression in the will but, to the contrary, running throughout the entire instrument we find the expressions "my said executors \* \* \* and to the survivor of them and their successors," with a method provided in the will for the appointment of successors. The word "executor" is used in nearly every paragraph; the word "trustee" not at all.

In paragraph 6 the devise is made to executors, the survivors of them, and their successors. In paragraph 7 the power is given alike to the executors and successors. In paragraph 8 the duty of final distribution is laid alike upon the executors and their successors. Paragraph 10 provides for the continuance of the board of executors and the filling of vacancies by appointment made by the county court. In paragraphs 6, 7, 8, and 10 the final duty of distribution, as well as the continuance of the office until all purposes of the will are accomplished, are given and bestowed, not upon any definite person as a personal trust, but upon the persons in office in perpetual succession. The testator knew and assumed (as we all must) that executors die, resign, or become disqualified, and he could not have, by any use of words or language, more firmly annexed a declaration of his intentions to provide that the office (the functions and powers given) was not to, in this manner, be endangered until the objects provided for by the will had been accomplished. Taking these facts into consideration, the language is convincing that he intended to annex the estate and power devised and donated to the office of executor *virtute officii*. The will named Johnson and Wheeler as executors; it did not name them as trustees. They therefore became trustees by virtue of the fact that certain powers and duties were conferred upon them as executors which do not pertain to the powers and duties of executors, but belong to those of trustees.

[3] If a person be expressly named as executor and also as trustee, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but, where powers and duties are conferred on a person appointed as executor which do not pertain to the powers and duties of an executor but pertain to those of a trustee, the executor by virtue of his appointment becomes a trustee by operation of law, in which event the revocation of his appointment as executor, or his resignation as such, revokes his power to act as trustee, and the duties and powers thus conferred upon him as an incident to his appointment as executor terminate. *Nangle v. Mullanny et al.*, 113 Ill. App. 457; *Mullanny v. Nangle et al.*, 212 Ill. 247, 72 N. E. 385; *Johnson v. Lawrence et al.*, 95 N. Y. 154; *McAlpine et al. v. Potter et al.*, 126 N. Y. 285, 27 N. E. 475; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; 7 Am. & Eng. Ency. of Law (1st Ed.) p. 238; *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. Ed. 520; *Mather v. Mather et al.*, 103 Ill. 607; *Estate of Matthew Delaney*, 49 Cal. 76; *Carson v. Carson*, 6 Allen (83 Mass.) 397; *Groton v. Ruggles et al.*, 17 Me. 137; 1 Perry on Trusts (5th Ed.) p. 36; *Mott*

*v. Ackerman*, 92 N. Y. 539; *In Re Sturgis*, 164 N. Y. 485, 58 N. E. 646; *Royce et al. v. Adams*, 123 N. Y. 402, 25 N. E. 386.

For the reasons stated (which are fully supported by the authorities last cited), we conclude from the language used that Johnson and Wheeler, by virtue of their appointments as executors and the powers given them by the will, became trustees by operation of law; that their resignation, its acceptance, and the appointment of their successors (if valid) revoked and terminated their powers to act as trustees; and that the title to the trust property devolves, by operation of law, upon their successors without the formality of a conveyance or assignment.

[4] It is conceded that executors nominated by the will and their successors legally appointed may, as such executors, hold and administer testamentary trusts, if the will so provides *ex officio* or *virtute officii*. *Killgore v. Cranmer*, 48 Colo. 226, 109 Pac. 950; *Johnson v. Lawrence*, 95 N. Y. 154; *Laytin v. Davidson*, 95 N. Y. 263; *In re McAlpine*, 126 N. Y. 285, 27 N. E. 475; *Kidwell v. Brummagim*, 32 Cal. 436; 39 Cyc. 249.

The fallacy of the appellees' arguments lies in the assumption that by the will Johnson and Wheeler were personally designated as the trustees of the trust created, when, as we have shown, it named them as executors only and did not expressly or by necessary implication designate them as the trustees; they became *ex officio* trustees only by virtue of the fact that certain powers and duties were conferred upon their office of executors which did not pertain to the regular duties of executors, but belonged to those of trustees. This is self-evident when we consider the language in the will which places these duties upon his executors, the survivor of them, and their successors, and devises his property to his executors, the survivor of them, and to their successors, and provides for the method for the appointment of such successors.

[5] We know of no rule of law which prevents a testator from providing a system for the selection of a successor executor. As we understand the rule, he may provide conditional, limited, or substituted executors in case of vacancy, giving to them the same powers as those designated in his will. 11 Am. & Eng. Ency. of Law (2d Ed.) 747, 748; *Bishop v. Bishop*, 56 Conn. 208, 14 Atl. 808; *Ingle v. Jones*, 9 Wall. 486, 497, 19 L. Ed. 621.

[6] We are not unmindful of the argument and have considered the cases, which hold, where the same parties are appointed executors and trustees and after many years have elapsed since the performance of the last duties as executors, and that the duties thereafter performed have been only those of trustees in such capacity, the law will assume that they have ceased to act as executors and are acting as trustees only;

but in the case at bar, from the language used, the testator intended that the executors named, their survivors or successors, should be continued and act as executors until the purposes of the will were fully executed. This intention is not declared in a single clause or sentence of the will, but runs through all its framework and is interwoven into almost every provision thereof. We know of no rule of law which compels executors to close up an estate and turn it over to themselves as trustees within a certain time, where the will discloses a different intention. The opinions of this court throughout are that it is expected that the executors will continue to hold and act as such until the duties imposed upon them by the will have been fully executed. *Hake v. Stotts' Executors*, 5 Colo. 140; *Killgore v. Cramner*, 48 Colo. 226, 109 Pac. 950; *Wyman v. Felker*, 18 Colo. 382, 33 Pac. 157; *French v. Woodruff*, 25 Colo. 339, 346, 54 Pac. 1015.

Suppose the will provided that the executors should, within a year from the date of its probate, sell the real estate and divide the proceeds among the heirs. In such case no one would contend that such a duty was not properly imposed upon the executors and that they should do this before they were discharged as such. In many of the cases cited the principal reason for holding the persons named as executors and trustees, in the capacity of trustees only, is that the wills clearly contemplate a period of time when there shall be a separation of functions and duties, when the duties of the executors as such shall end, and when, by reason of the trust invested in them by force of the will, they shall assume exclusively the character of trustees. But this will discloses a contrary intention; it provides that the board of executors shall continue until the purposes of the will are fully accomplished and that any vacancy arising, on the application of any beneficiary, is to be filled by the county court of Weld county. The testator emphasizes this intention by saying, "meaning the court in said county which shall have at the time jurisdiction of probate matters in said Weld county." The contention of the appellees that the estate is unnecessarily burdened with the cost of executors' reports, etc., is answered in the declaration of the testator himself, a man learned in the law. When making these provisions he must have known that his estate would be burdened with the necessary court costs incidental thereto throughout the period prescribed by him for keeping it intact. Having thus provided the system which he thought necessary for the protection of his heirs—if it does not violate any positive rule of law—neither the beneficiaries nor the courts have any power to change the conditions prescribed.

[7] The next contention urged is, assuming that the construction we have given the will is correct and that the testator intended as

we have indicated, it cannot be carried into effect for the reason that the tenth paragraph, which empowers the county court of Weld county to appoint a successor executor in case of a vacancy, is void for the reason that the county court sitting as a court of probate is without jurisdiction to make such appointment of either an executor or trustee; that only district courts which have unlimited chancery jurisdiction can appoint such trustees; that the county court sitting as a court of probate is limited to the appointment of an administrator with the will annexed.

Section 23 of article 6 of the Constitution says that the county courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, etc., and such other civil and criminal jurisdiction as may be conferred by law, etc. Eliminating appellants' contention that the order of the county court is broad enough to cover their appointments as administrators with the will annexed authorized by section 4682, *Mills*, and that section 4749, *Mills*, gave to them as such the authority to do everything which they have done, if the Legislature has clothed the county court with the power to appoint successor executors, it cannot be consistently argued that this section of the Constitution has not vested them with this power. General section 4720, vol. 2, *Mills' Ann. Stats.* in force at the time of the execution of this will and at the time of these appointments, provides that where letters of one of several executors or administrators are revoked, or one or more of the executors or administrators shall die or become disqualified, the county court may, in its discretion, join others in their stead or place, and require additional bonds from such new administrator or administrators, or the survivor or survivors of such as shall not have their powers revoked, shall proceed to manage the estate, and in case the letters of all of them shall be revoked or all of said executors or administrators shall depart this life before final settlement and distribution of the estate shall have been made, administration with the will annexed, or as the case may require, shall be granted to the person next entitled thereto; that, in all cases where such executor or administrator shall have his letters revoked as aforesaid, he shall nevertheless be liable on his bond to such subsequent administrator or administrators or to any other person or persons aggrieved for any mismanagement, etc.

Unless all rules of construction are disregarded, by the language of this section it was intended to vest county courts with power in certain cases to appoint subsequent executors. It says: "Where one or more of the executors shall die or become disqualified, or in case the letters of all shall be revoked, the county court may, in its discretion, join others or \* \* \* administration

with the will annexed, or as the case may require shall be granted to the person next entitled thereto." If, as contended by counsel, the only appointment that could be made under this section was that of administration with the will annexed, what meaning is to be given the word "executors," and what use is to be made of the words "join others in their stead or place"? The words "to join others in their stead or place," when applied to executors, certainly mean another executor in the place of the other. On down in the section we find the words "or as the case may require shall be granted to the person next entitled thereto," when applied to executors as in this case, that person would be the person selected in the manner provided by the testator in the will; otherwise, all these words and phrases in the section must be treated as surplusage. This is contrary to all rules of construction when full force and effect can be given them and thereby harmonize the entire section. This can be done by holding that the county court may appoint successor executors in a proper case, thereby giving force and effect to all the language used in its ordinary sense.

In *Hake v. Stotts' Executors*, 5 Colo. 140, this construction was assumed as a matter of course. The will appointed a certain person executor. The action was brought for his removal. The court held he should have been removed and that the county court was possessed with that power. After so deciding, among other things, the court said: "It will be the duty of the county court, upon the removal of the executor, to appoint a successor under the provisions of the law; to take good and sufficient bond for the faithful discharge of his duty; to see that he discharges his duty; and generally to protect this fund from the rapacity of all comers." We also have a legislative construction of this section. In 1903 it was thought proper to make a complete revision of our probate laws by their repeal and reenactment; many changes were made in order to clear up questions then in doubt. The words "guardian," "conservator," "executor," and "administrator" were repeatedly inserted in the new act in order to make the meaning of certain sections more clear and certain. It is common knowledge that the burden of this revision was assumed by an organization of county judges effected in 1902. Upon account of their experience and knowledge of the defects existing, these gentlemen were eminently fitted to supervise such work. When we come to the revision of this section, which is general section 7121, R. S. 1908, we find the words "subsequent executor" are added in the last part of the section. This was unquestionably for the purpose of making clear the right of subsequent executors to bring suits against their predecessors for any defalcation, etc., the same as the former act

said that administrators might do. The Legislature must have assumed that the first portions of the old section authorized the county court to appoint subsequent executors, for the reason that they made no change in that portion; but, realizing that there was a doubt as to the authority of a subsequent executor to bring a suit against his predecessor, they sought to make that more clear by inserting the words "subsequent executor," thus making the act read the same throughout as to administrators and executors. We conclude that the county court was possessed with the power, under the circumstances disclosed, to appoint subsequent executors, and the appointments of the plaintiffs in error being substantially in compliance with the provisions of the will that they are not subject to attack. Illinois has vested her county courts with the same power. *Kennedy v. Kennedy*, 105 Ill. 350; *Kinney v. Keplinger*, 172 Ill. 449, 50 N. E. 131.

It appears to be conceded, where a direction in a will is that if the named executor dies another person shall be the successor, that the successor thus appointed is an executor by substitution, and not a mere administrator de bonis non. *Blake, Adm'r, v. Dexter et al.*, 12 Cush. (66 Mass.) 559; *Kinney v. Keplinger*, 172 Ill. 449, 50 N. E. 131.

In removing the present executors the decree says, in substance, because of their unauthorized appointment by the county court and their misconduct as acting trustee of said estate and the friction and feeling existing between them and the life beneficiaries, the acts pertaining to their alleged misconduct are not stated, nor any acts of hostility to the life beneficiaries. The record as a whole discloses that the real contest centers around the county court's jurisdiction to make the appointments which included the validity of paragraph 10 of the will, and not the other matters. The court in substance exonerates the executors from any fraud pertaining to any alleged breach of trust, and in the oral opinion rendered says, in substance, that he was satisfied that no appointment he could make would long be satisfactory to the life beneficiaries, also that none of the executors had diverted any of the trust funds, but that they were not trustees de jure, and that he would do the same as though it was a matter of first instance, as if no trustees were in existence. From this record, had it not been for the erroneous conclusions of law pertaining to the jurisdiction of the county court, we cannot say that the decree would have been as it is pertaining to the removal of the executors, regardless of the alleged hostility existing between them and the life beneficiaries, who it appears desire their removal.

It is quite probable that, had the life beneficiaries requested the resignation of

the executors and not coupled with it a demand for the return of a large sum of money, most of which at least was properly paid out by them, that they—as their predecessors had done—would have resigned and turned the management over to others; but when the validity of certain portions of the will, including that upon which their appointments were based, is attacked, and when it is sought to hold them personally liable for the moneys expended in the defense of these matters, in the prosecution and defense of other suits, and in payment of their salaries, it is hardly probable that the mind of any individual is so constructed that he would be willing, under such circumstances, to voluntarily relinquish his claim to such appointment, confess the error of his actions (conceded by the court to have been in good faith), and also pay to the life beneficiaries a large amount of money equal to that expended by him in these matters, including that received as his salary for the time spent during a series of years in the performance of such duties. In any event, from the conclusions reached, it follows that the county court has exclusive jurisdiction in the appointment of successor executors when so provided for by the will. General section 7121, R. S. 1908; Hake, *Guardian, v. Stotts' Ex'rs*, 5 Colo. 140; *Kennedy v. Kennedy*, 105 Ill. 350.

It is alleged in the pleadings that some of the counsel fees were excessive. It is also alleged that other moneys paid to former executors were not justifiable, and that other fees paid in the defense of certain litigation against them were not justified or expended in good faith, for which reasons the judgment of the trial court should be sustained concerning these matters. There is practically no evidence pertaining to the amount or value of these services, or any attempt to separate their acts as executors or as trustees. The only evidence we call to mind concerning extortion of fees is that of the appellant Mayher upon cross-examination, wherein he states, in substance, that it appears to him that some of the counsel fees were too high. The record as a whole discloses that the portion of the decree calling for the removal of the appellants and the personal judgment against them is based principally upon the erroneous assumption that the county court was without jurisdiction to appoint successor executors, for which reasons we do not feel justified at this time in attempting to separate and pass upon the matters proper to be determined in an action of this kind as the issues and evidence now stand, but prefer to leave them to a trial court, when they are properly separated and presented in harmony with the views herein expressed, that the appellants are the duly and lawfully appointed subsequent executors of the will.

[8] This justifies them in incurring any

necessary and legitimate expenses in attempting to have sustained the validity of the entire will, their appointments thereunder, as well as to in good faith defend their course of procedure when attacked while in office. They have a right to an allowance out of the estate funds in a reasonable amount necessarily expended in such matters. 2 *Perry on Trusts* (3d Ed.) § 910; *Kennedy v. Kennedy*, 105 Ill. 350; *Sherman et al. v. Leman*, 137 Ill. 94, 27 N. E. 57; 28 *Am. & Eng. Ency. of Law* (2d Ed.) 1091.

The decree provides that the trustees distribute to the life beneficiaries George W. and Henry F. Currier under certain conditions \$10,000 out of the estate funds as the increment or increase pursuant to the provisions of paragraph 7 of the will. Considerable argument is presented and many authorities cited as to the correct meaning of these words as here used. It is claimed by the appellants that no such issue was raised by the pleadings or tried; that under our rules of practice the relief must be confined to that called for by the facts stated in the pleadings. The following cases sustain this general rule: *Soden v. Murphy*, 42 Colo. 352, 94 Pac. 353; *Mott v. Scott*, 35 Colo. 68, 83 Pac. 779; *Ruble C. G. M. Co. v. P. A. G. M. Co.*, 31 Colo. 158, 71 Pac. 1121; *Greer v. Helser*, 16 Colo. 306, 26 Pac. 770; *City of Pueblo v. Griffin*, 10 Colo. 366, 15 Pac. 616; *Miller v. Hallock*, 9 Colo. 551, 13 Pac. 541; *Tucker v. Parks*, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486.

The allegations of the complaint as well as those in the cross-bill of the life beneficiaries were that the principal estate had been fraudulently reduced under the management of the several executors in about \$25,000. For this reason the accounting was sought to be followed by a judgment against the executors requiring them to return to the principal estate this amount. The executors denied these allegations. To justify this judgment the court had to find not only that the allegations of the complaint and cross-complaint in this respect were not true, but that the allegations of the answer were more than true. If the findings upon which this portion of the judgment is based are to be considered at issue, we have the anomalous position of having the defendants attempting to prove a case in favor of the plaintiffs and cross-complainants which they themselves are attempting to disprove.

[9] The appellants contend if it were a proper issue that the estate must be dealt with in solido that the increase or supposed increase in one piece of property cannot be segregated as income, but still remains as a part of the principal estate until at least every part of the estate has been subject to an examination and appraisal and the whole aggregated. This appears to be the general rule. *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Parker v. Johnson*, 37 N. J. Eq. 366;

*Parker v. Seeley*, 56 N. J. Eq. 110, 38 Atl. 280; *Parsons v. Winslow*, 16 Mass. 361; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493; *Van Blarcom v. Dager*, 31 N. J. Eq. 783.

In addition to their being no such an issue made by the pleadings, the record discloses that the rule above stated was not followed. There was no evidence offered covering, or full and complete appraisal taken of, all the property for the purpose of determining this question, or to show, where certain items of property had increased in value (as found by the court in Greeley and vicinity), that this rise would offset the loss in certain other items which may have decreased in value. Manifestly, this could not be done upon the evidence concerning certain portions of the property only which had increased in value, when nothing is said about the remainder.

[10] The facts and rule of law last stated are not seriously controverted, but are sought to be avoided by the contention that the appellants have no right to be heard upon the judgment pertaining to the increase and increment, the manner in which it was secured, or the evidence upon which it is based, under the well-known rule that they have no personal interest in the result of this portion of the judgment which concerns the life beneficiaries and the residuary legatees only, all of which were parties to the action. The following cases are cited to sustain this contention: *Benton v. Hopkins*, 31 Colo. 518, 74 Pac. 891; *Barth v. Richter*, 12 Colo. App. 365, 55 Pac. 610; *Black v. Kirgan*, 15 N. J. Law, 45, 28 Am. Dec. 394; *Briard v. Goodale*, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896.

[11] Had such an issue been made by the pleadings, we might find it necessary to pass upon the question; but the primary object of this case was to secure a construction of the will, the removal of the executors, and personal judgments against them. Appellants were charged with malfeasance in office; they had the right to be heard on these charges as well as upon the construction of the will and the right to appeal from any ruling thereon. They brought with it the entire case wherein they would in any manner be affected personally, or in their official capacity. The matter of the increment or increase is not here alone. It was not made an issue by the pleadings in the court below. No motion was made to dismiss the appeal concerning this portion of the judgment. The record shows that some of the plaintiffs who are residuary legatees were minors represented by a guardian ad litem probably selected at the solicitation of the life beneficiaries; we say this, from the fact that the trial court, in substance, found that the original suit was instituted and thereafter maintained by them. Upon this subject the court in its preliminary findings says: "I have no difficulty in determining that this action

has been waged by one, if not both, of the life beneficiaries, and mostly instigated and inspired rather by them than by the children—the remaindermen. This is apparent all through the record. It is significant that the remaindermen ask nothing of the beneficiaries, attended with the additional circumstance of the cross-bill being filed on the very same day, and, if I am a literary critic at all, drawn by the very same hand. It now appears of record that Henry is bearing most of the expenses of the litigation, which abundantly supports the conclusion that it is being waged for his benefit."

We are of opinion that the evidence justifies this statement, and, when all these facts are taken into consideration with the fact that the cause must be reversed for other reasons, we do not think that such a case is presented which requires us to at this late date segregate this portion of the judgment from the other in order to establish a precedent either way as to the right of executors to take an appeal from such judgments, but prefer to remand the cause for a new trial, when, if desirable, such an issue can be properly made up and evidence received and considered concerning it.

The judgment is reversed, and the cause remanded, with leave to the parties to amend their pleadings as they may be advised.

Reversed and remanded.

MUSSER and GARRIGUES, JJ., not participating. WHITE, J., dissents.

#### On Extension of Opinion.

HILL, J. [12] Upon petition for extension of opinion by some of the appellees and for rehearing by others. It is urged upon behalf of some of the appellees, as this suit was instituted in part to procure a construction of the will, that, in considering the portion of the judgment which pertains to the increase or increment awarded to the life beneficiaries, we should place a construction upon the language in the will which reads: "I enjoin upon my said executors to distribute fully and carefully the total net annual income and increment of my estate to the persons and in the time and manner herein provided and so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that shall originally come to them under this will." In view of a new trial or continued litigation upon this subject, we have thought it proper to do so. A reading of the original opinion will disclose that, in passing upon the question of increment, we accepted without discussion the meaning given to the word by the testator in the above paragraph. When this paragraph is considered in connection with the other portions of the will, which empowers the executors in their discretion to sell and dispose of all or any part of the



property, both real and personal, and to reinvest the proceeds in productive securities or improved productive real estate as they may deem safe, there ought not to be any contention over it. Unless the force of this language is to be eliminated, it follows that the life beneficiaries are entitled to receive from the executors both the income and any increase in the total value of the estate above its value at the time it came into their hands. They are the only ones (except in case of the death of one of them) to whom the executors could distribute the increment so as to avoid the accumulation in their hands of property in excess of the total value of the property and assets that originally came to them under the will. This was unquestionably the intention of the testator. It could not apply to the residuary legatees; as to them (as there used) it would be meaningless, for the reason that, at the time they are to receive anything (except in case of the death of one of the fathers), it provides for a distribution of the total estate among them, but not for any increment or increase alone. When they are thus to receive the estate, nothing is to be left to accumulate in the hands of the executors. The reason for the reversal of the award of \$10,000 allowed as increment was because no such an issue was raised by the pleading, and no such case tried, and because the court did not deal with the estate in solido, which is the general rule in such cases. This rule is specially applicable here, where it is possible for the executors not to be possessed of any of the original property which came into their hands, and where the executors are enjoined (which makes it their duty) to distribute to the life beneficiaries the net annual income and increment of the estate so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that originally came to them under the will.

We adhere to our former views in all matters covered by the original opinion.

The petition for rehearing is denied.

#### TUCKERMAN et al. v. CURRIER et al.

(Supreme Court of Colorado. Dec. 9, 1912.)

#### APPEAL AND ERROR (§ 69\*)—ORDERS APPEALABLE—REMOVAL OF TRUSTEES—APPOINTMENT OF RECEIVER.

An order removing trustees of a decedent's estate, and appointing a receiver therefor, prior to final judgment, is reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 352-366; Dec. Dig. § 69.]

White, J., dissenting.

En Banc. Error to District Court, Weld County; Louis W. Cunningham, Judge.

Suit by Mary B. Currier and others against James Tuckerman and another. From an

order removing defendants from their office as trustees of the estate of Warren Currier, deceased, and appointing a receiver therefor, they bring error. Reversed and remanded.

James W. McCreery, of Greeley, for plaintiffs in error. Charles D. Todd, of Greeley, R. T. McNeal, and Charles B. Brock, of Denver, for defendants in error.

HILL, J. This writ of error is between the same parties and involves one phase of the contention covered by case No. 8,085, James Tuckerman et al. v. Mary B. Currier et al., 129 Pac. 210, decided at this term. Its object was to secure a reversal of the order removing the plaintiffs in error from (as the order states) acting as trustees of the Currier estate and in the appointment of a receiver therefor. This order was made some time prior to the rendition of the final judgment in the case upon the many other questions involved. A supersedeas was granted. The only separate contention here made is that the order removing the plaintiffs in error and appointing a receiver is interlocutory and not final, and that a writ of error will not lie to review such order, for which alleged reasons a motion was made to quash the supersedeas and writ and dismiss the action. Upon hearing this motion was denied. All other questions are covered in the other opinion.

For the reasons there stated, the judgment of the trial court in the removal of the plaintiffs in error and in the appointment of the receiver is reversed, and the cause remanded.

Reversed and remanded.

MUSSER and GARRIGUES, JJ., not participating. WHITE, J., dissents.

#### STOCKMAN v. LEDDY, State Auditor.

(Supreme Court of Colorado. Dec. 9, 1912.)

#### 1. CONSTITUTIONAL LAW (§ 42\*)—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

The State Auditor may, in a suit to compel his obedience to a statute providing for his drawing warrants payable out of public funds, question its constitutionality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.\*]

#### 2. WATERS AND WATER COURSES (§ 3\*)—TITLE TO WATERS OF STREAMS IN STATE.

The waters of the natural streams in the state are, as declared in Const. art. 16, § 5, the property of the state; and its right to their distribution and control within its borders is free from interference by any other sovereignty.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. § 3.\*]

#### 3. STATES (§ 114\*)—APPROPRIATIONS—POWER OF LEGISLATURE.

The General Assembly has power to make an appropriation to protect the rights of the state in its natural streams and the waters

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereof, and the interest of its citizens acquired thereunder.

[Ed. Note.—For other cases, see States, Cent. Dig. § 113; Dec. Dig. § 114.\*]

**4. CONSTITUTIONAL LAW (§ 53\*)—LEGISLATIVE POWERS—ENCROACHMENT ON EXECUTIVE**

Laws 1911, p. 871, in making a joint committee of members of the Senate and House to conduct an investigation, on which the committee should come to a conclusion and act in the matter of prosecuting or defending actions for the benefit of the state, confers executive power on a collection of its own members, in contravention of Const. art. 3.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 86-88; Dec. Dig. § 58.\*]

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Mandamus by Louis R. Stockman against Michael A. Leddy, State Auditor. Writ denied, and plaintiff brings error. Affirmed.

Elliott & Bardwell and Roy C. Hecox, both of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Philip W. Mothersill, Asst. Atty. Gen., for defendant in error.

CAMPBELL, C. J. The immediate object of this action in mandamus by Stockman against the Auditor of State is to compel the latter to issue to him a warrant in the sum of \$55.75 for services which he rendered to a joint legislative committee created by an act of our General Assembly. Session Laws of 1911, p. 871, c. 227. The principal purpose of the action, however, appears to be to determine the constitutionality of the statute. The first section creates a joint legislative committee, "consisting of three members of the Senate and three members of the House of Representatives," the appointment of whom is to be "by the respective presiding officers thereof, to investigate the acts and claims of the Interior Department, the Reclamation Service, and the Forest Service of the Federal Government, and to ascertain whether or not the right of this state to control the distribution of the waters thereof within its borders is thereby in any way unlawfully limited or interfered with or infringed upon, or about to be interfered with or infringed upon; to investigate and determine what claims are made by or upon behalf of any state or corporation or individual thereof to the waters of any stream or streams originating in or flowing in the state of Colorado to the detriment of the interests of this state and the citizens thereof or the appropriators and users of said waters; and to examine into all matters by which the state's right to control the waters thereof may be affected." By section 2, the committee may "authorize the prosecution or defense of such action or actions as it may deem proper to determine or to protect the rights of the state in the matters aforesaid, and to employ counsel

therefor; and to employ counsel to assist in the conduct of any private suit or suits now pending or hereafter begun in which any material question as to the rights of the state may, in the judgment of said committee, be involved and properly determinable; and said committee may employ counsel to advise it as to the legal questions involved in such investigations." Section 3 makes the Attorney General ex officio a member of the committee, to whom is given the supervision of all actions or proceedings directed by said committee to be brought in behalf of the state or in which the state shall intervene under the provisions of the act, and he shall be assisted by the counsel employed by the committee. Section 4 confers upon the committee such power as will enable it to accomplish its contemplated work. By section 5 the committee is required to make a report of its acts to the Governor and a similar report to the next General Assembly. Section 6 makes an appropriation of \$50,000, "which said fund shall be subject to the use and disposal of said committee, and the Auditor of State shall draw warrants therefor upon vouchers approved by said committee and signed by the chairman and secretary thereof."

Some questions of minor importance, such as the sufficiency of the alternative writ under the previous decisions of this court, are argued; but, in view of our conclusion as to the soundness of the act, they will not be considered.

[1] As preliminary to the main discussion, we note the point made by plaintiff that the State Auditor may not question the constitutionality of this act in a mandamus action. It is familiar learning that a person may not attack a statute on the ground of its unconstitutionality, whose right it does not affect, and who, therefore, has no interest in defeating it; but this court has said, in accordance with the weight of authority, that where a statute prescribes a duty to be directly performed by a ministerial or executive officer, as a disbursing officer of the treasury, or an auditor charged with the duty of issuing warrants, payable out of public revenues, he may raise the constitutional objection when an action is brought against him to compel his obedience to it. *Newman v. People*, 23 Colo. 300-311, 47 Pac. 278. See, also, a well-considered case. *State v. Candland et al.*, 36 Utah, 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834.

[2, 3] There are two principal questions for decision: First, may the General Assembly, out of the public revenues, appropriate money for the purpose of protecting or defending its rights, or those of its citizens, in the waters of the natural streams of the state; and, second, can the appropriation in this act be upheld, or is it in contravention

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of our Constitution, as an attempt by the General Assembly to confer purely executive power on a body or committee composed entirely of its own members? That the General Assembly, which, under our Constitution, is the representative of the people in making laws, has the power, and is charged with the duty, to protect the state's interest in the natural streams of this state, cannot be questioned. The general purpose which the General Assembly had in mind in passing this act is not only praiseworthy, but strictly within the range of legislative action. From the very beginning of settlement in Colorado territory, and in other arid regions of the West, irrigation has been recognized by federal and state legislation, by the decisions of the federal and state courts, and by the people directly interested, as the declared public policy. These decisions need not be cited. They are abundant. In section 5 of article 16 of our state Constitution as originally adopted, this public policy is thus tersely expressed: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the Constitution, and declares for all time the public policy of this state which theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier sessions of our General Assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use. The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. The property right, however, in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use.

This Constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of Congress, and the President of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by Congress on the state of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling

act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a Constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity. We therefore find it to be not only that our state Constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty.

There is nothing in *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. 231, at all inconsistent with this conclusion. In that case this court declined to pass on the question which is involved in the pending action, because it was not necessary to the decision of that controversy. This court, by then withholding expression of opinion, did not intend to intimate, and did not intimate, that this state did not have full control over its natural streams and the distribution of their waters. The right of Congress to regulate and control navigable interstate streams and the jurisdiction of the Supreme Court of the United States to determine, in a controversy between two or more sovereign states over the waters of an interstate stream, whether they are reasonably exercising their inherent powers of sovereignty, are not overlooked or questioned by us; but these considerations do not, for the reasons above stated, affect or bear upon the right of ownership and control by Colorado of its own natural streams, and its power and authority to regulate the distribution of their waters, within its own territory, for beneficial purposes. We find nothing in *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, *Kansas v. Colorado*, 206 U. S. 48, 27 Sup. Ct. 655, 51 L. Ed. 956, *Rickey*

L. & C. Co. v. Miller & Lux, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032, Bean v. Morris, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821, or in any other case that has been brought to our attention, which militates against our conclusion, when these cases are considered, as they should be, in connection with the facts on which they were determined. We therefore conclude that the General Assembly, in order to protect the rights of the state in our natural streams and their waters, and the interests which its citizens have acquired thereunder, may make a valid appropriation of money for the purpose of protecting and defending them.

[4] This decision, however, is not conclusive as to the validity of the appropriation made by the act under consideration. It will be observed that there is no pretense by the General Assembly that the investigation which it authorizes, and the ascertainment of facts which it proposes, are to aid it in future legislation, or to assist it in its legislative capacity in supplying a remedy for some existing evil, or to furnish such information as a guide to the Attorney General, or some other appropriate officer of the executive department, in the performance of his duties in carrying out the legislative mandate. There can be no question that it is competent for the General Assembly to authorize such an investigation to be made by its own members for such purposes and to appropriate money to defray the necessary expenses thereof. But that is not the case we are considering. The General Assembly, it is true, purported to make an appropriation; but that appropriation is for the purpose of conducting an investigation by a committee of its own members, so that the committee itself might reach a conclusion as to what action it should deem proper to take to protect existing property rights of the state. In other words, the General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members. This is contrary to article 3 of our Constitution, which reads: "The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial—and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others except as in this Constitution expressly directed or permitted." It is, of course, in the affairs of government, not always easy to distinguish between executive, legislative, and judicial power, and it sometimes happens that power properly belonging to one department is ex-

ercised by another department, but properly, and only, as an incident to its own legitimate functions. The attempt here, however, undisguised, is to confer purely executive power upon a collection of members of the legislative department.

Counsel have cited us to several previous acts of our General Assembly, which they claim to be similar to, and precedents for, the present one. It will be found, in every case, that the duty of carrying out the act was imposed on the Attorney General, or some other officer of the executive department, and the appropriation was made to defray the expenses of such executive officers in executing the same. The General Assembly might well have authorized the Attorney General to expend this money in protecting the rights of the state here involved, and, if it had done so, and the act in other respects had been within the constitutional limit, no question could have been successfully raised as to its validity.

The legislative committee was without power to control this appropriation, and the Auditor of the state was right in refusing to recognize its claim to the possession thereof.

The district court took the same view, and its judgment is therefore affirmed. All the Judges concurring.

# BOND v. BOURK.

(Supreme Court of Colorado. Dec. 9, 1912.  
Rehearing Denied Jan. 6, 1913.)

## 1. FRAUDS, STATUTE OF (§ 83\*)—SALES—CONTRACTS WITHIN STATUTE—"CONTRACTS FOR WORK AND LABOR."

A contract to construct an article according to another's plans, whether at an agreed price or not, is a contract for work and labor and not within the statute of frauds, though the transaction results in the sale of the article, so that a contract by plaintiff to manufacture and deliver to defendant a soda fountain of particular dimensions according to a special design furnished, by assembling the various parts which were procured by plaintiff from others, was a contract for work and labor and not within the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 147-153; Dec. Dig. § 83.\*]

## 2. SALES (§ 340\*)—REMEDIES OF VENDOR—SUIT FOR PRICE.

If a purchaser wrongfully refused to accept an article when tendered, such as a soda fountain, manufactured to his order after a special design, the seller may elect to hold the property for the purchaser and recover the contract price; the article being presumed not to have a market value because of it being made specially.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 927-942; Dec. Dig. § 340.\*]

## 3. SALES (§§ 343, 344\*)—REMEDIES OF SELLER—ACTION FOR PRICE—RIGHT OF ACTION—REFUSAL OF PROPERTY.

Though a contract for the sale of a chattel, such as a soda fountain, provided that title should not pass until the fountain was set up and accepted, upon tender of delivery and refusal, the seller may sue for the agreed price; the tender coupled with ability to deliver and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

election to sue vesting title in the purchaser for the purposes of the action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 947-955; Dec. Dig. §§ 343, 344.\*]

Error to District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Frank O. Bourk, doing business as the American Root Beer & Supply Company, against Veal D. Bond, doing business as the Lincoln Drug Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harry E. Kelly and Charles H. Haines, both of Denver, for plaintiff in error. John H. Reddin and J. R. Alphin, both of Denver, for defendant in error.

BAILEY, J. In substance the complaint alleges that on or about March 10, 1908, plaintiff Bourk entered into an oral agreement with defendant Bond, to manufacture and deliver to the latter a soda water fountain of certain dimensions and particular design, to be manufactured by A. H. & F. H. Lippincott, of Philadelphia, except the marble counter and base and the superstructure and wooden base, which were to be made by the Eureka Marble Works and J. P. Paulsen, respectively, Denver firms, all in accordance with certain specifications furnished by the Philadelphia company; that defendant agreed, in payment therefor, to deliver to the plaintiff a certain secondhand soda water fountain and apparatus, of the agreed value of \$126, and the sum of \$930, \$45 thereof in cash, \$140 thereof on delivery of the new fountain, and the balance in equal monthly installments for which notes were to be given, payment to be secured on the fountain; that defendant, upon tender of the new fountain, refused to accept it, or permit it to be installed, or to make the cash payments or execute the notes, or to in any way perform his part of the agreement; and that the fountain is held by plaintiff as the property of the defendant. The complaint also sets out a memorandum agreement in evidence of the oral one, which on its face appears to be a contract between A. H. & F. H. Lippincott and the defendant. It was on a printed form used by the Lippincotts, filled in to conform to the alleged agreement. It is further averred that the names A. H. & F. H. Lippincott, whenever they appear therein, should be erased and the name of the plaintiff inserted in lieu thereof. Damages were prayed at the agreed price of the fountain. The defendant admitted that he signed the memorandum agreement set out in the complaint, but denied that it was a contract with plaintiff; also admitted that he refused to deliver the old fountain or accept the new, or to permit plaintiff to put it up, or to make the cash payments or execute the notes, and denied all other allegations. The second defense is a general de-

nial. The third defense alleges noncompliance with, and nonperformance by plaintiff of, the provisions of the agreement. The replication puts in issue all new matter in the answer. A jury found for the plaintiff upon the issues tendered, and assessed his damage at \$1,105.28, being the contract price with interest. Judgment was entered accordingly, and the defendant brings the case here for review on error.

Defendant contends that there was no contract between himself and the plaintiff, as alleged, or at all; and further, that if the agreement set out in the complaint is held to be between plaintiff and defendant, still there was a failure by plaintiff to perform the conditions thereof binding on him, and no recovery can be upheld.

The jury, under full and correct instructions, found that the contract was made by the parties as alleged in the complaint, and also that plaintiff had fully complied with its terms, completed the fountain according to specifications, offered to deliver the same within the time specified and set it up as required by the agreement. These findings have ample support in the evidence, and are conclusive on review. So that it must be accepted as settled that the contract is as set forth by plaintiff, and that he had fully complied, or was ready, able and willing to comply, with all of its provisions binding on him.

[1] It is urged that there can be no recovery, because there was no sufficient written agreement between the parties, as required by the statute of frauds, that every contract for a sale of "goods, chattels or things in action" for the price of \$50 or more shall be void unless a note or memorandum thereof be made in writing and subscribed by the parties to be charged therewith. Is the contract within the statute of frauds?

The fountain which the plaintiff agreed to manufacture and deliver was of particular dimensions and finished after a special design furnished by a third party. It does not appear that it was such an article as the plaintiff manufactured or produced for general trade purposes, nor does it appear that he manufactured such an article in the ordinary and usual course of business. The wood work was to be furnished by one party, the marble work by another, and the working parts by still another; all of which plaintiff contracted to assemble and deliver to the defendant, in the form of a complete new soda water fountain after a special design, peculiarly adapted for the use to which, and in the place where, defendant had planned to put it. The prevailing rule in American courts is that an agreement by one to construct an article particularly for and according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor. The contract is for the manufacture and sale of a thing made

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to suit the fancy and serve the particular convenience and purpose of the defendant, without a market value for use in general trade, and therefore, although the agreement might result in the production and sale of a chattel, is one for work and labor, and not within the statute of frauds. *Hientz v. Burkhard*, 29 Or. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777; *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; *Godard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Meincke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788; *Bird v. Muhlinbrink*, 1 Rich. (S. C.) 199, 44 Am. Dec. 247; *Donnell v. Hearn*, 12 Daly (N. Y.) 230; *Parker v. Schenck*, 28 Barb. (N. Y.) 38; *Higgins v. Murray*, 73 N. Y. 252; *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N. Y. Supp. 845; *Mead v. Case*, 33 Barb. (N. Y.) 202; *Moore v. Camden Granite & Marble Works*, 80 Ark. 274, 96 S. W. 1063, 117 Am. St. Rep. 87, 10 Ann. Cas. 308; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; 29 Am. & Eng. Ency. Law, pp. 964, 965; 20 Cyc. pp. 241, 242. In this view it becomes unnecessary to determine whether the memorandum referred to is a sufficient compliance with the requirement of the statute of frauds under consideration.

The agreement before us is clearly distinguishable from the one considered in the case of *Ellis v. D. L. & G. R. R. Co.*, 7 Colo. App. 352, 43 Pac. 457, based upon a contract to make railroad ties, which could have been bought in the open market, are variously produced and sold in the ordinary course of trade, and such as are in use by railroad companies generally.

[2] The court instructed the jury that the measure of damage was the contract price of the article to be furnished, to wit, \$1,056, with interest at the rate of six per cent. per annum from May 10, 1908, the time limit within which delivery was to be made. The defendant objects to this instruction as improperly stating the rule. The plaintiff pleaded and proved a tender of the property constructed according to the terms of the contract, and an offer to set it up, in exact compliance with the agreement, and the jury so found. He also, to the satisfaction of the jury, established his ability and willingness to do this, and showed that the only reason for failure of delivery was the refusal of the defendant to permit him to set the fountain up, or to pay for or receive it on any terms or at all. The plaintiff then and there elected to hold the fountain as the property of the defendant and sue for the contract price, and gave notice accordingly. The rule is practically universal in this country, that where a purchaser refuses, without legal justification, to accept, when tendered, an article manufactured to his order, after a special and particular design,

the vendor may, at his election, hold the property for the purchaser and sue for recovery of the contract price; such article being presumptively without a market value. The rule here announced as the measure of damage is intended to be limited to the particular facts of this case, and to cases involving a like or kindred state of facts. The English rule is different, and has been followed in two or three of our states, notably Maine and Vermont.

[3] On the contention that no title passed to the defendant, the weight of authority is that, although a contract for a sale of a chattel provided that title should not pass until settlement is concluded, and it is accepted by the buyer, still after a tender of delivery the seller may maintain an action for the agreed price. The tender of delivery and election to sue for the contract price vests title in the defendant, at least for the purposes of an action like this. Defendant repudiated his contract when he notified plaintiff that he would not receive or pay for the fixture, and would not permit it to be put up in his store; and he waived the conditions that the payments were not to be made or the notes executed until the fixture was set up. Plaintiff thereupon was entitled to sue for the contract price, without reference to the fact that the apparatus had not been set up; that is, the defendant cannot take advantage of the nonperformance of the conditions by plaintiff which he himself has prevented him fulfilling. Plaintiff stands, and at all times has stood, ready to deliver the fixture, finished and set up precisely as agreed upon, and there is no apparent sound or valid reason why he should not recover the amount which the defendant specifically undertook to pay therefor. Plaintiff has obtained from the Lippincotts the working parts of the fountain, and Paulsen and the Eureka Marble Works have carried out their contracts with him, and he has either paid, or is obligated to pay, for the work so done and materials so supplied. Defendant is not liable to these parties, that liability is solely upon plaintiff, and they must look to him for their respective claims, and he in turn ought, as a matter of common fairness, to be saved harmless on his contract. The defendant alone is in default; he has deliberately repudiated his contract to the damage of plaintiff; and we are unable to see how a more just, natural or proper measure of that damage can be found than the amount named in the original contract and fixed as the actual value to the defendant of the article furnished. Under such circumstances substantial justice can only be done by permitting the plaintiff to recover the agreed price, which is, in effect, simply requiring the defendant to live up to his contract. If the defendant does not want the property, he is at liberty to protect himself, should he desire to do so, by disposing of it,

and that burden is properly upon him, rather than upon the plaintiff. These conclusions are abundantly supported by the following well-considered cases: *Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219, 59 Pac. 879; *Colo. Springs L. S. Co. v. Godding*, 20 Colo. 249, 38 Pac. 58; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117; *Bookwalter v. Clark (C. C.)* 11 Biss. 128, 10 Fed. 793; *Ballentine v. Robinson*, 46 Pa. 177; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Range Co. v. Mercantile Co.*, 120 Mo. App. 438, 96 S. W. 1040; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Crown Hill Vinegar & Spice Co. v. Wehrs*, 59 Mo. App. 493; *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Schwarzer v. Karsch Brewing Co.*, 74 App. Div. 383, 77 N. Y. Supp. 719; *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Register Co. v. Hill*, 136 N. C. 272, 48 S. E. 637; *American Soda Fountain Co. v. Gerrers' Bakery*, 14 Okl. 258, 78 Pac. 115, 2 Ann. Cas. 318; *Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074; *McCormick Harvesting Machine Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; *Kinhead v. Lynch (C. C.)* 132 Fed. 692; *Gaar, Scott & Co. v. Fleshman*, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348; -3 *Sutherland on Damages (3d Ed.)* § 649.

The judgment is affirmed.

MUSSER and WHITE, JJ., concur.

#### VAN GORDOR v. VAN GORDOR.

(Supreme Court of Colorado. Dec. 9, 1912.  
Rehearing Denied Jan. 6, 1913.)

##### 1. DIVORCE (§ 286\*)—APPEAL—ALIMONY—AMOUNT—DISCRETION OF COURT.

The decision of the lower court as to the amount of alimony in a divorce case will not be disturbed except for a clear abuse of discretion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.\*]

##### 2. DIVORCE (§ 240\*)—ALIMONY—AMOUNT—DISCRETION OF COURT.

An award of \$8,000 alimony was not an abuse of discretion where the defendant's estate was valued at from \$14,700 to \$35,000, and was accumulated during the married life of 31 years.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678; Dec. Dig. § 240.\*]

##### 3. DIVORCE (§ 252\*)—ALIMONY—AMOUNT.

Where husband and wife have lived together until she is unable to perform hard labor, and have by their joint labor acquired property sufficient to support them both comfortably when living together, and she is forced to seek a separation by the misconduct of the husband, she is entitled to sufficient to support her, living alone.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 713-715; Dec. Dig. § 252.\*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by Mary Evelyn Van Gorder against Virgil Van Gorder. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Churchill, of Greeley, for appellant. Joseph C. Ewing, of Greeley, for appellee.

BAILEY, J. Plaintiff, appellee here, commenced this suit against defendant, appellant here, in the district court of Weld county, for divorce and alimony, basing her right of action on three grounds: First, that the defendant had been guilty of habitual drunkenness for the space of one year or more; second, that he had been guilty of extreme and repeated acts of cruelty toward the plaintiff; and third, that he had been guilty of adultery. The case was tried to the court without a jury, and defendant was found guilty of extreme and repeated acts of cruelty toward the plaintiff, and of adultery. A decree of divorce was awarded and plaintiff given a judgment for \$8,000 as permanent alimony, also \$100 for attorney fees in addition to \$100 already allowed for that purpose. The judgment was made a lien against the real estate of the defendant, until within a time limit he should give a legal and sufficient bond on appeal to the Supreme Court, in the sum of \$12,000, which bond was duly filed and approved.

From the judgment of the court awarding alimony the defendant brings the case here upon the ground that such award is excessive, contrary to law and not supported by the evidence. The evidence taken as a whole shows that the value of the defendant's property, at the time of the judgment, varied, in round numbers, from \$20,000 to \$24,000, according to the testimony of the defendant and his witnesses, and from \$37,000 to \$43,000 upon the testimony of the plaintiff and her witnesses; that the property consisted of a 160-acre ranch with water rights, growing crops, ordinary farm machinery, live stock, work horses and the like. The evidence showed that the defendant was indebted in the sum of \$9,000. If the testimony of the plaintiff be taken, the net value of the defendant's assets would be \$35,300, one-half of which would be \$17,650. According to the testimony of the witness Holland, sworn in behalf of plaintiff, the net value of the defendant's assets was \$30,000, one-half of which would be \$15,000. According to the estimate of the witness Farr, called by the defendant, the net value of the latter's estate was \$14,700, one-half of which would be \$7,350.

[1] It is well established that the amount of alimony to be awarded in divorce proceedings is in the sound discretion of the trial court, and an appellate tribunal will not review that decision unless a clear abuse of such discretion has been shown. *Boggs v. Boggs*, 45 Ind. App. 397, 90 N. E. 1040; *Gussman v. Gussman*, 140 Ind. 433, 39 N. E.

918; and *Read v. Read*, 28 Utah, 297, 78 Pac. 675. The rule is stated by Justice McCarty, in the case of *Read v. Read*, supra, as follows:

"The awarding of alimony and fixing the amount thereof are questions, the determination of which rests within the sound discretion of the trial court; and, unless it is made to appear that there has been an abuse of discretion on the part of the court in dealing with one or both of these questions, its judgments and orders granting or fixing the alimony will not be disturbed."

[2] We have carefully examined all of the evidence, and reach the confident conclusion that it amply supports the award. From the testimony of the defendant, which in the very nature of things is quite as favorable to himself as it could be made, it appears that the net value of his estate was \$14,700, one-half of which would be \$7,350, only \$650 less than the alimony actually decreed. Under the well established rule that appellate tribunals will not disturb judgments based on conflicting testimony, where there is sufficient in the record to support it, the award of alimony here should stand, as the discretion of the trial court seems to have been not only properly, but wisely, exercised.

[3] Upon the law of the case, natural justice requires that at least one-half of the property, representing the joint accumulations of husband and wife for a lifetime, should go to the wife, where she obtains a decree of divorce through the fault of the husband. Where, as in this case, the husband and wife have lived together until she is unable to perform hard labor, and have, by their joint labor, management and economy, acquired property sufficient to support them both comfortably when living together, certainly when the wife is forced by the misconduct of the husband to seek separation, she ought to receive sufficient property to support her comfortably, living alone, without reference to her ability to work and contribute to her own support. *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400; *Ressor v. Ressor*, 82 Ill. 442.

In many respects the case of *Gercke v. Gercke*, supra, is like the one at bar. There plaintiff and defendant had been married 33 years, and by industry and economy had accumulated an estate worth about \$12,000. Plaintiff, who was 57 years old and in poor health, had always been a faithful wife; defendant had treated her with great brutality and had been guilty of adultery. He was 54 years old, in robust health, and making money in his business. The wife had no means of support, and from her age and health was unable to earn anything. The trial court made an allowance of \$6,000 alimony, which was sustained by the Supreme Court of Missouri. In the opinion of the court Justice Brace makes the following comment:

"That decree gives the plaintiff a moiety

of the defendant's fortune. Is it under the circumstances too much? As before intimated, this fortune represents the joint labor, thrift and economy of 33 years of the married life of the plaintiff and defendant. The one equally with the other is the meritorious cause of its existence; by hard work faithfully performed by each, within their respective spheres, it was saved and laid by, from the rewards of their daily labor. They should have gone down to their graves in its mutual enjoyment; that they have not done so, is not the fault of the plaintiff; without fault upon her part, she has by the brutal and unfaithful conduct of her husband been deprived of the fruits of her toil and thrown upon the world with nothing but a little household furniture the value of which is not worth estimating. Her age and the condition of her health is such that she can by her labor do but little towards making a support, and reduces to an inappreciable amount the suggested value of her inchoate right of dower when considered in connection with the age and health of the defendant. The husband is in possession of all the fruits of their joint labor; he has it invested in real estate and in a profitable and thriving business; he is in the enjoyment of vigorous and robust health, and 'making bushels of money,' as he expresses it. Under these circumstances it did not seem to the chancellor that it was anything but fair and just that the innocent, injured, and comparatively helpless wife should have a moiety of this estate, and now after the lapse of more than two years, during which time the defendant has refused to pay the moderate alimony pendente lite his appeal to this court, allowed her by the trial judge, or to contribute anything to her support, but has put her to the expense and delay of prosecuting two actions through the appellate court in order to get anything, we do not feel disposed to disturb his judgment."

It appears in the case of *Ressor v. Ressor*, supra, that the appellant was a capable, industrious woman, attending to her family, her house, cooking and working on the farm, doing a man's work besides, and had been a good manager; that the parties were married and had lived together for 37 years, and she was 59 years old at the time of the hearing; that when they were married neither had any property; and that through their joint efforts they had accumulated a comfortable fortune. It was vigorously contended by the husband, on appeal, in that case, that the wife should be limited to one-third of the income from his property. The facts there, and the contention of the attorney for the husband as to the amount of alimony, are substantially as here. There the court, among other things, at page 445, said:

"She in every way contributed equally to its (farm) improvement, and is fully entitled



in equity, and the broadest principles of justice, in her declining years, to a comfortable support from it. She should not be put off with what will barely prolong her existence.

"It appears that she was 59 years old at the time of the hearing, and was not in her former vigorous and robust health. She has probably passed the period when she will be able to perform much more physical labor. The infirmities of age must soon, according to the course of nature, render her at least comparatively helpless, and she must look to other sources than her own efforts for support. As we have seen, she has earned and is entitled to a comfortable support out of the joint accumulations of herself and her husband.

"In consideration of all the evidence, we regard the amount fixed by the court as being too small. Her board, we presume, would cost her two-thirds of the amount, and the remainder would seem to be a scant allowance to purchase and make her clothing, pay doctor's bills, and other contingent expenses. At her age, her ability to work should not be taken into account, as the infirmities of age may and soon will prevent that, and even if it were not so, she, after her life of hard and incessant toil to accumulate this property, has the right to spend her declining years in ease and comfort, freed from toil and effort. This she has earned, and is entitled to it. \* \* \*

"If so, one-third of the sum would be \$500 per annum. But the court is not limited to a third of its income. This amount would not be unfair, unjust or unreasonable, even if it should require a sale of a portion of this property. Natural justice would say, that if she contributed equally to its acquisition, she has an equal right to its enjoyment. Independent of conventional law or usage, such would be the decision."

The foregoing cases deal with facts quite similar to those in the case at bar. Plaintiff and defendant started life as man and wife, practically without a cent. Their married life covered a period of 31 years; they reared a family of three children. Even after marriage, the wife worked in a hotel for \$1.50 a week. They then settled on a homestead, and she taught school four miles from home for \$50.00 a month, and boarded herself in order to pay the homestead fees. She walked the eight miles, to and from school. Later she went to cook and work out on a ranch, and stayed there for two years, until within one month before her first child was born. As soon as the baby was ten or eleven months old, she went back to the ranch to work, and cooked there for four years, all of her earnings going into the common fund. She assisted her husband on the farm, planting and harvesting crops, raising chickens, making butter and milking cows. One winter she fed the stock, while the husband worked

away from home, and sold butter and eggs enough at the same time to support herself and the baby in his absence. After living in Kansas nine or ten years, they rented farms in Colorado for some time, and the first two or three years the wife worked in the field, the same as her husband. Everything that she acquired from the sale of butter, eggs, chickens and the like was turned into the family fund. She continued thus to perform labor, working and contributing to this fund for the period of 27 years, until all of the property acquired and now held by the defendant was practically paid for. It is distinctively a common property, the joint product of the two. They then moved to the city of Greeley, in order to have educational advantages for their children. It was about this time that their troubles began, which finally led to this action. The defendant himself, in his testimony, bears witness to the devotion and fidelity of this faithful and patiently industrious wife in the accumulation of the family fortune, in this picturesque and convincing language: "My wife helped to accumulate this property, the water rights and the farm, and helped all along ever since we were married, about 31 years. I think she did her full share. Worked out and taught school when we were first married, milked cows and slopped hogs and worked in the field. She cooked for hired men." It would be difficult to imagine a state of facts more emphatically calling for an application of the rule stated in and illustrated by the cases of *Gercke v. Gercke* and *Ressor v. Ressor*, supra. Under the circumstances disclosed by this record, it seems clear, as matter of law and upon the broadest principles of justice, that this woman is entitled to the full sum awarded, which, under all of the evidence, may be said to represent less than one-half of the net worth of the property, in the accumulation of which plaintiff has borne so conspicuous and helpful a part. Even had a larger sum been allowed her, it could have been, upon the entire record, fairly and justly upheld.

The judgment is affirmed.

MUSSER and GABBERT, JJ., concur.

#### KINDERMAN v. HERSCH.

(Supreme Court of Colorado. Dec. 9, 1912.)

##### 1. GUARANTY (§ 4\*)—ASSIGNMENTS OF NONNEGOTIABLE CONTRACT.

Where defendant leased sheep for a year, and at the end of that time was to receive the original number of ewes and a lamb for each ewe, the contract was not negotiable, and his indorsement "Pay to the order of W. K.," without a guaranty of delivery, was, in effect, a warranty only that the contract was genuine, and a direction that the lessee should deliver the sheep to the assignee, and imposed no lia-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bility upon defendant upon the lessee's failure to deliver.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3-6; Dec. Dig. § 4.\*]

**2. EVIDENCE (§ 423\*)—PAROL EVIDENCE—EXPLAINING TERMS OF LEASE.**

Where the indorsement of a nonnegotiable sheep contract or lease did not fix any liability as indorser, it was competent for the indorser to show by parol what liability he did assume when the contract was assigned and delivered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.\*]

**3. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—REQUEST FOR FINDINGS.**

In an assignee's action against the assignor of a sheep contract, or lease, for damages for nondelivery thereunder, where the judgment for defendant, rendered upon practically undisputed facts, was right, any error in refusing plaintiff's request for special findings of law and fact was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

**4. APPEAL AND ERROR (§ 936\*)—PRESUMPTIONS—COSTS—RETAXATION.**

Where neither the order for the issuance of subpoenas for witnesses nor the affidavits on which it was based is in the record, it cannot be assumed that it was made without notice, if notice was necessary, merely upon an affidavit that it was obtained ex parte, nor from the mere statement in the affidavit that the witnesses subpoenaed, but not called, knew nothing of the facts in the case, can bad faith be imputed to the party subpoenaing them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3782, 3787; Dec. Dig. § 936.\*]

**5. COSTS (§ 184\*)—ITEMS—WITNESSES—FEES.**

Costs for witnesses regularly subpoenaed, though not called, may be taxed against the losing party, unless he shows that they were not subpoenaed in good faith, but for purposes of oppression.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. § 184.\*]

**6. COSTS (§ 146\*)—DISCRETION OF TRIAL COURT—COSTS UNREASONABLY INCURRED.**

The trial court has power to refuse to tax costs unreasonably incurred by the successful party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 567-569, 572-574; Dec. Dig. § 146.\*]

Error to District Court, City and County of Denver; Hubert L. Shattuck and Harry C. Riddle, Judges.

Action by William Kinderman against David Hersch. Judgment for defendant, and plaintiff brings error. Affirmed.

Warwick M. Downing, of Denver, for plaintiff in error. Chas. A. Johnson, of Durango, for defendant in error.

GABBERT, J. Plaintiff in error brought suit against defendant in error to recover damages for the nondelivery of certain ewes and lambs, which, according to the allegations of his complaint, he had purchased from the defendant. In his complaint the plaintiff set out a bill of sale which recited, in substance, that one Martinez had sold to the defendant a specified number of ewes and lambs, to be selected from respective

herds of about one thousand each, and delivered on a date specified. It was these ewes and lambs which plaintiff claimed to have purchased from the defendant, and also that he had guaranteed to deliver at the time mentioned in the bill of sale. In his answer the defendant, so far as material to consider, averred that the bill of sale set out in the complaint was, in fact, a lease of sheep belonging to him; that they were not the property of Martinez, but that the latter was to take possession of and care for them for one year, and at the end of that period return the original number of ewes thus leased, and a lamb for each ewe; that, for his remuneration, Martinez was to have the wool clip from the ewes, and any lambs in excess of the number of ewes; and that the transaction upon which plaintiff based his right of recovery consisted of an assignment of this contract to him. The cause was tried to the court, and judgment rendered for defendant. At the trial it appeared that the contract in question was delivered to Kinderman, indorsed and signed by the defendant, "Pay to the order of William Kinderman," and that Martinez never delivered the ewes and lambs which it covered. It also appeared from the testimony that at the time the bill of sale was executed the lambs were not in esse. Plaintiff admitted that at the time he took the bill of sale indorsed as above he knew it was a sheep contract between Martinez and defendant; that by this transfer he had not bought any particular ewes and lambs; that he bought the contract because he thought "Mr. Hersch was good for it," and that he knew he was to select the sheep out of a large herd. Over the objection of plaintiff, the defendant was permitted to testify that Kinderman asked him for a guaranty of delivery, which was refused, and that the agreement between the parties was that Kinderman should look exclusively to Martinez for the sheep.

Upon this record, counsel for plaintiff contends (1) that the relation between the defendant and Martinez was that of bailor and bailee, and that the situation was, in effect, the same as though the defendant had had the sheep in his corral at the time he transferred the bill of sale to the plaintiff, and (2) that the court erred in receiving the testimony of the defendant to the effect that, by the transfer of the bill of sale, he did not sell the sheep, but merely assigned all his right, title, and interest in that contract; and that, by parol, it was agreed that he did not guarantee a delivery of the sheep called for by the contract. It is unnecessary to consider the first proposition, as the case turns upon a determination of the second.

[1, 2] This proposition is based upon the assumption that the written indorsement fixed the contract between the parties, and could not be varied by parol. The conten-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion is not tenable. The contract or bill of sale executed by Martinez was in no sense negotiable paper, like a promissory note. When the defendant transferred it by the indorsement "Pay to the order of William Kinderman," he merely directed that Martinez should deliver to Kinderman the sheep which he had agreed to deliver him. But the terms of the indorsement did not fix any liability on the defendant, like an indorser of negotiable paper, for the obvious reason that the contract assigned was nonnegotiable. Consequently it was entirely competent for the defendant to show by parol what liability he did assume when the contract was assigned and delivered. Such testimony did not violate the rule that a written contract cannot be varied by parol, because the indorsement, notwithstanding the language employed to evidence it, was nothing more than an assignment of a nonnegotiable, executory contract whereby the defendant merely warranted that the contract was genuine, not that it would be performed by Martinez, or that he, the defendant, would deliver the sheep in the absence of an agreement to that effect. *Galbreath v. Wallrich*, 45 Colo. 537, 102 Pac. 1085.

[3] At the conclusion of the trial counsel for plaintiff requested the trial judge to make special findings of law and fact, which was refused. If it be conceded that the court should have complied with this request, the refusal constitutes error without prejudice. It is manifest from the practically undisputed facts that the defendant merely assigned to the plaintiff the Martinez contract, but he did not guarantee its performance, or that he would deliver the sheep, and hence incurred no liability, because Martinez failed to comply with his agreement. The trial court was therefore clearly right in rendering the judgment it did.

After judgment, the plaintiff filed a motion to retax the costs. In support of this motion an affidavit was filed, which recited, in substance, that the case under consideration and another were originally pending in the county court; that counsel for the respective parties were endeavoring to compromise these cases; that, in order to prevent costs, they agreed that neither party would subpoena witnesses from any county outside of the city and county of Denver; that, notwithstanding this agreement, the defendant, without notice to plaintiff, procured an order from the district court in which the cause was pending that subpoenas might issue for three witnesses (naming them), residing in Archuleta county; that the subpoenas issued and were served; that the witnesses attended at the trial, but only one of them testified; and that neither of the others knew anything material to the issues in the case. The clerk had taxed as

costs against plaintiff the fee and mileage of these witnesses, which, by the motion, on the facts stated in the affidavit, it was sought to have disallowed.

[4-6] The motion was denied, which counsel for plaintiff contends is erroneous, for the reason that the order for the subpoenas was obtained ex parte, and that, in any event, the fees and mileage of the two witnesses not called should not have been taxed against the plaintiff. Neither the order for the issuance of the subpoenas nor the affidavits upon which it was based are before us. With the order absent, we cannot assume that it was made without notice, if notice was necessary, merely upon an affidavit that it was obtained ex parte. The costs for witnesses regularly subpoenaed, though not called, may be taxed against a losing party, unless the latter shows that they were not subpoenaed in good faith, but for the purposes of oppression. 11 Cyc. 115. A trial court undoubtedly possesses power to refuse to tax costs unreasonably incurred by the successful party, but the mere statement in an affidavit of the losing party that witnesses subpoenaed, but not called, knew nothing of the facts in the case, is not sufficient to impute bad faith on the part of the party subpoenaing them. This is especially true when the affidavit upon which the order for a subpoena was obtained is not before us.

The judgments of the district court upon the merits and denying the motion to retax costs are affirmed.

Judgments affirmed.

CAMPBELL, C. J., and HILL, J., concur.

CARY v. MINE & SMELTER SUPPLY CO.  
(Supreme Court of Colorado. Dec. 9, 1912.)

1. STATUTES (§ 64\*)—PARTIAL INVALIDITY—SEPARATE PROVISIONS.

Code Civ. Proc. § 164, with reference to the issuance of injunctions, without notice, on the giving of an emergency bond, provides that if it shall afterwards appear that the emergency did not exist, or existing was brought about by the act or omission of or for the plaintiff, or by his knowledge, the court shall find or enter judgment accordingly, and shall also dismiss the complaint without reference to the merits thereof, and shall also summarily enter judgment on the emergency bond for the defendant and against plaintiff and the sureties, and issue execution therefor. *Held*, that the clause requiring the dismissal of the complaint without respect to the merits was separable from the balance of the section; and hence the fact that such clause might be invalid did not invalidate the balance of the section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

2. CONSTITUTIONAL LAW (§ 55\*) — DEPARTMENTS OF GOVERNMENT—JUDICIARY—STATUTES PRESCRIBING PROCEDURE.

The Constitution, vesting the judicial power of the state, as to matters of equity, in certain designated tribunals and such other courts

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as may be prescribed by law, does not preclude legislation prescribing the procedure by which the jurisdiction is to be exercised, unless the regulations adopted substantially impair a constitutional power of the court, or practically defeat its exercise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58-62, 67, 68, 71, 80, 81, 83; Dec. Dig. § 55.\*]

3. CONSTITUTIONAL LAW (§ 312\*) — INJUNCTION — EMERGENCY BOND — SUMMARY JUDGMENT — DUE PROCESS OF LAW.

Code Civ. Proc. § 164, authorizing the granting of a temporary restraining order without notice in case of an emergency on the filing of an emergency bond, but declaring that in case the emergency is subsequently declared not to exist the court may enter summary judgment on the emergency bond for defendant and against plaintiff and the sureties, and issue execution therefor, was not unconstitutional as failing to provide for due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 928; Dec. Dig. § 112.\*]

En Banc. Error to District Court, City and County of Denver; Booth M. Malone, Judge.

Action by the Mine & Smelter Supply Company against Wilson Cary, administrator, substituted for John Cary, deceased. Judgment for plaintiff, and defendant brings error. Reversed.

T. J. O'Donnell, John W. Graham, Jr., and Canton O'Donnell, all of Denver (Edwin H. Park, of Denver, of counsel), for plaintiff in error. Gerald Hughes and Barnwell S. Stuart, both of Denver, for defendant in error.

WHITE, J. The Mine & Smelter Supply Company, a corporation, instituted a suit in the district court within and for the city and county of Denver against John Cary, whereby it claimed that certain shares of the capital stock of another corporation, held by and in the name of Cary, in truth and in fact belonged to and was the property of the plaintiff, and therein sought to have it so decreed, and to have defendant transfer the stock to it and account for certain dividends received by him upon such stock. At the same time it made application, in conformity with section 164 of the Code of Civil Procedure (R. S. 1908), for and secured a temporary injunction, without notice, restraining the defendant from transferring, selling, or incumbering the stock. The plaintiff executed and filed two bonds or undertakings, with sureties, as required by Code of Civil Procedure (R. S. 1908) §§ 163, 164. The one required by section 164, commonly known as the additional or emergency bond, was in the sum of \$500, "conditioned for the payment of the sum therein mentioned to the defendant if it shall be adjudged that such emergency did not exist, or that the plaintiff created, or connived at its creation, by neglect or otherwise."

Upon hearing the matter the court held that the emergency alleged, upon which the

temporary restraining order was issued, without notice, did not exist, dissolved such order, and denied the relief prayed in that respect. Thereupon the defendant interposed a motion to dismiss the complaint and enter judgment on the emergency bond in his favor and against the plaintiff and his sureties therein, and to issue execution therefor as provided by section 164, supra. The motion was denied; but the court subsequently, upon request of plaintiff, dismissed the complaint, and the defendant, as plaintiff in error, brings the cause here for review.

The action of the trial court was based upon the assumption that the Code provision, requiring the court, when it finds that the emergency alleged for the purpose of securing the restraining order, without notice, did not exist, or, if existing, was brought about by the act or omission of or for the plaintiff, or by his knowledge, to thereupon "dismiss the complaint without respect to the merits thereof," and to "summarily enter judgment on said emergency bond for the defendant and against the plaintiff and his sureties" for the amount designated therein, and to "issue execution therefor," violates fundamental principles of the state and likewise the federal Constitution. The particular constitutional provisions said to be involved are the following: Sections 3, 6, 14, and 25 of article 2, section 25 of article 6, Constitution of Colorado, and section 1 of the fourteenth amendment of the Constitution of the United States.

[1] The necessity of determining the constitutionality of the clause requiring the dismissal of the complaint, without respect to the merits thereof, was eliminated by the dismissal of the complaint upon the request of the plaintiff, and we shall express no opinion thereon. Were we to assume that clause of the legislative act to be unconstitutional, and strike it out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent. So the sole question for consideration and determination is the validity of that portion of the section requiring the court, upon certain conditions stated, to enter judgment for the defendant against the plaintiff and his sureties in the emergency bond, and to issue execution therefor.

[2] While the Constitution, except as therein otherwise provided, vests the judicial power of the state, as to matters of equity, in certain designated tribunals and such other courts as may be prescribed by law, it in no wise inhibits legislation prescribing the procedure by which the jurisdiction is to be exercised, unless the regulations adopted substantially impair the constitutional power of the court, or practically defeat its exercise. *Pomeroy's Equity Jurisprudence*, c. 3; *Ex parte Harker*, 49 Cal. 465; 11 Cyc. 739. Indeed, the right in that re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spect has been exercised by the General Assembly since the organization of the state, and particularly as to injunctive procedure and relief. Code Civ. Proc. 1877, §§ 125, 126, and 127; Sess. Laws 1887, pp. 141, 142, §§ 146, 147, and 148; Sess. Laws 1903, p. 252, § 148.

Such, also, has been the practice of the legislative bodies of other states. In *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060, it is said that: "As early as 1723 a law was passed in Maryland that any person desiring to proceed in equity against a verdict or judgment rendered against him in the county court should be required to give security in double the amount of the debt for the due prosecution of the injunction and payment of debt and all costs and damages that should accrue in the Chancery Court or should be occasioned by the delay, unless the Court of Chancery should decree to the contrary, and in all things obey such order and decree as the court should make. In 1793 an additional law was passed, to the effect that whenever application should be made for an injunction to stay proceedings at law the Chancellor should have power and discretion to require the applicant to give a bond to the plaintiff at law, with condition to perform such order or decree as the Chancellor should finally pass in the cause. Similar laws were passed in Virginia in 1787, and in New Jersey in 1799, and no doubt in other states at an early date. Their object was, where an adjudication had already been had at law, to make it compulsory on the Chancellor to require security before granting an injunction. \* \* \* Regulations substantially similar to those above adverted to were prescribed by general rule of the Court of Chancery of New York prior to the adoption of the Revised Statutes. In 1828 they were codified, with amendments, in that revision. But the rule, as well as the statute, only related to injunctions for staying proceedings at law. In 1830 the Chancellor of New York, for the first time, made a general rule (No. 31), that where no special provision was made by law as to security the vice chancellor, or master, who allowed an injunction out of court, should take from the complainant, or his agent, a bond to the party enjoined, either with or without sureties in the discretion of the officer, in such sum as might be deemed sufficient, not less than \$500, conditioned to pay such party all damages he might sustain by reason of such injunction if the court should decide that the complainant was not entitled to the same; and that the damages might be ascertained by a reference or otherwise, as the court should direct. 1 Hoffman, Ch. Pr. 80; 1 Barb. Ch. Pr. 622; [Cayuga Bridge Co. v. Magee] 2 Paige (N. Y.) 122. \* \* \* This rule, enlarged and made applicable to all courts and judges, was copied in the New York Code of Procedure of 1848, § 195 (now section 222), and

has been followed in other codes and systems of practice in other states. See 2 R. S. Wisconsin, 748; also Laws of Illinois, Iowa, Colorado, etc. It was substantially adopted in the chancery rules of New Jersey in 1853, except that it was left to the discretion of the officer to require a bond or not."

[3] We are very certain that the procedure here in question is valid. It requires the court to do only that which it had inherent power to do, and which has been exercised by courts of equity from time immemorial. Such courts, in cases where damage may be occasioned to the defendant in the event of an injunction or interim restraining order proving to have been wrongfully granted, have frequently required the plaintiff, as a condition of interference in his favor, to enter into an undertaking to abide by any order the court may make as to damages. *Kerr on Injunctions*, p. 557.

Without the statutory provisions under consideration, one court may impose terms as a condition precedent to the granting of a writ without notice, while another court might resort to none. Under the statute the terms and conditions imposed must be identical in all cases, except solely the sum of money required by the plaintiff to be paid the defendant, if it subsequently transpires that the plaintiff wrongfully caused the sovereign to interfere with the rights of the defendant without first affording him an opportunity to be heard. The discretion intrusted to the court in this respect we think wise, and in no sense discriminatory. That which would be reasonable, proper, and just to the defendant in one case might not be so in another. In a sense it might be said that the statute is a legislative declaration that in every case where an *ex parte* injunction is issued the defendant may be damaged, and is, if the necessity for the injunction is not imminent; and, as the damage may be uncertain or incapable of being readily ascertained, the plaintiff shall enter into an obligation to pay liquidated damages in the event it shall afterwards appear to the court, upon any hearing or trial of the matter, that the emergency alleged, inducing the court to act without notice to the defendant, did not exist, or existing was brought about by the act or omission of the plaintiff, or by his knowledge.

The requirement that the court summarily enter judgment on the emergency bond for the defendant and against the plaintiff and his sureties, and issue execution therefor, does not, in our opinion, constitute a denial of due process of law. While it is true that ordinarily in an action of this character the party aggrieved must resort to an independent action upon the undertaking to recover the damages by him sustained, the rule does not apply where there is a statute authorizing the award in the original cause. *Sartor v. Strassheim*, 8 Colo. 185, 188, 6 Pac. 215. The statute in question expressly com-

mands that the judgment, for a fixed and known sum, shall be summarily entered in the cause. The undertaking was executed in pursuance of the statute and for the purpose of obtaining its benefits, and necessarily constitutes, in legal effect, a part thereof. *Shannon v. Dodge*, 18 Colo. 164, 169, 32 Pac. 61. The principal and sureties filed the instrument in the cause, and by the terms of the statute consented that the court should enter judgment against them for the amount specified in the bond if the court adjudged that the emergency alleged did not exist, or existing was brought about by the act or omission of or for the plaintiff, or by his knowledge.

All the parties are thus before the court, in the cause, and that which is done is in accordance with the provisions of the statute. The judgment is therefore reversed for further proceedings in accordance with the views herein expressed.

Judgment reversed.

**DENVER OMNIBUS & CAB CO. v. GAST.**  
(Supreme Court of Colorado. Jan. 6, 1913.)

**1. JUDGMENT (§ 239\*)—JOINT TORT-FEASORS—JUDGMENT AGAINST PART.**

Plaintiff, in an action against several carriers for damages for the loss of a trunk, may recover against such of the defendants as his testimony shows guilty of the tort charged; and in a case where it is debatable whether his evidence sustains the action against some particular defendant plaintiff need not elect and dismiss against certain of the defendants, but the court or jury may find certain defendants liable and others not, as the evidence may show.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 417; Dec. Dig. § 239.\*]

**2. PLEADING (§ 245\*)—AMENDMENT BEFORE TRIAL.**

Where the complaint, in an action for the loss of a trunk, alleged defendant's agreement to carry it to a certain place, which place, if changed, would not, in view of the other material allegations, state a new cause of action or prejudice defendant, such allegation after failure of proof might be eliminated by amendment prior to a new trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 653-675; Dec. Dig. § 245.\*]

**3. PLEADING (§ 378\*)—ISSUES AND PROOF.**

Where the first defense was a general denial, plaintiff had the burden of proving all the material allegations of his complaint, regardless of the other defenses in the answer, even if they were incomplete.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1232-1236; Dec. Dig. § 378.\*]

**4. PLEADING (§ 93\*)—ANSWER—SEPARATE DEFENSES.**

Separate defenses need not be consistent with each other.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.\*]

**5. PLEADING (§ 129\*)—ANSWER—ADMISSIONS.**

In an action for the loss of baggage, an amended answer to the effect that defendant admitted that some one, to it unknown, delivered to it a certain trunk at 1673 Broadway, but that as to whether plaintiff was the owner defendant had no sufficient information upon

which to base a belief, was not an admission of the receipt of plaintiff's trunk at 1673 Broadway, but made that a matter in issue.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

**6. CARRIERS (§ 408\*)—ACTION FOR LOSS OF BAGGAGE—BURDEN OF PROOF.**

In an action for the loss of a trunk, plaintiff had the burden of establishing that the trunk admitted to have been received by defendant at a certain address was his trunk.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.\*]

**7. TRIAL (§ 194\*)—INSTRUCTIONS—PROVINCE OF JURY.**

In an action for the loss of a trunk, where plaintiff had the burden of proving the issue as to whether a trunk admitted to have been received by defendant at a certain address was his trunk, and where the evidence thereon was conflicting, an instruction that defendant admitted that it received plaintiff's trunk was reversible error as taking the issue from the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

**8. EVIDENCE (§ 370\*)—DOCUMENTARY EVIDENCE—PRELIMINARY IDENTIFICATION.**

In an action for the loss of a trunk, where plaintiff testified that he received both defendant's check and a hotel check of the same number, the admission of defendant's purported check, referred to in plaintiff's deposition, although it was not a part thereof, without identification or foundation for admission, was error.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1538, 1559-1579, 1592; Dec. Dig. § 370.\*]

Gabbert and Garrigues, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Wilson M. Gast against the Denver Omnibus & Cab Company and others. Judgment for plaintiff as against the cab company, and it brings error. Upon petition for rehearing, former opinion withdrawn, judgment reversed, and cause remanded for a new trial.

Thomas, Bryant, Nye & Malburn, of Denver, for plaintiff in error. W. W. Cover, of Denver, for defendant in error.

HILL, J. This action was brought by Wilson M. Gast against the Denver Omnibus & Cab Company, the Union Depot & Railway Company, and the Chicago, Burlington & Quincy Railway Company to recover damages for the loss of his trunk and contents. The verdict of the jury and judgment were against the Denver Omnibus & Cab Company, but in favor of the other defendants. The cab company brings the case here for review on error. By stipulation Martha E. Gast, administratrix of the estate of Wilson M. Gast deceased, has been substituted as defendant in error.

The complaint alleges that plaintiff delivered his trunk to the defendants, as common carriers, to transport from 1673 Broadway, Denver, Colo., to Williamsport, Pa. The testimony on behalf of plaintiff was to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

effect that he delivered the trunk to the cab company, and that its engagement was to transport it from 1673 Broadway to the baggageroom of the Union Depot & Railway Company in Denver, which it failed to do. There was no evidence connecting the other defendants with the transaction. The action was a joint one for tort against all three defendants, for which reason it is urged that proof of a separate tort by the cab company and failure to prove any concert between the defendants resulting in the loss of the trunk is fatal to the action; that in order to hold persons jointly liable for tort it must appear in some way that it was the result of their joint action, or joint neglect of duty.

[1] As we understand it, in an action charging this kind of a joint tort, the rule is that the plaintiff will be permitted to recover against such of the defendants as his testimony establishes by community of fault were guilty of the tort charged, and that a judgment can be entered accordingly. *Carper v. Risdon*, 19 Colo. App. 530, 76 Pac. 744; *Dahms v. Sears*, 13 Or. 47, 11 Pac. 891; section 241, Rev. Code 1908.

Some states hold that in order to secure such a judgment the plaintiff must, at the trial, amend his complaint and proceed against the parties whom the evidence shows are jointly liable for the tort; that in such case he is entitled to amend as a matter of course. *Sturzebecker v. Inland Co.*, 211 Pa. 156, 60 Atl. 583. But in a case where it is debatable whether the evidence sustains the action against some particular defendant, we think that the rule announced in *Carper v. Risdon*, supra, is the better one; and that, instead of requiring the plaintiff to elect and dismiss the action against certain of the defendants, it is just as competent for either the court or jury to find certain defendants liable and others not, as the evidence to them discloses.

[2] The complaint alleges an agreement on the part of defendants to convey the plaintiff's trunk to Williamsport, Pa. The evidence fails to establish this. If the cab company received the trunk (which is in dispute), the evidence tends to establish that its agreement was to convey it to the baggageroom of the depot company, for which reason it is urged that the case should fail, because the contract set up in the complaint was not established. As the case must be reversed for other reasons, we deem it unnecessary to pass upon this question, for the reason that the material allegations of the complaint are the receipt of the trunk, the agreement to transport it somewhere, or do something with it, the failure of the company to do so, and its loss. As the place where it was to be transported, if changed, would not state a new cause of action or jeopardize the rights of the defendant, the question can be eliminated by amending the pleadings prior to a new trial.

[3] By instruction 2 the jury were told, in substance, that the cab company admitted in its answer that it received the plaintiff's trunk, and that the burden was upon it to account for it, and on failure to do so it was liable for its value. In this the trial court erred. The first defense set up in the amended answer is a general denial. This is sufficient to place the burden on the plaintiff of proving all the material allegations of his complaint, regardless of the other defenses in the answer, even if they are incomplete. *Pike v. Sutton*, 21 Colo. 84, 39 Pac. 1084; *Bessemer I. D. Co. v. Woolley*, 32 Colo. 437, 444, 76 Pac. 1053, 105 Am. St. Rep. 91.

[4] Under our rule of practice separate defenses may be inconsistent with each other. *Pike v. Sutton*, supra; *Hill v. Groesbeck*, 29 Colo. 161, 67 Pac. 167; *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579; *Western Union Telegraph Co. v. Eysler*, 2 Colo. 141; *Duffield v. D. & R. G. R. Co.*, 5 Colo. App. 25, 36 Pac. 622; *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195; *People ex rel. Crawford v. Lothrop*, 3 Colo. 429; *Hummel v. Moore (C. C.)* 25 Fed. 380; *Colo. Central C. M. Co. v. Turck*, 50 Fed. 888, 892, 2 C. C. A. 67.

[5] This instruction eliminated the debatable question of the receipt of the plaintiff's trunk by the defendant. This was made an issue by the first defense in the amended answer. This is sought to be justified under the claim that the defendant, in its amended answer, admitted the receipt of his trunk at 1673 Broadway. We do not so understand the effect of this pleading, the substance of which is that the company admits that some one, to it unknown, did, on the 19th of July, 1906, deliver to it a certain trunk at 1673 Broadway; but as to whether plaintiff was the owner of the trunk, or whether the contents was of the value of \$1,000, the defendant has not and cannot obtain sufficient information upon which to base a belief. The record discloses that the plaintiff at that time did not assume that the company admitted the receipt of his trunk, for the reason that in his replication to the amended answer he says: "Plaintiff admits that 'some one' did, on the 19th day of July, 1906, deliver to defendant in the city and county of Denver a certain trunk, which trunk, plaintiff avers, was delivered by plaintiff to the defendant herein, and is, and at the time was, the said trunk of plaintiff in question."

[6, 7] It will thus be observed that the issues as made up cast the burden upon the plaintiff to establish that the trunk admitted to have been received by the defendant at 1673 Broadway was the trunk of the plaintiff. The deposition of the plaintiff upon this question was, in substance, that he was the owner of a trunk and its contents, which he delivered upon July 19, 1906, at about 11 p. m., at 1673 Broadway, to one of the drivers of the Denver Omnibus & Cab Company

for delivery to the Union Depot at Denver, for which he paid the driver 50 cents; that he received from the driver a check of the Denver Omnibus & Cab Company, No. 3295. The deposition of Charles E. Lamm was that he was with Gast at the time. The remainder of his testimony was the same as Gast's.

William H. Wheadon testified that he was secretary of the Denver lodge of Elks; that as such he received a letter from the plaintiff, dated Williamsport, Pa., September 6, 1906. This letter was introduced in evidence, in which Mr. Gast in substance said that in leaving Denver, after attending the Elks' Convention, he had his trunk checked by porter of the Savoy Hotel, night of July 20th, having stopped across the street from the Savoy at 1673 Broadway; that the porter of the Savoy took the trunk over to the hotel, giving him the Savoy Hotel check 3295 for same; that the following morning the baggage department claimed the trunk had not reached depot, but gave him their check No. 65926 for the Savoy check; that he had not received the trunk yet, and in a letter from Baggage Agent Campbell, August 11th, he was informed the Denver Omnibus & Cab Company had no record of receiving trunk from the hotel; that the hotel people were unable to locate it up to that time. He requested investigation by the secretary. Also said: "It is possible that the porter stole this trunk, and probably the police department could learn who was porter at the Savoy Hotel night of July, 20, and by seeing that individual could learn something of the present location of same."

A Mr. McIlduff testified that he lived at 1673 Broadway, knew Wilson M. Gast, met him at witness' home here; that Mr. Gast wrote him to go to the night porter of the Savoy Hotel and try to trace the trunk from there.

Mrs. McIlduff testified that she resided at 1673 Broadway; that Mr. Gast came to their house to room during the Elks' Convention; that when he got ready to leave he went to the Savoy Hotel and had the night porter come over and get his trunk; that he brought over a light hand cart and took the trunk to the Savoy Hotel between 9:30 and 11 o'clock; that Mr. Gast left the following morning; that there was no wagon of the Denver Omnibus & Cab Company at her house after the trunk; that Mr. Gast, Mr. Lamm, herself, and another lady, who lives in Oregon, were present when the porter of the Savoy Hotel came over and got the trunk; that the night porter never took any other trunks from her house that she knew of.

It will be observed that there was a sharp conflict in the evidence concerning the delivery of the plaintiff's trunk to the cab company. There was no evidence offered to

establish that the porter of the Savoy Hotel was a representative of the company, or had authority to check trunks for it; while there is an irreconcilable conflict between the plaintiff's deposition and his letters concerning the disposition of his trunk. The defendant sought to show that the porter had no authority to accept trunks for it. The evidence was rejected, presumably upon the same theory under which the instruction was given. Competent evidence upon this subject was proper. It will thus be observed that the issue concerning the receipt of the plaintiffs' trunk by the defendant was never considered by the jury. This necessitates a reversal of the judgment.

[8] In view of a new trial, we call attention to the admission in evidence upon behalf of the plaintiff of defendant's purported check No. 3295. This was objected to as not being identified and no foundation laid for its admission. When this objection was made, counsel for plaintiff said, "It is the check Mr. Gast refers to in his deposition." It was not made a part of the deposition, nor produced or identified by any witness. It was presented by counsel for plaintiff. The identity of the checks became material, for the reason that the plaintiff testifies that a driver of the defendant gave to him its check No. 3295 when he received his trunk, while his letter states that the porter of the Savoy Hotel gave him a hotel check of the same number. In the manner offered, the objection to its admission should have been sustained.

Other assignments urged, pertaining to instructions refused and given and the sufficiency of the evidence, need not be considered. In view of the briefs and the knowledge disclosed by the authorities cited, most, if not all, of these questions can be eliminated upon a second trial.

The former opinion is withdrawn. The judgment is reversed, and the cause remanded for a new trial in harmony with the views herein expressed. Both parties will be permitted to amend their pleadings as they may be advised.

Reversed and remanded.

GABBERT and GARRIGUES, JJ., dissent.  
CAMPBELL, C. J., not participating.

# KING v. PEOPLE.

(Supreme Court of Colorado. Jan. 6, 1913.)

## 1. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that "deliberately" did not mean brooded over, or reflected upon for a week, day, or hour, but meant an intent to kill executed by "the" defendant in a cool state of blood, was not on the weight of the evidence for using the last-quoted word, instead of "a."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]



## 2. CRIMINAL LAW (§ 823\*)—TRIAL—CURING ERRONEOUS INSTRUCTIONS.

Any omission in an instruction that, to warrant a finding of first-degree murder, the jury must find that the killing was with deliberation and premeditation, in not requiring such finding to be upon the evidence and beyond a reasonable doubt, was cured by other instructions requiring guilt to be established by the people beyond a reasonable doubt, and that accused must be presumed innocent until proved guilty by the evidence beyond a reasonable doubt, which instructions were, in substance, repeated several times.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823; \* Homicide, Cent. Dig. §§ 718, 719.]

## 3. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS INVADING PROVINCE OF JURY—DEGREE OF OFFENSE—"MURDER"—"MURDER IN THE FIRST DEGREE."

The court instructed that if the jury found that F. willfully, deliberately, etc., with malice aforethought, killed decedent, and further found from the evidence beyond a reasonable doubt that accused was present at the time and place aforesaid, and did then unlawfully and with malice aforethought abet or assist in such killing, accused was also guilty of first-degree murder, and other instructions differentiated and explained first and second degree murder. *Held*, that the instruction was not reversible error, as taking from the jury the question of the degree of the murder; Rev. St. 1908, § 1622, defining murder as the unlawful killing of a human being with malice aforethought, express or implied, and section 1624 providing that murder may be perpetrated by any kind of willful, deliberate, and premeditated killing, and providing that a killing committed in attempting robbery shall be first-degree murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726-7727; vol. 5, pp. 4637-4641; vol. 8, p. 7727.]

## 4 CRIMINAL LAW (§§ 763, 764\*) — INSTRUCTIONS—PROVINCE OF JURY.

The court instructed that if the jury believed beyond a reasonable doubt that accused and another willfully and feloniously attempted to take from decedent by violence his money, and the other unlawfully killed decedent at a time when accused was present, unlawfully aiding, abetting, or assisting the other in the attempt at robbery, accused would be guilty of first-degree murder. *Held*, that since Rev. St. 1908, § 1624, made a deliberate killing, committed in an attempt to perpetrate robbery, first-degree murder, the instruction was not reversible error, as withdrawing the question of the degree of murder from the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764; \* Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

## 5. HOMICIDE (§ 308\*)—INSTRUCTIONS — DEGREES OF MURDER.

Where the absence of preconceived design to take life does not reduce the grade of the offense, as where the killing was committed in perpetrating other felonies such as robbery, the court need not instruct on the lesser degrees of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 308.\*]

## 6. HOMICIDE (§ 308\*)—INSTRUCTIONS—BURDEN OF PROOF—FIRST-DEGREE MURDER.

An instruction that if the jury found that F. willfully, etc., killed decedent, and did not find that such killing was with deliberation and

premeditation, and found that accused aided and assisted the other in the killing, then accused was guilty of second-degree murder, "provided the jury further found that at the time of the killing accused and the other were not engaged in an attempt to rob decedent," was erroneous as in effect charging that, though the killing was without deliberation, it was first-degree murder, in the absence of an "affirmative" finding that it was not committed in an attempt to rob, in effect placing the burden on accused of negating first-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 308.\*]

## 7. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The instruction was prejudicial to accused, in view of the fact that the instructions covered two theories of first-degree murder—one in which there was an actual design to kill, and the other in which the homicide was committed in the perpetration of robbery—and it being impossible to determine from the evidence that the killing was committed as last hypothesized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

## 8. CRIMINAL LAW (§ 1141\*)—APPEAL — PRESUMPTIONS.

Every presumption is indulged by the Supreme Court in favor of the correctness of the trial court's ruling, and a judgment will be affirmed, unless the record affirmatively shows error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.\*]

Gabbert and Garrigues, JJ., dissenting.

En Banc. Error to District Court, Elbert County; J. W. Sheafor, Judge.

George King was convicted of murder, and brings error. Reversed and remanded.

H. A. Hicks and Charles Roach, both of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Charles O'Connor, First Asst. Atty. Gen., for the People.

WHITE, J. George King was tried for, and convicted of, the murder of Felix Jackson, commonly known as Pete Jackson, and upon the verdict of the jury sentenced to death. He brings the case here for review.

[1] In instructing the jury as to the meaning of the word "deliberately," the court stated inter alia that it does not mean "brooded over or reflected upon for a week, or a day, or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood," etc., and plaintiff in error claims that by the use of the adjective "the," instead of "a," before the word "defendant," the court thereby expressed an opinion that the "defendant on trial had in a cool state of the blood committed the crime charged." We are not impressed with the criticism or the inference sought to be drawn from the language used. The clear meaning of the instruction is that deliberation, as an element of the crime, did not exist, unless the jury found that the defendant, in the absence of overpowering passion, distinctly formed in his mind the intent to

kill the deceased, and thereafter, however short the time, so executed the act of killing.

[2] Instruction No. 8 told the jury that, in order to warrant them in finding a verdict of murder in the first degree, "you must find, and so indicate in your verdict, that the killing was with deliberation and premeditation," and it is claimed that because they were not also told therein that such finding must be upon the evidence, and beyond all reasonable doubt, it constitutes reversible error. The burden of proof to establish the guilt of defendant from the evidence beyond a reasonable doubt was placed upon the people by instruction No. 5, which also declared that the defendant must be presumed to be innocent of the crime charged against him until proven guilty by the evidence beyond a reasonable doubt. Moreover, the necessity of finding the truth of the charge from the evidence beyond all reasonable doubt was covered by several other instructions, and it is clear that no possible misconception in that respect could have entered the minds of the jurymen. It is not a case where there was given an incorrect and a correct instruction covering the same matter, but rather one wherein that which is said to be an omission from one instruction was supplemented and cured by the language of another forming a portion of the same charge.

[3] Instruction No. 9 told the jury that if they believed and found from the evidence beyond a reasonable doubt that one "John Fields \* \* \* willfully, unlawfully, feloniously, deliberately, premeditatedly, and with malice aforethought" killed and murdered the deceased, and "if you should further find and believe from the evidence beyond a reasonable doubt that the said defendant, George King, was present at the time and place aforesaid, and did then and there unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, abet or assist" in such killing, "then you are instructed that the defendant, George King, is also guilty of murder of the first degree, and you should so find and state in your verdict." It is claimed that the instruction constitutes reversible error, because the question of the degree of murder is thereby taken from the jury. We do not believe that the instruction has the effect claimed. The statute declares murder to be the unlawful killing of a human being with malice aforethought, either express or implied, by any of the various means by which death may be occasioned. Section 1622, R. S. 1908. And section 1624, R. S. 1908, declares, *inter alia*, that murder which shall be perpetrated "by any kind of willful, deliberate and premeditated killing," or "which is committed in the perpetration or attempt to perpetrate any \* \* \* robbery \* \* \* shall be deemed murder of the first degree."

By instruction No. 3 the two degrees of murder, as defined in the statute, were fully explained. So the substantial effect of instruction No. 9 was to say to the jury that if they found from the evidence beyond a reasonable doubt that John Fields was guilty of murder in the first degree, and that the defendant was an accessory thereto during the fact, deliberately and premeditatedly assisting therein, he was likewise guilty of murder in the first degree, and they should so find by their verdict.

[4] A like objection and criticism is made and urged against instruction No. 10. It told the jury that if they found and believed from the evidence beyond a reasonable doubt that defendant and Fields at a time and place named did willfully and feloniously engage in an attempt to take from the person of Jackson, by violence and force, or by violence and intimidation, his money, goods, or other valuable things, and while so engaged Fields did unlawfully and feloniously shoot and kill Jackson, and at the time the shot was fired by Fields and the mortal wound inflicted upon Jackson the defendant, George King, was present, unlawfully and feloniously aiding, abetting, or assisting Fields in the attempt to take from Jackson his money, et cetera, then the defendant, King, would be guilty of murder in the first degree, and the jury should so find and state in their verdict.

While it is true that when the crime of murder is established, the law declares it to be murder of the second, in the absence of circumstances showing it to have been murder of the first, degree, nevertheless when the facts and circumstances in evidence are detailed in an instruction, and embody only the elements of murder in the first degree as declared by the statute, it is not improper to state in an instruction that, if the jury finds the existence of such facts beyond a reasonable doubt, the defendant would be guilty of murder in the first degree, and the jury should so find. The statute makes a homicide committed in the perpetration or attempted perpetration of robbery murder in the first degree, and the substantial effect of the instruction was to impose the duty upon the jury to ascertain whether the robbery had been committed or attempted, and, if so, whether the homicide had been committed in the perpetration thereof. If both were found in the affirmative, beyond a reasonable doubt, the statute fixes the homicide as murder of the first degree, and under such circumstances that degree is the only grade of the offense of murder the evidence will support.

[5] The rule, as stated in 21 Cyc. 1067, is that, "where the absence of an actual pre-conceived design to take life does not reduce the grade of the offense where the homicide was committed in the perpetration of certain other felonies, such as arson, bur-

glary, rape, or robbery, the court need not, in such cases, instruct the jury as to minor included offenses." Under such circumstances, there is but one grade of the offense; that is, murder in the first degree.

[6] By instruction No. 12, the jury were told, substantially, that if they found beyond a reasonable doubt that John Fields willfully, unlawfully, feloniously, and with malice aforethought killed the deceased, and they did not find that such killing was with deliberation and premeditation, and they further found beyond a reasonable doubt that the defendant, King, so aided and assisted Fields in such killing, "then you are instructed that the defendant, George King, is guilty of murder of the second degree, and you should so find and state in your verdict; provided you further find from the evidence that at the time of the killing of the said Felix Jackson, commonly known as Pete Jackson, the said defendant and the said John Fields were not engaged in an attempt to rob the said Felix Jackson, commonly known as Pete Jackson, as defined in instruction No. 10." We think the instruction vicious. Its effect was to tell the jury that, although the killing of deceased may have been without any deliberation or premeditation whatever, it was, nevertheless, murder in the first degree, unless they further found affirmatively that the homicide was not committed in the execution or attempted execution of robbery. Such is not the law. If the jury believed and found that the killing was without deliberation and premeditation, but attended with all the other elements of murder, the defendant was entitled to a verdict of murder in the second degree, though the jury entertained a reasonable doubt, and made no finding as to whether the homicide was or was not perpetrated in an attempt to rob. The principle applicable here is considered and applied in *Pribble v. People*, 49 Colo. 210, 112 Pac. 220.

[7] If the case had been submitted solely upon the theory that the murder was committed in the perpetration or attempted perpetration of robbery, or if the evidence had been embodied in a bill of exceptions and made a part of the record, and we could clearly discover therefrom that the homicide had been so committed, it might be held that the instruction was without prejudice. *Wickham v. People*, 41 Colo. 345, 93 Pac. 478. Under the first instance, we might presume that all the issues made were presented by the instructions, and, inasmuch as homicide committed in the perpetration or attempted perpetration of robbery is murder of the first degree, the defendant had suffered no injury; and under the second we might know that the defendant was in no wise prejudiced. But this record presents no such facts and conditions. Two theories of murder of the first degree were covered by the instructions: One that there was an actual preconceived design to take the life

of the deceased; the other that there was no actual design to kill, but that the homicide was committed in the perpetration of a designated felony. An instruction also covered the theory of murder in the second degree, the jury being told that if they did not find the defendant guilty of murder of the first degree, as explained in the charge, it would be their duty to determine whether he was guilty of murder of the second degree as elsewhere defined in the instructions, and that they could find him guilty of either degree of murder, or not guilty as the evidence warranted. As the evidence was not brought into the record by a bill of exceptions, we must presume that it called for the instructions given. We cannot presume that it supported only the theory of murder in the first degree committed in the perpetration or attempted perpetration of robbery, when the court not only instructed upon that theory, but upon the theory of an actual preconceived design to take the life of the party killed, and also upon the theory of murder in the second degree. On the contrary, the controlling presumption must be that the instructions given presented only the issues involved. *Garver v. Garver*, 121 Pac. 165. The instruction cannot be applied as a correct proposition of law to any conceivable state of facts consistent with the record, and is governed by the rule stated in *Garver v. Garver*, supra, where, on page 167 of 121 Pac., we said: "While it is true, as claimed by defendant in error, if the evidence be not preserved by bill of exceptions, an instruction, erroneous as an abstract proposition of law, but which, as applied to a particular state of facts, may be correct, will not necessarily require the reversal of a case; nevertheless a contrary rule exists, and must be applied where the instruction is clearly erroneous, and could not be applied as a correct proposition of law to any conceivable state of facts."

In *Murphy v. Johnson*, 45 Iowa, 57, 58, the rule is recognized and applied in the following language: "The errors assigned relate solely to the instructions given and refused, and it is objected by the appellee that no part of the evidence is properly before us, and that, therefore, we cannot pass upon the pertinency of the instructions or determine they are erroneous. This does not necessarily follow, for, if under no possible view that can be taken do the instructions embody correct propositions of law when applied to the issues presented by the pleadings, and if, on the contrary, they are clearly erroneous, then we not only have the power, but it is our duty, to pass upon and determine the questions presented." And in *Downing v. State*, 10 Wyo. 373, 377, 69 Pac. 264, 265, after stating that it has been repeatedly held that, when the evidence is not in the record, a cause will not be reversed for giving to the jury an instruction which would be correct under any evidence that

could have been admitted under the issues in the cause, the court says: "It is held, however, that if the instructions are in themselves radically wrong under any state of facts that could have been proven under the issues in the cause, and direct the minds of jury to an improper basis on which to place their verdict, the cause will be reversed, though the evidence is not in the record."

[8] Every presumption in favor of the correctness of a ruling of the trial court is indulged by this court, and unless the record affirmatively discloses an error of which complaint is made, based upon the entire record, the judgment will be affirmed. But here the record affirmatively discloses prejudicial error under the issues in the cause as made by the pleadings and submitted to the jury. This is essentially true, because the evidence is no part of the record until made such by bill of exceptions, and no law makes it incumbent upon the losing party to bring the evidence into the record. So, upon the whole record, it appears affirmatively that prejudicial error was committed, and the substantial rights of the defendant disregarded. The judgment is therefore reversed, and the cause remanded for a new trial.

Judgment reversed and remanded.

MUSSER, J., specially concurs. GABBERT and GARRIGUES, JJ., dissent. CAMPBELL, C. J., not participating.

MUSSER, J. (specially concurring). I concur in the result reached by Mr. Justice WHITE and in his opinion, except in so far as the views I herein express may conflict with or modify it.

It appears from the record in this case that at the trial an official stenographer was present and took down the testimony in shorthand, and that afterwards his shorthand notes were unintentionally destroyed. Apparently these notes were unwittingly picked up by some member of the stenographer's family at his home, and with other papers, supposed to be of no value, thrown into a fire. Anyway the stenographer could not find them, and therefore could not furnish the testimony as is usual in such cases. Neither the defendant nor any one for him had anything to do with the loss or destruction of these notes. Section 1472, Rev. Stat., provides that the judge of each judicial district may appoint a shorthand reporter to attend during any term of court, and on the direction of the court take down in shorthand the testimony and other matters occurring at the trial. This section was in the General Laws of 1877, the General Statutes of 1883, and all statutes since. For years it has been the invariable custom for district judges to appoint stenographers for their respective districts to appear at every criminal trial and under the court's direction, take down the testimony and other

matters, and when a defendant wanted a bill of exceptions, containing all of the testimony in a case, if desired, it has been the custom invariably to obtain it from the stenographer. In accordance with that custom, and by virtue of the statute, a stenographer was present and was directed to take down the testimony in this particular case, and he did take it down. The defendant had the right, under such circumstances, to assume that he would obtain the testimony from this stenographer for his bill of exceptions. He was not called upon to make any other arrangements than were in virtue of the statute provided by the direction of the court trying him, nor to anticipate that he would be called upon to procure that testimony from any other source, nor compelled to depend upon the uncertain memory of those present as to what the testimony was. In this condition of affairs, without any fault of his own, he was deprived of this statutory and usual, and in this case particular, source for obtaining the testimony for his bill of exceptions solely on account of the fault of an official of the court, who did not properly care for his notes. It is for this reason that the testimony does not appear in the bill of exceptions. Of course, he might have collected together some persons who were present at the trial, who might have detailed to him their version of what the testimony was, and the judge of the court, upon his own memory and the memory of these persons, may have put into the bill of exceptions something which they thought was the testimony. It cannot be the law of this state that the defendant, under sentence of death, must suffer for the fault of the court stenographer, whose duty it was to preserve his notes, nor that the defendant, by reason of such official neglect, was compelled to resort to an uncertain and antiquated method of obtaining the testimony for his bill of exceptions, which has long ago been discarded in the practice in this state. If the defendant or his attorney were to blame for the loss of the notes, or if the stenographer had the notes and the defendant had failed or neglected to have them extended and put into the bill of exceptions—that is, if the absence of the testimony from the bill of exceptions was caused by any fault, neglect, or wrong of the defendant—an entirely different question would be presented. Here the absence of the testimony is the fault of the official of the court, and not of the defendant. Under such circumstances, it is the law in my judgment that the instructions can be reviewed, notwithstanding the absence of the testimony. To say that they cannot be is to take away from defendant the right of review on account of the fault of the other party to the litigation. It was the officer of the court who was to blame for the condition of the record. Through no fault of his, but by reason of the officer's fault, it was

impossible for the defendant to obtain the testimony and put it into his bill of exceptions, in accordance with the recognized practice in this state. He was entitled to pursue that practice, and was not required to resort to some discarded one. To say that he is cut off from his right to have the instructions reviewed, on account of the absence of the testimony, is to say that the prosecution, the people, shall profit by the fault of their official, and that the defendant shall bear the burden of that fault. In the cases wherein this court has said that instructions cannot be reviewed in the absence of the testimony no such circumstances existed as are here presented to account for such absence, and they are, therefore, not applicable. Let him who is at fault bear the resulting burden.

Therefore, forasmuch as the absence of the testimony was occasioned by the neglect of the court official, which neglect rendered the recognized and established practice impossible, it should be conclusively presumed as against the people that there was evidence that would warrant the jury in returning a verdict of murder in the second degree, because the court instructed in that degree. This being so, the defendant was entitled to a correct instruction. As instruction No. 12 was erroneous, for the reasons stated by Mr. Justice WHITE, the error could not be otherwise than prejudicial in the state of the testimony.

GABBERT, J. (dissenting). The province of this court is to redress real grievances, and not to decide moot questions. For this reason, it is a rule of universal application that a judgment will not be reversed on account of an erroneous instruction, unless it appears probable that the jury were misled to the prejudice of the party appealing. It is not sufficient to show that error, in the abstract, was committed in giving an instruction. It must affirmatively appear that it was prejudicial. This can only be determined by a consideration of the evidence. In other words, a party bringing a case here for review cannot base reversible error on only part of the record or proceedings which led up to his conviction. It is said in the opinion that, if the evidence were preserved by a bill of exceptions, it might appear that this instruction was not prejudicial. This announcement recognizes that a consideration of the testimony might disclose that an erroneous instruction was not prejudicial, but, notwithstanding this conclusion, the opinion is based upon the erroneous theory that it may be considered in the absence of the testimony, although whether or not it prejudiced the rights of the party bringing the case here for review can only be ascertained by a consideration of everything presented to the trial court. But the conclusion announce-

ed in the majority opinion, that an instruction may be considered without the testimony, permits reversible error to be predicated upon a part of the record and proceedings, instead of the whole, and hereafter we shall find that a party convicted of a crime will find it not only convenient, but to his advantage, when an instruction given does not correctly state the law, to bring up the instructions without the testimony, for, with the latter, it might conclusively appear that the error predicated upon the instruction did not prejudice his rights. It is hardly necessary to refer to the many cases where we have held, in both civil and criminal actions, that, in the absence of the testimony, the instructions will not be reviewed. It is sought to take the case out of this general rule by stating, in effect, that instruction No. 12 cannot be applied as a correct proposition of law to any conceivable state of facts consistent with the record. Applying this rule, the opinion, in my judgment, is not logical. True, the court instructed on murder in the first and second degrees, but it by no means follows that, in the absence of the testimony, we can say or assume there was testimony, when considering an instruction alone, to establish the fact that the life of Jackson was taken, except in the attempt to rob him.

But, waiving these matters, I cannot agree that instruction No. 12 is erroneous, for the reason stated in the majority opinion, to the effect that the burden of proving that the homicide was not committed in an attempt to rob was placed upon the defendant. Instruction No. 10 clearly advised the jury that murder committed in an attempt to rob constituted murder in the first degree. By instruction No. 12 they were told what constituted murder in the second degree; and, if they found the state of facts therein enumerated was established by the evidence beyond a reasonable doubt, then the defendant was only guilty of murder in the second degree, but that the killing of Jackson would not reduce it to that degree if it appeared from the testimony, beyond a reasonable doubt, that Jackson's life was taken in an attempt to rob him. Instructions must be considered as a whole, and, when instructions 10 and 12 are read together, it appears to me that this was clearly the effect of the two instructions, and that under no circumstances could the jury have been misled or have understood that any burden was placed upon the defendant whatever to show a state of facts which would reduce the homicide to murder of the second degree.

Nor do the views expressed by Mr. Justice MUSSER change the situation. I have always understood the rule to be that a court of review never acted upon what was not or could not be brought before it. With all due deference to my learned Associates, I respectfully submit that, if the decision of the ma-

majority is followed in the future, it will inevitably result in the reversal of convictions which would, and should, without question, have been sustained had it been declared, as it should be, that, in the absence of the testimony, instructions will not be reviewed.

Now, what does the statement in the opinion of Mr. Justice WHITE, to the effect that, if the evidence were here, it might appear that the instruction upon which the reversal is based, mean, except to say that, if one convicted of a crime only brings up the instructions for consideration, his case may be reversed, whereas, if he brought the testimony before the court by a bill of exceptions, it might not be. This is equivalent to saying, and in fact, does say, that a case may be reversed upon part of the proceedings before the trial court, when the proper rule is that all matters before the trial court which in any manner bear upon the question presented for review must be considered before an alleged error will be declared prejudicial. That this must be the true rule is manifest from the expression just mentioned, for the very obvious reason that, if the evidence were here, it might appear the instruction, although erroneous as a legal proposition, was not prejudicial. In other words, this expression of itself recognizes that with the testimony before us the judgment of the trial court might be affirmed, thus, in effect, saying that from all the proceedings it might appear that the error complained of was non-prejudicial. Does not this statement, then, logically recognize that the testimony must be considered before an instruction will be declared to be prejudicial, although erroneous? If it does (and I submit that this is the only logical conclusion to be deduced from it), then it must follow, as of course, that a person convicted of a crime cannot predicate alleged prejudicial error upon an instruction alone, when, with the testimony before us, it might appear that it was not. In brief, when it is recognized that a consideration of all the proceedings had in the lower court in any manner bearing on the question raised by an instruction might show that it was without merit, the rule must be that they must be presented here in an appropriate manner before we can say that an error worked prejudice; otherwise, a defendant convicted of a crime is permitted to gain an advantage by not bringing up the testimony in the case. There may be decisions from other jurisdictions which tend to support the conclusion of the majority that instructions may be reviewed in the absence of the testimony; but, if they do, they are manifestly illogical, and ought not to be followed.

In my opinion the judgment of the District Court should be affirmed.

The writer is authorized to state that Mr. Justice GARRIGUES concurs in this opinion.

GANKYO MITSUNAGA v. PEOPLE.

(Supreme Court of Colorado. Jan. 6, 1913.)

1. JURY (§ 70\*)—SELECTION—OPEN VENIRE.

The statutory method of summoning jurors is not exclusive; the court being entitled either to order jurors drawn from the box, or summoned on an open venire directed to the sheriff.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330; Dec. Dig. § 70.\*]

2. CRIMINAL LAW (§ 1171\*)—APPEAL—PREJUDICE.

Accused was not prejudiced by a narration of purported confessions, in the opening statement, where such confessions were afterwards held competent and admitted in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

3. WITNESSES (§ 269\*)—IMPEACHMENT—CROSS-EXAMINATION—IMMATERIAL MATTERS.

Where, in a prosecution for the killing of a wife, there was no evidence tending in the slightest degree to connect her husband with the offense, and he testified merely to finding her body on his return from a distant city, two days after the alleged killing, the court properly refused to permit questions asked him on cross-examination tending to show ill feeling between him and deceased and that the witness had made attempted preparations for taking deceased's life.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

4. WITNESSES (§ 383\*)—CROSS-EXAMINATION—INCONSISTENT STATEMENTS — IMMATERIAL MATTERS.

Where a witness made previous statements out of court on a matter material to the issue, substantially different from his evidence, such statements are admissible to impeach him; but prior statements concerning matters on which the witness has not testified, and with reference to matters not material to the issue, are incompetent; the test being whether the impeaching party would be entitled to prove the statement made by the witness out of court in support of his case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.\*]

5. WITNESSES (§ 215\*)—CONFESSIONS—PRIVILEGED COMMUNICATIONS.

Accused, while in jail, was visited by a Methodist minister, by whom he sent word to the chief of police that he wished to make a statement. He voluntarily made a statement to the chief of police without violence, threats, inducements, or promises, after he had been reminded of the seriousness of his offense, and that his statement must be voluntary. Held, that the statement was not objectionable as a privileged communication made to the minister as a spiritual adviser; it not being shown that accused was a Methodist, or that the minister was his spiritual adviser.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 778; Dec. Dig. § 215.\*]

6. CRIMINAL LAW (§ 1169\*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

Accused was not prejudiced by the admission of statements alleged to have been made by him to the chief of police, where he subsequently testified in his own behalf in substantially the same language as contained in the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

**7. CRIMINAL LAW (§ 1166½\*)—APPEAL—PREJUDICE—FAILURE TO PRODUCE ARTICLES ON SUBPENA DUCES TECUM.**

Where accused, in a prosecution for murder, subpoenaed the chief of police duces tecum to produce certain articles of clothing alleged to belong to accused, in order to show that they contained no blood stains, he was not prejudiced by the failure of the witness to produce the clothes on the plea that they had disappeared; the witness having testified that the clothes so delivered to him showed no signs of blood stains, and there being no evidence that the clothes delivered to the witness were those worn by the defendant while at the house of the deceased on the day of the killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8114-3125; Dec. Dig. § 1166½.\*]

**8. HOMICIDE (§ 309\*)—INSTRUCTIONS—DEGREE OF OFFENSE.**

Where, in a prosecution for homicide, there was no controversy over the fact that deceased had been murdered, the only question being who committed the murder, the court did not err in omitting to charge on manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**9. CRIMINAL LAW (§ 786\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.**

Where the court charged that the jury were the judges of the credibility of all the witnesses and the weight to be given their testimony, in determining which the jury should consider the motive or interest any witness might have in testifying falsely, it was not error for the court further to charge that defendant was subject to the same test as other witnesses and that the jury should take into consideration his interest in the result of the trial in determining the weight to be given to his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.\*]

**10. CRIMINAL LAW (§ 556\*)—WEIGHT OF EVIDENCE—STATEMENTS BY ACCUSED.**

In a prosecution for homicide, the state was not bound by statements of accused introduced in evidence as a part of the state's case in chief because they were not shown to be untrue; the weight to be given to such statements being a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1258; Dec. Dig. § 556.\*]

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Gankyo Mitsunaga was convicted of murder, and he brings error. Affirmed.

O. N. Hilton and B. B. Laska, both of Denver (Cæsar A. Roberts, of Denver, of counsel), for plaintiff in error. Benjamin Griffith, Atty. Gen., and Philip W. Mothersill, Asst. Atty. Gen., for the State.

GARRIGUES, J. 1. Friday, May 6, 1910, Catharine Wilson moved into No. 1054 Clayton street, Denver. The family consisted of herself and husband; but she was alone at the time, he being at Hot Springs, Ark. That night she stayed with her daughter, Mrs. Galland, and Saturday returned to the house, where she employed the defendant to clean the windows and bathtub, in the afternoon. Saturday afternoon, she met Hazel Miller, whom she invited to stay with her that night,

and as far as disclosed by any of the evidence—other than the account given by the defendant—this is the last that was seen or heard of her, until her body was found Monday afternoon. Miss Miller, on arriving at the house Saturday evening to keep her engagement, found the house locked. She went in by raising a back window; but found no one there, and, after waiting for Mrs. Wilson an hour or more, left about 8:30. Sunday, May 8th, Mr. Wilson, who was on his way to Denver from Hot Springs, telegraphed his wife, in care of Mrs. Galland, that he would arrive in Denver about 12:15 Monday noon. Late in the afternoon, Mr. Galland took this message to 1054 Clayton street, and finding the house locked, and no one at home, left it sticking in the door. Miss Miller told Mrs. Galland of her experience at the Wilson house Saturday night, and Mrs. Galland, still unable to learn of the whereabouts of her mother, met Mr. Wilson at the station, and told him she was missing. They went to the house that afternoon, finding it still locked, and, upon searching the premises, found the body in the cellar, crowded into a box, covered with excelsior, straw, and another box. A strip of muslin cloth was drawn tightly about the throat, indicating strangulation. There were bruises and cuts on the head and chest, and blood stains in the kitchen, and on the stairs leading to the cellar; an attempt having been made to obliterate these by wiping them up with rags, left in the sink. Her "rat" had been crowded into her throat, and a three-pound Indian club, stained with blood, was found behind the retaining wall in the cellar.

Deceased was a large, robust woman weighing about 160 pounds. The defendant was a small Japanese, about 120 pounds in weight, but physically strong and active, except that his left arm had been injured 10 years before. He worked for a Broadway cleaning establishment, operated by a Japanese, who took orders, and filled them by sending others to do the work, collecting a percentage on what they received, as commission.

On this Saturday morning, defendant was sent to clean carpets on York street, and, while there, was directed by phone from the establishment to go to 1054 Clayton, to work in the afternoon, which he did, arriving there about 1:30, and going to work at once. He left about 5:30, before finishing, going to the cleaning house, where he ate his supper, changed his clothes, went downtown, returned and erased his name from a book which gave the information that he had been sent to 1054 Clayton. That night he went to McCook, Neb., changed his name, and in a couple of days went to work as a section hand. Later he was arrested there, brought to Denver, and placed in jail. While confined, he made two separate statements to the authorities re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

garding the transaction, which were reduced to writing, and on the trial were read to the jury as part of the people's case in chief. In the first statement, he said he had not worked at all at 1054 Clayton; that he went there; but that the lady who came to the door told him she wanted a Jap to come in the morning, and not in the afternoon, so he returned to the cleaning establishment. In the second statement he said he worked at 1054 Clayton, cleaning the windows in the afternoon, and assisted a man in putting the dead body of Mrs. Wilson in the box. In the first statement, he said he went on the train with 12 Jap boys to McCook. In the second, he said he did not know whether they were on the train; that he met them after he arrived there. In the first statement, he said he borrowed the money to buy a ticket to McCook. In the second statement, he said he bought it with money given him by the man he assisted. On the trial, he said that he was sent by the cleaning establishment to 1054 Clayton, where he made an agreement with the lady to clean her windows and bathtub, and went to work at once; that he cleaned the windows first and then went to the bathroom, the lady being about the house, and occasionally conversing with him; that, while he was working in the bathroom, a tall stranger came in, his face scratched and bleeding, and his shirt covered with blood, who, with a revolver in his right hand, seized defendant with his left, and forced him to go to the cellar, where, at the bottom of the stairs, lay the dead body of the lady; that the man's left arm was injured, and he put a cloth around her neck, stood on one end of it, and pulled the other end with his right hand until it was tight, then at the point of his revolver he forced defendant to assist him in putting the body in the box; that the stranger, still threatening him with his revolver, forced him to take rags and wipe up the blood stains, after which he took him to the front door, gave him \$30, and pushed him out. Going to the cleaning establishment, he changed his clothes, ate supper, and went downtown, where he met a fellow countryman, to whom he related the occurrence, and, being informed that it was a serious matter, he became frightened, went back and erased his name from the book showing his presence at 1054 Clayton, not on account of the transaction, but to escape the payment of a commission; then went downtown again, and tried to secure a railroad pass to accompany a number of Japanese boys who were going to McCook, Neb., to work on the section, but, failing in this, he bought a ticket with a portion of the money the man had given him, and left that night.

The defense is that the murder was committed by the stranger who compelled defendant to assist him in putting the body in the box and wipe up the blood stains, and an attempt is made to cast suspicion upon Mr.

Wilson. There is no evidence in the whole record even suggesting the husband had anything to do with the crime. No objection is made here that the evidence is not sufficient to support the verdict. The errors assigned are: (1) Challenge to the array; (2) election between counts; (3) remarks of the district attorney in opening the case; (4) refusal to allow certain cross-examination; (5) admission of defendant's statements; (6) failure of the chief of police to produce certain clothes. Such of these assignments as have not been abandoned will be considered.

[1] 2. Defendant challenged the array because the jurors were selected upon an open venire, and not drawn, at a time when there were in the box the names of 500 competent jurors. There is nothing in this contention. The statute provides that the court may order a jury drawn from the box, or summoned by an open venire. Whenever the court needs more jurors, it has the power, under the statute, to either draw them from the box or summon them by an open venire. Aside from this, we have held that the statutory method of summoning jurors is not exclusive, and, unless prohibited, the court has the inherent common-law power to select a jury upon an open venire, directed to the sheriff. *Mackey v. People*, 2 Colo. 13; *Giano v. People*, 30 Colo. 26, 69 Pac. 504; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Walt v. People*, 46 Colo. 138, 104 Pac. 89.

[2] 3. It is next complained that the district attorney in his opening statement told the jury that the defendant had confessed, and narrated the purported confessions—being the two statements afterwards admitted in evidence—to the jury. It is contended the court should not have allowed the prosecution to do this, because the admissibility of the evidence had not been determined, and, if excluded, the rights of the defendant might be jeopardized. It probably would be the better practice, ordinarily, for the prosecution in opening, merely to refer to such matters, without going into details; because at the trial the offered evidence might be excluded. In this case, however, no harm was done the defendant, because the statements were afterwards held competent, and admitted in evidence.

[3] 4. Deceased's husband, Ridgley Wilson, testified about starting to Denver from Hot Springs, and telegraphing his wife from Kansas City that he had missed connections, and would not reach Denver until 12:15 Monday noon; of Mrs. Gaillard meeting him at the station and telling him of the disappearance of his wife; of their going to the house in the afternoon and finding the body in the cellar. This, in substance, was his testimony. On cross-examination he was asked: Did your wife tell you, just before you left Denver, that she had told Mrs. Faxon that she desired to change her insurance policy, so as to make her daughter beneficiary instead



of yourself; that she expected something would happen to her, and if she was killed it would be you who did it, to look for her and she would be found? Did you ever pursue her with a revolver, about the house? You had frequent quarrels with your wife, while you were married and living with her? Did you tell her in a letter that when she found a house you wanted her to get one in a locality where you were not known? Did you tell Mabel Galland you wanted her to keep it (the identification slip given him by the porter on the Pullman), that somebody might say you had come into Denver on a mule? The objections to these questions were sustained, because they were not proper on cross-examination. It is claimed in argument they were asked for the purpose of impeaching the witness. It is evident they were not germane to any matter about which the witness had testified, and therefore not proper cross-examination; neither were they proper impeaching questions.

[4] If a witness has made previous statements out of court, upon a matter material to the issue, substantially different from his evidence in court, such statements may tend to impeach his recollection or his truthfulness, and should be considered by the jury in determining the credibility of the witness, and the weight to be given to his testimony. *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Jaynes v. People*, 44 Colo. 541, 99 Pac. 325, 16 Ann. Cas. 787; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Nutter v. O'Donnell*, 6 Colo. 253. But prior statements of a witness about matters upon which he has not testified in court cannot be shown. There must be a material inconsistency or contradiction between his evidence in court and his alleged previous statements out of court, and the impeaching question must not be upon collateral, irrelevant, or immaterial matters, but must be upon matters material to the issue. The test as to its materiality is said to be: If the statement which it is alleged the witness made out of court was true, would the impeaching party be entitled to prove it in support of his case? *Askew v. People*, 23 Colo. 455, 48 Pac. 524; 40 Cyc. 2700. These questions did not tend to affect the credibility, or test the recollection, of the witness upon any material evidence he had given, and, if he had answered in the negative, defendant would not, on that account, have been allowed to prove the contrary.

[5] 5. While in jail, defendant was visited by Shirato, a Japanese Methodist minister, who reported to the chief of police that defendant wished to see him. He was taken to the chief, and made the first statement. Later, he again sent word by Shirato that he wanted to see the chief, to whom he made the second statement. It is claimed these statements were privileged communications, because made to Shirato as his spiritual ad-

viser. There is no evidence that defendant was a Methodist, or that Shirato was his spiritual adviser. Defendant voluntarily sent his wish by Shirato to see the chief, and then made the statements to him. He was well represented by interpreters, and precaution was taken to remind him of the seriousness of the offense, and that his statement must be voluntary. No violence, threats, inducements, promises, or hope of any kind were held out to him to induce him to make these statements, and there was no error in admitting them in evidence. *Reagan v. People*, 49 Colo. 316, 112 Pac. 785; *Byram v. People*, 49 Colo. 533, 113 Pac. 528.

[6] The defendant afterwards testified in his own behalf in practically the identical language of his second statement, so we do not see how he could have been harmed by its introduction in evidence by the people.

[7] 6. It will be remembered the defendant, after he left Clayton street, went to the cleaning establishment, ate his supper, changed his clothes, and went downtown. Afterwards, the proprietor of the place delivered some clothes to the chief of police, which were said to belong to defendant, and on the trial the officer was subpoenaed *duces tecum*, by the defendant, to produce these articles; the purpose being to show the jury they contained no blood stains. This the chief said he could not do, because they had disappeared, and this is assigned as error. There is no evidence that these clothes were worn by the defendant while at the Wilson house; and, as the chief testified the clothes brought to him showed no signs of any blood stains, their nonproduction could make no difference to the defendant.

[8] 7. Error is assigned upon the refusal of the court to instruct upon manslaughter. The deceased was murdered. Over this, there was no controversy. Who committed the murder, was the only question. There was no occasion for instructing on manslaughter, because there was no evidence upon which to base such a verdict. *Smith v. People*, 1 Colo. 144; *Crawford v. People*, 12 Colo. 292, 20 Pac. 769; *Kelly v. People*, 17 Colo. 137, 29 Pac. 805; *Carpenter v. People*, 31 Colo. 290, 72 Pac. 1072; *Mow v. People*, 31 Colo. 360, 72 Pac. 1069; *Van Wyk v. People*, 45 Colo. 12-18, 99 Pac. 1009; *Reagan v. People*, 49 Colo. 326, 112 Pac. 785.

[9] 8. In instruction 16, the court told the jury they were the judges of the credibility of all the witnesses and the weight to be given their testimony; in determining which, they should take into consideration the motive or interest any witness might have in testifying falsely. In instruction 17, they were told that defendant was subject to the same test as other witnesses, and they should take into consideration his interest in the result of the trial. Error is assigned upon the latter instruction, because it singles out the defendant, and directs special attention to

his credibility. The court had previously told the jury, in instruction 16, that they were the judges of the credibility of all the witnesses, and should take into consideration the interest any witness had in the trial. This included the defendant as a witness, and the court might properly have stopped there; but perhaps some jurymen might not have comprehended that this included him—that is, might have considered him in some different or other capacity. Therefore it was not prejudicial error for the court to tell the jury, in another instruction, that the defendant was a witness, and they had no right to disregard his testimony merely because he was the defendant, but must consider it, and give it such weight as they thought proper, in connection with all the other evidence in the case, and, in determining the weight and credibility of his evidence, they had a right to take into consideration the fact that he was the defendant, and his interest in the result of the trial. We know there are authorities holding it is reversible error to single out the defendant in this manner; but we fail to see how such an instruction can so prejudice the rights of the defendant as to make it reversible error, and this court is committed to its propriety. *Minich v. People*, 8 Colo. 440-453, 9 Pac. 4; *Babcock v. People*, 13 Colo. 515-523, 22 Pac. 817; *Porter v. People*, 31 Colo. 508-515, 74 Pac. 879.

[10] 9. Counsel for defendant contend the people were bound by his statements which the prosecution introduced in evidence in chief, unless they were shown to be untrue. It was for the jury to determine from all the evidence in the case how much, if any, of the statements they would believe. *State v. Merkel*, 189 Mo. 315-321, 87 S. W. 1186. Affirmed.

WHITE and MUSSER, JJ., concur.

# EMPIRE RANCH & CATTLE CO. v. HOWELL.

(Court of Appeals of Colorado. Dec. 16, 1912.)

## 1. MORTGAGES (§ 374\*)—FORECLOSURE—TRUSTEE'S DEED.

Where the notice of a trustee's sale under a deed of trust recited that at the request of the owner of the promissory bond the trustee gave public notice, a certified copy of the advertisement being inserted in the deed, that instrument cannot be declared invalid on the ground that there was no recital that the legal holder of the notes requested the trustee to advertise and sell the land.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1118-1123; Dec. Dig. § 374.\*]

## 2. TAXATION (§ 761\*)—TAX TITLES—VALIDITY.

A tax deed is invalid, where it shows that the assignment of the tax certificate was made more than three years after its date.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.\*]

## 3. TAXATION (§ 679\*)—TAX TITLES.

Before land sold for taxes can be legally bid in by the county, it must be continually offered from day to day until the sale is concluded.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 697.\*]

## 4. TAXATION (§ 757\*)—TAX TITLES—TAX DEEDS.

To be good, it must affirmatively appear by the recital of the tax deed that every preliminary step was regularly taken.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1507; Dec. Dig. § 757.\*]

## 5. TAXATION (§§ 772, 775\*)—TAX DEEDS—CORRECTION DEEDS—CONSTRUCTION.

Where a correction tax deed recites that "the said county of Yuma did heretofore sell, assign, and deliver unto \* \* \* the said certificate of purchase," and both deeds are offered in evidence, the two instruments must be construed together; and, where the original deed recites that the assignment was made by the clerk, it will be presumed that such was the case, nothing appearing in the second deed to negative this presumption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1540, 1543; Dec. Dig. §§ 772, 775.\*]

## 6. TAXATION (§ 761\*)—TAX TITLES—TAX DEEDS.

A correction tax deed, reciting that the treasurer, having passed the property from "time to time" until the last day, struck off the property to the county, is insufficient, as it fails to show that the first and last day were not one and the same day.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.\*]

## 7. TAXATION (§ 762\*)—TAX TITLES—VALIDITY.

Where a tax deed, though reciting that the purchaser had deposited with the treasurer of the county the tax assessed on the property since the date of the sale thereof, did not recite the amount of such taxes, it is bad.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

## 8. TAXATION (§ 766\*)—TAX TITLES—ACKNOWLEDGMENT.

A purported acknowledgment of a tax deed, reciting that the treasurer of the county, personally known to the county clerk taking the acknowledgment, appeared at the date of the execution of the conveyance, and that his name was affixed to the conveyance as treasurer, is insufficient under *Mills' Ann. St. § 3901*, requiring the treasurer to acknowledge the execution of such deeds as his voluntary act.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1528, 1529; Dec. Dig. § 766.\*]

## 9. TAXATION (§ 813\*)—QUESTIONS DETERMINABLE.

In view of *Rev. St. 1908, § 5733*, providing that, where lands sold for taxes are recovered in ejectment, taxes paid after the sale thereof shall be ascertained and paid by the persons recovering the land, the invalidity of tax deeds may be ascertained even though they are excluded by the trial court from the evidence; the admission of the deed not being necessary to the determination of its validity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1611; Dec. Dig. § 813.\*]

## 10. LIMITATION OF ACTIONS (§ 182\*)—PLEADING—NECESSITY.

The defense of limitations must be pleaded. [Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

# 11. TAXATION (§ 813\*)—CONFORMITY TO PLEADINGS.

In ejectment to determine the validity of tax titles, it was error to decree a cancellation of deeds not put in issue by the pleadings, or to cancel deeds in so far as they affected lands not involved in the suit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1611; Dec. Dig. § 813.\*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

CUNNINGHAM, J. [1] 1. This is an action in the nature of ejectment, brought to test the title to the N. W.  $\frac{1}{4}$  of section 24, township 5 N., range 48 W., in Yuma county. The plaintiff alleged ownership in fee simple, and that the defendant wrongfully withholds the land. The answer was a general denial only. To prove his title the plaintiff introduced a government patent without objection, a trust deed by the patentee, a trustee's deed based on the foreclosure of said trust deed, and a deed from the grantee named in the trustee's deed; or, rather, it was stipulated that the said grantee had conveyed the land to plaintiff Howell, appellee here. Appellant in its brief argues, against the validity of the trustee's deed, that it contains no recital that the legal holder of the note secured by the trust deed applied to the trustee or requested the trustee to advertise and sell the same. The abstract does not indicate that any such objection was offered by counsel for appellant to the admission of the trustee's deed. At least, there is no specific objection of this sort contained in the abstract. The trustee's deed is too meagerly abstracted to determine whether it does or does not contain such a recital; but by reference to the original record there appears a notice of trustee's sale, containing the following: "Now, therefore, at the request and direction of the legal holder and owner of said promissory bond, \* \* \* I, W. H. Lanning, trustee, do hereby give public notice" of the sale. Immediately preceding this notice of the trustee's sale, which was set out in full in the trustee's deed, appears the following by way of introduction to the aforesaid notice: "A certified copy of said advertisement is here incorporated and made a part of this deed"—meaning the trustee's deed. Moreover, reference to the bill of exceptions discloses that the trust deed provides for the sale of the land by the trustee, "in case of default of payment of said bond or any part thereof or interest thereon," and the trust deed does not appear to provide for or require that the legal holder should, as a con-

dition precedent to the sale, make application to the trustee to make the sale. In this respect the trust deed involved in this case is unlike the trust deed before the court in Bent-Otero Improvement Co. v. Whitehead, 25 Colo. 354, 54 Pac. 1023, 71 Am. St. Rep. 140, cited and relied upon by the appellant. We conclude therefore that appellee's title to the land involved here was established, unless the same was extinguished by two certain tax deeds offered in evidence by appellant for the purpose of establishing title in itself.

[2] 2. The two tax deeds offered by defendant were based upon one and the same sale. The second tax deed is denominated or referred to as a correction deed, and was issued after this action was begun. The first tax deed, offered by defendant, shows upon its face that the county clerk transferred to the defendant the tax certificate upon which the said tax deed was based on April 2, 1901, said tax certificate having been originally issued to the county by the treasurer on a tax sale begun on the 5th day of October, 1896. This would invalidate the tax deed, as the county clerk possessed no authority to make the assignment of the tax certificate more than three years after its date. *Lambert v. Scott* (No. 7173, Sup.) 127 Pac. 142.

[3, 4] The said tax deed was also void on its face for the further reason that it nowhere appears by the recitals or on the face thereof upon what days the land had been exposed to public sale by the treasurer. It nowhere appears on the face of the deed that the treasurer passed the sale of the land because of failure of bids, from day to day until the last day of the sale. It is ruled in *Charlton v. Toomey*, 7 Colo. App. 304, 43 Pac. 454, that, before land may be legally bid in by the county, it must, after being first offered, be continually offered from day to day until the sale is concluded, and that the county can only become a purchaser of the entire tract in default of an outside bid, after the same has been offered each day. It is also held in the *Charlton Case* that it must appear affirmatively by the recitals of the instrument—that is, the tax deed—that every preliminary step required to divest the title of the owner was regularly taken as prescribed by law.

[5] The second or correction tax deed offered by the defendant disposes of the matter of the assignment of the tax certificate by simply reciting that "the said county of Yuma did heretofore sell, assign, and deliver unto it, the said Empire Ranch and Cattle Company, the said certificate of purchase." Defendant having offered both tax deeds, we are at liberty, indeed it is our duty, to construe them together, and therefore we may fairly assume, from what appears in the first tax deed, that the tax certificate referred to in the second tax deed was also

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assigned by the clerk; nothing whatever appearing in the second tax deed to negative this presumption.

[6] The second tax deed recites that the tax sale was begun on the 5th day of October, 1896 (in this respect the two tax deeds agree), and further that: "Said treasurer, having passed such real property *from time to time* until the last day of the sale, \* \* \* did bid off at said sale for and in the name of the county of Yuma \* \* \* the premises herein described." It will be noted that this recitation does not state that the treasurer passed the real property *from day to day*, but "*from time to time* and until the last day of the sale." It nowhere appears on the face of the deed that the first day of the sale and the last day of the sale were not one and the same day.

[7] Moreover, the first tax deed, as abstracted, recites that the Empire Ranch & Cattle Company had deposited with the treasurer of said county the taxes assessed on said property since the date of the sale thereof, but does not recite the amount of such subsequent taxes. In the abstract of the second tax deed appears no statement whatever concerning the amount of the subsequent taxes; but an examination of said deed, as the same appears in the bill of exceptions, shows the same defect last pointed out in connection with the first tax deed. *Barnett v. Jaynes*, 28 Colo. 279, 57 Pac. 703; *Carnahan v. Sieber Cattle Co.*, 34 Colo. 257, 82 Pac. 592.

[8] 3. Although the abstract recites that the first tax deed was acknowledged, reference to the original record does not support this statement. The purported acknowledgment of this deed reads as follows: "I hereby certify that before me, J. B. Campbell, clerk of the county court in and for said county, personally appeared the above-named J. W. Cloyd, treasurer of said county, personally known to me to be the treasurer of said county, at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county for the purposes therein expressed. Given under my hand and seal this 10th day of April, A. D. 1901." It will be observed that the clerk does not certify that the treasurer "acknowledged the execution of the same to be his voluntary act and deed," as provided by section 3901, M. A. S., or that he acknowledged the deed at all. For the reasons stated, the trial court properly sustained the objection made by appellee to the introduction of the two tax deeds.

[9] 4. Counsel for appellee in this, and in other cases of similar character in which he appears, contends that a trial court has no authority by its decree to cancel tax deeds offered as evidence, but excluded on the ground of invalidity. In his brief he states his position thus: "When the court excluded those two tax deeds as evidence, they were

out of the purview of the court, and thereafter had no more authority to adjudicate in relation to them than any other deeds which were not offered in evidence." And again he says: "Had the defendant taken no appeal so as to preserve the record of this offer of evidence by bill of exceptions, we would have no knowledge whatever of those deeds. They would nowhere be connected with the case." But in this respect there is no distinction between a document offered and admitted in evidence and one offered and excluded; neither can be made a part of the record, except by bill of exceptions. This case was tried to the court without a jury. We perceive no difference in the jurisdictional power of the court over an exhibit of this sort where the court formally and finally, at the moment it is offered as evidence, rules it void and therefore inadmissible, than over an exhibit that is admitted and thereafter held by the court to be invalid. Whenever a trial court without a jury, in a case of this character, renders its judgment and enters its decree in favor of the owner of the fee, it necessarily holds the tax deeds void as against the fee owner, and it matters not, as we view it, when this adjudication as to the invalidity of the tax deed is made, whether before or after its admission in evidence. The admission in evidence of the deed, in the course of a trial without a jury, is not necessarily a final ruling by the judge upon the validity of the deed. By admitting it (when this course is pursued) the trial court simply holds in abeyance its final judgment upon the deed. At least, this must be true where the final judgment goes against him who, relying upon the deed for his title, offers it in evidence.

In an action in ejectment, it is the duty of the court to cancel void tax deeds, where it is made to appear either by the pleadings, or without objection by the proof, that the action is one brought for the recovery of land sold for taxes. The duty of the court in this behalf arises from the requirements of section 5733, R. S., which reads in part as follows: "When the recovery is effected in all cases the value of the improvements, etc., made on the land so sold, *and all taxes paid after the sale thereof*, with interest thereon at the rate of fifteen per cent. per annum, shall be ascertained by the jury trying the action for the recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the land so recovered." As was said in *Rustin v. M. M. & T. Co.*, 23 Colo. 358, 47 Pac. 302: "It would be illogical and unjust to require the owner to refund the subsequent taxes, and, at the same time, to allow the purchaser to hold the cloud of the tax deed upon his title."

[10] 5. Counsel for appellant discusses in his brief the seven-year statute of limitations; but under the answer, which, as we

have stated, consisted solely of a general denial, it is not necessary for us to consider this contention, since appellant was not in a position to rely upon the statute of limitations. *Webber v. Wanamaker*, 39 Colo. 431, 89 Pac. 780; *Chivington v. Colorado Springs Co.*, 9 Colo. 603, 14 Pac. 212.

[11] In some way, probably through inadvertence, the trial court in its decree canceled one tax deed that had not even been offered in evidence, and which was in no manner referred to in the pleadings, and also canceled the second or correction tax deed, to which we have hereinabove referred, although the last-named deed included several tracts of land not in any way involved in this suit. The decree should be so corrected as to limit its effect entirely to the N. W.  $\frac{1}{4}$  of section 24, township 5 N., range 48 W.—the only land involved in this action. It is doubtless the law that the decree of a trial court could not operate upon or in any manner affect real property not before the court; but, inasmuch as the decree specifically names other property or deeds, giving the book and page of the county record where the same appear, it might be that the error in the decree would occasion serious embarrassment to the holder of the tax deeds on these other properties. The cause is therefore remanded, with directions to the trial court to so modify its decree as to limit its effect to the land described in the complaint, and, as thus modified, the decree of the trial court is affirmed.

Judgment affirmed.

#### LARIMER COUNTY CANAL NO. 2 IRRIGATING CO. et al. v. POUDRE VALLEY RESERVOIR CO. et al.

(Court of Appeals of Colorado. Dec. 16, 1912.)

#### 1. WATERS AND WATER COURSES (§ 33\*)—DIVERSION—ACTIONS—EVIDENCE.

In proceedings to change the place of diversion of water, evidence held to establish petitioners' ownership of the water sought to be changed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

#### 2. WATERS AND WATER COURSES (§ 19\*)—DIVERSION—RIGHT OF JUNIOR APPROPRIATORS.

As a junior appropriator of water to a beneficial use has a vested right against his senior to a continuation of the existing conditions, the senior appropriator, though entitled to a large flow of water for the irrigation of a small area which lies so close to the stream as to permit return of the water, cannot change the point of diversion so as to take the entire amount of water to irrigate a larger area so far away from the stream as to prevent its return.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.\*]

#### 3. WATERS AND WATER COURSES (§ 24\*)—DIVERSION—JUDGMENTS—CONSTRUCTION.

Where a judgment is rendered fixing the amount of water appropriators may divert, the amount of diversion is to be construed with the land to be irrigated, and, though an appropriator is decreed the right to take a large flow of water, he cannot take more than is reasonably necessary to irrigate his land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 16; Dec. Dig. § 24.\*]

#### 4. WATERS AND WATER COURSES (§ 33\*)—DIVERSION—PROCEEDINGS FOR CHANGE OF POINT OF DIVERSION.

While in a proceeding for a change of the point of diversion of water already appropriated there can be no order granting an enlarged use, yet the amount of water which may be appropriated may properly be determined; the parties not being required to seek relief in subsequent actions.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

Appeal from District Court, Larimer County; James E. Garrigues, Judge.

Action by the Poudre Valley Reservoir Company and others against the Larimer County Canal No. 2 Irrigating Company and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions.

Rhodes, Temple & Foster, of Ft. Collins, for appellants Larimer County Canal No. 2 Irrigating Co., New Mercer Ditch Co., and Arthur Irrigation Co. H. N. Haynes, of Greeley, for appellants Larimer & Weld Irrigation Co. and New Cache la Poudre Irrigating Co. C. D. Todd and Joseph O. Ewing, both of Greeley, for the appellees.

KING, J. The appellees filed their petition in the district court under the act of 1903 (Session Laws 1903, p. 278), praying for an order allowing them to change the plea of diversion of certain rights claimed to belong to them, in the decreed priorities of what was called the Cañon Canal Company's Ditch, from the head gate of that ditch to the head gate of the Poudre Valley canal, owned by petitioners, both of those ditches taking water from the same river. The Cañon Canal Company's ditch, or Cañon canal, as it is usually designated in the record of the present proceeding, was designated as No. 20 in the general decree adjudicating the relative priorities of right to the use of water for irrigation purposes in that water district, which was entered in the year 1882, and by that decree said Cañon canal was adjudged to be entitled to priority No. 28, by original construction, computed at 8.6 cubic feet per second of time, and also priority No. 55 (changed by amendment of the decree in 1884 to No. 56), by reason of enlargement, computed at 48.8 cubic feet per second of time, in all 57.4 second feet. The petitioners claimed to be the owners (the nature of their interests, as between themselves, being imma-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terial here) of 1.63 second feet of priority No. 28, and 24.44 second feet of priority No. 56, in all 26.07 second feet, of the water so decreed to the Cañon canal. The appellants, who were the owners of certain priorities, as adjudicated by said general priority decree, of later date than those of the Cañon canal, protested against the granting of the relief sought by petitioners, claiming that the vested rights of the protestants would be injuriously affected by the proposed change. The decree of the court found the issues in favor of the petitioners, and unconditionally ordered the change in the place of diversion of 26.07 second feet of the water decreed to canal No. 20, or Cañon canal; that is, 1.63 second feet of priority No. 28, and 24.44 second feet of priority No. 56, and the delivery of that much water, according to the priorities stated, to the petitioners' Poudre Valley canal, at its head gate. From that decree this appeal was prosecuted.

The Cañon canal was substantially parallel with the Poudre Valley canal, between it and the river, the head gate of the former being located about 2,000 feet down the stream from that of the latter. The first named canal or ditch appears to have been a small affair, not exceeding three miles in extreme length, and being at no point more than one-half mile distant from the river. The Poudre Valley canal was 16 or more miles in length, of large carrying capacity, and had been constructed to convey water to a large reservoir at a great distance from the river. It had no decreed priority for irrigation purposes, except in connection with the storage reservoir. There was no head gate of a ditch taking water from the river, and no tributary or source of water supply affecting the flow of the stream, intervening between the head gates of the two canals.

[1] Appellants' first objection to the decree challenges the sufficiency of the proof of appellees' ownership of the proportion of the decreed priorities of the Cañon ditch allowed by the decree in the present proceeding to be diverted to the Poudre Valley canal. In so far as part ownership of the decreed priorities depended upon the ownership of the ditch, it seems that the contentions of appellants' counsel in that regard are not sustained by the evidence. The ditch appears to have been constructed in 1868, and subsequently enlarged in 1873 by certain individuals who had land claims along the ditch, and claimed ownership of it in different proportions or undivided interests, so that technical accuracy in proving title of record to the various interests could hardly be expected. However, the petitioners produced record evidence in support of their claim to the rights included in their petition, consisting of several mesne conveyances. Their title immediately rested upon a deed conveying, in connection with certain land, the proportion of the decreed priorities of the Cañon canal

claimed by them in this proceeding, the grantor in that deed having apparent title by recorded conveyance to a one-half interest in the ditch, and certified copies of the deeds to petitioners' more remote grantors were introduced, which seemed to convey rights and interests in the ditch, and which were recorded more than twenty years before this proceeding was commenced. It appeared that the immediate predecessors in title of the petitioners exercised acts of ownership and possession of the ditch, used water therefrom upon their lands, for the period of about 20 years prior to 1904, when the flume which carried the water of the ditch across a certain cañon was washed out by flood, rendering part of the ditch useless. It does not appear that the ditch was thereafter utilized, although during two seasons some part of the water supposed to belong to it was turned into the Poudre Valley canal. There was testimony tending to show that the right of the petitioners and their grantors to the rights claimed by them in the Cañon ditch were recognized by others having interests in that ditch and its priorities. On the whole, the evidence was sufficient to establish petitioners' prima facie right to the one-half interest in the Cañon ditch, except as to that part of the priority numbered 28 not conveyed to or claimed by them, for the purposes of this proceeding, and in the absence of evidence of adverse title or claim. *Bates v. Hall*, 44 Colo. 360, 98 Pac. 3.

The attempt was made to cast doubt upon the petitioners' proof of title by showing that at an early period individual owners of the Cañon ditch had incorporated a company known as the Cañon Canal Company of Colorado, and that the ditch was designated in the decree adjudicating priorities as the Cañon Canal Company's canal, and, further, that the claim filed with the referee in that proceeding was made in the name of the corporation by one who signed and verified the claim as its president. The last-named person appears to have been one of the original owners of the ditch, but not one of petitioners' grantors. Nevertheless, there was no evidence whatever of any conveyance to the corporation; while there was definite proof to the effect that the corporate organization was never completed, but was abandoned by the incorporators, and that no stock of the corporation was ever issued as representing any interest in the ditch or otherwise. The decree in the statutory proceeding to adjudicate priorities did not and could not determine the ownership of the ditch. It cannot be said that the abortive attempt at incorporation was enough to overcome the prima facie evidence of title produced by petitioners.

[2] The further and principal contention of appellants is that their vested rights as junior appropriators will be injuriously affected by the change in the point of diversion if granted unconditionally in accordance

with the terms of the decree appealed from. They have not at any time protested against a mere change in the point of diversion from the head of the Cañon ditch to the head of the Poudre Valley canal under restrictions as to use, but have at all times insisted that under such change as prayed for, combined with change in place of use, serious and permanent injury to their interests will result, unless the decree allowing the change be upon such terms and conditions as will prevent such injurious effect and protect the appellants therefrom. This attitude of appellants is proven by their written protest, which, among other things, stated that the quantity of water claimed by petitioners had at no time, when diverted into the Cañon canal, been used to irrigate to exceed 274 acres of land thereunder; that such land was near, and sloping to, the river, so that any quantity in excess of 5 second feet of water diverted into the ditch, returned at once to the river; and "that the proposed change of point of diversion sought in the petition will injuriously affect these objecting parties and their respective consumers, unless the decree sought by petitioners be modified and limited to application of water so sought to be changed as to place of diversion, to the same lands, to wit, 274 acres of land lying along and near said Cañon canal, heretofore irrigated by means of said portions of said priorities;" as, also, by a statement of their counsel on motion for rehearing that a decree should be directed authorizing diversion into the Poudre Valley canal of no more water than is necessary to irrigate those lands of petitioners which were purchased with the water-rights, and perhaps also such additional lands as lie between the Poudre Valley canal and the Cañon canal, not to exceed 5 second feet.

Appellants make particular and specific objection to the form of the decree allowing the change of point of diversion, for that the water commissioner is thereby "directed and required to divert said water annually into the Poudre Valley canal *whenever needed and required by petitioners to irrigate their lands*, in the same manner as though said 26.07 second feet of water had been decreed to the Poudre Valley canal in the general adjudication proceedings of 1882"; it being contended that it is not only the effect of said order, but was the intention of the trial court, to preclude investigation in any subsequent action as to enlarged use in time and volume under the new conditions. Appellants' contention of injurious effect is based mainly upon two claims. The first is that because of the greater length of the canal and its location, by reason of which the acres capable of irrigation, and to be irrigated therefrom, are increased to several times that under the Cañon canal, the change of the point of diversion of the priorities of the Cañon ditch to the Poudre Valley canal will result in the application of the waters repre-

sented by said decreed priorities (as construed by appellees and the trial court) to a largely increased acreage, thereby taking from the river a greater quantity of water, both as to volume and time, than ever had been used by petitioners or their grantors, or could be used beneficially by means of the smaller ditch, and that the change in place of use will necessarily prevent the return of any of such waters to the stream. The second claim is that by its terms and the law under which it was rendered the decree in the general adjudication proceedings, properly interpreted and construed, gave to the Cañon canal and the owners of its priorities no right to the use of more water than necessary to irrigate the amount of land lying under the ditch, intended to be and susceptible of being, and which were, within a reasonable time after the completion of the ditch and the rendering of said decree, irrigated therefrom, and that the trial court refused to so construe the said decree. No extended statement of the evidence is necessary, or would be useful. The undisputed facts are that under the Cañon ditch, as originally constructed and since maintained, not to exceed 300 acres of land could be beneficially irrigated; that such land lay in a narrow strip, at no place exceeding one-half mile in width, between the ditch and the river, and with such slope that all water turned into the ditch, and not consumed, must of necessity be quickly returned to the river above the head gates of appellants' ditches. Application of water to any larger area of land was prevented by the topography of the country. Of this acreage the evidence tends to show that not to exceed 274 acres have at any time been irrigated. From these facts it is plain that the junior priorities owned by appellants have not at any time been affected to a greater extent than that occasioned by the consumptive use of the water on said small area of land under the Cañon ditch and near the river, as the entire amount claimed by appellees and their grantors under said decree, when turned into the ditch, returned to and became a part of the stream and was appropriated by appellants, except the small amount required for and consumed in the irrigation of said land. Direct and undisputed testimony as to the quantity of water that could be beneficially used upon the land was given by one of the water commissioners who stated that, if 8½ second feet of water were turned into the ditch from the river, it would be possible to use it on the lands thereunder, but he would consider it an excessive use. Another witness, water commissioner at the time of the hearing and for many years prior thereto, testified, in substance, that, if 56 second feet were used in a ditch to cover only 270 acres, the water would be in the river available to junior appropriators practically all but 6 or 7 days of the year; but if turned into petitioners' ditch, unless it should break, the

river would be deprived of that water absolutely during the irrigation season.

It was well said by Mr. Justice Garrigues in *Weldon v. Farmers' Co.*, 51 Colo. 545, 550, 119 Pac. 1056, 1057, that "any one familiar with irrigation knows that 47 cubic feet of water per second is not necessary for the irrigation of 640 acres of land. That amount, therefore, was not beneficially applied thereto." With greater force may it be said in this case that any one familiar with irrigation knows that 56 cubic feet of water per second is not necessary for the irrigation of the tract of less than 300 acres of land under this ditch could not have been beneficially used thereon, and, if turned thereupon, under the physical conditions shown to exist, would soon return to and become a part of the stream subject to appropriation by appellants as if it had never been diverted from the stream. Appellees' ditch has a carrying capacity much greater than that of the Cañon canal. It extends about 25 miles, terminating in a large reservoir, and in its course empties into other such reservoirs, the first of which is situated about 12 miles from the head of the ditch. In addition to the lands purchased with these priorities, petitioners have 1,200 acres upon which they will use these waters for irrigation, several hundred acres of which lie above the high water line of the reservoirs, and therefore cannot be irrigated from stored water. No portion of the water turned into that ditch can return to the river above the head gates of appellants' ditches, or any of them, with the exception of such as may return if used in the irrigation of the lands formerly irrigated from the Cañon ditch. Appellees' witness testified that if the water diverted into this ditch should be applied to irrigate, not only the acres under the Cañon ditch, but also the lands adjacent to the reservoirs, the enlargement of the consumptive use will depend upon the amount procured from the river. But without such direct testimony the inference that such would be the case is not only deducible, but inevitable. So far as disclosed by the evidence, there is such an intimate, inseparable connection between the change in point of diversion and the change in place of use and storage that injurious enlarged use is as certain and inevitable as the operation of the laws of gravitation in obedience to which the water once diverted into the ditch of petitioners, and guarded by its protecting banks, will follow its descending grade miles beyond the place or places at which appellants have heretofore gathered and used it, and beyond their reach, until in its full volume and at all times it will be consumed upon largely increased acreage of thirsty land, or garnered into a succession of storage reservoirs. At the original place of diversion the quantity of water that could possibly be consumed in beneficial uses was limited by physical conditions to about one-tenth the quantity of the priority decree, as

asserted by petitioners, and to less than one-fourth of that which they now claim; while by the change in the point of diversion these physical limitations and restrictions are removed. Both the ability and intention of petitioners to consume the entire quantity are admitted. Nothing appears to be lacking to establish and make certain the injurious effect to appellants' vested rights, within the meaning of the law, and nothing to prevent it except the imposition of terms as provided by the statute under which this proceeding was instituted, or denial of the petition. We think the evidence in this case brings it fairly and fully within the rule announced in *Vogel et al. v. Minnesota Canal Co.*, 47 Colo. 534, 107 Pac. 1108, in which the Supreme Court, by Mr. Justice Bailey, said: "This court has often said, in substance, that a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation. If this means anything, it is that, when the junior appropriator makes his appropriation, he acquires a vested right in the conditions then prevailing upon the stream, and surrounding the general method of use of water therefrom. He has a right to assume that these are fixed conditions and will so remain, at least without substantial change, unless it appears that a proposed change will not work harm to his vested rights." The facts, as shown by the evidence in the case just cited, differ from those in the instant case in some respects; but the judgment there appealed from and sustained was based almost entirely upon the finding that the proposed change would interfere with return waters, and in the use of waters of the stream at such times as petitioner's grantors had not used the entire volume awarded by the priority decree during the irrigation season; and the evidence does not present as strong a case as found in this record. This branch of the case will be further considered in connection with the second claim. So far, we have discussed the question conceding that the priority decree to the Cañon ditch gave it the right to 56 second feet absolutely for the irrigation season, as claimed by appellees.

[3] Appellees contend that the quantity of water, the point of diversion of which may be changed, is that determined by the adjudication decree itself (*New Cache la Poudre Co. v. Supply Co.*, 49 Colo. 1, 111 Pac. 610; *Wadsworth D. Co. et al. v. Brown*, 39 Colo. 57, 88 Pac. 1060), and that such quantity is the volume named in the decree, and for the entire irrigation season. While appellants claim that the volume only is fixed, the time being indefinite, to be determined and limited to the needs of the acreage for which the water was appropriated, and, further, that the decree relied on does not award the quantity of water claimed, and invoke a construc-



tion of the decree. The priority claimed by appellees under the decree is so grotesquely out of proportion to the quantity of water which was, or might be, beneficially applied to lands capable of being irrigated by the ditch, as to justify a construction of the decree to ascertain its true intent and meaning. One and forty-four one-hundredths second feet for 80 acres of land is the basis upon which water rights were procured for and applied to lands under the ditches, generally, in northern Colorado, and subsequent use and experience has demonstrated that such amount is ample. *Weldon v. Farmers' Co.*, 51 Colo. 545, 549, 119 Pac. 1056. In water district No. 38, one second foot to 50 acres (*Drach v. Isola*, 48 Colo. 134, 109 Pac. 748), and in district No. 40, one foot to 40 acres (*Crawford-Clipper D. Co. v. Needle Rock D. Co.*, 50 Colo. 176, 114 Pac. 655), is the maximum allowed by the decrees; and in the case last named it is shown that subsequent use and experience has demonstrated that one second foot is sufficient to irrigate 53 acres in that vicinity. From the statement of claim upon which the decree in question was founded, it appears that the land under the ditch intended to be irrigated therefrom was 275 acres; and the evidence herein shows that at no time since the decree has there been to exceed 300 acres under the ditch which could be irrigated therefrom. Under these facts, the decisions of the Supreme Court in *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989, and *Drach v. Isola*, supra, are applicable and controlling. The decree now under consideration is the identical decree construed in the *New Mercer Ditch Case* and similar to that construed in *Drach v. Isola*, and contains the same general provision limiting the several specific awards as to quantity. In the first case it was held that although the decree appeared to give to the Yeager ditch 33 cubic feet of water per second of time, nevertheless, by its terms and the general law read into every decree, it gave to Yeager only sufficient water with which properly to irrigate 120 acres of land, the acreage set out in the statement of claim, and the maximum irrigated from said ditch after the decree was rendered, to wit,  $3\frac{1}{2}$  cubic feet per second. Appellees contend that neither of these cases apply for the reason that abandonment was the issue upon which the same were decided. In the first case the court said that, whether it adopted the finding of abandonment, or held that the decree itself gave only sufficient water with which properly to irrigate 120 acres of land (both of which conclusions were affirmed), "in either case, or in both cases, as to the quantity of water decreed to Yeager, only such portion thereof as has been used by him \* \* \* within a reasonable time after the original diversion can now be enjoyed by him or his grantees." In *Drach v. Isola* the court said that the question of abandonment was not there in-

volved, and that the suit, which raised the same question as to the meaning of the decree as is here insisted upon, was not an attack upon the decree, but an attempt to enforce its provisions. In *Crawford-Clipper D. Co. v. Needle Rock D. Co.*, supra, in construing a decree somewhat similar to this, Mr. Justice White said: "As the absolute right established could lawfully be based only upon the application of the water to a beneficial use, the right decreed must be measured thereby. This was the extent of the court's authority in the premises, and, the decree being susceptible of that construction, such must be the meaning ascribed to it." Upon the authority of these cases, we hold that, as affecting the interests of the parties to this proceeding, the adjudication decree to the Cañon ditch gave to the owners thereof only sufficient water with which properly to irrigate 300 acres of land, and that the quantity which may be diverted by petitioners at the head gate of the Poudre Valley canal must be limited to that amount.

[4] It is contended by appellees that the question of enlarged use is not a proper issue in the statutory proceeding for change of point of diversion, and in support thereof they cite *Cache la Poudre Irr. Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123, *Seven Lakes Res. Co. v. New Loveland, etc., Land Co.*, 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329, *Platte Valley Irr. Co. v. Central Trust Co. et al.*, 32 Colo. 102, 75 Pac. 391, *Fulton Irr. D. Co. et al. v. Meadow Island Irr. Co.*, 35 Colo. 588, 86 Pac. 748, and *New Cache la Poudre Co. v. Water S. & S. Co.*, 49 Colo. 1, 111 Pac. 610, in which it is held that whether the place of diversion may be changed is not to be determined by the manner of use, or by the quantity of water employed, or the length of time which the same is to be enjoyed after changing from the head gate of one ditch to that of another. But that rule is carefully qualified by the statement that if the evidence shows that the changed conditions necessarily, or by reasonable inference, would result in an enlarged use, the petition should not be granted. *New Cache la Poudre Co. v. Supply Co.*, 29 Colo. 469, 63 Pac. 781; *Bates v. Hall*, 44 Colo. 360, 371, 98 Pac. 3. We do not herein depart from the rule thus established by many decisions of the Supreme Court, but adhere thereto. This is not a case in which the same volume of water decreed to be used at one point is sought to be changed to another point and used at a new place and upon increased acreage for the same time as theretofore, but a greater volume for a longer time, and with no return to the stream. This demand the decree appealed from grants, from which injury to appellants must necessarily result under the facts as here disclosed. We are not unmindful of the decisions of the Supreme Court which hold that an order permitting a change in point of diversion does

not, and cannot, in any way enlarge the right of its recipient by conferring upon him the power to divert a greater quantity of water from the stream than he theretofore took, nor permit him to use it for a longer length of time than he was previously entitled to; but thereafter in some appropriate proceeding the question of the quantity of water, as measured by time or volume, can be determined, and that the general law of the state reads into all these decrees allowing change of the point of diversion, the exception and limitation that the change so allowed is not thereafter to become a source of injury, and that any attempt to use it in such a way as to injure other appropriators would still be within the control of the proper courts, and is a continuing protection to such appropriators. But appellants contend that the decree here rendered not only precludes a subsequent suit, but was so intended. The decree is susceptible of that construction, and, under any view of the case, it ought to be so modified as to make it clear that such is neither its purpose or effect, nor the law, as understood by the court. Litigants should not needlessly be sent from court to court in search of an appropriate proceeding, but their rights should be settled when the parties are before the court. Such is the policy of the law, and we perceive no obstacle thereto inherent in this proceeding. The former opinion will be withdrawn, the judgment reversed, and the cause remanded to the district court, with instructions to ascertain and determine the quantity of water necessary to properly irrigate the land owned by petitioners heretofore irrigated from the Cañon ditch, and also that lying between the line of the Cañon ditch and the Poudre Valley canal, in all not to exceed 300 acres, and to enter a decree permitting the change in point of diversion of that quantity only; and, if necessary, that additional testimony be taken to ascertain such quantity.

Reversed and remanded.

# CENTRAL TRUST CO. v. CULVER.

(Court of Appeals of Colorado. Dec. 9, 1912.)

## 1. APPEAL AND ERROR (§ 1011\*)—CONFLICTING EVIDENCE.

A judgment will not be disturbed, which is founded on controverted facts, if there be sufficient evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

## 2. WATERS AND WATER COURSES (§ 33\*)—IRRIGATION DITCH — ABANDONMENT OF RIGHTS.

The question of abandonment of a water right is one of fact to be determined by the judge or jury, as the case may be.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

## 3. WATERS AND WATER COURSES (§ 32\*)—IRRIGATION DITCH—"ABANDONMENT" OF WATER RIGHTS—ESSENTIALS.

To constitute "abandonment" of water rights, both act and intention must be shown.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.\*]

For other definitions, see Words and Phrases, vol. 1, p. 12.]

## 4. WATERS AND WATER COURSES (§ 33\*)—IRRIGATION—ABANDONMENT OF RIGHTS—BURDEN OF PROOF.

The burden of proving an abandonment of a water right is on the one asserting it; the law not presuming that a valuable right once existing has been abandoned.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

## 5. WATERS AND WATER COURSES (§ 33\*)—IRRIGATION — ABANDONMENT OF WATER RIGHTS—EVIDENCE.

Under the issue of abandonment of water rights, if there be sufficient evidence tending to establish nonuser subsequent to a decree declaring that there was no abandonment, evidence of nonuser and similar acts of the owner prior to the decree is admissible to show intent thereafter in not using what was awarded by the decree.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

## 6. APPEAL AND ERROR (§ 931\*)—TRIAL BY COURT—EVIDENCE—PRESUMPTIONS.

Where a case was tried without a jury, evidence only admissible for one purpose will be presumed to have been considered only for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

## 7. WATERS AND WATER COURSES (§ 33\*) — STATUTORY PROCEEDINGS — OWNERSHIP — PRIORITIES.

In statutory proceedings for the adjudication of priorities and appropriations of water, the district court can only determine priorities of the several ditches and amount of water awarded thereto, but not the ownership or property rights in the ditches.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

## 8. ESTOPPEL (§ 3\*)—REAL ESTATE—PLEADINGS AND TESTIMONY IN PRIOR SUIT.

A party is not estopped by his sworn pleadings or testimony in another action, which was dismissed, as to the ownership of an irrigation ditch, in the absence of a showing that the other party has been led to change his conduct to his damage, and should be allowed to explain them.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 2-5, 7; Dec. Dig. § 3.\*]

## 9. ESTOPPEL (§ 3\*)—PLEADINGS IN PRIOR ACTIONS—CONSTRUCTION.

In order to apply the doctrine of estoppel as to matters contained in a sworn complaint in a prior action, statements in the pleader's favor should be noticed, as well as those against his interest.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 2-5, 7; Dec. Dig. § 3.\*]

## 10. APPEAL AND ERROR (§ 1052\*)—HARMLESS ERROR—EVIDENCE.

A party cannot complain that the court admitted in evidence deeds to an irrigation ditch, which had been executed prior to a de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cree declaring the title in him, where the court decided in his favor as to the ownership at the time of the decree, but that he abandoned his rights therein after the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

Appeal from District Court, Boulder County; Harry P. Gamble, Judge.

Action by Elvira E. Culver against the Central Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Denison, of Denver, for appellant.  
John A. Rush, of Denver, for appellee.

**HURLBUT, J.** [1] This action was begun by appellee (plaintiff below) against appellant (defendant) to establish title to certain water rights and ditches claimed by plaintiff, and to enjoin defendant from interfering with plaintiff's use thereof. Defendant's answer denies plaintiff's claim, and alleges a prior right to and ownership in the water rights and ditches in question. The case rests largely upon facts which were sharply contested at the trial. Whichever way the court may have found the facts, there appears to be ample evidence to have supported the findings. The court found in favor of plaintiff and entered a decree accordingly; and unless the record discloses some prejudicial error in the proceedings below we are bound thereby, according to the well-settled practice of this court that a judgment will not be disturbed, which is founded on controverted facts, if there be sufficient evidence to support it.

Appellant's entire title, if it has any, to the water rights and ditches in controversy depends upon the title previously held by W. R. Blore and wife. What is known as the W. R. Blore No. 2 ditch, and its alleged abandonment, appears to be the storm center of this suit. The court found, and the evidence tended to show, (1) that no water had ever passed through Blore No. 2 ditch after 1867; (2) that the water rights decreed to Blore No. 2 ditch in 1883, as well as the ditch itself, were owned and used by Blore at the time that decree was rendered, but had been wholly lost and abandoned since that time, and that neither plaintiff nor defendant had any right or interest therein; (3) that plaintiff had established her ownership in the Culver and Mahoney ditch, which had a priority of April 15, 1867, and was the oldest priority on the Little Thompson creek in water district No. 4, and had at all times applied the waters decreed thereto to irrigate her lands, and to other beneficial uses; (4) that defendant had no right or interest in the said Culver and Mahoney ditch; (5) and that no change in point of diversion of the water decreed to Blore No. 2 ditch had ever been made, and neither defendant nor its predecessor or

representatives had ever used the waters decreed thereto in or through any other ditch or ditches. The court having so found, a decree for plaintiff was inevitable. All the findings of facts by the court were based upon conflicting evidence. With courteous persistence counsel for appellant ably and forcefully presses his contention that the record fails to disclose sufficient evidence to support the decree. From a painstaking examination of the record, we are unable to reach that conclusion. Even if Carey Culver's testimony were eliminated from the record, we still think there would remain sufficient evidence to support the findings of the trial court upon the disputed facts.

[2, 3] The real crux of this contest appears to be the issue of abandonment as to Blore No. 2 ditch. Considerable evidence was adduced on this issue. It needs no citation of authority to support the statement that abandonment is a question of fact to be determined by the trial judge or jury, as the case may be, and to constitute abandonment both act and intention must be shown. Much evidence was also received relative to other ditches and water rights aside from the Blore No. 2 ditch, namely, "Culver and Mahoney" ditch, Blore No. 1 ditch, Supply ditch, and Supply Lateral ditch, all of which were subsequent priorities to Blore No. 2 ditch; likewise Blore No. 1 ditch, Supply ditch, and Supply Lateral ditch, were subsequent priorities to "Culver and Mahoney" ditch. Defendant does not contend that any water was conveyed through Blore No. 2 ditch after 1867, but does strenuously urge that its grantors exercised and used the water rights granted to that ditch by conveying the water through Blore No. 1, Supply, and Supply Lateral ditches, and by so doing clearly negatived any intention on its part to abandon the water and water rights granted thereto. The finding of the court, however, was against it on this contention, as above shown.

[4] We agree with defendant that the rule is well settled that on the issue of abandonment the burden of proving the same is on the one asserting it. *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056. The law indulges in no presumption that a valuable right shown to have once existed has been abandoned by its possessor. It is not the question here whether or not we think, upon reading the evidence, the trial court should have found the issue of abandonment in favor of appellant, but rather, Does the record show sufficient evidence to support the court's findings upon that issue? We have decided it does.

[5] Appellant further complains that the admission by the court, over its objection, of certain evidence relative to acts, sayings, and doings of appellee and her predecessors,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

concerning abandonment of Blore No. 2 ditch, etc., prior to the decree of 1883, and the admission in evidence of certain deeds offered by plaintiff, was prejudicial error, because the decree conclusively established nonabandonment of the ditch or water rights by defendant at the time it was rendered. It may be conceded that the decree of 1883 is conclusive as to the amount of water the several ditches mentioned were entitled to and the date of their respective priorities as fixed by the decree, and that at the time it was rendered there was no abandonment of the water rights decreed to any of such ditches. However, the Supreme Court has held, in *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112, that, under the issue of abandonment, if there be sufficient legal evidence tending to establish nonuser subsequent to the decree, then evidence of nonuser and similar acts of the owner prior to the decree is admissible for the purpose of showing his intent thereafter in not using what was awarded to him by the decree.

[8, 7] The evidence objected to was admissible for the purpose of showing intent only, and, the case being tried to the court without a jury, it will be presumed that the court considered it only for the purpose for which it was admissible; and, further, the deeds from Blore and his grantees to plaintiff, admitted against defendant's objections, were also properly admitted in evidence under plaintiff's claim that the same conveyed to him the water rights in issue, and that he was the owner thereof, and that such ownership could not be determined by the decree of 1883. In the instant case the court found "that at the time of the granting of the water decrees, in 1883, W. R. Blore was the owner of the ditch known as the W. R. Blore ditch No. 2, and entitled to the water thereto decreed." But it also found "that ever since the granting of the decree, in the year 1883, there has been no water run through W. R. Blore ditch No. 2, nor has the point of diversion been changed, nor the water at that time decreed been used through any other ditch by said Blore, or any one for him, or claiming under or through him; that said W. R. Blore ditch and the water thereto decreed has been wholly abandoned; that the plaintiff, Carey Culver, or Elvira Culver, his widow, or the defendant, has no right to the W. R. Blore ditch No. 2, or the water decreed thereto."

In its reply brief appellant says: "We do not claim that the decree of 1883 determined that Blore was the owner of the right in question, but we do claim that the evidence did, and, moreover, that that decree did, determine that the water right in question was then alive, and that therefore all evidence of abandonment before 1883 was erroneously admitted." The trial court did, however, in its decree, find that the decree of 1883 found that Blore was the owner of

the ditch, in these words: "And in said decree [1883] it was stated also that at the time of the said adjudication the said Blore was the owner of said ditch and entitled to the water thereof. \* \* \* " If this is at all material in this case, then that part of the decree of 1883 just quoted is void to that extent, as it is the settled law in this state that in statutory proceedings for the adjudication of priorities and appropriations of water the court has no jurisdiction to determine ownership or property rights in the ditches, nor to determine who has the right to use the water awarded to the various ditches, canals, etc.; in other words, the district court can go no further than to determine the priorities of the several ditches and amount of water awarded thereto. *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854; *Hallet v. Carpenter*, 37 Colo. 30, 86 Pac. 317; *Evans v. Swan*, 38 Colo. 92, 88 Pac. 149; *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. 849; *Woods v. Sargent*, 43 Colo. 268, 95 Pac. 932; *Park v. Park*, 45 Colo. 347, 101 Pac. 403; *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056.

[8] Another question raised by appellant is that of estoppel by admissions in judicio; the contention being (1) that in a certain suit brought in 1893 by plaintiff's grantor against Laws, a water commissioner, his sworn complaint asserted the ownership of Blore No. 2 ditch to be in Blore, and that Blore had used the water decreed thereto through plaintiff's ditches (this suit was not determined, but was dismissed, by stipulation, on October 26, 1895); (2) that Culver appeared as a witness in the proceedings which resulted in the decree of 1883, and gave testimony which tended to establish Blore's continuous use of the water through Blore No. 2 ditch. Both contentions may be considered together. It appears that after the Laws suit was instituted Blore was made a party thereto by order of court, but the record shows by stipulation that he never made any appearance therein. As the suit was dismissed, nothing was adjudicated, and neither plaintiff nor defendant gained or lost anything thereby; nor does it appear from the record that defendant or its assigns were influenced thereby to change in any way their position or actions respecting their relations with the ditch or water rights claimed. Appellant contends, however, that it was damaged and injured by reason of the injunction writ preventing it, for several months, from using the ditch and water in question. In answer to this we say the record shows that when the suit was dismissed under the stipulation it was therein provided that no suit should be brought on the injunction bond; therefore any injury sustained by defendant by reason of the enforcement of the writ of injunction was waived by it, and it cannot now be heard to complain. The complaint

was properly admitted in evidence, in order that it might be considered by the trial judge as affecting the credibility of Carey Culver as a witness, but not to establish estoppel. The complaint itself contains a clear recital and statement to the effect that whatever rights Blore may have had in any of the ditches or water rights appurtenant thereto they were subsequent titles and water rights to those of plaintiff himself, and that plaintiff had the oldest and first appropriation of water on the stream. It cannot be seriously contended that under these allegations plaintiff would be estopped at a subsequent time from claiming a prior right to that of defendant in the use of the water therein referred to. The allegations in the complaint were in no way attacked by defendant. Blore filed no answer or other pleading tending to raise an issue with plaintiff upon such allegations. He was a party to the suit, but chose to make no appearance therein. Plaintiff maintained his claim of paramount right and title to that of Blore and his assignees in the subject-matter of this suit down to the time of this trial. So far as the pleadings in the Laws suit are concerned, plaintiff did not change his ground nor assume a position contrary to that assumed in that suit.

[9] We do not overlook the fact that the complaint contains other allegations tending to show a conflict with his claim of first appropriation of water on the stream. Had issue been taken by Blore upon plaintiff's claim, and trial had, we cannot say how he would have explained this apparent inconsistency. He may or may not have been able to do so. In this respect the complaint was clearly ambiguous, but we do not think that, in order to apply the doctrine of estoppel to him in such a case, the law would select from the complaint such statements as are against his interest and ignore those in his favor, particularly where the suit was dismissed and never tried.

Some of the Tennessee cases cited appear to sustain appellant's contention, among which, and most relied on, are *Chilton v. Scruggs*, 5 Lea (Tenn.) 308, and *Grier v. Canada*, 119 Tenn. 17, 107 S. W. 970. In the first case the doctrine of estoppel was successfully invoked against defendant, on the ground that in a former suit he had pleaded and testified that the note in litigation was valid, and that certain assets were in the hands of trustees for the payment thereof. Under these facts the court held that he could not plead the statute of limitations against the note in the main case. Both parties in the main case were parties in the former suit, and it was tried and determined. It can be well said that defendant's testimony and pleadings in the former suit were relied upon by Chilton, and caused him to pursue a different course respecting the note than he would have had no such position been assumed by Scruggs in the former suit.

Scruggs' action lulled him into a feeling of security, and rendered it unnecessary for him to give any thought to the statute of limitations as applicable to the note in issue. In the absence of defendant's testimony and pleadings in the former suit, it is a reasonable presumption that Chilton would not have permitted the note to become barred by the statute. We think this case comes within the rule announced by our Supreme Court in *Fisher v. Denver National Bank*, 22 Colo. 373, 45 Pac. 440.

In the second case, *Grier v. Canada*, the facts are not fully stated in the opinion, but enough appears to mark quite a distinction between that case and the one at bar. However, if that case goes to the extent claimed for it by appellant, it is not in harmony with the weight of authority as interpreted by us. It is a sound and salutary principle, sustained by ample authority, that the doctrine of estoppel as to real estate is not readily applied to prior sworn pleadings or testimony of a party, in the absence of a showing by the record that the party seeking to invoke the same has thereby been led to change his conduct, or been damaged, injured, or substantially prejudiced, or placed in such a position that he could not maintain or defend his property rights as successfully as he could have done had no such pleadings or testimony been made or given. In such cases opportunity is given for one to make a full explanation thereof when he is sought to be estopped thereby. The rule seems to be supported to some extent by *Fisher v. Denver National Bank*, 22 Colo. 373, 45 Pac. 440. We extract the following from that opinion, viz.: "A careful examination of all these cases (unless it be the cases from Tennessee) satisfies us that they are not authority for the ruling of the trial court. Fisher did not succeed in his former suit; nor was the plaintiff in this action a party to it, or injured by it. Had Fisher been successful, or obtained some advantage, the rule contended for would apply; but where, as in this case, he was unsuccessful, and the plaintiff here was not a party there, or injured thereby, and the suit was never prosecuted to a termination, but dismissed, while it was proper in the case at bar to receive in evidence these former pleadings as affecting the credibility of the defendant Fisher, such former declarations would not constitute an estoppel against him, and he should have been permitted, if he could, to explain to the jury the circumstances under which he made the former inconsistent statements. *Hyman v. Wheeler* [C. C.] 29 Fed. 347; *McLemore v. Nuckolls*, 37 Ala. 662; *Beatty v. Randall*, 5 Allen [Mass.] 441; *McQueen's Appeal* [104 Pa. 595, 49 Am. Rep. 592]."

In *Hyman v. Wheeler*, supra, an action in ejectment to recover mining property, Wheeler, one of the defendants, was shown to have been plaintiff in a prior suit against Markell

and others, in which certain admissions were made by Wheeler in the complaint and affidavits which tended to show that he asserted the existence of a certain vein in the Spar lode mining claim; but in the main case he assumed a contrary position to that stated in the complaint and affidavits. In the main case it was sought to estop Wheeler by reason of this variance. Judge Hallett had under consideration a question similar to the one before us, and in his instruction to the jury spoke as follows: "But, grouping them all together, they amount simply to the admission by J. B. Wheeler himself of the existence of a vein in the parts of the territory mentioned in the bill of complaint and affidavits; and this admission is not at all conclusive of the proposition contained in the bill of complaint and affidavits." In *Beatty v. Randall*, supra, the following language is found: "It was correctly ruled at the trial that the plaintiff was not estopped by his allegations in his bill in equity, which he formerly brought against the defendant. At the most they were evidence against the plaintiff, to be considered by the jury." In *McQueen's Appeal*, supra, the court says: "The verdict is not evidence that he committed perjury; it evidences that McQueen lost nothing by reason of the alleged payment. McQueen was not precluded from recovery in that suit by reason of the allegation of payment; had he been, the plaintiff would be estopped from now setting up that matter as a collateral." From Cyc. vol. 16, p. 1050, we extract the following: "Admissions in other judicial proceedings, for example, in an affidavit, or in a pleading, even in a sworn pleading, or in his testimony, or a plea of guilty in a criminal case, are not conclusive upon the party, but may be explained or contradicted in the same manner as purely extrajudicial admissions"—citing many authorities. We quote the following from *Sharp v. Swayne*, 1 Pennewill (Del.) 210, 40 Atl. 113: "This is a statement, made in an affidavit filed in a mechanic's lien case, where the action has been stayed, and no judicial determination whatever had. \* \* \* The court therefore instructs you that the doctrine of estoppel is not applicable to the facts in this case. We do, however, instruct you that any and all statements and admissions made by the defendant elsewhere, contrary to his evidence given upon the witness stand in this case, go to his credibility, and are so to be considered by you in making up your verdict." In *Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484, discussing the doctrine of estoppel, the court said: "In the case before us, nothing was actually decided in the former suit, that being dismissed by plaintiff upon his own admission of inability to prosecute it to a successful termination; and it follows from the authorities we have cited that the answer in the bankruptcy proceedings, even if shown

to be her answer, could not be held conclusive against her." In *Solomon Railroad Co. v. Jones*, 30 Kan. 601, 2 Pac. 657, part of the syllabus reads as follows: "A verified petition filed in one case by a party is competent evidence against such party on the trial of another case, as a statement or admission, but is not conclusive, and carries nothing of estoppel." In *Phoenix Insurance Co. v. Gray*, 113 Ga. 424, 38 S. E. 992, the syllabus contains the following: "A party to a suit, who testifies on his own behalf on a former trial, and who on a subsequent trial of the same case is offered as a witness, becomes in such subsequent trial an original witness, and is not 'estopped' from testifying contrary to his evidence as reported on the former trial."

From the authorities cited the law seems to be that, as to admissions or statements made in pleadings, or on the witness stand in a former suit, the same are not conclusive in a subsequent suit against the one making them, but may be explained by him; and, further, that they do not work an estoppel in the subsequent suit, unless it appears that the party invoking estoppel was influenced by such admissions or statements to change his position, assume a different line of conduct, or otherwise adopt, to his detriment or damage, a different course of action, concerning the subject-matter, than he would have adopted had no such admissions or statements been made.

In order to ascertain how far the rule is applicable in this case, let us consider defendant's situation as disclosed by the evidence. Defendant doubtless had the right to rely upon the decree of 1883 and the record behind it; and it appearing therefrom that at the time the decree was rendered Blore had the first priority in, and the right to use the water through, Blore No. 2 ditch it was justified in loaning the money to Blore and taking the security upon the faith of that record. The decree was conclusive against abandonment on the part of defendant at that time; but as to whether or not defendant or its grantors had wholly lost or abandoned the right to use the water subsequent to the rendering of the decree the doctrine of caveat emptor applies. The decree in the instant case found that no abandonment took place prior to the decree of 1883, and that at that time Blore was the owner of, and entitled to the water decreed to, Blore No. 2 ditch; so any evidence admitted concerning abandonment prior to the decree of 1883, if error at all, was harmless.

It is claimed that in the general adjudication of water rights culminating in the 1883 decree plaintiff testified that Blore had continuously applied the water appropriated by means of the Blore No. 2 ditch to a beneficial use, and that he should not now be permitted to change his position, and either testify to or base his claim upon an abandonment or nonuser of said water prior to the

time of said decree. We are of the opinion that in this respect the estoppel should apply. But, conceding this, if the evidence of nonuser prior to the decree was inadmissible, nevertheless there was testimony of nonuser for 20 years or more after the decree sufficient to justify the court's conclusion, without reference to the evidence of nonuser prior to the decree, and it will be presumed that the court eliminated that testimony from consideration.

[10] We have hereinbefore held that the conveyances under which appellee claimed to be the owner were admissible in evidence, although made prior to the 1883 decree, and in addition to the reasons there given we may further state that the admission was not prejudicial for two reasons: (1) It would not be an estoppel, because the question of ownership was not there in issue, could not be determined, and was immaterial. (2) Upon the issue of plaintiff's ownership of Blore No. 2 ditch, prior to the 1883 decree, or at any other time, the trial court held against him; therefore appellant could not have been prejudiced.

As to the estoppel claimed by reason of the injunction suit in 1893, we think the contention cannot be sustained for the reason that in that pleading plaintiff asserted his priority of right as against Blore, although asserting the priorities of both himself and Blore as against any other appropriations; that his position in that case is not so inconsistent with his position in this as to operate to estop him; and besides the cause was never determined, and the injunction might have been sustained upon Culver's claim in the Culver and Mahoney ditch alone, without reference to the rights of Blore.

The briefs extensively discuss the proposition as to whether or not the warranty deeds from Shirley and Blore conveyed to grantees any water rights or ditches. The court found that the deed from Blore to Culver and Mahoney did not convey such water rights, which finding was in favor of defendant. Neither the abstract of record nor transcript thereof contain any assignments of cross-error by appellee; hence it will be unnecessary for this court to pass upon that issue.

In view of the conclusions reached, the judgment will be affirmed.

Judgment affirmed.

# DENVER CITY TRAMWAY CO. v. GAWLEY.

(Court of Appeals of Colorado. Dec. 16, 1912.)

## 1. PLEADING (§ 387\*) — ISSUES, PROOF, AND VARIANCE.

The proof must correspond with, and be restricted to, the allegations in the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.\*]

## 2. DAMAGES (§ 158\*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

A complaint in an action for injuries to a street car passenger in a collision, which alleges that plaintiff was violently thrown from her seat and was bruised, mangled, and wounded by the car, whereby a finger on her right hand was cut, her left arm bruised, and whereby she received a severe blow and bruise on the back of her head and wounds and bruises on her back, left hip, and mouth, etc., and that by reason thereof she was permanently injured in her back, spine, hip, and nervous system, justifies the admission of testimony of permanent injury to her spine and back and nervous system, due to the specific injuries alleged, and justifies the admission of the testimony of her physician as to the condition of her back and spine at the time of the trial, 13 months after the accident, and as to the permanency of the injuries to her spine, back, and nervous system, when confined by the instructions to the allegations of the complaint.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

## 3. EVIDENCE (§ 558\*)—OPINION EVIDENCE—TESTIMONY OF PHYSICIANS—CROSS-EXAMINATION.

Where a physician, testifying as an expert, stated that he had not read a medical work and was not familiar with it, the medical work could not be used on his cross-examination to contradict him, the general rule only going to the extent that a physician, who bases his opinion on medical works, may be cross-examined thereon to show his error and contradict his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.\*]

## 4. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a physician testified as an expert to opinions of his own in accord with those found in a medical book, and his testimony indicated conclusively that he agreed with the statements made therein, the exclusion of questions on cross-examination as to whether he agreed with statements in the medical book was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

## 5. EVIDENCE (§ 558\*)—EXPERT TESTIMONY—CROSS-EXAMINATION.

Where a physician confined his testimony to his experience, cross-examination as to whether he agreed with writings of a medical author was improper unless he first testified that he had read the author and regarded his work as of sufficient merit on which to base his opinion; the general rule being that medical authors may not be used to contradict an expert generally.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.\*]

## 6. APPEAL AND ERROR (§ 1058\*)—EXPERT TESTIMONY—MEDICAL BOOKS—HARMLESS ERROR.

Where the physicians for both parties in a personal injury action testified to all of the information contained in the pages of a medical book offered in evidence, the exclusion of the pages was not erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

## 7. EVIDENCE (§ 363\*)—EXPERT TESTIMONY—MEDICAL WORKS—ADMISSIBILITY.

Medical works are not admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1516-1519; Dec. Dig. § 363.\*]

**8. DAMAGES (§ 208\*)—EXTENT OF INJURIES—QUESTION FOR JURY.**

Evidence of a blow on the back of the head which was sufficiently severe to break the bridge of plaintiff's false teeth and knock them out of her mouth, and also of severe wounds and bruises on the back and left hip, *held* sufficient to carry to the jury the question of damages for permanent injury to the back, spine, and left hip.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 205, 220, 533, 534; Dec. Dig. § 208.\*]

**9. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.**

Where, in an action for personal injuries, the court charged that the jury should not allow any compensation for plaintiff's nervous condition brought about by reason of the contemplation of the litigation or of any matters other than those connected with the physical injuries sustained, the refusal to charge that the jury could not award damages on account of any nervous disorder induced by reason of dwelling on the claim and on the probable result of the action or by any cause other than the injuries sustained was not erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**10. DAMAGES (§ 215\*)—ASSESSMENT OF DAMAGES—INSTRUCTIONS.**

Where the verdict indicated that the jury did not assess exemplary damages, an instruction directing the jury to consider all the facts in evidence in awarding damages was not objectionable as permitting exemplary damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 543-547; Dec. Dig. § 215.\*]

Appeal from District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by Sarah A. Gawley against the Denver City Tramway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gerald Hughes, Howard S. Robertson, and Frederick P. Smith, all of Denver, for appellant. George F. Dunklee and O. E. Jackson, both of Denver, for appellee.

**MORGAN, J.** Mrs. Gawley was injured in a collision while a passenger on one of appellant's street cars in Denver, in August, 1908, and, in an action for personal injuries, obtained a judgment in the district court against the appellant for \$1,000 October 7, 1909. In this appeal from the judgment, appellant contends that the lower court erred in the admission and in the exclusion of evidence, and in the giving and in the refusal of instructions. Appellant's negligence is conceded, and the assignments of error are extremely technical.

[1, 2] Appellant argues that, as the plaintiff alleged injuries to only certain parts of the body, no recovery could be had for injuries to any other part, unless it were shown that such latter injuries were due to the former. The complaint states: "That, by reason of said collision, said car in which the plaintiff was a passenger was badly wrecked and damaged, and the plaintiff,

without any fault or negligence on her part, and while in the exercise of due care and caution, was by the said negligence of the defendant violently thrown from her seat and was then and there bruised, mangled, and wounded by the framework of the seat and other parts of said car, whereby her first finger on her right hand was severely cut and wounded, her left arm was wounded and bruised from the shoulder to the wrist, she received a severe blow and bruise upon the back of her head, and severe wounds and bruises on her back, left hip, outside of the right ankle, and outside of the right knee, and her mouth and left eye were cut and bruised, and by reason whereof she was permanently injured in her back, spine, left hip, and her nervous system, in a way and manner which she is unable to more definitely state, and by reason of said injuries she has ever since been unable to carry on her household duties, and has suffered great pain and mental anguish. That all of said losses and injuries have resulted from the aforesaid wrongful acts on the part of the defendant."

The appellant says that, under the foregoing allegations, it was error to permit a physician to testify, on plaintiff's behalf, that the condition of her spine and back, at the time of the trial, was the result of the injuries received in the collision; that he believed the injuries were permanent, because such proof did not correspond with the allegations of the complaint; that such evidence should have been confined to the specific injuries enumerated therein; that any evidence as to the injury to the spine and back was inadmissible unless it was shown that the same were due to some one or all of the specific injuries alleged; that no testimony as to any permanent injury to the spine and back, left hip, or nervous system should have been admitted, because there was no testimony that such injuries were caused by the specific injuries set out in the complaint. The contention is that such evidence was outside of the complaint and was a "broadening of the issues," and that plaintiff should have been restricted to the injuries alleged. There is no rule of law more firmly settled than that which requires the proof to correspond with, and be confined and restricted to, the allegations in the pleadings, but that rule was not violated in the pending case, but was substantially followed. The principal contention is that the testimony concerning the permanent injury to the spine and back and nervous system should have been excluded, because it was not shown by the testimony that the latter permanent injuries were the direct result of the specific injuries alleged to have been received on the arm, leg, back, left hip, mouth, and back of the head. The testimony, however, discloses many facts tending to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



prove that such permanent injuries were due to the specific injuries alleged. Plaintiff testified to all the specific injuries, and in her testimony stated that the bones at the back of her head were hurt; that she was badly bruised in the back; that the plate in which she had a few artificial teeth was broken by the blow on the back of her head, thereby causing her mouth to be filled with blood; that she could not sleep for two or three months on account of the pain in her head; that the physician treated her head for two or three months; that she was not able to do any work except light work until the latter part of January, 1909; that she suffered from injuries to her head, back, and left side; that her hip continued to burn at times, especially on damp days; that she never slept much, lost her appetite, had no ambition to do anything; that sound almost made her cry; that she could not stand any noise or excitement of any kind, and never had any nervous prostration before that time. Her daughter also testified as to her nervousness. Her physician testified to all the injuries, and in his testimony stated that the posterior part of the pelvic frame was considerably bruised; that there were contusions on the lower part of the spinal column, the lumbar, and sacral parts; that she had complained of injury in that locality more or less up to the time of the trial; that when she got up out of bed in January, 1909, she was suffering from neurasthenia; and that such trouble may be caused by such injuries. He stated that there were no injuries from which she would not recover, except the injury to the spinal column, which he said might continue to give her more or less trouble, and added "the nervous system, of course." He stated that he expected no improvement in the nervous condition at all, and that the injury to the nervous system would probably continue. Another physician testified, on behalf of defendant, that the plaintiff was suffering at the time he examined her, 18 months after the accident, with a nervous condition, a mild type of neurasthenia.

In the admission and exclusion of testimony, and also in the instructions, the court considered all the contentions of counsel for defendant, and restricted the testimony and the instructions in such a way as to substantially confine the issues to the allegations of the complaint. The testimony of the plaintiff's physician as to the condition of the back and the spine at the time of the trial was fairly within the allegations of the complaint, and his testimony as to the permanency of the injuries to the spine, back, and nervous system was sufficient to show that such permanent injury was due to some one or more of the specific injuries alleged; hence there was no error committed by the court in the admission of the testimony complained of. There are a number of cases in which

the courts have held that the evidence introduced constituted a material departure from the allegations of the complaint and did not correspond therewith, but we have not found any case that goes so far in such direction as counsel contend for here. In the case of *D. & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582, relied upon by appellant, the acts of negligence alleged were that no warning was given of the approach of the train, and that its speed was greater than a certain ordinance permitted, while the testimony admitted was that the engineer did not see the injured person and did not keep a lookout in front of his engine. It is clear to the legal mind that the evidence of negligence proved did not correspond with the acts of negligence alleged, but even in that case the court held that the variance between the pleadings and the proof did not require a reversal, on account of the fact, however, that the case was tried regardless of the defect. Counsel in the pending case have raised sufficient objections at the trial, and saved their exceptions, and if there were any substantial variance between the pleadings and proof, or any material departure in the proof from the allegations in the complaint, this court would be justified in reversing the case; but, as heretofore stated, there was no such variance or departure. In a later case (*Denver Tramway Co. v. Cowan*, 51 Colo. 64, 76, 116 Pac. 136, 140) our Supreme Court had under consideration a similar question, wherein the plaintiff was permitted to testify that the sartorius muscle was sore from the effects of the injury, and a physician was permitted to testify that pleurisy developed as a result of the injuries occasioned by the accident; and it was argued that the evidence was not admissible under the pleadings, and under a certain bill of particulars, as the complaint only alleged that "the neck of the right femur of the plaintiff was broken and the flesh, muscles, and tissues surrounding the same were very greatly injured, lacerated, and torn, and the body of this plaintiff was severely bruised, beaten, and wounded," and the bill of particulars only described certain "bones broken and wrenched, muscles and tissues lacerated and torn," but did not designate the sartorius muscle, and did not mention nor include pleurisy; but the court held that a general allegation of injury or sickness, as an element of injury resulting from an accident, was sufficient to let in proof of the character under consideration. And in the case of *D. & R. G. R. Co. v. Mitchell*, 42 Colo. 43, 48, 94 Pac. 289, 291, our Supreme Court had under consideration an instance wherein the court permitted the plaintiff to testify as to injuries to her lungs, while no such injury was averred in the complaint, and used the following language: "While it is true that some injuries were said to be to other parts and organs of her body, there was a general allegation that she received great personal injuries,

without specifying their location. This evidence was not outside the issues tendered and joined in the case. Besides, the small verdict rendered was not an excessive one for the injuries which the plaintiff undoubtedly sustained as the result of the collision."

[3] 2. Plaintiff's physician was asked on cross-examination if he agreed with the statements made by a certain author in his work entitled "Bailey on Diseases of the Nervous System Resulting from Accident and Injury," on page 433, and the court sustained the objection made to this question. This was not error, because the witness had already stated that he had not read the work, was not familiar with it, and hence could not have based any of his testimony upon it, and therefore it could not be used to contradict him. The general rule only goes to the extent that a physician who bases his opinion upon certain medical works may be cross-examined thereupon for the purpose of showing his error and in contradicting his testimony. 2 Enc. of Ev. 588-593, citing *State v. Wood*, 53 N. H. 484; *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198, and other authorities.

[4] Furthermore, the witness testified in his examination to opinions of his own that are in accord with those found on said page 433, and his testimony indicates very conclusively that he agreed with the statements made by the author; hence the exclusion of the testimony was in no way prejudicial to the defendant. An extreme rule in such case is sometimes stated that, where a witness bases his opinion on medical writings generally, any reputable work may be read, and he may be asked if he agrees with the statements contained therein, and he may be cross-examined thereupon to contradict his testimony. This is contrary to the general rule, but is upheld by very good authority. 2 Enc. of Ev. 592, citing *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355, and other authorities. The general rule that medical authorities may not be used to contradict an expert generally is upheld by a long list of authorities cited in 2 Enc. of Ev. 592, among which is the case of *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55, also *Davis v. State*, 38 Md. 15, and *Knoll v. State*, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704, and other cases.

[5] The physician in the pending case, however, did not base any of his opinions upon medical works, but seems to have confined his testimony to his experience, and for this reason, in particular, it was not proper to cross-examine him by asking him if he agreed with the writings of any medical author, unless he had first testified that he had read such author and regarded his works as of sufficient merit upon which to base his opinion.

[6, 7] 3. A physician on behalf of the defendant, after stating that the medical work aforesaid was written by a recognized and

well-known authority, was asked to read certain pages therefrom and state what the author was dwelling upon and discussing there. This was refused, and the defendant then offered three pages of the book in evidence, with the request that the same be read to the jury. This was refused, and error was assigned thereupon. The ruling of the court complained of was not erroneous, first, because both the physicians for and against appellant testified to all of the information contained in the pages offered that was material to the issues. These pages were read into the record and have been carefully examined, and all that is contained therein of any material benefit to appellant is the opinion of the author that litigation is one of the worst things to which a patient with traumatic neurasthenia can be exposed. Both the physicians testified to the same thing. Second, it is doubtful if many of the statements of the author are directly applicable to the case and within the issues, as it does not appear that the author confined himself wholly to traumatic neurasthenia, but took up hysteria, distinguishing it from neurasthenia, and stating that litigation had a worse influence on the former nervous condition, and also based his opinions upon circumstances not altogether within the testimony in the pending case. Third, medical works, by the great weight of authority, are not admissible, in such instances as this, as independent proof of the opinions therein expressed. This has not been passed upon in this state, but the authorities against the admission of medical books, in such instances, are numerous, and while the reasons given are not altogether satisfactory, nor wholly unanswerable and conclusive, yet they have survived the lapse of time, and neither the encroachments thereupon nor the criticisms thereof have lessened their value. In 2 Enc. of Ev. many authorities are cited against the admission of such evidence, including *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *U. P. Ry. Co. v. Yates*, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553; *Ashworth v. Kittridge*, 12 Cush. (66 Mass.) 193, 59 Am. Dec. 178; *Bixby v. Omaha & C. B. R. & B. Co.*, 105 Iowa, 293, 75 N. W. 182, 43 L. R. A. 533, 67 Am. St. Rep. 299; *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

In the case of *U. P. R. Co. v. Yates*, supra, Thayer, Circuit Judge, delivered the opinion, and cites a considerable number of authorities in support of his view upholding the general doctrine that medical books are not admissible in evidence in cases of this kind. He says: "One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps more important, reason for rejecting such testimony is that the science of medicine is not

an exact science." And a fourth reason might be added that, without the introduction of the entire work, the exact views of the author and his reasons for the same cannot be definitely ascertained from mere extracts, and if one book be admitted, or any extracts therefrom, another should be admitted on the other side, and there would be no end to the record that would follow in such cases. Furthermore, considering the technical terms that are frequently used by medical authors, which often conceal rather than disclose the meaning, the ordinary juror would not be very much enlightened by the introduction of such testimony. *People v. Hall*, supra. Even in states where there is a statute providing that historical works and books of science or art are presumptive evidence of facts of general notoriety or interest, the courts have refused the admission of medical books. *Bixby v. Omaha, etc., Co.*, supra; *U. P. Ry. Co. v. Yates*, supra.

In the case of *Gallagher v. Market Street Ry. Co.*, 67 Cal. 13, 15, 6 Pac. 869, 871 (51 Am. Rep. 680, note), the court had under consideration a statute of this character, which states: "Historical works, books of science, or established and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest," and the court held that "facts of general notoriety and interest" limited the intended extension of the rule of evidence so that medical works were not included within the terms of the statute. In the *Bixby Case*, supra, the same kind of a statute was under consideration, and, while there is no such statute in this state, the opinions of the courts in states that have such statutes excluding medical books are particularly in point, because they show a disposition of the courts to exclude medical books, even where it was the intention of the Legislature to extend the rule of evidence in such cases beyond that which existed at common law. In the *Bixby Case*, extracts from several works on medical subjects were offered in evidence and refused, and the court said: "While they might aid the educated physician to a better understanding of the matters discussed, we are satisfied their tendency was to mislead and confuse the jury. A person of ordinary comprehension could not understand much of the language used, and would be in great danger of being misled." The opinion quotes Chief Justice Shaw in *Ashworth v. Kittridge*, supra: "Medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author; whereas a

medical witness would not only give the fact of his opinion and the grounds on which it is offered, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience." Several other cases are taken up in the opinion and discussed, among which are *Bowman v. Woods*, 1 G. Greene (Iowa) 441; *Stoudenmeier v. Williamson*, 29 Ala. 558. The last two authorities are among those which hold that medical books may be introduced in evidence in certain cases, and it may be said that, outside of the states of Iowa and Alabama, there seem to be no well-considered cases upholding the admission of medical books in cases like this. The cases in Alabama seem to be direct and positive, but the Iowa cases admitting such testimony are distinguishable from those cases adopting the general rule. The case of *Birmingham Ry., L. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024, is another strong Alabama case holding that parts of standard medical books relating to the disease in controversy are competent evidence.

Appellant lays great stress upon an article by Prof. Wigmore in 28 Am. Law Review, p. 326. If, as appellant's quotation from Prof. Wigmore indicates, "scientists have none of the temptations in their writings to prevaricate and to conceal which surround the expert testifying for a particular purpose," the answer may be that if their writings be universally admitted, as the testimony of an expert now is, and it be true that experts do "prevaricate for a particular purpose," then, as a scientist is nothing more than an expert, he may be, once his writings are universally held to be admissible in evidence, surrounded with just as many and as great temptations, as Prof. Wigmore intimates that experts are now, to prevaricate and conceal. Scientific writers would become quite numerous, and their writings could be made to fit either side in certain litigations, and if surrounded with sufficient temptation, as intimated, they might become as plentiful as experts, and of equal variety, and, not being surrounded with the possibility of prosecution, and being ambitious for notoriety, they might greatly excel the modest expert of today in their capacity to "prevaricate" and in their ability to "conceal."

[8] 4. The court refused to give an instruction to the jury, requested by defendant, that they should not award any damages for permanent injuries to the back, spine, or left hip, because there was no evidence that tended to show that such injuries were brought about by any of the specific injuries alleged. There was no error in this, because there was evidence that tended to show that the former injuries were caused by the latter. A blow on the back of the head sufficient to break the bridge and knock the plaintiff's false teeth out and cause severe wounds and bruises on the back and left hip surely might result in permanent injury to the back, spine,

and left hip, and plaintiff and her physician testified that such was the result.

[8] The court refused another instruction taking from the jury any consideration of damages for or on account of any nervous disorder, either induced by reason of dwelling upon her claim against the defendant and upon the probable result of her suit, or brought about by any causes other than injuries sustained, but the court substantially withdrew any consideration of these things by its instruction No. 11, wherein the court instructed the jury that: "In determining the damages, if any, that the plaintiff is entitled to recover in this case, you are not permitted to allow any compensation for the plaintiff's nervous condition brought about or endured by reason of the contemplation of this litigation or by reason of any other matters other than those connected with, or brought about by, the physical injuries sustained."

[10] It is contended that it was error for the court to instruct the jury that they "should take into consideration all the facts and circumstances in evidence before them," because such instruction would permit them to assess exemplary and punitive damages. This is hardly worthy of conjecture. Furthermore, there is nothing to indicate that the jury did any such thing, as the verdict is too small to indicate or even to intimate it.

The judgment is affirmed.

Affirmed.

# HOUSTON et al. v. WALTON.

(Court of Appeals of Colorado. Dec. 16, 1912.)

## 1. MUNICIPAL CORPORATIONS (§ 605\*)—ORDINANCES—NUISANCES.

Under Rev. St. 1908, § 6525, par. 45, conferring upon cities and towns the power to declare what shall be a nuisance, and to abate the same and to impose fines upon the guilty parties, a municipal corporation may, by ordinance, declare an incorporated club which sells intoxicating liquor contrary to law to be a public nuisance, and its declaration and determination is conclusive.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1338; Dec. Dig. § 605.\*]

## 2. INTOXICATING LIQUORS (§ 258\*) — NUISANCES—ABATEMENT.

Though a municipal corporation had, under its statutory authority, declared an incorporated club which sold intoxicating liquor to be a nuisance to be abated as any other nuisance, its officials were not authorized to destroy the property of the club, the power of the municipality not warranting it in taking the law into its own hands, instead of proceeding by the ordinary writs and processes.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 397; Dec. Dig. § 258.\*]

## 3. INTOXICATING LIQUORS (§ 325\*) — PROPERTY.

Intoxicating liquor, even though in a district in which it could not lawfully be sold, is

property, and is not a nuisance per se which may be abated by its destruction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 466; Dec. Dig. § 325.\*]

## 4. INTOXICATING LIQUORS (§ 325\*) — MAINTENANCE—BASIS ON ILLEGAL ACTS.

While no cause of action against a defendant can arise out of plaintiff's wrong, the test whether it so arises is the plaintiff's ability to establish his case without any aid from the illegal transaction; consequently, an action for damages for the conversion and destruction of intoxicating liquors by a wrongdoer does not arise out of plaintiff's wrong, though the liquors were procured for illegal sale, nor, is plaintiff in *pari delicto* with defendant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 466; Dec. Dig. § 325.\*]

## 5. ASSIGNMENTS (§ 70\*)—VALIDITY—CONSIDERATION.

One who wrongfully destroyed property to which he was in no way entitled cannot challenge the owner's assignment of his cause of action on the ground of lack of consideration.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 129; Dec. Dig. § 70.\*]

## 6. APPEAL AND ERROR (§ 484\*)—SUPERSEDEAS—EFFECT.

Where an appeal, which operated as a supersedeas, was taken from a decree ordering the dissolution of a corporation, the corporation could act pending the appeal, and the affirmance of the order of dissolution would not retroact so as to make ineffective an assignment made during that time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264-2279; Dec. Dig. § 484.\*]

## 7. REPLEVIN (§ 46\*)—REPLEVIED PROPERTY—STATUS OF HOLDER.

Where the owner of intoxicating liquor which had been confiscated by the city retook it in replevin, the owner's rights were those of a bailee, who might be required to return the property to the city; and consequently, in case of destruction, the owner, as bailee, might recover its value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 177, 178; Dec. Dig. § 46.\*]

## 8. APPEAL AND ERROR (§ 1046\*)—REVIEW—HARMLESS ERROR.

In an action for damages for the destruction of property, where the defendants offered no excuse for the destruction and the court practically directed a verdict for plaintiff, remarks having a natural tendency to prejudice defendants with the jury were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.\*]

Cunningham and Morgan, JJ., dissenting.

Appeal from District Court, Fremont County; Charles Cavender, Judge.

Action by Joseph Walton against David J. Houston and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hardy Sayre, of San Diego, Cal., and A. L. Taylor and J. G. Schweigert, both of Canon City, for appellants. J. H. Maupin, of Canon City, and Charles D. Bradley, of Florence, for appellee.

KING, J. Appellee brought his action in trespass against the city of Canon City,

David J. Houston, and eight others, appellants herein, to recover damages for entering certain rooms in said city, and taking therefrom and destroying personal property consisting chiefly of intoxicating liquors, but including other drinks and cigars. Appellee sued as assignee of the Canon City Labor Club, a corporation, which he alleged was the occupant of the premises and the owner and in possession of the goods at the time of their destruction, and charged that the goods were destroyed by said Houston and others at the instigation and request of the defendant city made by and through its duly qualified and acting officials. The damage claimed was the alleged value of the goods.

The first defense was a general denial. For a second defense, it was alleged: That at and prior to the time of the destruction of said goods an ordinance of said city was in full force and effect prohibiting the sale of intoxicating liquors within the limits of the city, and making it unlawful to keep such liquors for the purpose of sale within any building in said city, and further providing that the sale, or keeping for the purpose of sale, of any of such liquors constituted a nuisance, to be abated as any other nuisance, and that it should be unlawful to use any means or device, as the organization of a club, incorporated or not, for the purpose of evading any of the provisions of the ordinance, violation of any of which provisions subjected the person offending to a penalty of fine and imprisonment. That after the adoption of said ordinance the Canon City Labor Club was organized with intent and purpose of carrying on a saloon under the guise of a social club for the purpose of evading the provisions of said ordinance. That the goods alleged to have been destroyed were purchased by plaintiff and said club, and kept for the purpose of sale upon the premises and within the building mentioned in the complaint and answer, and were by plaintiff and said club being sold by the drink over the bar as at any saloon, and that such was the principal business of plaintiff and said club. That the city council had investigated the conduct of plaintiff and the club, and determined that the organization and carrying on of said club by plaintiff and his associates constituted a public nuisance under the provisions of said ordinance, and thereupon adopted the following resolution: "Be it resolved by the city council of the city of Canon City, Colorado, that the so-called 'social clubs' known as the Canon Jockey Club and the Canon City Labor Club, and each of them, be and hereby are, declared by said council to be public nuisances, and that the city marshal be, and hereby is, directed to proceed immediately without any delay whatever, to abate entirely and put an end to said 'clubs' as such public nuisances, and to arrest and bring before the police magistrate of said city all

proprietors, officers, bartenders, clerks and employes of said 'clubs,' and confiscate and bring before the police magistrate of said city, all intoxicating, spirituous, malt, vinous, fermented and mixed liquors that are within the room or rooms, basement or basements and storage or warehouses of said 'clubs,' all of which liquors shall be disposed of as directed by said city council, and further, to take the names of all persons in said room or rooms or who are in or upon any of said premises at time of said arrests and confiscation." That the defendant Houston at all times mentioned in the complaint was the marshal of said city. That acting as such, and in the performance of his duties under said ordinance and resolution, he called to his aid his codefendants, entered the premises in which said alleged nuisance was being carried on, and did then and there abate the same, and arrest the plaintiff as the keeper of the premises and maintainer of the nuisance, and that all that was done by the defendants, or any of them, was done under said ordinance and resolution. A general demurrer to the second defense was sustained by the court, after which plaintiff voluntarily dismissed his cause of action as to the city. The cause was tried to a jury upon the issues joined by the complaint and the first defense, and submitted on an instruction by the court that, if the jury found for the plaintiff, it should assess his damage in the full amount alleged in the complaint as the value of the goods. The principal grounds upon which appellants attack the judgment are that the court erred in sustaining plaintiff's demurrer to the second defense, and in overruling defendants' motion for a new trial. Other minor objections are urged, but will require little consideration.

1. The sufficiency of the allegations of the special defense to constitute justification for defendants' acts is the most serious and important question involved in the case, not only to the litigants here, but as a matter of general interest and concern. Appellants contend that, because appellee's assignor was engaged in the unlawful selling of intoxicating liquors in violation of an ordinance of the city, that fact of itself made its place of business, and its business, a nuisance, which the city might lawfully and summarily abate by the destruction of such liquors, and that the ordinance pleaded in the second defense, supplemented by the action of the city council resulting in the resolution set forth herein, was sufficient to conclusively fix and determine the character of the place and the business of plaintiff and the club as a public nuisance, and authorize its abatement by destruction of the goods. But they further insist that, if the acts of appellants were illegal, still the business of plaintiff and his assignor was also illegal, and therefore the law will refuse them redress in civil damages—that, both plaintiff

and defendants being law breakers with respect to the matters in litigation, the law and the courts will leave them where they find them—and, further, that, inasmuch as the goods were not such as could be lawfully sold within the city, they had no market value, and therefore were not property for the destruction of which civil damages could be awarded. If the second defense is sufficient, it is because of one or more of the following reasons: (1) The goods and business and place of business of plaintiff's assignor were nuisances per se, or nuisances by virtue of the ordinance pleaded. (2) Defendants had the right, at common law, or because so authorized by ordinance and resolution, to abate the nuisance in the manner shown, to wit, by destroying the goods. (3) The action being for the value of the goods bought, kept, and used in violation of the ordinance of the city, the courts will not lend their aid for their recovery. (4) The parties were in pari delicto. (5) Sale of the goods being prohibited, they had no value in law, and were not property for which substantial damages could be awarded.

[1] The general statutes (paragraph 45 of section 6525) confer upon towns and cities the power "to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist." This grant of power does not, by its terms, provide for the abatement of nuisances, and is not self-executing for such purpose. It requires an ordinance to make it effective. *Ridgeway v. West et al.*, 60 Ind. 371; *City of Denver v. Mullen et al.*, 7 Colo. 345, 3 Pac. 693. The power of a municipality, under the foregoing statutes, to declare and abate an alleged nuisance, is discussed in *City of Denver v. Mullen et al.*, supra, in which the court said: "The proper construction of this language is that the city is clothed with authority to declare by general ordinance what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify, and enact what things or classes of things, and under what conditions and circumstances such specified things are to constitute and be deemed nuisances, \* \* \* not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination." The facts in the case cited differ from those in the case at bar, in this: that no ordinance was before the court defining nuisances; while in pleading the second defense in this case an ordinance is presented which declares the Canon City Labor Club and its business a nuisance, but provides no manner of abatement, except by the words "as any other nuisance." The cases are similar, however, in that the city in each case, without judicial determination, and by resolution, declared the particular

thing under consideration a nuisance, and ordered its summary abatement by destruction of the property. In this respect the court said: "It is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways, under circumstances presenting an emergency. Such clear cases of nuisances per se are well understood, and need not be further noticed here to distinguish them from the case before us." There have been no decisions by a court of last resort in this state as to the power of a municipality to declare that the selling of intoxicating liquors, or the keeping of the same for sale, or keeping a place in which they are sold in violation of the law or ordinance, if passed, will be conclusive upon that question. But the matter has been decided by the highest courts of other states, including the Supreme Court of Illinois, under a general statute conferring such power in language almost identical with that of our own statute, and such power has been upheld and sustained. *Goddard v. President & Trustees of Jacksonville*, 15 Ill. 588, 60 Am. Dec. 778; *Laugel v. City of Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; *City of Topeka v. Raynor*, 8 Kan. App. 279, 58 Pac. 509. In *Laugel v. City of Bushnell*, supra, decided in 1902, the court in sustaining such an ordinance classified nuisances as follows: (1) Those which in their nature are nuisances per se or are so denounced by the common law or by statute; (2) those which in their nature are not nuisances but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; (3) those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. And with reference thereto said: "The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances and abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances; but, as to those things falling within the second class, the power possessed is only to declare such of them to be nuisances as are in fact so."

And that case held that an ordinance which declared that any place in the city where hop ale, cider, and other like drinks were kept for sale, sold, or given away constitutes a nuisance was within the power of the city council, and that such determination was conclusive.

Under these authorities, the city of Canon City had the power to pass the ordinance set forth in the special defense, declaring such a place as that alleged to have been kept by the plaintiff in this case, and the

business and the goods so kept, a nuisance, and such declaration and determination was conclusive.

[2] The ordinance made no provision for summary abatement by destruction of the property, or otherwise, and it was not self-executing. The language of the ordinance to the effect that such nuisance should be abated as any other nuisance can only be held to mean as any other nuisance can lawfully be abated. Appellants contend that the statute conferring power upon municipalities to declare what shall be a nuisance and to abate the same, means that the city is not required to ask some court to make or aid the abatement, but has the same right to summarily abate the nuisance that a private person has to remove an obstruction on a highway which impedes his passage. That may be true as to nuisances which may at common law be so abated; but, in the absence of statute or ordinance so providing, it is not true as to other nuisances, nor where the existence of the nuisance depends upon proof that the law has been violated. That is not an open question in this state. Since this cause was tried in the court below, and under an ordinance similar to the one pleaded in the special defense herein (but containing a provision for abatement, permitting and requiring the city marshal and other police officers to abate a nuisance by closing up the place declared to be such and preventing any person from entering the same except for the lawful removal of such liquor), the defendant city attempted and threatened to carry out the summary abatement of an alleged nuisance such as is here under consideration, but was enjoined from so doing. On appeal to the Supreme Court such action of the trial court was sustained, the court holding that the violation of the ordinances, if any there was, consisted in dispensing liquors to members of the club, and that whether there was such violation could not be determined by the city officers. *Canon City v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272. The court said: "Persons, even though they be officials of a municipality, may not take the law into their own hands, however justifiable they may think such a course may be to prevent infringement of the law. \* \* \* A man's property cannot be seized, nor can he be punished, except for a violation of the law, and whether he has been guilty of such violation as justifies the seizure of his property, or the infliction of punishment, can only be determined by a court of competent jurisdiction where he is afforded an opportunity to be heard before judgment is pronounced against him"—citing *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Earp v. Lee*, 71 Ill. 193; *Baldwin v. Smith*, 82 Ill. 162. This case and the cases therein cited seem to be conclusive against the defendants of their right to abate the alleged nuisance at the time and in the manner set forth in their special defense.

Conceding the truth of all the allegations of the special defense, it does not appear that the acts of plaintiff and his assignor might not have been prevented and the business entirely stopped in due time by the usual and ordinary processes and writs available to the city or the citizens thereof. It must be presumed that the laws relative to the sale of intoxicating liquors can be effectively enforced if proper effort be made. The records and reports of the Supreme Court and of this court abundantly show the efficacy of the laws and of the courts to prevent and abate the acts and business unlawfully carried on by the plaintiff and his assignor in this case. He and his associates were repeatedly convicted, and their convictions sustained by the Supreme Court. *Lloyd et al. v. Canon City*, 46 Colo. 195, 103 Pac. 288. The *Canon City Labor Club* as a corporation was dissolved. *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

[3] It being conceded for the purpose of the demurrer that plaintiff and his assignor were carrying on the business of selling intoxicating liquors in defiance of law, counsel, in support of their contention that the civil courts will not aid plaintiff in securing damages for the destruction of such property, cite many and respectable authorities. *Oviatt v. Pond*, 29 Conn. 479; *Nichols v. Valentine*, 36 Me. 322; *Plummer v. Harbut et al.*, 5 Iowa, 306; *Sommer v. Cate*, 22 Iowa, 585; *Dolan v. Buzzell*, 41 Me. 473; *Walker v. Shook et al.*, 49 Iowa, 284; *Blunk v. Waugh*, 32 Okl. 616, 122 Pac. 722; *O. F. Haley Co. v. State (Okl.)* 125 Pac. 736, 738. Under these authorities and others, it is clear that a suit upon a contract for the price, or in quantum meruit for the value, of liquors may not be enforced where such liquors were sold in violation of the law. But no decision has been cited by appellants, nor have we found any, which holds either that such liquors have no value in law, or that the value thereof cannot be recovered when wrongfully destroyed or converted, except under a statute which provides in substance that no action shall be maintained for the recovery or possession of spirituous liquors, or the value thereof, except in cases where the person owning or possessing such liquors, with lawful intent, may have been illegally deprived of the same, or which provides that there shall be no property rights in such liquors. Such statutes were shown to be in force in *Oviatt v. Pond*, *Dolan v. Buzzell*, *Sommer v. Cate*, *Walker v. Shook*, and *Blunk v. Waugh*, supra. Under the several statutes referred to, it has been held, either upon the statutory inhibition against such action, or for the reason that the liquors were not to be regarded as property, that an action in trespass or trover for the value of such liquors cannot be maintained, and that even if unlawfully converted or destroyed nominal damages only can be recovered.

Under the laws of this state spirituous liquors are regarded as property, are taxed, may be lawfully purchased, possessed, and used for many purposes. In *Brown v. Perkins*, 12 Gray (78 Mass.) 89, and *Earp v. Lee*, and *Baldwin v. Smith*, the Illinois cases cited with approval by our Supreme Court in *Canon City v. Manning*, supra, it is held that, under laws similar to ours, intoxicating liquors are not per se a nuisance, are property, and that in a civil action, such as this for unlawful conversion or destruction, compensation in damages may be awarded, and that the measure of the damage is the value of the property destroyed.

[4] Appellants claim the benefit of the maxim that no man shall be allowed to found any claim upon his own iniquity—"Ex turpi causa non oritur actio"—that because the claim is for the value of liquors which were purchased, kept, and intended for an illegal purpose plaintiff cannot recover. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or from the transgression of a positive law of this country, there the court says he has no right to be assisted." Wharton's Legal Maxims, p. 81; *Martin v. Hodge*, 47 Ark. 378, 383, 1 S. W. 694, 696 (58 Am. Rep. 763). "The test to determine whether an action arises ex turpi causa is the plaintiff's ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends upon a transaction which is malum in se, or prohibited by law, and which he must prove in order to make out his case, he cannot recover." *Martin v. Hodge*, supra. The foregoing test, although decisive on demurrer to the sufficiency of the complaint, does not preclude an answer which pleads an illegal transaction as a bar to the suit, nor evidence in support thereof. The plaintiff herein, in order to state and prove his cause of action, was not required to state or prove, and did not state, anything except ownership and possession of the property at the time of the alleged trespass and its destruction by defendants; and this, as against a naked trespasser or wrongdoer, was sufficient.

[5] His claim or cause of action did not directly arise from, and was not based upon, his own illegal transaction, but upon the illegal acts of appellants, in which he did not participate. In *Hall v. Corcoran*, 107 Mass. 251, 253 (9 Am. Rep. 30), it is said: "The fact that the owner of property has acted or is acting unlawfully with regard to it is no bar to a suit by him against a wrongdoer, to whose wrongful act the plaintiff's own illegal conduct has not contributed. Thus an action lies against one who takes and appropriates to his own use property kept by the plaintiff in violation of a statute, and there-

fore liable to be destroyed." The mere fact, if fact it be, that the illegal acts of appellants were provoked by other illegal acts of plaintiff and his assignor, does not place the parties in pari delicto. The case of *Haley v. State* (Okla.) 125 Pac. 736, relied on by appellants, apparently takes a different view from that expressed in *Hall v. Corcoran*, supra, and in the tests mentioned. The apparent difference arises from its sweeping declaration that: "If the courts will not open their doors to enforce an illegal contract, they certainly will not to enforce a demand inseparably connected with a violation of the criminal laws." This declaration, however, is inseparably connected with the statute of Oklahoma which declares that there are no property rights whatever in liquor kept or used in violation of its laws. The overwhelming preponderance of authority supports the ruling of the trial judge upon the demurrer. Among the cases are the following: *Coppedge et al. v. Goetz, etc., Co.*, 67 Kan. 851, 73 Pac. 908; *State v. Stark*, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910, 88 Am. St. Rep. 251; *Carry Nation v. District of Columbia*, 34 App. D. C. 453, 26 L. R. A. (N. S.) 996; *Baldwin v. Smith*, 82 Ill. 162; *Earp v. Lee et al.*, 71 Ill. 193; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Booraem v. Crane*, 103 Mass. 522; *Monty v. Arneson*, 25 Iowa, 383; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Dolan v. Buzzell*, 41 Me. 473; *Ridgeway v. West et al.*, 60 Ind. 371; *Brown v. Perkins*, 78 Mass. (12 Gray) 89; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *City of Chicago v. Union Stockyards*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; *Fuller v. Bean*, 30 N. H. 181.

The evidence shows that the arrest of plaintiff by the defendants was effected by unnecessary force and violence amounting to assault and battery; and the destruction of the property, which, besides the intoxicating liquors, included much legitimate merchandise, was accompanied by acts which attracted such attention as to disturb the peace of an otherwise orderly community on a Sabbath morning. The final appeal of every citizen of this state for redress of grievances must be to the law. There is no grievance that is a fit object of redress by violence and riot. "In no case is the interposition of mob law either necessary, justifiable, or excusable." Safeguarding every citizen, without regard to occupation or station in life, is the constitutional guaranty that no person shall be deprived of life, liberty, or property, without due process of law. Punishment may be inflicted or property confiscated only through courts of competent jurisdiction and after due inquiry. If the law is not sufficient, the remedy is through legislation. The courts of last resort have steadfastly adhered to these elementary and fundamental principles of our constitutions and laws, and re-



fused to relieve individuals from pecuniary liability for damage caused by them in attempting to enforce the criminal laws while themselves violating the law. Upon these principles, as well as upon preponderance of authority, we hold that the matters alleged in the second defense constituted neither justification nor excuse for defendants' acts, nor a defense to the cause of action.

[6] 2. Defendants based their motion for a new trial chiefly upon the following matters: (a) The evidence does not show a legal assignment of the claim to plaintiff; (b) the evidence showed that part of the liquors alleged to have been destroyed were held by plaintiff's assignor under bond in replevin, and not absolutely, and that its claim thereunder could not be assigned; (c) improper language used by the court tending to prejudice the jury; (d) newly discovered evidence. The club, plaintiff's assignor, was in possession of the goods, and the defendants had no right thereto; and, as to them, whether with or without consideration, the club had the right to make the assignment. Moreover, an apparently good assignment was established by authority of an order of the board of directors, made at a meeting duly called and held.

[7] It was contended in argument that the corporation had been dissolved, and therefore could not make the assignment. That matter was not in evidence, but appears upon the records of this court (*Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120); but it also appears that, after the order of dissolution made by the district court, an appeal was taken which operated as a supersedeas. Therefore, pending the appeal, the corporation might lawfully act, and the final order of dissolution made by this court would not retroact so as to make ineffective an assignment good at the time it was made.

[8] It appeared upon cross-examination that part of the liquors, in value amounting to about one-half the damage asked, had been confiscated by the city, retaken by the club under its bond in replevin, and by it held in storage. The rights of the plaintiff's assignor in this respect were the same or similar to those of a bailee. Its contract of bailment was contained in the bond which required it to return the property to the city in case the city's right to the same should be adjudged. The club's possession was therefore lawful. Under the well-recognized law of bailments, the bailee can maintain an action for recovery of the goods, or, if destroyed, for their value; and, even though the city should eventually prevail in the replevin suit, the right of the bailee to have his property or its value to return to the city under bond cannot be denied, and the measure of damage, being the value of the goods, would not differ, although the bailee's right was not absolute.

The judge upon the trial made remarks that would have a natural tendency to prejudice the jury against the defendants. But we think they could not have affected the verdict, for the reason that the instruction of the court practically directed a verdict for the plaintiff upon testimony that was undisputed. The court fixed the damages at the value alleged in the complaint and supported by plaintiff's testimony, the only exception being that the jury were not bound by plaintiff's testimony if they believed it to be false. Defendants offered no evidence. The jury could not well find otherwise than for plaintiff in the absence of any testimony against him.

The showing made on the ground of newly discovered evidence is wholly insufficient. The defendant may have had the right to show the illegal purpose for which the liquors were kept for the purpose of affecting the value thereof. If they could not be lawfully sold, that fact might materially affect their market value, and evidence tending to show it would be both material and competent. But the defendants did not offer such testimony, perhaps upon the theory that the same was excluded by the court's ruling upon the demurrer to the special defense. If admissible at all, it was, we think, admissible under the general denial, as any other fact affecting values. But, by reason of their failure to offer such proof, its exclusion cannot avail the defendants.

No error appearing in the record, the judgment is affirmed.

CUNNINGHAM and MORGAN, JJ., dissent.

SCOTT, P. J. (specially concurring). It has occurred to me that the facts in this case should have been stated more fully in the opinion of the majority of the court, which so admirably states the law controlling the case, in order that the exact question decided may be relieved from possible uncertainty. The Canon City Labor Club was at the times mentioned a corporation organized under the laws of this state. It is charged in that part of defendants' answer to which the demurrer was sustained that this corporation was a club consisting of several hundred members, and organized and existing for the purpose of evading the liquor laws of the state and the ordinances of the city of Canon City in relation thereto, and that the only purpose of such club aside from its profit was to furnish the members a place to secure intoxicating liquors in violation of the law.

For the purposes of this case, these must be accepted as the facts, and, in addition thereto, this court had before it its own judgment rendered since the institution of this action, affirming the judgment of the district court, canceling the corporate charter

of this club for the very reasons assigned in the answer in this case. The second defense set up in the answer alleged a resolution of the city council, which, in substance, declared the said club to be a nuisance, and ordered the city marshal to abate the same by arresting the officers and agents of the club, by confiscating and bringing before the police magistrate all intoxicating liquors found on the premises of the club, together with the arrested officers and agents, there to be dealt with by the city council. But the acts of the defendants complained of in this case cannot be brought within the purview of this resolution.

What the defendants did, and in violation of this resolution, which commanded at least peaceful, if not lawful, methods, was to go to the place occupied by the club between the hours of 9 and 10 o'clock on a Sabbath morning, enter the building by means of a key, and at a time when no person was in the building or on the premises except the plaintiff, then manager of the club, and without warrant of authority, and with axes and by other means destroy the goods, the value of which is involved in this action. These goods, in addition to intoxicating liquors, included fixtures, glassware, cigars, and other property. A part of the liquors were at the time involved in a replevin suit between the club and the city. The conduct of the defendants, as appears from the undenied testimony of Walton, the plaintiff, was as follows: "Mr. Worrell, I think, spoke first. He says, 'Ah, ha, we've got you now, Joe.' I didn't make any remark. He says, 'I have a warrant for your arrest.' I says, 'All right, will you read it to me or let me see it;'" and Mr. Houston made an attempt I thought to let me see the paper and read it, and then Taylor spoke up and says, 'Beef him, kill him, damn him!' and I was struck from behind with a blunt instrument of some kind right in the ear, and fell forward to the floor, and in getting up I was knocked down again, and I was knocked while down, and, after I got up the second time, I was then approaching the front door. I was then struck from behind again and knocked down, and fell into the little hallway. Before going outside I got up again, and was then struck with an instrument on the cheek bone. The scar is there now, and I fell to the pavement, and that is all that I can remember. I fell senseless to the pavement." It is clear that the resolution of the city council did not order or suggest such conduct, and is therefore no defense. The mere fact that plaintiff had violated the law by the unlawful sale of intoxicating liquors was clearly not an excuse in law for such conduct or for the destruction of the property. The defendants upon the basis of their belief that the club had violated the liquor laws in the past, or might do so in the future, and without intimidation or suggestion that such had or would

be the case on the particular day, voluntarily left the privacy of their homes, assembled together, entered a closed and locked building, and there deliberately engaged in the trespass and destruction complained of. This constitutes willful trespass. I know of no case where private punishment for public wrong has been sanctioned by the law, or where public wrong has been held as an excuse for a willful private trespass. If the doctrine of the dissenting opinion in this case is to be approved, it must apply not only to those who violate the liquor laws, but all laws as well, and thus due process of law is a constitutional guaranty in name only.

The Supreme Court of this state has fully determined this question in the case of *Canon City v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272, and the rule there announced is sustained by an unbroken line of authority. The perpetuity of the government rests upon the principle therein stated, that neither municipalities nor persons may take the law into their own hands. Wrongs may be prevented and punishment inflicted only through courts of competent jurisdiction. That no person shall be deprived of life, liberty, or property without due process of law is a guaranty to the guilty and innocent alike. Popular government, if it is to continue, must be a government of law, and not of force. Individuals cannot prevent or punish one wrong by means of the commission of another, for such would be incipient anarchy. If the law is not sufficient, the remedy is with the Legislature. The law of this state has provided a means for the destruction of gambling paraphernalia, but even in such case it is to be accomplished in an orderly manner and upon the order of a court of competent jurisdiction. The courts can make no distinction as to property or persons as between law violators, else law and order must seek other habitations, and courts of justice and constitutional guarantees stand as a mockery. However deplorable the situation as presented in this and other cases from the same locality as regards the violation of the liquor laws, I still believe the law sufficient to provide both punishment and prevention, and I cannot lend my sanction to the unlawful acts of some of the citizens upon the theory that these are to prevent the unlawful acts of others. The final appeal of every American must be to the supremacy of the law. The principle involved in this case is different from that wherein recovery is sought for the value of goods in case of sale, where the sale of such goods is prohibited by law. There can be no question, however, but that these goods are property and have value, even though sale is prohibited by law.

CUNNINGHAM, J. Finding myself unable to concur in the conclusions reached by the majority of the court, I have reluctantly

determined that it is my duty to state the grounds upon which I base my dissent. There are several propositions of law covered by the majority opinion, but I shall limit my consideration to one, expressing no opinion as to all other matters discussed and settled by the majority opinion. The error committed by the trial court in sustaining the demurrer of plaintiff to the second defense set up in the answer ought in my judgment to reverse the case, and it is to this error I shall confine myself.

It will be observed by reading the second defense in the action, set out in full in the majority opinion, that it charges *inter alia* that at the time of the destruction of the liquors an ordinance of the city was in full force and effect prohibiting the sale, or keeping for sale, of liquors within the limits of the city; that the assigned club was organized with the intention and for the purpose of violating this ordinance; that the goods destroyed were purchased and kept by plaintiff and said club in furtherance of a common design or purpose to defy the law. By demurring, instead of denying, plaintiff admits these allegations of the defendant's answer are true. It is my firm conviction that defendant should have been given an opportunity to prove these serious, and, I think, material, allegations. And, if the defendant had succeeded in establishing the truth of these allegations, it would have become the duty of the court to dismiss the case. Proper self-respect requires, as it seems to me, that courts of justice should not sustain actions in regard to property which is admittedly bought and kept for the sole purpose of defying the law, whether that property be the implements of a burglar, the spurious coin of a counterfeiter, the grog of a bootlegger, or the paraphernalia of a gambler. It has been well said by a strong court, speaking through a distinguished jurist that: "One who sets himself deliberately at work to contravene the fundamental laws \* \* \* forfeits his own right to protection, in those respects, wherein he was studying to infringe the rights of others. \* \* \* So, too, if any member of the body politic, instead of putting his property to honest uses, converts it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his bona fide interest in such property before it was put to that use. And he can, I apprehend, sustain no action against any one who destroys his property with the bona fide intention of preventing injury to himself or others." *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68. It may be contended that a saloon is not "an engine to injure the life, liberty, health, morals, peace, or property of others," but, if such argument be advanced—that is, if it shall be contended that the saloon is not *per se* just such an institution, and calculated to injure the life, liberty, health, peace, and morals of any community

in which it may be operated—then I submit as my authority for holding a contrary view the following language from *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620: "By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dramshop where intoxicating liquors in small quantities to be drunk at the time are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source." The above language will be found quoted with approval in *Schwartz v. People*, 46 Colo. 249, 104 Pac. 96. I submit that under this authority, which has the sanction of our own Supreme Court, according to the allegations of the second defense of defendant's answer to which the trial court sustained a demurrer plaintiff and his assignee were maintaining and operating an institution that was not only *malum prohibitum*, but *malum in se*. In *Spalding v. Preston*, *supra*, the Supreme Court of Vermont further says: "If such plaintiff got out of court without getting into Newgate, \* \* \* he might esteem himself fortunate." Joseph Walton is to be congratulated, since he not only gets out of court without getting into Newgate, but he walks triumphantly out of the courts of Colorado with a judgment for the full value he places upon the grog which he bought and kept for the express purpose of defying the law, if the allegations of defendant's answer, to which the demurrer was sustained, were true. Doubtless Joseph will cherish for the balance of his days a profound regret that he did not ask for punitive damages in this case. It is a neat turning of the tables that makes of a chronic lawbreaker the instrumentality for law enforcement. When Satan receives a consideration for rebuking sin, the anomaly of his conduct disappears. Walton could not have recovered judgment against the city marshal had he sold his liquors to that officer on credit. This much is conceded by the majority opinion. If the officer violated the law in destroying the liquors, then he should answer to the law, rather than to a lawbreaker. It is a strange perversion of the doctrine of the atonement which permits the washing away of sin with sin, an unusual application, to say the least, of the maxim, "*Similia similibus curantur*."

The rule established by the majority opinion in this case, if the same be permitted to stand, violates the maxim of the law that no man should be allowed to found any claims upon his own iniquity. "*Nullus commodum capere potest de injuria sua propria*." "To enforce an obligation to virtue by refusing encouragement to wrong, the law leaves the parties to such transactions where it finds them, allowing no action or suit by either, even though defendant has acquired an ad-

vantage over plaintiff which he is thereby enabled to retain." 1 Cyc. 674. As was said in *Carrington v. Caller*, 2 Stew. (Ala.) 197: "If the defendant in such case be deprived of this answer to the action, unless he would restore to the plaintiff what he had received, the rule would be inefficient and the defense afforded by it valueless." In *Funk v. Galivan*, 49 Conn. 128, 44 Am. Rep. 210, it is said: "The law could not take any other position than that it will not lend its aid to either of the parties in an immoral or illegal transaction, but will leave them as it finds them; and, to be consistent with this principle, it is necessary to give to either party the right to plead or prove the true nature of the transaction in bar to an action founded upon it." I am aware that the facts involved in the Alabama and Connecticut cases are not parallel, but the doctrine laid down by these cases is applicable to the matter here under consideration. As has been well said by the Supreme Court of Connecticut in *Treat v. Jones*, 28 Conn. 335: "The object of the law is to repress vice, preserve the peace, and promote the general welfare of the state and of society, and no individual has any right to its assistance in enforcing a demand originating in a violation on his part of its principles or enactments."

The procedure of the city marshal, I freely concede, was unlawful, and, being such, I unreservedly condemn it. Public officers of all men must be held to a scrupulous observance of the law. But I entertain too high an opinion of our laws to believe that there is no method whereby the offending city marshal can be adequately punished without rewarding a malefactor whose lawlessness the city official was striving to curb. In addition to the Vermont case, from which I have already quoted, I cite the following cases from Oklahoma, which I believe sustain my position: *Blunk v. Waugh*, 32 Okl. 618, 122 Pac. 717; *Haley v. State*, 125 Pac. 736. It is true that Oklahoma has a statute which provides that there shall be no property right of any kind whatsoever in any liquors kept for the purpose of violating the law. In view of the position taken by the majority of this court in the instant case, it is to be hoped that our Legislature may, at its next session, enact a similar salutary statute. But a casual reading of Oklahoma cases cited must convince any one, I think, that the court did not rest its conclusion upon the statute alone, but upon the broad general principle announced in the *Blunk* Case, without reference to the statute, in this language: "If the courts will not open their doors to enforce an illegal or fraudulent contract, they certainly will not to enforce a demand inseparably connected with a violation of the criminal law." Adopting the language of an abler writer than myself, who had under consideration at the time these Oklahoma cases and their application to this case: "It is certainly refreshing to consider this clean declaration of a principle that is as

old as the law itself, and its application to the facts in that case, which are not substantially different from those in the case now under consideration. The declaration was upon the common law, and not upon the statute. I understand the common law to be the result and embodiment in the unwritten law of the centuries-long efforts of the courts to make practical application of the principles of the moral law to the affairs of men. And so the common law has become well adapted to enforce and apply these principles to the facts in the individual cases. I regard the statutes of the several states mentioned but declarations of the common law, or perhaps an extension by statute of the principles of the common law to cover such instances. And I believe the courts would not only have the right, but that it is their duty, to make such application of this principle or rule of law in the absence of statute when the facts in the case justify it. In view of the facts pleaded and not denied [in the second defense of the instant case] or admitted by the demurrer, I regard it as brazen effrontery on the part of the plaintiff in this case, and indeed an open insult to the law and the courts, to come into a court of justice charged with the administration and enforcement of law, and demand the exercise of its powers to collect for him the value of his outlawed goods employed in the prosecution of his outlawed business carried on in defiance and contempt of the laws whose protection he now craves, and that there is here presented a situation pre-eminently permitting and demanding the application of the rule." The authorities are legion holding void a contract which conflicts with the morals of the times and contravenes the established interests of society on the ground that such contracts are against public policy. This rule, which is but the adoption of the ancient maxim: "Potior est conditio defendentis"—better is the condition of the defendant than that of the plaintiff—is ably discussed in *Pueblo & Ark. Valley R. R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512. I apprehend that where a plaintiff is barred by this rule from recovering on a contract, or quasi contract, he will likewise be barred in an action sounding in tort, where the defendant pleads and proves that the property damaged by him was purchased and kept with the design and purpose on the part of plaintiff of violating the law, especially where the defendant is a public officer charged with the duty of enforcing the law and in the discharge of that duty exceeds his authority. Other cases supporting this rule are *Solinger v. Earle*, 82 N. Y. 393, wherein it is stated that Lord Mansfield, in *Smith v. Bromley*, 2 Doug. 696, concedes that: "When both parties are equally criminal against the general laws of public policy, the rule is potior est conditio defendentis." *Branham v. Stalling*, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213, where Justice Hayt, speaking for the court, follows the maxim, "In equal

guilt, the stronger is the situation of the defendant," or "Where misconduct is mutual, the law will not lend its aid to either party." Commenting on these maxims, Judge Hayt says (21 Colo. page 215, 40 Pac. 397, 52 Am. St. Rep. 213): "This rule was not adopted for the benefit of defendants, but simply upon the ground of public policy." *Norris v. Norris*, Adm'r, 9 Dana (Ky.) 317, 35 Am. Dec. 138, is cited with approval by Justice Hayt in the *Branham Case*, and the following language is quoted therefrom: "When the parties to an illegal or fraudulent contract are in pari delicto, neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory, or in revoking or rescinding that which may have been executed. In such a case the law will not be the instrument of its own subversion, and to every invocation of its assistance replies in pari delicto potior est conditio defendantis." In *Young v. Thomson*, 14 Colo. App. 294, at page 314, 59 Pac. 1030, at page 1037, Bissell, P. J., quotes with approval from Lord Mansfield the following: "No claim founded in bad faith in moral turpitude in deception upon the public or a third person, or in fraud practiced by one contracting party on the other, can constitute a good cause of action; and that, whenever such a claim makes its appearance in a court of justice, the law, ever watchful of the public morals and right, is sure to defeat the dishonest scheme, either by exerting its powers or withholding its aid." Commenting on the quotation, Judge Bissell says: "This is a strong, sound, terse, and satisfactory expression of the principle which is determinative of the plaintiff's rights. The claim is founded in bad faith." Certainly there can be no doubt that plaintiff's claim in this case is not only founded in bad faith, but in absolute violation of the law, assuming, of course, that the allegations in the second defense, to which the demurrer was sustained, state the truth.

2. It may be that the weight of authority, if the same be arrived at by counting cases, supports the view expressed by the majority opinion, but I am persuaded, were the matter *res nova*, I would be spared the embarrassing task of writing a minority or dissenting opinion in this case. It is said in the majority opinion that: "The overwhelming preponderance of authorities supports the ruling of the trial judge upon the demurrer." From this I assume that the writer of the opinion and the members of the court who concur in his conclusions have been influenced largely by the doctrine of *stare decisis*. I am the more persuaded that such is the case by the fact that nowhere in the very able and exhaustive majority opinion is there any attempt to defend the conclusions arrived at, save by the citation of authorities. It may, therefore, be not amiss to briefly consider the doctrine of *stare decisis*. It has been said by our own Supreme Court in

*Colorado Seminary v. Arapahoe Co.*, 30 Colo. 509, 71 Pac. 411: "This court has gone possibly as far as any appellate tribunal concerning the maxim *stare decisis*. The rule, however, is not inflexible, and the maxim should not be allowed to stand as an absolute bar in the way of a re-examination of legal questions previously decided by the same court, if improperly determined, and particularly where the decision reviewed has not passed into a settled rule of property. This is well illustrated in *Calhoun G. M. Co. v. Ajax G. M. Co.*, 27 Colo. 1 [59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17], wherein this court overruled one of its former decisions upon an important question of mining law announced fourteen years before and repeatedly reaffirmed." In the opinion in the *Calhoun Case*, *supra*, our Supreme Court said: "Courts are not bound to perpetuate errors merely on the ground that a previous erroneous decision has been rendered on a given question." This opinion is of particular interest, in view of the fact that it ignored the doctrine of *stare decisis*, notwithstanding the fact that by so doing the Supreme Court reviewed and reversed earlier decisions which affected real property, and which had passed into a settled rule of property. Lord Mansfield has said: "The law of England would be a strange science, indeed, if it were decided upon precedents only. Precedents only serve to illustrate principles, and to give them a fixed authority. But the law of England depends upon principles." And, again, the same authority uses this language: "General rules are wisely established for attaining justice with ease, certainty, and dispatch. But, the great end of them being to do justice, the courts are to see that it is really attained." Lord Bacon is authority for the statement that: "A forward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old things are but a scorn to the new." In *Ellison v. Georgia R. Co.*, 87 Ga. 696, 13 S. E. 810, Chief Justice Bleckley, who long graced the supreme bench of Georgia, referring to the doctrine of *stare decisis*, uses this language: "Minor errors, even if quite obvious, or important errors if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a Supreme Court, supreme in the majesty of duty, as well as the majesty of power is, not *stare decisis*, but *fiat justitia, ruat cælum*." On the same subject the Supreme Court of Indiana, in *Hines v. Driver*, 89 Ind. 342, observes: "When a court comes to the deliberate conclusion that it has made a mistake

upon some former occasion, it is generally better, looking to future permanency and repose, that it shall frankly acknowledge its mistake, and declare the true doctrine as it should have been at the time announced." In *Mason v. Nelson*, 148 N. C. 495, 62 S. E. 625, 18 L. R. A. (N. S.) 1229, 128 Am. St. Rep. 635, appears the following language: "The foundation of the rule of stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it." 26 Am. & Eng. Enc. of Law (2d Ed.) 184.

Feeling that my Associates have been too much influenced by the doctrine of stare decisis, I have devoted perhaps more space to a consideration of that subject than the facts and the situation which confronts us in this case warrant, for we are not in this case controlled by any opinion of either of the courts of review of this state, and we have, as I have already pointed out, respectable authority to support the views that I have hereinabove expressed. But no matter what the opinions of other states may be, or how their number may predominate against the views I have here stated, I would rather see this court establish correct principles, which satisfy its own notions of justice, than to have it trailing unwillingly after hoary precedents that do violence to every sense of justice and common sense. I do not intend that anything that I have said herein shall militate against the right of the plaintiff to recover for such property as may have been destroyed by the officer of the law, which the plaintiff had a right, under the ordinances, to keep and sell.

Feeling that the trial court committed grievous error in sustaining the plaintiff's demurrer to the defendant's second defense (and I am not considering any other matter whatever), I am profoundly convinced that the judgment of the lower court ought to be reversed.

**VICKREY et al. v. MAIER et al.**  
(L. A. 2,956.)

(Supreme Court of California. Dec. 23, 1912.  
Rehearing Denied Jan. 22, 1913.)

**1. CONTRACTS (§ 88\*)—CONSIDERATION—WRITTEN AGREEMENTS—PRESUMPTIONS.**

Under Civil Code, § 1614, providing that a written contract is presumptive evidence of consideration, it will be presumed that the consideration consisted of something of value not mentioned in the agreement itself, unless the terms thereof forbid such assumption.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 403-405, 407; Dec. Dig. § 88.\*]

**2. CONTRACTS (§ 59\*)—CONSIDERATION—MUTUAL PROMISES.**

An agreement by a subscriber to stock to give the defendants a preferred right to buy it was a sufficient consideration for an agreement of defendants to pay dividends on the stock and, at the subscriber's option, to buy the

stock at a stated price; the promise of one party being adequate consideration for the promise of another.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 348; Dec. Dig. § 59.\*]

**3. CORPORATIONS (§ 82\*)—SALE OF STOCK—LACHES—REMEDY OF PURCHASER.**

A contract of sale of corporate stock, that at any time after 6 months, on 90 days' notice, the seller would repurchase the stock at the price paid, but that the purchaser need not sell said stock at the price paid, contemplated that there would be some delay; and where proceedings were set in motion for a demand that the seller repurchase, before the statute of limitations had run, and the actual demand was made a few months thereafter, there was no such laches as would bar an action therefor.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

**4. LIMITATION OF ACTIONS (§ 66\*)—CONTRACT TO REPURCHASE STOCK—ACCRUAL OF RIGHT OF ACTION—DEMAND—NECESSITY.**

Under a contract of sale of corporate stock, that at any time after 6 months, on 90 days' notice, the seller would repurchase the stock at the price paid, but that the purchaser need not sell said stock at such price, the statute did not commence to run until a demand to purchase had been made; it being a contract to purchase personal property, and not a positive obligation to pay money.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 353-375; Dec. Dig. § 66.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by O. A. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Alton M. Cates and Stewart & Stewart, all of Los Angeles, for appellants. James P. Clark and Mott & Dillon, all of Los Angeles, for respondents.

SHAW, J. Appeal from the judgment on the judgment roll alone.

The complaint is in three counts upon three contracts of similar form. The first is dated November 14, 1905, and is for the sale of 10 shares of the Maier Packing Company, a corporation, at \$5,000. The second and third are dated, respectively, August 20 and November 10, 1906; the second being for 20 shares of said stock at \$10,000, and the third for 30 shares at \$15,000. A consideration of the first contract will be determinative of all questions presented, except that of the statute of limitations.

On November 14, 1905, plaintiffs subscribed for the 10 shares of stock, and paid \$5,000 to said company therefor; that being the par value. The shares were issued to them on February 20, 1906, and they have ever since held and owned the same. Upon the date they subscribed the plaintiffs and defendants executed a written agreement as follows: "This agreement made and entered into this 14th day of November, 1905, by and between Simon Maier and John T. Jones,

parties of the first part, and O. A. and B. L. Vickrey, party of the second part, witnesseth: That whereas said second party has subscribed for 10 shares of the capital stock of the Maier Packing Co., a corporation, the first parties are desirous of securing the first right to purchase said stock in the event second party may desire to sell the same: Now, therefore, said second party agrees that, before offering said stock for sale, he will first notify first parties and give them the first right to buy the same at the price offered by any bona fide intending purchaser. In consideration of which said first parties agree and obligate themselves to pay or cause to be paid to second party a dividend of six per cent. per annum on said stock, payable quarterly, and that at any time after six months from date hereof, on ninety days' notice, they will purchase said stock at the price paid therefor and six per cent. per annum from date of payment of last dividend, but the party of the second part shall not be obligated to sell said stock at the price paid therefor."

Dividends of 6 per cent. per annum were regularly paid by said company on said stock down to and including the quarterly dividend due on July 3, 1909. In each of the last two counts the date "July 3, 1909," is, by what is obviously a clerical error, written July 3, 1910. We attach no importance to this misprision and disregard it entirely. No other dividends have been paid on the stock. On March 4, 1910, the plaintiffs gave to the defendants the following notice: "Messrs. Simon Maier and John T. Jones—Gentlemen: In accordance with the provisions contained in three certain agreements between yourselves upon the one part and the undersigned upon the other, of date of November 14, 1905, August 20, 1906, and November 10, 1906, respectively, at which times the undersigned purchased from the Maier Packing Company, a corporation, ten (10), twenty (20), and thirty (30) shares of its capital stock, respectively, making a total purchase of sixty (60) shares of the capital stock of said Maier Packing Company for the sum of thirty thousand (\$30,000) dollars, we request and demand that you carry out the provisions of said agreements and each thereof by paying or causing to be paid to the undersigned all dividends now in arrears upon said stock at the rate of six (6) per cent. per annum, payable quarterly, and we further request and demand that you comply with the provisions of said agreements and each thereof by purchasing on or before ninety (90) days from date hereof said sixty (60) shares of stock and paying us therefor the price paid for the same, to wit, the sum of \$30,000, and in addition thereto all said sums now unpaid on account of dividends."

On September 12, 1910, plaintiffs tendered to defendants the said shares of stock, and demanded that the defendants should pay to plaintiffs the price paid by the plaintiffs

therefor, to wit, \$5,000, and the further sum of \$355.87 as interest on the \$5,000, from the date of payment of said last paid dividend to the date of the demand. The defendants refused and still refuse to perform said agreement of November 14, 1905, and have not paid said sums or any part thereof. The prayer of the complaint is for judgment for \$32,134.01, being the aggregate amount demanded upon the three contracts, including purchase price and dividends unpaid. The action was begun on the day of the tender and immediately thereafter.

The only defenses alleged in the answer are that there was no consideration for the agreements sued on, and that the action is barred by the provisions of section 337 of the Code of Civil Procedure, prescribing four years as the period of limitation. No evidence was offered in support of either of the defenses, and the plaintiffs offered no evidence to prove a consideration. Upon the foregoing facts the court below gave judgment for the defendants.

The complaint states facts sufficient to constitute a cause of action. The agreement bound the defendants to perform two things: First, to pay, or cause to be paid, quarterly, a dividend on the stock at the rate of 6 per cent. per annum; second, to repurchase the stock at the price which the plaintiffs had paid therefor, with interest from the date of the payment of the last dividend. No dividend has been paid for the year beginning July 3, 1909. The dividends for that year on the 10 shares of stock covered by the first contract amounted to \$300. The defendants had agreed to pay this sum to plaintiffs, and had failed to do so, although it was past due. It was a direct undertaking for the payment of money, and upon a breach thereof they were immediately liable. The plaintiffs were therefore at least entitled to recover the amounts of the quarterly dividends on all the stock due and remaining unpaid at the time the action was begun.

[1, 2] There is no merit in the claim that the agreement was without consideration. Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed, and, if necessary, we must assume that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. If the contract had not recited any consideration, the fact that it was in writing would therefore be sufficient evidence thereof. But the agreement, on its face, shows a consideration. It is a well-established rule of the law of contracts that a promise by one party may be a sufficient consideration for the promise of another; that where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, par-

ticularly where it is expressly so declared. *Gallagher v. Equitable, etc., Co.*, 141 Cal. 707, 75 Pac. 329; *Van Loben Sels v. Bunnell*, 120 Cal. 682, 53 Pac. 266; 1 *Parsons on Cont.* \*p. 449; 1 *Page on Cont.* § 296; 1 *Beach on Cont.* § 178. Here the plaintiffs agreed that if they chose to sell the stock they would give the defendants a preferred right to buy it over all other purchasers. The defendants deemed this a valuable thing, and in consideration therefor they agreed to pay dividends on the stock, and also to buy the stock at plaintiffs' option at any time after 6 months, on 90 days' notice, at a stated price. Under the authorities there was a sufficient consideration.

The remaining question is that of the statute of limitations, so far as the action proceeds for the recovery of the price agreed to be paid for the stock. The action was begun on September 12, 1910. With regard to the second and third contracts, dated, respectively, August 20, 1906, and November 10, 1906, it is clear that the four-year period of limitation had not expired at the time the action was begun. The third contract was made less than four years prior to the beginning of the action. The second contract was made more than four years before that date, but the six months therein specified as the earliest date at which the repurchase could be demanded did not expire until February 20, 1907. Under no circumstances could the cause of action upon this contract have accrued until the latter date, and it was less than four years before the action was begun.

[3] The claim that the first contract is barred is based on the theory that the demand for the repurchase was made after the statutory period had run. The general rule is that, where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made; and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable. *Thomas v. Pacific B. Co.*, 115 Cal. 142, 46 Pac. 899; *Williams v. Bergin*, 116 Cal. 60, 47 Pac. 877; *Meherin v. S. F. Produce Exch.*, 117 Cal. 217, 48 Pac. 1074; *Bills v. Silver K. M. Co.*, 106 Cal. 21, 39 Pac. 43, concurring opinion of *Beatty, C. J.*

It is argued that the 90 days' notice, under the terms of the contract, could have been given 90 days prior to the expiration of the first 6 months—that is, on February 13, 1906—so as to make performance demandable on May 14, 1906, and that to delay giving such notice until March 4, 1910, which was more than 4 years after it might have been given, brings the case within the rule above stated.

It is also suggested that, even if the 90 days' notice was not to be given prior to May 14, 1906, the plaintiffs, by giving it on that date, could have made the contract enforceable and a demand possible on August 12, 1906, and that giving the notice within the 4 years thereafter does not save them from the consequences of their laches, for the reason that they did not make any tender or demand until September 12, 1910, which was beyond the limit of 4 years from the time when they might lawfully have made it, if they had been prompt to assert their rights.

[4] It may be conceded, though we do not say it, that these arguments would be sound if the rule in question were applicable to cases of the character here presented. We do not think it applies to this case. The cases cited were all for the payment of money simply, and the money was positively owing, and would become due and payable upon a mere demand by the payee. We have found no case where the doctrine has been applied to a contract for the purchase and sale of property at a fixed price, at the option of the seller. Here there was no positive obligation to pay money. There was no obligation at all, unless the plaintiffs elected to sell the stock, and gave the notice, nor, even after such election and notice, until they had offered to deliver the stock in pursuance of the agreement. This case is in effect an action to enforce performance of a contract to buy personal property. We see no reason why it should be governed by a different rule from that which controls in the case of a sale of real property. The rule is thus stated: "Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time." 25 *Cyc.* 1210. This statement is supported by the authorities cited to the text. *Oaks v. Taylor*, 30 App. Div. 177, 51 N. Y. Supp. 775; *Deming v. Haney*, 23 Iowa, 77; *Hall v. Felton*, 105 Mass. 516; *Iron Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

Furthermore, the contract shows by its terms that performance at the expiration of the six months was not of its essence. The circumstances show that some delay was contemplated. The plaintiffs had the option, which they could exercise "at any time after" the six months. It was obviously expected that events occurring after the six months might determine their choice. That period was named to prevent them from demanding a repurchase earlier, not to fix a limit upon the time after its expiration within which they might make the election. Even in cases involving contracts for the payment of money, if the contract shows by its terms that the right to demand it is to endure for a con-



siderable period, and that an indefinite delay in making it is contemplated, the rule that a demand must be made within the statutory period of limitation, counting that period from the time when the demand can first be made, has never, so far as we are advised, been held to control and bar the action as a stale demand. 25 Cyc. 1209; Wood on Limitations, § 118; Jameson v. Jameson, 72 Mo. 640; Thrall v. Mead, 40 Vt. 540; Stanton v. Stanton, 37 Vt. 411. The decisions declaring the rule recognize the fact that it may not apply to such cases. Thus, in the leading case establishing the rule, Palmer v. Palmer, 36 Mich. 494, 24 Am. Rep. 605, the court, after stating the rule, say: "It may be otherwise where delay is contemplated by the express terms of the contract." To the same effect, see Bills v. Silver K. M. Co., supra. We are of the opinion that as the plaintiffs, within the four years, set in motion proceedings for a demand for performance, and made the actual demand within a few months thereafter, they have not been guilty of laches sufficient to bar their action.

The point is urged upon this appeal that the plaintiffs have not kept the tender good by averring a readiness to deliver the stock and bringing it into court for delivery when performance by the defendants is enforced by the court. There are many authorities holding that where the tender is of specific articles of property it need not be kept good in this way, but that in such cases the title to the property is presumed to pass, and the vendor holds it as bailee for the purchaser. 38 Cyc. 159. It has been held that payment into court is not necessary where such payment is conditional upon the execution of a deed by the payee, which is the condition in the case at bar. McDanel v. Kimbrell, 3 G. Greene (Iowa), 335. The chief reason for the exception relating to tender of specific articles is that the plaintiff cannot reasonably or conveniently bring bulky articles into court, or carry them about with him in readiness to make his tender good at any time it may be demanded. There are cases which reject the rule if the articles are bills or bonds, which are as easily carried about as money. We do not think it necessary to decide the question. The point does not seem to have been raised at the trial, where, if it had been mentioned, the plaintiff could readily have obviated the objection by producing the stock, or by submitting to a conditional judgment making the money payable only upon the deposit of the stock in court for the defendants' use. Upon a new trial the court may allow an amendment to the complaint on this point and require the production of the stock.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

**VICKREY v. MAIER et al.**  
(L. A. 2,955.)

(Supreme Court of California. Dec. 23, 1912.)

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. M. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Alton M. Cates, of Los Angeles, for appellants. Mott & Dillon and James P. Clark, both of Los Angeles, for respondents.

SHAW, J. The facts in this case are in all essential particulars the same in effect as in the second contract considered in the case of Vickrey v. Maier, 129 Pac. 273 (L. A. No. 2,956), this day decided. The parties to this appeal have stipulated that the decision of the appeal in that case shall control the decision here. Upon the reasons stated in the opinion in that case, it is obvious that the judgment of the court below in this case for the defendants was erroneous.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

**SOUTHERN PAC. R. CO. v. JACKSON OIL CO. et al.** (L. A. 2,827.)

(Supreme Court of California. Dec. 24, 1912.  
Rehearing Denied Jan. 22, 1913.)

**1. PUBLIC LANDS (§ 103\*)—RAILROAD GRANT—CONSTRUCTION—DETERMINATION OF INTERIOR DEPARTMENT.**

Under the rule that a patent to a railroad grant must be construed in accordance with the government survey in force at the time the patent is issued, the Interior Department having determined that a patent to a specified description of public land under a railroad grant covered the land in controversy, and such determination having been accepted by the parties and by the Secretary of the Interior on the theory that it was dependent on the supplement to an indemnity list filed by the railroad, and not on the original selection, such determination was conclusive on the courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 304, 306; Dec. Dig. § 103.\*]

**2. PUBLIC LANDS (§ 103\*)—CONTEST—SECRETARY OF INTERIOR—JURISDICTION.**

Where a contest with reference to public land is pending before the Secretary of the Interior, he has jurisdiction to review all rulings theretofore made, but, after a patent is issued and the government has formally declared that it conveyed the land in question, no further interference by the department is possible; the Secretary's jurisdiction being limited to a request of the Attorney General to institute proceedings to annul the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298, 299, 307; Dec. Dig. § 103.\*]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against the Jackson Oil Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Frank Thunen, of San Francisco (Wm. Singer, Jr., of San Francisco, of counsel), for appellant. C. L. Clafin, of Bakersfield, M. B. Harris and E. M. Harris, both of Fresno, and William P. Hubbard, of San Francisco, for respondents.

MELVIN, J. Plaintiff sued to recover possession and rent for the use of a certain tract of land in Kern county known as lot 4 of section 11 in township 30 S., range 21 E., Mt. Diablo base and meridian. Judgment was in favor of defendants, and plaintiff prosecutes this appeal therefrom.

Plaintiff bases its claim for title to and right of possession of said lot 4 upon a patent dated January 25, 1896, from the United States government to plaintiff for a tract of land designated as the N. E.  $\frac{1}{4}$  of section 11. The land in controversy is within the above-mentioned quarter section according to the official survey made by one Carpenter in 1893, but defendants contend, and the court evidently concluded, that the land conveyed by plaintiff's patent was the N. E.  $\frac{1}{4}$  of section 11 as designated by an earlier survey (also official) made by one Reed in 1869. Lot 4 is not included within the quarter section as shown by the Reed survey. Defendants claim the right to possession of the land under mining locations. Before this action was commenced, defendants had discovered and developed oil on the premises. If the Reed survey controls plaintiff's patent, lot 4 was not conveyed to that corporation. If the Carpenter survey is to be followed, then the land in question belonged to plaintiff, and was not subject to location for mining when defendants took possession thereof.

On February 17, 1892, the Southern Pacific Railroad Company applied, by list No. 48, to be permitted to select certain indemnity lands, including the N. E.  $\frac{1}{4}$  of section 11. At that time the Reed survey was the only official admeasurement of that section. Said survey had been approved April 27, 1869. On November 18, 1893, the Carpenter survey was approved. By it the former N. E.  $\frac{1}{4}$  of section 11 was preserved and marked on the Carpenter map as "S. P. R. R. Co., Lot 41." It was not attached to any section according to the Carpenter map, but subsequently to the issuance of plaintiff's patent, a section line was run through said lot 41, thereby placing a part of it in section 11, and the remainder in section 2. On June 24, 1902, plaintiff filed a supplemental indemnity list, No. 48, specifying the lot here in question. On January 14, 1896, indemnity selection list No. 48 was approved by the Interior Department. On January 25, 1896, patent No. 31 was issued from the government to plaintiff for the N. E.  $\frac{1}{4}$  of section 11. If that patent operates only as of the date of its issue, it includes lot 4 within the terms of its description. If it relates back to the date of the selection of the N. E.  $\frac{1}{4}$  of section 11, then its description covers not the quarter section in which lot 4 is lo-

cated, but that which is called on the Carpenter map "S. P. R. R. Co., Lot 41." The general rule is that such patents relate back to the date of selection of the land within the indemnity limits, with the approval of the Land Department. *Southern Pacific Co. v. Wood*, 124 Cal. 475, 57 Pac. 388; 32 Cyc. 960; *Weyerhaeuser v. Hoyt*, 219 U. S. 391, 81 Sup. Ct. 300, 55 L. Ed. 258. Therefore respondents contend that the patent was exactly like one which might have been issued December 23, 1891, when the Reed survey alone was in effect, in so far as the actual location of the land was concerned.

The Land Department has rendered conflicting decisions with reference to this lot. On July 16, 1902, Commissioner Hermann, after citing the decision in *S. P. R. R. Co. v. Bruns*, 31 Land Dec. Dept. Int. 272, rendered an opinion, which is in part as follows: "Following the ruling of the Department in the case cited which involved sec. 1 of this township, I must hold that the patent issued January 25, 1896, to the company for the N. E.  $\frac{1}{4}$  of sec. 11, covers lots 1, 4 and 9 of sec. 11, as that was the only public land in said quarter section at that date. While said lots 1, 4 and 9 were never selected by the company, yet the patent is unimpaired and the company will be required to specify from the lands lost within the primary limits of the grant a basis for the land so irregularly patented." This decision was approved by the Secretary of the Interior. The company subsequently gave formal acceptance to this ruling, and the commissioner declared the case closed. This was in 1903. Plaintiff contends that this decision and its acceptance were binding on all persons, and that no question may now be raised with reference to plaintiff's title. Defendants, on the other hand, insist that the matters decided were merely based upon questions of law, and, as plaintiff and nobody else has assented to their correctness, the defendants herein are not bound by the rulings of the Land Department. They also assert that the Bruns decision has been vacated and recalled, and that the Department of the Interior has adopted the view for which they contend. In *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, 37 Land Dec. Dept. Int. 244, the Department, following *Gleason v. White*, 199 U. S. 54, 25 Sup. Ct. 782, 50 L. Ed. 87, reversed the ruling made in *Southern Pacific R. R. Co. v. Bruns*, and on March 17, 1911, the very selection now under discussion was reviewed by the Commissioner of the General Land Office, who held that the patent of the Southern Pacific Railroad Company dated January 25, 1896, did not convey any title to lots 1, 4, and 9 of section 11. The Department of the Interior, however, reviewed this ruling, and overruled *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, supra, in the following opinion: "The Southern Pacific Railway Company has appealed from the decision of the Commission-

er of the General Land Office, dated March 17, 1911, wherein, as the result of a contest proceeding instituted by the Jackson Oil Company, it was found that lots 1, 4, and 9, being a part of the N. E.  $\frac{1}{4}$  section 11, township 30 S., range 21 E., M. D. M., Visalia land district, Cal., are oil lands; that said tracts were not embraced in any previous patent issued to said company; and that its selection therefor, which was held to be still pending, was rejected because of said mineral finding. The mineral character of the tracts in question seems to be conceded, but the railroad company earnestly contends that the tracts involved are not public lands, having been included in the patent issued to said company January 23, 1896. This township was originally surveyed by one Reed, whose survey was approved April 27, 1869. The township was later surveyed by one H. P. Carpenter, whose survey was approved November 18, 1893, and the plat thereof filed in the local land office at Visalia April 6, 1894. December 26, 1891, the Southern Pacific Railroad Company applied to select, among other tracts, the N. E.  $\frac{1}{4}$  of section 11 of this township. The selection was not acted upon until 1896, when patent was made to it of the N. E.  $\frac{1}{4}$  of section 11 of said township. The question involved is as to whether such N. E.  $\frac{1}{4}$  is to be understood according to the survey in effect when the company applied to select this land, or the survey in force at the time the patent was issued. It is well settled that no selection is complete until acted upon by the Department. At the time the Department acted on this application the Carpenter survey was in force, and there was no authority in law for issuing patents to the railroad in other than odd-numbered sections. It necessarily follows that the patent issued in 1896 to the railroad company must be interpreted according to the Carpenter survey. If a mistake was made in issuing the patent—which is not decided—it is too late to correct that mistake. It necessarily follows that lots 1, 4, and 9 did pass to the railroad under the patent of 1896, while no land now in section 2 under the Carpenter survey passed to the railroad. This holding is in consonance with the decision of the Department of January 23, 1903. Consequently the patent of 1896, issued to the railroad company, as held in said decision of January 23, 1903, conveyed the title to these lots to said company; and since then this Department has been without jurisdiction over the lands. Any expression to the contrary in the case of McKittrick Oil Co. v. Southern Pacific Railroad Co. (37 Land Dec. Dept. Int. 243) must be regarded as overruled. The decision appealed from is reversed, and the cause is dismissed."

[1] With the foregoing opinion we entirely agree. The United States government by its duly authorized agents declared the title

to this lot to be in the plaintiff and the whole matter finally settled and closed. This was in 1903 and the mining locations which are the bases of the title asserted by defendants were made in 1907 and 1908. This ruling was supported by the plaintiff's patent which in terms related to this very land. In 1906 the patent was ratified by mutual construction given by the parties thereto.

[2] While the matter was pending, the Secretary of the Interior had jurisdiction to review all rulings theretofore made (Gage v. Gunther, 136 Cal. 345, 68 Pac. 710, 89 Am. St. Rep. 141), but, after the patent had issued and the government had formally declared that it conveyed the land in question, no further departmental interference was legally possible. The Secretary of the Interior might have requested the Attorney General to institute proceedings for the annulment of the patent (Gage v. Gunther, supra), but that would have been the limit of his authority. He did not pursue such course, but, on the contrary, after a review of the facts, he declared the transaction between the government and the patentee to be closed. It was for him to determine whether the patent as finally issued was dependent upon the selection originally made or upon the supplement to indemnity list No. 48, which antedated the patent and in which lot 4 was specified by the Southern Pacific Railroad Company. Upon the facts presented he did not, in our opinion, err in his interpretation of the law. The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

In re NICCOLLS' ESTATE. (L. A. 3,294.)  
(Supreme Court of California. Dec. 18, 1912.)

1. HOMESTEAD (§ 151\*)—SELECTION—SETTING APART—LIMITED PERIOD.

Code Civ. Proc. § 1468, as amended in 1881 (St. 1881, p. 8), relating to homesteads, provides that if property set apart is a homestead selected from the separate property of the decedent the court can set it apart only for a limited period, to be designated, and, subject to such homestead right, the property remains subject to administration. *Held*, that such provision is applicable to the setting apart of homesteads to widows in probate proceedings, where no homestead had been previously selected.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 286-292; Dec. Dig. § 151.\*]

2. HUSBAND AND WIFE (§ 262\*)—COMMUNITY PROPERTY—PRESUMPTION.

All property acquired by either spouse during the existence of the marriage is presumed to be community property; and the burden of overcoming the presumption by clear and satisfactory evidence is on the party claiming that the property is separate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.\*]

### 3. HUSBAND AND WIFE (§ 240\*)—PERSONAL PROPERTY—NATURE OF OWNERSHIP—WHAT LAW GOVERNS.

Where a husband and wife acquired personal property in Illinois, where there is no such a thing as community property as between husband and wife, and later removed with the property to California, neither the property accumulated while in Illinois, nor that for which it was exchanged in California, became community property in that state.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 878; Dec. Dig. § 246.\*]

### 4. HOMESTEAD (§ 150\*)—ASSIGNMENT—TITLE TO PROPERTY—JURISDICTION.

The superior court sitting in probate in determining an application of a widow to set aside to her certain property as a homestead, had no jurisdiction in that proceeding to determine the title to the property, or the validity of any claim of title adverse to that of the estate.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 294-306; Dec. Dig. § 150.\*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Judicial settlement of the estate of Robert Niccolls, deceased. From an order overruling objections to a widow's petition to set apart to her certain real property in fee as a homestead, the heirs appeal. Reversed, with directions.

W. J. Mossholder, Marks P. Mossholder, Mills & O'Farrell, all of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

SLOSS, J. Robert Niccolls, a resident of the county of San Diego, died intestate, leaving property in that county and elsewhere. His heirs were his widow, Frances Niccolls, and a number of nephews and nieces. Upon the nomination of the widow, W. R. Rogers was appointed administrator of the estate.

Included in the estate was a lot, with a dwelling thereon, in the city of San Diego. The widow petitioned to have this property set apart to her as a homestead. Objections were filed by various other heirs. After a hearing the court made its order setting said property apart as a homestead and vesting it absolutely in the widow. The contesting heirs appeal from the order, and from a subsequent order denying their motion for a new trial.

[1] The order setting apart the homestead contained findings that no homestead had been selected and recorded during the lifetime of the decedent, and that the property involved was community property. The latter finding is attacked as unsupported by the evidence. That the finding is material is not to be questioned. Where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited period only. Under the provisions

of the Code of Civil Procedure, as originally enacted, the power of the court was not so restricted. *Mawson v. Mawson*, 50 Cal. 539. Section 1468 was, however, amended in 1881 (St. 1881, p. 8) by the addition of this clause: "If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." The added provision might seem, at first glance, to refer to the case of property which had been selected as a homestead during the lifetime of the decedent. It is, however, settled by the decisions of this court that this is not its proper construction. The new clause applies to homesteads set apart in probate proceedings; no homestead having been theretofore selected. Its effect, as to such cases, is to alter the rule declared in *Mawson v. Mawson*, *supra*, and to take from the court the power to assign a homestead absolutely, except where the property set apart is community property. In *re Schmidt*, 94 Cal. 334, 29 Pac. 714; *Lord v. Lord*, 65 Cal. 84, 3 Pac. 96; In *re Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834; In *re Lahiff*, 86 Cal. 151, 24 Pac. 850.

[2] We think the appellants are clearly right in their contention that the finding of the community character of the property in question is not supported by the evidence. It is undoubtedly the rule that all property acquired by either spouse during the existence of the marriage is presumed to be community property, and that the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate. *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Davis v. Green*, 122 Cal. 364, 55 Pac. 9. Here, however, the evidence regarding the acquisition of the property was without substantial conflict, and, giving it the strongest possible construction in favor of the respondent, it pointed indisputably to the conclusion that the house and lot in controversy were not community property.

Robert Niccolls, the decedent, and Frances Niccolls, the respondent, were married in Pennsylvania in 1854. Shortly after their marriage they took up their abode in Bloomington, Ill., and resided there until 1881 or 1882, when they moved to San Diego, in this state, where they remained until the husband's death. Testimony with respect to their property before and after marriage was given by Mrs. Niccolls. Concerning some details there was more or less uncertainty in her testimony. This was due, no doubt, as the witness herself said, to a slight impairment of memory—a condition which was not surprising in view of her ad-

vanced age and the length of time that had elapsed since the events of which she was speaking. But, taking her testimony in its aspect most favorable to her, it appears that at the time of the marriage Mrs. Niccolls owned real estate in the state of Illinois of the value of \$5,000. Her husband also owned some property. With the proceeds of the property of both, the husband purchased land in Illinois. From 1854 to 1860 or 1861 the husband, who was a physician, practiced his profession. From 1861 to 1865, the period of the Civil War, he was attached to the forces of the United States as an army surgeon, in which capacity he earned a fixed salary. After the war he resumed his residence in Bloomington. He did not again engage in medical practice, but occupied himself with buying and selling land and loaning money, generally on mortgage security. The capital employed in these ventures was made up of the proceeds of the property which his wife had owned before marriage, together with the property which he had owned and his subsequent earnings. No distinction was made between the husband's property and that belonging to his wife. All was handled and controlled by the husband. As Mrs. Niccolls expressed it: "Everything was his, and everything was mine. \* \* \* I expected him to do what was right." When the couple moved to California, Dr. Niccolls brought with him a part of the accumulations he had thus made, and with this he acquired the property in controversy and a ranch in San Diego county. He never practiced his profession in California; nor did he follow any other occupation in this state. The character of the property owned by himself and his wife did not, therefore, change after they had taken up their residence in San Diego.

[3] The question, then, is: What, according to the law of the state of Illinois, was the character of the property owned and acquired by Dr. and Mrs. Niccolls in that state, and by them brought to California? "If a husband and wife acquire personal property in one state, and then remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property." Ballinger, Com. Prop. § 47; *Kreamer v. Kreamer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488. The record before us contains testimony, which is uncontradicted, that "there is not in the state of Illinois, by statute or as common law, any such thing as community property, whereby the husband and wife both have a community interest in property accumulated during the marriage relation." It follows that the property accumulated during the marriage, whatever might have been its character if the parties had acquired it while domiciled in California, was not com-

munity property in Illinois. Consequently neither it, nor any property for which it was exchanged, became community property in this state. It was either the property (separate) of the husband, or of the wife, or it belonged to both in proportion to their respective contributions thereto. But neither of these conditions justifies the finding that it was community property.

[4] It is claimed by the respondent that the accumulations of the spouses were the product of the property owned by her before marriage, and thus constituted her separate property. From this premise she argues that she was entitled to the house and lot in any event, and that the appellants are not injured by the order, which merely sets apart to her her own property. There are two answers to this position. In the first place, the evidence does not compel, if, indeed, it would permit, the conclusion that all the property was the separate property of the wife. The court has not found that it was. On the contrary, the finding is that it was community property, and we cannot support the order based on this finding by supposing that the court might, or would, have found that it was separate property of the wife. But, beyond this, a finding that the house and lot were separate property of the wife would not have justified the order setting apart a homestead. In making such order, the court is dealing only with the property of the estate. It has no jurisdiction, in a proceeding of this character, to determine the title to the property, or the validity of any claim of title adverse to that of the estate. *Estate of Burton*, 64 Cal. 428, 1 Pac. 702; *Estate of Groome*, 94 Cal. 69, 29 Pac. 487; *Estate of Kimberly*, 97 Cal. 281, 32 Pac. 234. "It determines merely that the parcel named is selected from the estate of the deceased (whatever his interest therein may have been), and who are the persons entitled to the benefit of the homestead selection. \* \* \* Title to real estate cannot be tried in such proceeding." *Estate of Burton*, supra. The application of the respondent was therefore necessarily based upon the theory that the house and lot in question were a part of the estate of the decedent. She was invoking the power of the court to set apart to her the interest which the decedent had owned, whether as community or his separate estate, in the property. Any title that she might claim in it as her separate property was not involved and could not be adjudicated.

The appellants do not object to the assignment of this property to the widow as a homestead. They complain merely of the provision that sets it apart to her absolutely. They suggest that the order be modified so as to limit the homestead right to the life of respondent. This concession obviates the necessity of a new trial, and we think the course suggested a proper one.

The order setting apart the homestead is reversed, with directions to the court below to modify the same by striking therefrom, in the paragraph preceding the description of the property, the words "and is hereby vested absolutely in said widow," and substituting therefor the words "during her lifetime." The order denying a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

**WEST BERKELEY LAND CO. et al. v. CITY OF BERKELEY et al. (S. F. 5,776.)**

(Supreme Court of California. Dec. 26, 1912.)

**1. EMINENT DOMAIN (§ 45\*)—PROPERTY SUBJECT—STREETS—TIDE LANDS—"LANDS"—"TERRITORY."**

Street Opening Act 1889 (St. 1889, p. 70), granting power to the city council of any municipality to condemn and acquire any and all lands and property necessary or convenient for streets, conferred power on cities to open streets over tide lands; the word "lands" not being used in its ordinary signification as meaning the exposed surface of the earth, but in a technical sense as meaning "territory."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 94-100, 102, 106; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700, 7701; vol. 8, pp. 6925, 6926.]

**2. MUNICIPAL CORPORATIONS (§ 294\*)—STREETS—EXTENSION—TIDE LANDS—POSTING NOTICE.**

Where, in proceedings for the extension of a street over tide lands, the street superintendent in a boat at high tide anchored notices attached to floats at proper intervals along the line of the proposed work over the tide lands, the floats being so constructed that the notices appeared about three feet above the surface of the water, such method of posting the notices was not objectionable as not calculated to give notice to the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.\*]

**3. MUNICIPAL CORPORATIONS (§ 487\*)—STREETS—EXTENSION OVER TIDE LANDS—NOTICE—RIGHT TO ATTACK.**

Residents within an assessment district, affected by proceedings to extend a street over tide lands but who were not the owners of the property sought to be condemned, could not object to the manner of posting the notices of the proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1146; Dec. Dig. § 487.\*]

**4. MUNICIPAL CORPORATIONS (§ 294\*)—STREET EXTENSION—TIDE LANDS—NOTICE—PRESUMPTIONS.**

Where notices of proceedings to extend the street over tide lands were printed and attached to floats anchored in the water, it would not be presumed, from material on which the notices were printed, the manner of their attachment to the land, and the character of the lands, that the notices did not remain posted during the period contemplated by the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.\*]

**5. MUNICIPAL CORPORATIONS (§ 450\*)—STREETS—EXTENSION—ASSESSMENT DISTRICT.**

Where nothing was done by property owners between the date of filing a map of the city addition and the acceptance of the streets delineated thereon by the city to indicate a change in the owners' intention to devote such streets to the use of the public, and it did not appear that the intervening rights of third persons were involved, an assessment district described as bounded on one side by a street, delineated on the plat, the name of which was subsequently changed, was sufficient to describe the boundary of the district, though the property owner attempted to annul the dedication by filing a declaration that the map was filed simply for convenience, and not with an intention to dedicate any street delineated thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**6. MUNICIPAL CORPORATIONS (§ 293\*)—STREETS—EXTENSION—DESCRIPTION—BOUNDARIES.**

A resolution of intention to extend a street over certain tide lands to the western boundary line of state tide lands was not objectionable because a landowner could not ascertain from inspection and the resolution alone whether his land was affected; such question being ascertainable from the official map of the tide lands located elsewhere.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the West Berkeley Land Company against the City of Berkeley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McKee & Tasheira, of Oakland, and R. M. F. Soto, of San Francisco, for appellant. Redmond C. Staats, F. W. Dorn and James M. Koford, all of Berkeley, and F. D. Stringham, of San Francisco (George L. Hughes, of Berkeley, of counsel), for respondents.

MELVIN, J. Plaintiffs sued to recover from the city of Berkeley money paid under protest to prevent the sale of certain lands by the superintendent of streets of that city because of delinquency in paying assessments upon said properties levied in the proceedings for the opening and extension of Snyder avenue under the provisions of the street opening act of 1889 (Stats. 1889, p. 70). From a judgment in favor of defendants, this appeal is taken.

[1] Appellants question the authority of the municipality to open or extend its streets over tide lands. By the first section of the street opening act of 1889, the city council of any municipality is granted power "to condemn and acquire any and all land and property necessary or convenient for that purpose." Appellants quote a number of sections of that statute in an effort to show that the words "land" and "lands" are em-

ployed in the act in their ordinary and popular meaning, rather than in a technical sense. They assert that "lands," in the ordinary acceptance of the term, is a word applicable to the exposed surface of the earth, and not to ground which is alternately covered and uncovered by the flow and ebb of the tide. They say that the Constitution and Codes of California make a distinction between public lands in the ordinary sense and tide lands (citing Const. art. 17, § 3; article 15, § 3; Pol. Code, § 3395 et seq.; Pol. Code, § 3443a), but they have evidently lost sight of the fact that the differences in treatment by the lawmaking power of tide lands and other public lands is due, partly at least, to the different sources of the state's original title; the lands above the shore having been acquired by direct grant from the general government, and the tide lands by reason of the state's sovereignty. *People v. Morrill*, 26 Cal. 352. Very early in the history of California, this court recognized and declared the right of the state to surrender into the jurisdiction and control of a city, and to sell into private ownership, not only tide lands, but those perpetually submerged. *Eldridge v. Cowell*, 4 Cal. 87. Jurisdiction over lands of this kind logically involves such incidental authority as the city may exercise in the condemnation of rights of way, the construction of streets, and the like. In *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 185, 50 Pac. 286, the Chief Justice, delivering the opinion of this court, said: "It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. By the exercise of the right of eminent domain, all necessary means of access from the uplands to the water front may be condemned for the public use at a cost not in excess of the reasonable value of the land taken or subjected to the servitude." The right of a city to reserve portions of the lands lying below tide water within its limits for street purposes was fully recognized in *Shirley v. City of Benicia*, 118 Cal. 346, 50 Pac. 404. Both before and after the passage of the act under which the opening and extension of Snyder avenue was conducted, there were adjudications of a municipal corporation's power to extend streets across tide lands into deep water within the limits of such city. The Legislature has left the act in practically its original form, and we must conclude, in view of both prior and subsequent judicial decisions, that the words "land" and "lands" in that statute were used in the technical sense meaning "territory," and not with the definition for which appellants con-

tend. By the very first section of the act, the city council is given "full power to order the opening, extending \* \* \* or closing up \* \* \* of any street \* \* \* within the bounds of such city, and to condemn and acquire any and all land and property necessary or convenient for that purpose." It would be difficult to find general language more completely inclusive of municipal territory, both wet and dry, both exposed and submerged. There can be no rational doubt of the city's power to extend the street in question over tide lands.

[2] Appellants condemn the method adopted by the street superintendent in posting notices of the passage of the resolution of intention in the matter of opening Snyder avenue. According to the evidence, these notices seem to have been in due form and to have been printed in letters of requisite size. Guided by a surveyor on shore, the superintendent of streets went out in a boat at high tide and anchored notices attached to floats at proper intervals along the line of the proposed work over the tide lands. The floats were so constructed that the notices appeared  $2\frac{1}{2}$  or 3 feet above the surface of the water. This method of posting is the only part of the service of notice of which appellants complain. There is no contention that notice was not sufficiently given by publication in a newspaper and by posting along that part of the proposed street which was above the line of high tide; but appellants assert that no reasonable notice may be given by the anchoring of floats supporting small placards at intervals of 300 feet far out in the bay.

[3] Even if the notice given were not sufficient as against the owners of the tide lands (and we think it was ample), nevertheless these appellants could not reasonably complain because they were not owners of property to be condemned, but were residents within the assessment district affected. *Davies v. City of Los Angeles*, 86 Cal. 46, 24 Pac. 771. The sort of constructive notice authorized by the act here considered has been so long approved that there is now no doubt of its sufficiency where the requirements of the statute have been followed. *Davies v. City of Los Angeles*, supra. The constitutionality of the statute has been upheld frequently, notably in the case of *Clute v. Turner*, 157 Cal. 74, 106 Pac. 240.

[4] There is no force in the suggestion of appellants that, from the material upon which the notices were printed, the manner of their attachment to the tide lands, and the character of those lands, it must be presumed that the placards did not remain posted during the period contemplated by the statute. The presumption is just the opposite. Due performance of duty by an officer of the law is presumed, and the burden of proof is upon the person asserting official default. *County of Los Angeles v.*

Lankershim, 100 Cal. 532, 35 Pac. 153, 556. When, as in this case, an affidavit is made that notices have been posted as required by law, the presumption arises that they remained in place during the statutory period. Estate of Sbarboro, 70 Cal. 149, 11 Pac. 563; Crew v. Pratt, 119 Cal. 153, 51 Pac. 38.

[8] The next assignment of error made by appellants relates to the exterior boundaries of the district to be assessed for the work here considered. The appellants say that these boundaries are not so specified that they can be ascertained, and our attention is called particularly to that part of the description depending upon the location of the southerly line of Stuart street. It appears from the evidence that Stuart street had no existence as an open street upon the ground prior to the initiation of the proceedings to extend Snyder avenue. On August 7, 1888, Mrs. Mary D. Mathews caused the filing of a map of "Mathews tract, Berkeley, Oakland township," upon which was delineated certain streets, one of them designated as "Moss street." On June 27, 1892, the town of Berkeley accepted this dedication, and on October 16, 1893, the name of Moss street was changed by ordinance to "Stuart street." Between the time of the filing of the map and the acceptance of the proposed dedication by the city, the land was inclosed by a fence. No property was sold in accordance with the map, and the land was farmed until the death of Mrs. Mathews in 1900. After that it was not cultivated, and the fence was removed. On July 11, 1892, after the formal acceptance by the town of Berkeley of the dedication of the streets shown on the map of the Mathews tract, Mary D. Mathews filed a declaration of revocation by which she sought to annul her map of 1888. In this document she declared, among other things, that "said map was filed merely for the purpose of convenience and for no other or further purpose, and not for the purpose of dedicating, or offer to dedicate, any street delineated thereupon." The only question for us to determine is whether the reference to Stuart street, in describing the exterior boundaries of the assessment district, was a sufficient compliance with section 2 of the act of 1889. That section prescribes a description in the resolution of intention "specifying the exterior boundaries of the district of lands to be affected," etc. The act does not indicate the sort of monuments or measurements to be used in the description, nor that streets, whether formally dedicated or not, should be mentioned therein; but, assuming the formal dedication and acceptance of a street to be necessary in order that its lines should officially form any part of the exterior boundaries of the district, we are of the opinion that the resolution of intention in this case was sufficient. Between the date of the filing of the map and that of

the acceptance of the streets by the city, nothing was done by Mrs. Mathews to indicate a change in her declared intention to devote certain platted spaces to the use of the public as streets, nor does it appear that the intervening rights of third persons are involved. The matter is therefore covered by principles announced in City of Los Angeles v. McCollum, 156 Cal. 149, 103 Pac. 914, 23 L. R. A. (N. S.) 378.

[9] Appellants attack that part of the resolution of intention which declared the purpose to open and extend Snyder avenue "westerly to the westerly boundary line of state tide lands," on the ground that the owner is entitled to know, from an inspection of the resolution alone, whether his land is affected. It was in evidence that certain tide lands, commonly known as "state tide lands," were situated within the limits of the town of Berkeley. At the trial a certified copy of an official map, showing the western boundary of said lands, was introduced in evidence. While it is true that the original was intrusted to an official who was not located in Alameda county, the mere inconvenience to which a property holder might have been subjected in order that he might have learned the exact location of the westerly line of said lands does not invalidate the description. It was sufficient that means were available for making certain the general reference to a well-known tract. Best v. Wohlford, 144 Cal. 737, 78 Pac. 293; Baird v. Monroe, 150 Cal. 571, 89 Pac. 352; Fox v. Townsend, 152 Cal. 58, 91 Pac. 1004, 1007; Houghton v. Kern Valley Bank, 157 Cal. 291, 107 Pac. 113; Campbell v. Shafer, 162 Cal. 211, 121 Pac. 737; Kehlet v. Bergman, 162 Cal. 219, 121 Pac. 918; Furrey v. Lautz, 162 Cal. 399, 122 Pac. 1073.

Other specifications of alleged error were made by appellants, but, as they were not discussed in the brief filed, we will not review them in detail. We have examined them, however, and find them without merit. The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

#### WOOD v. CALAVERAS COUNTY et al. (Sac. 1,913.)

(Supreme Court of California. Dec. 26, 1912.  
Rehearing Denied Jan. 24, 1913.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 21\*)—CITY "SCHOOL DISTRICT"—IDENTITY—SEPARATE FROM CITY.

A city school district is a corporation or a quasi municipal corporation, which is not merged in that of the city, though its territorial limits may be coterminous with those of the city.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 39, 40; Dec. Dig. § 21.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6345-6347; vol. 8, p. 7795.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. SCHOOLS AND SCHOOL DISTRICTS (§ 30\*)—COUNTY HIGH SCHOOL DISTRICT—TERRITORY.**

The fact that a school district is called a county high school district furnishes no reason why it should not contain less territory than a county.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 50; Dec. Dig. § 30.\*]

**3. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—HIGH SCHOOL DISTRICT—ESTABLISHMENT.**

Under Pol. Code, § 1670, subd. 20, as it stood prior to 1909, and former section 1671, authorizing the creation of high school districts in counties having a county high school district, it was not essential that the county district be dissolved before the formation of a union high school district out of a portion of the territory within the county; and this notwithstanding the formation of union districts might have the effect of depriving the county district of a large part of its means of support.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 154\*)—HIGH SCHOOLS—STATUTES—CONSTRUCTION—"DISTRICT."**

Pol. Code, § 1670, subd. 25, regulating high schools, provided that when, because of distance or of convenience in traveling, it is more convenient for pupils residing in any high school district to attend high school in another school district, the high school board in the latter district may admit such pupils on such terms as the two boards may arrange, and section 1671, prior to the amendment in 1909, declared that all high schools should be open to graduates of grammar schools of the county, and to all pupils of the county who could pass the examination for admission, to be conducted by the county board of education and principals of the county high school. *Held*, that the word "district," as used in section 1671, subd. 25, applies to territory to be served by county high schools as well as of union high schools.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 326, 327; Dec. Dig. § 154.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639, 7640.]

**5. STATUTES (§ 96\*)—TAXATION—SPECIAL TAXES—LIMITATION.**

Taxes assessed for the support of high schools are special taxes, the assessment of which the Legislature has power to limit to the property within the respective districts to be served.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. § 96.\*]

**6. STATUTES (§§ 73, 95\*)—LOCAL LAWS—TAXATION—EXEMPTIONS.**

Pol. Code, former section 1670, subd. 20, exempting property within union high school districts from taxation for the support of county high schools, does not violate Const. art. 4, § 25, prohibiting local laws exempting property from taxation, nor article 1, § 11, requiring all laws of a general nature to be uniformly operative.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75, 105, 106; Dec. Dig. §§ 73, 95.\*]

**7. SCHOOLS AND SCHOOL DISTRICTS (§ 106\*)—INVALIDITY—ESTOPPEL—PRIOR PAYMENT.**

That plaintiff, whose property within a union high school district had been erroneously assessed for a county high school, had paid

the tax, did not estop him to thereafter object to the validity of such county high school tax.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 149, 248-252; Dec. Dig. § 106.\*]

**8. SCHOOLS AND SCHOOL DISTRICTS (§ 28\*)—HIGH SCHOOL DISTRICT—ESTABLISHMENT—DE FACTO DISTRICT.**

Where a union high school district had been established, trustees elected, buildings erected, teachers employed, and taxes paid for the maintenance of the high school therein, and the same conducted generally as a duly organized district, it was a de facto high school district, the existence of which could not be collaterally attacked.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 46; Dec. Dig. § 28.\*]

**9. SCHOOLS AND SCHOOL DISTRICTS (§ 22\*)—ORGANIZATION OF DISTRICTS—CURATIVE ACTS.**

Pol. Code, § 1671, subd. 11, providing that the certificate of the county superintendent, when filed with the county clerk showing the establishment of a high school, at the expiration of the year shall be conclusive evidence that the school was legally established, and Pol. Code 1909, § 1724, validating all proceedings for the formation of high school districts, were valid curative acts curing all defects in proceedings for the prior organization of a union high school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 41; Dec. Dig. § 22.\*]

Department 2. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Suit by Carlton H. Wood against Calaveras County and others to compel acceptance of money tendered in payment of his taxes less an assessment for the support of Calaveras County High School. Judgment for plaintiff, and defendants appeal. Affirmed.

J. P. Snyder and Snyder & Snyder, all of San Andreas, for appellants. Frank J. Solinsky, of San Andreas, and Paul C. Morf, of San Francisco, for respondent.

MELVIN, J. Plaintiff is a resident within Bret Harte union high school district. His property, being wholly within said district, was assessed for the support of said union high school and likewise for the Calaveras county high school. Deeming the latter assessment improper, he tendered to the tax collector of the county the amount of his tax less the sum demanded for county high school purposes. The tender being refused, he deposited the money so tendered in bank to the credit of the tax collector and gave notice to that official, all in accordance with section 1500 of the Civil Code. He then brought this action to have the tax for the support of the county high school declared invalid and to compel the tax collector to accept the money tendered. From a judgment granting his prayer, this appeal is prosecuted.

Prior to the formation of the Bret Harte union high school district, the Calaveras

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county high school district was formed, including, territorially, the whole of the county of Calaveras. All of the property within the county was taxed for the support of that district. Appellants are of the opinion that: (1) The exemption of the property within the Bret Harte union high school district would be a fraud upon the owners of the remaining property of the county, and an unconstitutional confiscation of their property; that (2) the people of the Bret Harte high school district are estopped from questioning the legality of the tax for the county high school; and (3) that the union district was never legally formed.

It is conceded that the provisions of the Political Code in existence at the time of the formation of the Bret Harte union high school district exempted the property in such a district from taxation for the support of a county high school; but such exemption is attacked by appellants as being in violation of subdivision 20 of section 25, art. 4, of the Constitution, which prohibits local laws exempting property from taxation, and section 11 of article 1, requiring all laws of a general nature to have a uniform operation. Prior to 1909 the law with reference to the establishment and maintenance of county high schools provided (section 1671 of the Pol. Code as it then stood) as follows: "There may be established in any county in this state one or more county high schools; provided, that at any general or special election held in said county after the passage of this act, a majority of all the votes cast at such election, upon the proposition to establish a high school, shall be in favor of establishing and maintaining such county high school or schools at the expense of said county." Appellants contend that this language involves the inclusion of the whole county within the county high school district; that the words "county high school" mean exactly what they import—a school for the use of the inhabitants of the county. It will be noted, however, from an examination of the section, that, while the school is to be maintained at the expense of the county, the statute does not provide that all of the electors of the county shall or may participate in the election, nor that it shall be held *throughout* the county. Former section 1670, by subdivision 20 thereof, provided: "Nothing in this section shall be construed as preventing all of the school districts in any county from uniting to form one or more county high schools; provided, that when any city, incorporated town, school district, or union high school district shall vote to maintain a high school, such territory shall be exempt from taxation to support a county high school; and provided further, that when any city, incorporated town, school district, or union high school district shall establish a high school prior to the submission of the proposition to establish a county high school,

the electors of such city, incorporated town, school district, or union high school district shall be excluded from voting upon said proposition; provided further, that in counties where one or more city high schools, district high schools, or union district high schools, are maintained, the board of supervisors shall, upon the petition of two-thirds of the heads of families in a city high school district, union high school district, and in each school district composing the union high school district or districts, if there be more than one in the county, submit to all the qualified electors of the county the question of establishing and maintaining a county high school, and shall take such further steps as provided in section sixteen hundred and seventy-one of this act, relating to high schools. If the majority of all the votes cast on the proposition to establish a county high school are in the affirmative the board of supervisors shall, upon the establishment of the same, declare the high school or high schools existing in the county at the time of the election for a county high school, to be lapsed and the property of such lapsed high school or schools shall be held or sold by the board of supervisors for the benefit of the county high school."

By the fourth subdivision of former section 1671 the board of supervisors, in providing for the special tax therein authorized, was limited in making the levy to "all of the assessable property of the county, except as provided in subdivision twentieth of section one thousand six hundred and seventy of the Political Code." The above-quoted provisions indicate that the Legislature did not intend that a union high school district should be taxed for the support of its own school and for the maintenance of another school within the county. The two kinds of districts did not differ materially in the manner of formation. One was governed by the county board of education and the other by a district board; but there was and is no essential difference in the manner of their conduct and control.

[1] It has been held that a city school district is a corporation of a quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, its identity is not thereby lost nor merged in that of the city. *Los Angeles School District v. Longden*, 148 Cal. 381, 83 Pac. 246; *Hancock v. Board of Education*, 140 Cal. 561, 74 Pac. 44.

[2] So it may be said with equal force that, because a district is called a "county high school district," that fact furnishes no reason why it should not contain less than the territory of one county. It is evident from the provisions of the law as it stood at the time of the creation of the Bret Harte union high school district, and particularly subdivision 20 of section 1670 of the Political Code above quoted, that the Legislature

contemplated the existence of a county high school and other kinds, including union high schools, in the same county at the same time.

[3] The contention is made that there should have been a dissolution of the county high school district prior to the formation of the union district and that a school district in the territory of an established high school district may not seek to enter another high school district until after its withdrawal from the district with which it was formerly connected. *Moorpark School Dist. v. Reynolds*, 13 Cal. App. 171, 109 Pac. 149, is cited in this behalf. The court in that case was considering the sufficiency of certain petitions filed by residents of school districts for the formation of a new union high school district, and it was held that, as one of these districts was already in a union high school district, it could not come into a new union high school district. But there is no method provided by law for the formal withdrawal of a school district, as such, from a county high school district. Therefore that case is not in point here. It has been held that territory may pass from a union high school district otherwise than by formal withdrawal, namely, by operation of law when such territory is annexed to an incorporated city. *Frankish v. Goodrich*, 157 Cal. 614, 108 Pac. 685. The whole matter is one of legislative control, and the Legislature has clearly provided for the formation of a union high school district within a county where a county high school exists. In *Hughes v. Ewing*, 93 Cal. 417, 28 Pac. 1067, the court was considering the matter of a tax levy upon the property in a school district the limits of which had been changed between the time of an election by which a certain sum was voted for school purposes and the levy of the tax to raise said funds. It was held that property in the old but not included in the new district was not subject to the burden of a tax. In the course of the opinion the following language, which is applicable to the case at bar, was used: "The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and, whether exercised immediately by the Legislature or mediately by a board of supervisors—the local Legislature—is, whenever exercised, a legislative act. It is well settled that the Legislature has the power to make such changes, and that in the exercise of this power it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and that its action in this respect is conclusive. It is also well settled that when the boundaries of such corporation are changed, either by forming a new corporation out of the territory of the original one or by transferring a portion of the territory to another corporation, in the absence of any provision on the subject, the old corporation will be entitled to all the property and be

solely liable for all the obligations, and that the territory taken therefrom will not be entitled to any of the corporate property or liable for any of the obligations of the old corporation." Counsel for appellants earnestly protest that the power of school districts within a county to carve out new union high school districts being conceded, a situation might arise whereby the territory remaining might be too small and too poor to continue in operation the original county high school. That, however, is a matter of legislative rather than judicial concern.

[4] The principal argument of appellants against the constitutionality of the sections under review is based upon the statement that the county high school was and is kept open for the benefit of the inhabitants of the entire county, and that therefore the property in said county should be subject to taxation for its support. It is true that prior to the amendments of 1909 the ninth subdivision of section 1671 of the Political Code contained this language: "All county high schools shall be open to the admission of graduates holding diplomas from the grammar schools of the county, and to all pupils of the county who can pass the examination for admission. The examination for admission shall be conducted by the county board of education and the principal of the county high school." This, however, was merely a declaration of the scholastic requirements for admission to a county high school. The matter of *attendance* was regulated elsewhere, for subdivision 25 of section 1670 of the Political Code was as follows: "When, in consequence of distance or of convenience in traveling, it is more convenient for pupils residing in any high school district to attend the high school in another high school district, the high school board of the latter district may admit such pupils to the high school in their district upon such terms as the two boards may arrange." This provision has been practically retained in section 1751 of the Political Code adopted in 1909. We can find no reason, either in the former or the present statutes applicable to high schools, why the word "district," as used therein, did not apply to territory to be served by county high schools as well as by union high schools.

[5, 6] The taxes for the support of schools are in their nature special taxes, and the Legislature has the power to limit their assessment to the property within the respective districts to be served. *Chico High School Board v. Board of Supervisors*, 118 Cal. 119, 50 Pac. 275; *Brown v. Visalia*, 141 Cal. 380, 74 Pac. 1042. In *People v. Lodi High School District*, 124 Cal. 700, 57 Pac. 662, this court said: "It is within the power of the Legislature to constitute these schools and to provide for their support by methods different from those adopted for like purposes as to other schools." And again, in

*Hughes v. Ewing*, supra: "It would be difficult, upon principle, to uphold the validity of a tax upon property which is without the district to be benefited by the expenditure of the moneys so to be raised." We are satisfied that the statutes exempting property within union high school districts from taxation for the support of county high schools were constitutional and that the decision of the superior court based upon them was correct.

[7] The people within the Bret Harte union high school district were not estopped to deny the validity of the tax in question. No special facts constituting estoppel are pleaded, and the general circumstance that the tax had been paid formerly without protest was not sufficient to prevent plaintiff from denying its validity. It was void and could not be cured by the application of the doctrine of estoppel. *Raisch v. City and County of San Francisco*, 80 Cal. 6, 22 Pac. 22; *Lukens v. Nye*, 156 Cal. 506, 105 Pac. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158.

[8, 9] The final contention of appellants is that the Bret Harte union high school district has no legal existence because of the failure of those seeking to create it to comply with all the requirements of the law. There are two complete answers to this objection to the recognition of the district. The first is that the existence of the union district as a de facto high school district cannot be attacked collaterally. *Hancock v. Board of Education*, 140 Cal. 560, 74 Pac. 44. The second answer is that the Legislature has passed validating or curative acts making unquestionable the legal existence of districts which have been operating as such. There is no question in the present case of the facts that in the Bret Harte district its trustees had erected school buildings and employed teachers and its inhabitants had paid taxes for the maintenance of the high school and that it had been conducted generally as a duly organized high school district. There was evidence that the superintendent of schools had properly certified the result of the election by which the inhabitants of the school districts included within the Bret Harte district had voted to establish said union high school district. Subdivision 11 of old section 1671 of the Political Code provided: "The certificate of the county superintendent mentioned in subdivision four of section one thousand six hundred and seventy of the Political Code when filed with the county clerk, when the result of the election as therein declared is in favor of the establishment of the high school, shall at the expiration of one year from the date of such filing be conclusive evidence that such high school district and high school has been legally established." The language of section 1724 of the Political Code, adopted in

1909, contains a broader provision as follows: "All proceedings for the formation and organization of high school districts and the establishment of county, city, city and county, union, joint union and district high schools, had prior to the taking effect of this section, are hereby validated and declared legal, and said high school districts and high schools, and any other high school districts which have been acting as such for more than one year previous to the taking effect of this section, are hereby declared to be legally formed, organized and established." Such curative acts have been held valid. *People v. School Dist.*, 101 Cal. 661, 36 Pac. 119; *Board of Education v. Hyatt*, 152 Cal. 519, 93 Pac. 117; *People v. Pacific Grove, etc., Dist.*, 11 Cal. App. 213, 104 Pac. 586.

For the reasons above set forth, the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

CITY OF SIERRA MADRE v. LEHMER  
et al. (Civ. 1,203.)

(District Court of Appeal, Second District,  
California. Nov. 16, 1912.)

MUNICIPAL CORPORATIONS (§ 162\*) — CITY  
TREASURER—COMPENSATION.

Under Municipal Corporation Act (Hennings's Gen. Laws, p. 907) § 876, providing that a city treasurer shall be allowed 1 per cent. on all moneys received and paid by him as such treasurer, such percentage is to be computed only on the amount paid out by him from that which has been received.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.\*]

Appeal from Superior Court, Los Angeles County; J. D. Murphey, Judge.

Action by the City of Sierra Madre against F. C. Lehmer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Shaw & Stewart, of Los Angeles, for appellants. Charles C. Montgomery, of Sierra Madre, for respondent.

SHAW, J. The facts presented by the record herein are identical with those involved in the case of *City of Corona v. Merriam et al.*, 128 Pac. 769, Civil, No. 1,195, an opinion in which was filed in this court October 25, 1912.

In each case the action was one prosecuted by the city against its treasurer to recover from him and his sureties moneys retained by him and claimed as compensation for services as such city treasurer. In the *Corona Case* the claim of the treasurer was based upon an ordinance providing that, in addition to a salary of \$15 per month, he should receive "one per cent. on all moneys received and paid out by him as treasurer." In the case at bar the claim of the treasurer, in the absence of an ordinance fixing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

his compensation, is based upon section 876 of the Municipal Corporation Act (Henning's Gen. Laws, p. 907), which provides that he "shall be allowed one per centum on all moneys received and paid by him as such treasurer." It thus appears that, except in the one case the compensation is fixed by ordinance, while in the other it is fixed by statute, the provisions are identical. In each case the treasurer insisted that by virtue of the provisions quoted he was entitled to 1 per cent. not only upon the amount of money received by him as treasurer, but a like percentage upon the amount paid out, while the claim of the cities was that the percentage should be computed upon the amount paid out by him from that which he had received.

In the case at bar the trial court accepted the latter view, which is in accordance with the opinion of this court rendered in the case of *City of Corona v. Merriam et al.*, supra. Upon the authority of that case, the facts presented being the same, the judgment from which defendants appeal must be, and is, affirmed.

We concur: ALLEN, P. J.; JAMES, J.

#### BRIGGS v. HALL. (Civ. 978.)

(District Court of Appeal, Third District, California. Nov. 14, 1912.)

##### 1. APPEAL AND ERROR (§ 856\*)—MOTION FOR NEW TRIAL—SETTING ASIDE ORDER.

Only in rare instances and upon very strong grounds will the Supreme Court set aside an order granting a new trial, and other grounds for supporting such an order than those mentioned therein may be considered, except that the trial court may limit its order so as to exclude, as ground for its action, the insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408-3434; Dec. Dig. § 856.\*]

##### 2. BROKERS (§ 88\*)—MISLEADING INSTRUCTIONS.

An instruction that, if the owner, in breach of his agreement sold his property for less than \$13,000, the agent was entitled to his commission was misleading so as to call for a new trial, where, after the sale of the land, a rebate to the purchaser was made by the owner in consequence of a survey having shown a shortage of half an acre; the question being whether the land was sold for \$13,000.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121-130; Dec. Dig. § 88.\*]

##### 3. NEW TRIAL (§ 71\*)—VERDICT—CONCLUSIVE-NESS—CONFLICTING EVIDENCE.

The judge is not bound by the verdict of the jury where there is a conflict in the evidence in granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

##### 4. EVIDENCE (§ 317\*)—HEARSAY—STATEMENTS BY PURCHASER TO AGENT.

In an action by an agent for commissions on the ground that the owner had sold for less than the minimum agreed in his contract, providing that in such a case he would pay the agent a commission, testimony of the agent that

the purchaser had said to him that he would have bought the place from him, but had done better in dollars and cents, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by H. Briggs against A. J. Hall. Verdict for plaintiff, and, from an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

T. J. Butts, of Santa Rosa, and L. G. Scott, of Sebastopol, for appellant. Perrier & Libby, of Sebastopol, for respondent.

BURNETT, J. This is an appeal from an order granting defendant's motion for a new trial. The action was brought to recover an agent's commission for the sale of real property. The jury found in favor of plaintiff, and the court awarded a new trial, making the following order: "In this action a new trial is ordered upon the ground that instruction No. 6, as well as other instructions to the same point, is not covered by the issues raised in the pleadings. It was also error of the court to admit evidence on that point, but the court was of the opinion, when it admitted the evidence and gave the instructions, that there was a count in the complaint that permitted it so to do."

[1] It has been said that "it is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial." *Quinn v. Kenyon*, 22 Cal. 82. It is also true, as stated in *Morgan v. Robinson Co.*, 157 Cal. 352, 107 Pac. 697, that, "Even though the order declare in terms that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assignment upon which the motion should have been granted." *Kauffman v. Maler*, 94 Cal. 269 [29 Pac. 481, 18 L. R. A. 124]. This rule is subject to the one limitation that the trial court may limit its order granting the motion so as to exclude, as a ground for its action, the insufficiency of the evidence (*Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426 [83 Pac. 439, 7 Ann. Cas. 636]), but such exclusion, to be effectual, must be declared in the order itself. *Weisser v. Southern Pacific Co.*, 148 Cal. 426 [83 Pac. 439, 7 Ann. Cas. 636]; *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619 [75 Pac. 332]; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73 [64 Pac. 110].

In the notice of motion for a new trial, and in the "statement to be used on said motion," are found specifications of error in relation to rulings of the court in admitting evidence, the insufficiency of the evidence to support the verdict, and the giving of various instructions to the jury. We may consider any of these assignments with the exception, possibly, of the insufficiency of the evidence. We

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

speak of the last with some hesitancy, because of the declaration made in *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 74, 64 Pac. 110, that "when this is made one of the grounds of the motion, although other grounds are also presented, if the order does not by direct language exclude this from the grounds upon which the motion is granted, it will be assumed that it was one of the grounds for making the order, and the order will accordingly be affirmed." In the case at bar the said ground is not "by direct language" excluded, but only by implication. If it is to be held, therefore, that this ground must be considered unless expressly excluded by the terms of the order, under the admission of appellant that the evidence was conflicting, we would be constrained to affirm the order by virtue of the doctrine announced in the *Newman Case* that "the rule is fully established that the superior court is not only authorized, but that it is its duty, to grant a new trial whenever, in its opinion, the evidence upon which the former decision was made was insufficient to justify that decision. Its action in granting a new trial upon this ground is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review in this court." But, conceding that this specification must be disregarded, does there remain a legal ground for sustaining the action of the court?

[2] The aforesaid instruction was as follows: "Defendant contracted with Lyman & Briggs that he would not offer his lands for a less price than that listed with said Lyman & Briggs, and this part of the contract is binding upon him, and by reason thereof defendant will not be permitted to sell his lands for a less price while the said contract is in force and while said Lyman & Briggs were attempting to negotiate the sale thereof, either by himself or through another agency, and thereby deprive the said Lyman & Briggs or their assigns out of the commission contracted to be paid; therefore, if you find that the defendant did sell his lands for a price less than \$13,000, without the consent of said Lyman & Briggs, while their contract was in force, said Lyman & Briggs will have earned their 5 per cent. commission, as provided in said contract, and plaintiff will be entitled to a judgment for the sum of \$650." We do not think it can be said that this instruction was erroneous for the reason assigned by the court. The complaint, considered in connection with the contract of agency, which was attached as an exhibit, was comprehensive enough to admit evidence of a sale made by the owner for a price less than \$13,000, and no separate count was required to cover this particular feature. *Hallock v. Jaudin*, 34 Cal. 174; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962. But manifestly we are not controlled by the reason assigned by the court. Admitting the instruction to

be within the issues, and, moreover, to embody a correct legal principle, still there is force in respondent's contention that the jury were likely to make an erroneous application of the instruction by reason of the fact that, after the sale was consummated, a rebate to the purchaser was made by the owner in consequence of a survey having shown that there was a half acre less of land than was estimated. "The test of an instruction is not whether the instruction was erroneous but whether it was misleading." *Hayne, New Trial and Appeal*, § 122; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted. *Hirschberg v. Strauss*, 64 Cal. 272, 28 Pac. 235; *In re Calkins*, 112 Cal. 296, 44 Pac. 577.

Defendant's theory at the trial was that the land was sold for \$13,000 through another agency than plaintiff's assignor, while plaintiff relied principally upon the position that the owner had sold for less than the price fixed in the contract of agency.

[3] It is admitted by appellant that "upon that point there was a conflict in the evidence," but it is contended that "the jury passed upon that, and the jury were the sole judges of the fact, and it is not grounds for a new trial." As to this, appellant is clearly in error, as the trial judge is not bound by the verdict of the jury where there is a conflict in the evidence. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337. But the point we desire to emphasize is the importance of the question whether the land was sold for less than \$13,000. As we have seen, the owner agreed not to sell it for less than that while the contract of agency was in force. He reserved, however, the privilege of selling it for \$13,000; but, if he did so without the intervention of plaintiff's assignors, he was to pay the agents a commission of 2 per cent. His contention being that he sold the land for the full price without any participation on the part of said agents, he claimed that he owed them said 2 per cent. instead of 5 per cent., as demanded by them. It is apparent, of course, that the question whether he made a deduction would be unimportant if the evidence were conclusive that the sale was made through the agency of plaintiff's assignors, but it is admitted by appellant that as to this there was a conflict in the evidence. It was vitally important, therefore, that the consideration as to the price for which the land was actually sold by the owner should be properly presented to the jury. In this connection we may call attention to the fact that the court admitted improper evidence bearing upon this question, and it is quite likely, in view of said instruction No. 6, that said evidence may have determined the result in favor of appellant.

[4] The plaintiff was permitted to testify, over objection, to a conversation that he had with the purchaser after the latter had

agreed to buy the property and made a deposit, in which connection "he said he would like to have bought the place from us, but he done a little better in dollars and cents." This conversation, as is apparent, is not directed to any efforts made by the agents to secure a purchaser, but the testimony involved a hearsay declaration that might have been considered by the jury as evidence of a sale for less than \$13,000, to the prejudice of respondent.

As the record appears, we cannot say that there is no legal warrant for the order of the trial court granting a new trial, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**DOUGHERTY v. CLARKE et al.**  
(Civ. 1,084 [S. F. 6,423].)

(District Court of Appeal, First District, California. Nov. 12, 1912. Rehearing Denied by Supreme Court Jan. 10, 1913.)

**SCHOOLS AND SCHOOL DISTRICTS (§ 145\*)—EVIDENCE—EMPLOYMENT OF SCHOOL TEACHERS.**

In an action by a teacher against a school district, evidence held to warrant a finding that there was no contract of employment.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 315-317; Dec. Dig. § 145.\*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Alice Dougherty against J. W. Clarke and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Costello & Costello, Frank H. Gould, and Vincent Surr, all of San Francisco, for appellant. William H. Donahue, Dist. Atty., W. H. L. Hynes, Asst. Dist. Atty., and Walter J. Burpee, Deputy Dist. Atty., all of Oakland, for respondents.

HALL, J. This is an appeal from a judgment in favor of defendants and the order denying plaintiff's motion for a new trial.

The action was brought by plaintiff to recover one year's salary as upon a contract of employment as a school teacher. The determination of the appeal depends upon whether or not the evidence is sufficient to support the findings of the court that there was no contract of employment between the board of school trustees and the plaintiff in this action. We have carefully examined the record before us, and are of the opinion that there is sufficient evidence in the record to support the finding of the trial court. There certainly is a decided conflict in the evidence as to what took place at the board meeting on the night of August 3d, when plaintiff claims she was offered the employment and accepted the same. The minutes of the meeting on their face lend strong support to the

claim of plaintiff; but oral testimony was also introduced which, if true, shows that she did not then accept the employment. The testimony given by plaintiff upon the one hand, and the witnesses for defendants on the other, is in hopeless conflict as to what occurred subsequently to August 3d bearing upon the question as to whether or not she ever accepted the position offered her by the board. The evidence was sufficient to justify the trial court in finding that she never brought it to the knowledge of the board that she had accepted or would accept the offer the board had made her, and that there never was any meeting of minds between the board and the plaintiff such as would culminate in a contract of employment. It is without dispute that the board only offered her a position to teach a mixed class of the sixth and eighth grades. There is evidence that she positively refused to accept anything other than a class of the eighth grade. This statement she made as late as August 8th to one member of the board. It may be that she did intend to accept the position offered her, but her conduct was such as to justify the board in the belief that she had determined not to accept it. The board finally employed another person to teach the class, of which action they promptly notified plaintiff.

The judgment and order must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

**OLCOVICH v. GRAND TRUNK RY. CO. OF CANADA.** (Civ. 1,051.)

(District Court of Appeal, First District, California. Nov. 14, 1912.)

**1. COURTS (§ 489\*)—JURISDICTION OF FEDERAL COURTS—OVERCHARGES.**

Under section 9 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), which provides that any person claiming to be damaged by any common carrier may make complaint either to the State Commerce Commission, or may bring suit in any District or Circuit Court of the United States, the Interstate Commerce Commission or the designated federal courts have exclusive jurisdiction of an action for damages for overcharges or for any character of damage accruing out of the violation of section 8 making a carrier liable in damages for any violation of the act.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

**2. COURTS (§ 489\*)—CONCURRENT JURISDICTION—STATE AND FEDERAL COURTS—INTERSTATE COMMERCE ACT—ACTION FOR LOSS OF GOODS.**

Section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3160]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), provides that any common carrier of in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terstate shipments shall issue a receipt or bill therefor and be liable to the owner for any injury thereto caused by any connecting carrier, and that no contract shall exempt a carrier from such liability; section 8 makes a carrier subject to the act, liable to a person injured by any violation thereof; and section 9 provides that any person claiming to be so injured may complain to the Commission or sue in any district or circuit court. Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), gives the United States Circuit Courts jurisdiction concurrent with the state courts of certain civil suits, and Act March 3, 1911, c. 231, §§ 24, 289, 36 Stat. 1091, 1167 (U. S. Comp. St. Supp. 1911, pp. 135, 243), gave the District Courts the jurisdiction formerly exercised by the Circuit Courts. *Held*, in view of the acts defining the jurisdiction of the District and Circuit Courts, that an action under section 20 for damages to goods is not an action for a violation of the act, and hence not within the exclusive jurisdiction of the Commission or the federal courts, and that the state courts had concurrent jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

### 3. PLEADING (§ 192\*)—DEMURRER—FORM AND REQUISITES.

Where a demurrer specifies uncertainties and ambiguities in a complaint rather than the insufficiency of the facts stated to constitute a cause of action, the sufficiency of such facts cannot be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. § 192.\*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Herman Olcovich against the Grand Trunk Railway Company of Canada. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Archibald Barnard, of San Francisco (H. W. Philbrook, of San Francisco, of counsel) for appellant. McGowan & Westlake, of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff seeks to recover upon two causes of action, separately stated, the aggregate sum of \$1,738.49, as damages for alleged injuries to two distinct lots of merchandise, claimed to have been consigned to plaintiff, and intrusted to defendant for transportation from Berlin, in the state of New Hampshire, to the plaintiff at the city and county of San Francisco. The defendant is a common carrier, incorporated and existing under the laws of the dominion of Canada, and is engaged in transporting passengers and freight from state to state in the United States over its own lines of railway, and by connection over the railway lines of other common carriers. The plaintiff's causes of action, by appropriate allegations, purport to be founded upon an obligation arising by operation of law out of the provisions of an act of Congress and the amendments thereto, known as the interstate commerce act. The defendant interposed a demurrer to the plaintiff's com-

plaint, which attacked the jurisdiction of the state court to hear and determine the action. The demurrer, which was based upon several grounds, was sustained without leave to amend being granted. Accordingly judgment was entered for defendant, from which the plaintiff has appealed.

We are of the opinion that the demurrer was not well taken upon any of the grounds specified, and that the lower court erred in its ruling sustaining the same. In support of the demurrer, the defendant contends that, by the very terms of the act upon which the liability of the defendant is predicated, jurisdiction to entertain the same is expressly and exclusively conferred upon the Interstate Commerce Commission and the federal courts specifically designated in the act. This contention is founded upon the language of section 9 of the act, which provides that "any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the Commission, as herein provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District Court or Circuit Court of the United States of competent jurisdiction." Act Feb. 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 8159).

[1] The defendant insists that by this section litigants are limited in the selection of a forum for the adjudication of all claims for damages arising out of the interstate commerce act, and the amendments thereto, either to the Interstate Commerce Commission or to the federal courts designated in the act. This construction of the act has been held to be correct in so far as it concerns the right to sue for damages for overcharges or for any character of damage accruing out of the violation of the provisions of section 8 of the act, which provides: "That in case any common carrier subject to the provisions of this act shall do, cause to be done or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing by this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act."

The plaintiff's claim for damages in the present case, however, is founded upon the provisions of section 20 of the interstate commerce act, as amended June 29, 1906, by an act of Congress known as the Hepburn bill, which provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful owner

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by receipt, judgment or transcript thereof."

It is well settled that the federal courts have exclusive jurisdiction of all suits arising out of a violation of the provisions of section 8 of the interstate commerce act hereinbefore quoted. *Van Patten v. Chicago, etc., Ry. Co.* (C. C.) 74 Fed. 981; *Sheldon v. Wabash Ry. Co.* (C. C.) 105 Fed. 785; *N. P. R. Co. v. Pacific Coast Lumber Mfg. Association*, 165 Fed. 1, 91 C. C. A. 39; *Union Pac. Ry. Co. v. Oregon, etc., Lumber Co.*, 165 Fed. 13, 91 C. C. A. 51; *Texas, etc., Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

[2] It is equally well settled that a claim for damages, caused by injury to goods in transit, is not covered and controlled by the provisions of section 8 of the interstate commerce act, and therefore the provisions of section 9 of the act, which designate the forum in which claims arising out of a violation of the provisions of section 8 may be litigated, have no application to an action for damages founded, as is the present action, upon the provisions of the amendment to section 20 of the act. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186-208, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *Galveston, etc., Ry. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516. To hold otherwise would be to deprive the plaintiff of the right to seek redress for the damages here claimed before any tribunal other than the Interstate Commerce Commission. That this is so is demonstrated by a consideration of other acts of Congress which define generally the jurisdiction of the federal Circuit and District Courts.

The act of Congress of March 3, 1875, defining the jurisdiction of the Circuit Courts of the United States as they formerly existed, was amended August 13, 1888, so as to read that: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law

or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution and laws of the United States." Act March 3, 1875, c. 137, 18 Stat. 470; Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). An examination of the several acts of Congress conferring and defining the jurisdiction of the District Courts of the United States shows that such courts did not originally have jurisdiction to hear and determine civil actions involving a claim for damages of the kind now under consideration. 4 Fed. Stats. Annotated, 218 (U. S. Comp. St. 1901, p. 455). Very recently, however, the Circuit Courts of the United States were abolished (1 Fed. Stats. Annotated Supp. 1912, p. 249 [U. S. Comp. St. Supp. 1911, p. 243]), and thereupon Congress enlarged the jurisdiction of the District Courts by conferring upon them the jurisdiction formerly exercised by the Circuit Courts. By such enlarged jurisdiction, the District Courts were given cognizance of "all suits of a civil nature, at common law or in equity, \* \* \* when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and arises under the Constitution or laws of the United States. \* \* \*" 1 Fed. Stats. Annotated Supp. 1912, p. 139 (U. S. Comp. St. Supp. 1911, p. 135).

This being so, it would follow—if it were true, as defendant contends, that all causes of action for damage against a common carrier arising out of the interstate commerce act and the amendments thereto fall within and are controlled by the provisions of sections 8 and 9 of the act—that the plaintiff's claim for damages under the provisions of the amendment to section 20 of the act could be litigated only before the Interstate Commerce Commission. That this result was not contemplated by Congress when it enacted the amendment to section 20 of the interstate commerce act, known as the "Hepburn act," and under which the present action was instituted, is clearly pointed out in the comparatively recent case of *Smeltzer v. St. Louis & S. F. R. R. Co.* (C. C.) 168 Fed. 420. In that case the precise point presented here with reference to the jurisdiction of the state courts was raised upon demurrer, and decided to be without merit. The opinion in that case reviews the scope and effect of the several sections of the interstate commerce act and the amendments thereto under discussion here; and the reasoning upon which the court arrived at the conclusion in that case, that the state courts had jurisdiction over actions for damages arising under the Hepburn act, so clearly and convincingly disposes of the jurisdictional phase of the present case that we feel justified in quoting extensively from the opinion of the learned judge who decided the case referred to. In its pertinent points that opinion is as follows:

"The case is here on removal from the circuit court of Crawford county, Ark. The contention is that under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and amendments thereto (Act June 29, 1906, c. 3591, 34 Stat. 384; U. S. Comp. St. Supp. 1907, p. 892), exclusive jurisdiction is conferred on the District and Circuit Courts of the United States, or upon the Interstate Commerce Commission, and therefore the state court had no jurisdiction of the case when brought, and this court acquired none by removal.

"In the opinion of the court, the contention is without merit. The following cases are cited to support the demurrer: *Haracovic v. Standard Oil Co.* (C. C.) 105 Fed. 785; *Kalispell Lumber Co. v. Great Northern Ry. Co.* (C. C.) 157 Fed. 845; *Van Patten v. Chicago, M. & St. P. R. Co.* (C. C.) 74 Fed. 981; *United States v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550; *United States v. Atchison, T. & S. F. Ry. Co.* (C. C.) 142 Fed. 187; *Central Stock Yards Co. v. Louisville & N. R. Co.* (C. C.) 112 Fed. 823; *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n* [91 C. C. A. 39], 165 Fed. 1. I do not think any of these cases in point. They relate to actions brought under sections 8 and 9 of the act of February 4, 1887, known as the 'Interstate Commerce Act.' When that act went into effect, no such suit as the one now under consideration was authorized under then existing laws. This suit was brought under section 7 of the act of June 29, 1906, known as the 'Hepburn Act,' 34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1907, p. 892.) That section, it is true, is an amendment of section 20 of the act of February 4, 1887, but the section, as it stood in the original act, contained no provisions such as that under which this suit is brought. The provision under which this suit is brought \* \* \* relates solely to suits to be brought by shippers over interstate lines for loss or damage to their goods. No provision is made by the section as to what courts the suits shall be brought in for losses or injuries so sustained. The contention is that the provisions found in sections 8 and 9 of the act of February 4, 1887, and the provision found in the previous part of the section from which the above quotation is taken, applies to this class of actions. I am clearly of opinion that this contention is unsound. \* \* \*

"Sections 8 and 9 of the original interstate commerce act of February 4, 1887, must be considered with reference to the provisions of the act as it stood when enacted, and to the purpose and scope of the act. There was not the remotest reference in that act to the liability of an initial carrier for losses on its connecting lines, nor any provision requiring a railroad engaged in interstate commerce to give a through bill of lading, or withdrawing its power to limit by rule, regulation, or contract its liability to losses occurring on its

own lines. Sections 8 and 9 of the act of February 4, 1887, therefore, when enacted, could not have had any application to such an action as the one at bar, because no such action then existed. The very language used makes it clear that those sections have no application to such an action as this. \* \* \*

"Manifestly they relate to the right of any one who has been injured to recover such damages as he may have suffered by the failure of the carrier to do what the act required, or for doing the things the act forbids.

"But this suit is not brought because the carrier did something it was forbidden by the act to do, or neglected to do anything that the act commanded. All the cases cited above are of the character indicated, and have no application to a case like the one at bar. This is simply a suit for damages for breach of a contract, either entered into voluntarily without reference to the act, or in pursuance of, or in conformity to, it. In either event, it does not fall under the sections quoted, and hence is not required to be brought in a District or Circuit Court of the United States, or before the Interstate Commerce Commission.

"The question then arises, If Congress creates a new cause of action, and, by the act creating it, designates no court in which the suit shall be brought, what courts have jurisdiction? This question was before the Supreme Court in *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585. An examination of the act under which that suit was brought will show that it creates a new cause of action which under the general law belonged to the admiralty jurisdiction. It related wholly to losses and damages sustained on the high seas. That act did not designate any court in which cases created by the act might be tried, but did say, 'The owner or owners of the ship or vessel, or any of them, may take the appropriate proceeding in any court,' for certain purposes provided. The act differs from the one under consideration in that respect only, for the latter makes no reference to courts in which the shipper may institute suits for the relief provided. The Supreme Court in that case said, on the question of jurisdiction:

"The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties or any of them may take 'the appropriate proceedings in any court, for the purpose of apportioning the sum for which,' etc. Now no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims, and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have

invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter, and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

"This decision was followed in *Elwell v. Geibel and Another* (C. C.) 33 Fed. 71, and was also approved by the Supreme Court in *Providence & N. Y. Steamship Co. v. Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. The statute under which those suits were brought ousted the jurisdiction of all courts, state and federal, except the District Courts of the United States, because the subject-matter was maritime, and the general jurisdiction of the federal courts in all admiralty matters (with certain specified exceptions) is conferred by general statutes of the United States on the United States District Courts. \* \* \* These cases, I think, decide the principle involved here.

"We must look, then, to the judiciary act to see what courts, under the general law, have jurisdiction in like cases, otherwise we should have the anomaly spoken of in *Norwich Co. v. Wright* 'that the Legislature has passed a law which is incapable of execution,' which the court in that case said 'is never to be done if it can be avoided.' By Act March 3, 1875, c. 137, 18 Stat. 470, as amended by the Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), it is provided:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,' etc.

"By this statute it is plain that the jurisdiction is concurrent in the Circuit Courts of the United States and the state courts in all common-law cases where the amount in dispute, exclusive of interest and costs, exceeds the sum of \$2,000, if the suit is between citizens of different states or arises under the

Constitution and laws of the United States, \* \* \* and suits for \$2,000 and less must be brought in the state courts, otherwise jurisdiction obtains in no court, state or federal, for that class of cases, and the act of Congress to that extent is unenforceable. Any other conclusion would not only nullify the twentieth section of the Hepburn act under consideration, but many other acts of deep concern to the country, among others Act May 30, 1908, c. 225, 35 Stat. 476 (U. S. Comp. St. Supp. 1911, p. 1326), 'to promote the safety of employes on railroads,' Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), known as the 'Employer's Liability Act,' Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the 'act to prevent cruelty to animals while in transit,' and others which might be cited."

The case just quoted from was not cited to us by counsel in their briefs or upon the oral argument, and the case of *Galveston, etc., Ry. Co. v. Wallace*, supra, was discovered and appended to the briefs by counsel for the plaintiff shortly before the submission of the case here. It must be assumed, therefore, in fairness to the judge of the lower court, that these two cases were not called to his attention. In addition to the jurisdictional point just disposed of, the defendant insists that the demurrer was properly sustained upon the ground that neither count of plaintiff's complaint states facts sufficient to constitute a cause of action. In this behalf it is one of defendant's contentions that the complaint should contain an allegation that the damage sued for "occurred on the road of the defendant or on its portion of the through route," because the shipping receipts issued by the defendant are made a part of the complaint, and expressly provide that no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route. A complete and conclusive answer to this contention is to be found in the very language of the act itself upon which this action is founded. It declares that "no contract, receipt, rule or regulation shall exempt such common carrier \* \* \* from the liability hereby imposed."

[3] In regard to the several remaining particulars in which the defendant claims that the complaint is deficient in its statement of a cause of action, it will suffice to say that in each instance the specifications of insufficiency relate solely to matters which go only to the uncertainty and ambiguity of the complaint rather than to the sufficiency of the facts stated to constitute a cause of action; and, as they were not specified in the demurrer, they cannot now be considered.

For the reasons stated, the judgment is reversed, with instructions to the lower court to overrule the demurrer and require the defendant to answer.

We concur: **HALL, J.**; **KERRIGAN, J.**

## Ex parte ZANY. (Crim. 198.)

(District Court of Appeal, Third District, California. Nov. 14, 1912. Rehearing Denied by Supreme Court Jan. 13, 1913.)

1. INTOXICATING LIQUORS (§ 11\*)—CONFLICTING STATE AND COUNTY REGULATION — "GENERAL LAW."

Local Option Law April 4, 1911 (St. 1911, p. 599), which provides a state-wide scheme, by which any incorporated city or town, or that portion of any supervisorial district not within the boundaries of any incorporated city or town, may petition for an election whether the sale of alcoholic liquors shall be licensed therein, the obvious intention of which was to authorize any incorporated city or town, or the part of the county outside incorporated cities and towns, to act independently of each other in that matter, is a "general law," within Const. art. 11, § 11, which provides that any county, city, or town may make and enforce such police and other regulations as are not in conflict with general laws.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3065-3071; vol. 8, pp. 7669, 7670.]

2. INTOXICATING LIQUORS (§ 11\*)—CONFLICTING STATE AND COUNTY REGULATION.

Local Option Law April 4, 1911 (St. 1911, p. 599), a general law within Const. art. 11, § 11, which provides that any county, city, or town may make and enforce such police and other regulations as are not in conflict with general laws, provides that electors of any city or town, or of that portion of any supervisorial district not within the boundaries of any city or town, may petition for an election whether the sale of alcoholic liquors in such city, town, or district shall be licensed therein, by sections 13 and 19, makes a sale in no-license territory a misdemeanor, and by section 22 provides that nothing in the act shall be construed as putting limitations, except such as are positively stated herein, upon the existing police powers of cities, towns, and counties. Act April 3, 1911 (St. 1911, p. 577), as amended by Act Jan. 2, 1912 (St. 1912, p. 125), added to Pol. Code, § 4058, providing for direct legislation and including initiative and referendum in counties, and an ordinance was enacted pursuant thereto "by and for the county" of S. by the electors of the county, making it unlawful to sell intoxicating liquor in the county. *Held*, on habeas corpus by petitioner held in custody for a violation of such ordinance, that the legislative power given by the referendum act was intended to be given to the people of the entire county as to other matters of general concern, that the limitations "positively stated" in the local option act were those upon the power of electors of incorporated towns or cities, or supervisors of the districts, to independently determine the sale of alcoholic liquors, and that the ordinance attempting to determine the question for the county as a whole, and not for the cities, towns, or districts therein to be affected, was void as in conflict with the general local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.\*]

3. STATUTES (§ 206\*) — CONSTRUCTION — GIVING EFFECT.

A statute should be so construed as to give a sensible and intelligent meaning to every part, and, if possible, so as to make it valid and effective, and Civ. Code, § 3541, is declaratory of this rule of construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.\*]

4. HABEAS CORPUS (§ 32\*)—GROUNDS OF RELIEF—WANT OF JURISDICTION.

Under the express provisions of Pen. Code, § 1487, the unconstitutionality of a law or ordinance is ground for discharge on habeas corpus before trial and conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 29; Dec. Dig. § 32.\*]

Application by Charles Zany for a writ of habeas corpus. Ordered that the petitioner be discharged.

Ben Berry and Gordon A. Stewart, both of Stockton, for petitioner. L. J. Maddux, of San Francisco, for the People.

CHIPMAN, P. J. It appears from the petition that petitioner, Charles Zany, is imprisoned by the authority of a warrant of arrest issued on July 11, 1912, upon a complaint filed that day in the justice's court of Modesto township, county of Stanislaus. It is alleged in the petition that said complaint is invalid, illegal, and void in that it fails to charge a public offense and conferred no authority on the said justice of the peace to issue said warrant; "that said complaint is founded upon and charges a violation of the terms and provisions of an ordinance enacted by the people of the county of Stanislaus, state of California, on the 14th day of May, 1912, which ordinance marked 'Exhibit B,' is expressly referred to and made a part of this petition"; that no authority "is conferred by law upon the people of the county of Stanislaus to enact or adopt said ordinance and the same is invalid, illegal, null, and void."

The charging part of said complaint, after reciting the circumstances of the sale of certain two quarts of wine, is as follows: "Which said selling and furnishing as aforesaid was then and there in violation of 'An ordinance for police regulation relating to places where alcoholic liquors are sold, stored, delivered, kept, served, disposed of, or distributed or given away within the county of Stanislaus, state of California, making unlawful the selling, storage, delivery, possession, disposal, distribution, or giving away of such liquors (with certain exceptions), within such portions of the county of Stanislaus as are subject to the police powers of said county, providing a penalty for the violation thereof, and repealing all ordinances or parts of ordinances in conflict herewith.' Said ordinance enacted by a vote of the people of the county of Stanislaus on the 14th day of May, 1912, which said ordinance went into effect on the 31st day of May, 1912; said claret wine then and there being an alcoholic liquor."

The title and enacting clause of the said ordinance are as follows: "An ordinance for police regulation relating to places where alcoholic liquors are sold, stored, delivered, kept, served, disposed of, or distributed or given away within the county of Stanislaus,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state of California; making unlawful the selling, storage, delivery, possession, disposal, distribution, or giving away of such liquors (with certain exceptions) within such portions of the county of Stanislaus as are subject to the police powers of said county, providing a penalty for the violation thereof and repealing all ordinances or parts of ordinances in conflict herewith. The people of the county of Stanislaus (state of California), do ordain as follows." Section 1 of the ordinance, as shown by petitioner's Exhibit B, is as follows: "That it shall be unlawful for any person \* \* \* within such portions of the county of Stanislaus, state of California, as (are) subject to the police powers of said county, to sell \* \* \* any alcoholic liquors, except as hereinafter provided." Section 7 reads as follows: "Any person violating any of the terms or provisions of this ordinance or failing to observe and perform any of the requirements hereof shall be guilty of a misdemeanor thereunder and upon conviction thereof shall be fined not more than five hundred dollars or be imprisoned in the county jail not more than six months or be punished by both such fine and imprisonment." Section 12 reads as follows: "This ordinance shall go into effect from and after ten days after its adoption." Following this section is the following: "Be it further resolved that said election shall be held at the same polling places, in the same precincts and conducted by the same election officers as have been appointed for the May presidential primary election to be held on Tuesday, the 14th day of May, 1912. The above resolution was adopted by the following vote of the board: M. A. Lewis—Yes. W. R. Service—Yes. J. J. McMahon—Yes. A. E. Clary—Yes. John Dunn—Yes. Thereupon the board adjourned for the term. Attest: H. Benson, Clerk. By C. C. Eastin, Jr., Deputy."

In his return to the writ, respondent "admits that said complaint is founded upon and charges a violation of the terms and provisions of an ordinance enacted by the people of the county of Stanislaus, state of California, on the 14th day of May, 1912, which ordinance, marked 'Exhibit B,' is attached to said petition, except the last paragraph of said ordinance, beginning with 'Be it further resolved' down to and ending with 'deputy.'" The return further shows: "Said sheriff alleges that said ordinance, after due and legal proceedings had before the board of supervisors, said (ordinance was) submitted to a vote of the qualified electors of said county who had a right to vote at said election, on the 14th day of May, 1912. That at said election a majority, who had a right and were entitled to vote on said ordinance, voted in favor of the adoption of said ordinance. \* \* \* That said ordinance went into effect from and after ten days after its adoption, and ever since has been and now is in

effect in said county of Stanislaus, as provided in said ordinance."

There are certain provisions of the Constitution and statutes brought into review:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Section 11, art. 11, Const.

The act of April 4, 1911 (Stats. 1911, p. 599) is an act entitled "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option," etc. Section 1 provides that: "Qualified electors of any city or town, or of that portion of any supervisorial district not included within the boundaries of any incorporated city or town, \* \* \* may petition the city council, board of trustees or other legislative body of such city or town or the board of supervisors of the county in which such supervisorial district is situated, to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city, town, or supervisorial district outside of incorporated cities and towns." The sections following comprise complete directions for carrying out the objects of the statute. Section 13 declares that: "It shall be unlawful for any person \* \* \* within the boundaries of any no-license territory to sell \* \* \* any alcoholic liquors except as provided in section 16 hereof." Section 19 declares that the violation of the statute shall be deemed a misdemeanor punishable "by a fine not exceeding six hundred dollars, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment." Section 22 reads: Nothing in this act shall be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, towns and counties."

The act of January 2, 1912, is entitled "An act to amend section 4058 of the Political Code, relating to direct legislation and including initiative and referendum by electors of counties" (Stats. 1912, p. 125). The amended section 4058 was originally enacted as a new section to the Political Code, April 3, 1911 (Stats. 1911, p. 577), and the act was entitled "An act to provide for direct legislation, including initiative, referendum, and recall by electors in counties, by adding two new sections to the Political Code to be numbered sections 4058 and 4021a, respectively." Section 4021a provides that "the holder of any elective office of any county may be removed or recalled at any time by the electors; provided he has held his office at least six months," and provides the procedure for such removal. Section 4058, as it now reads, provides as follows: "Ordinances may also be enacted by and for any county of the state in the manner following." Then follow provisions by which "qualified electors of the county," in number as pre-

scribed, may by petition submit to the board of supervisors any proposed ordinance. "If the petition accompanying the proposed ordinance be signed by electors not less in number than twenty per cent. of the entire vote cast within such county for all candidates for Governor of the state, at the last general election at which such Governor was voted for, and contains a request that such ordinance be submitted forthwith to a vote of the people at a special election, then the board of supervisors shall either: (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or (b) forthwith the supervisors shall proceed to call a special election at which said ordinance, without alteration, shall be submitted to a vote of the electors of the county." Then follow provisions for conducting the election not necessary to be stated. Among other things, it is provided that "the enacting clause of an ordinance passed by the vote of the electors shall be substantially in the following form: 'The people of the county of ..... do ordain as follows.'" It is also provided that, "if a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the county and be considered as adopted upon the date that the vote is cast and declared by the board of supervisors and go into effect ten days thereafter."

Some significance is attempted to be given the fact that section 4058, introducing the initiative, was originally passed April 3, 1911, while the local option law was passed April 4, 1911. Section 4058, with which we are now to deal, was passed January 2, 1912, and is the law governing so far as it relates to the proceedings now under review, which were initiated since that date. This we deem sufficient answer to any inference which might be drawn had section 4058 remained unamended.

Respondent says in his brief: "It has never been claimed, nor has any one contended, that it (the ordinance) was passed by the board of supervisors. It is admitted that it was passed by the vote of the people." In his return respondent alleges that the ordinance was "submitted to a vote of the qualified electors of said county who had a right to vote at said election, on the 14th day of May, 1912; that at said election a majority, who had a right and were entitled to vote on said ordinance, voted in favor of the adoption of said ordinance." We are asked to infer from this statement that only those electors residing without the boundaries of any incorporated town or city voted at the election, and that section 4058 "refers to that part of the county over which the board of supervisors has jurisdiction"; that the board has no jurisdiction over incorporated cities and towns, and hence, in submit-

ting the ordinance, the board submitted it only to electors outside such cities and towns.

The ordinance declares that "the people of the county of Stanislaus, state of California, do ordain as follows." The act declares that "ordinances may also be enacted by and for any county of the state in the manner following." The act contemplates the enactment of ordinances by the electors of the county on the principle of the initiative and referendum. The ordinance shows on its face that it was enacted "by and for the county" in conformity with the statute and is the enactment of "the people of the county." It is perfectly clear that the ordinance was passed pursuant to section 4058 and not under the local option law.

It is immaterial, in the view we take of the section, whether the electors of the entire county participated in the election or only those residing outside incorporated cities and towns. It was not an election by the districts to be affected. We have, then, the question: Is the licensing of the liquor traffic governed by the local option law of 1911 or by section 4058 of the Political Code?

[1] The act of 1911 is a general law. *Ex parte Beck* (Sup.) 124 Pac. 543. As will be seen from its terms, quoted above, it provides a state-wide scheme by which "any incorporated city or town, or of that portion of any supervisorial district not included within the boundaries of any incorporated city or town," may petition to the appropriate legislative body to call an election to determine "whether the sale of alcoholic liquors shall be licensed in such city, town or supervisorial district outside of incorporated cities and towns." No provision of the act authorizes any county in its entirety, either exclusive or inclusive of incorporated cities and towns, to petition any legislative body to call an election for such purpose. The obvious intention of the Legislature was to authorize each of the mentioned subdivisions of the county to act independently of every other in determining the question for itself, unaffected by the votes of any other of the subdivisions named.

[2] Hence any ordinance passed by the people of the county or by the board of supervisors in conflict with this general law would be violative of section 11, art. 11, of the Constitution, supra, and void. In *re Desanta*, 8 Cal. App. 295, 96 Pac. 1027; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; In *re Sic*, 73 Cal. 142, 14 Pac. 405. That the ordinance in question is in conflict with the act of 1911 admits of no doubt. We have an apt illustration of this fact in the recent general election as well as in numerous previous elections in counties. In several counties, proceeding under the local option law, the electors of incorporated cities and towns and of supervisorial districts voted on the question whether they would license the sale of intoxicating liquors. The result was that,

in the vernacular of the day, some voted "wet" and others voted "dry," so that in the same county there is now "wet" and "dry" territory. Obviously, an ordinance enacted by a county-wide vote must necessarily result in nullifying the decision of one or more districts, whichever way the county as a whole might vote, and would thus thwart the underlying principle of the act of 1911, namely, local option by districts. It is easily conceivable that the electoral vote of the entire county might be invoked at any time to accomplish this very object. It might happen that, in a county-wide vote, the electors of a town or city would be able to determine the question for every other district in the county, or the combined vote outside the town or city might settle the question for the town or city. Was it the intention of the Legislature to authorize this to be done by the enactment of section 4058? We cannot believe that the Legislature so intended, or that such an intention necessarily results from anything to be found in that section. This section, as it now reads, differs but little and in no respect affecting the present question, from the section as originally passed. It was first enacted April 3, 1911, and the local option law was passed the next day, April 4, 1911. The local option law relates to a specific single subject and is a carefully worked-out plan by which the people of the supervisorial subdivisions of the county and the incorporated cities and towns may license the liquor traffic. The powers given by section 4058, we think, were given, and intended to be given, the people of the entire county, to legislate by the initiative upon other subjects of general concern to the whole county. To give the section the construction contended for would permit a county by its votes to repeal an ordinance passed by a district of the county under the local option law; or it might by its vote make it impossible for a district to enact an ordinance on that subject different from that enacted by the county.

The local option law requires "the petition of twenty-five per cent. of the number of votes cast for all candidates for Governor of the state," i. e., 25 per cent. of the votes cast in the supervisorial district or in the boundaries of the incorporated city or town. Section 4058 requires the petition to be "signed by electors not less in number than twenty per cent. of the entire vote cast within the county \* \* \* at the last preceding general election at which a Governor is voted for." For the reasons suggested, and others might be added, if section 4058 is given the construction contended for by respondent, the two acts are in irreconcilable conflict and one or the other must give way.

[3] "Interpretation must be reasonable." Civ. Code, § 3542. "An interpretation which gives effect is preferred to one which makes void." Civ. Code, § 3541. A statute should

be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, so as to make it valid and effective. 2 Sutherland, Stat. Const. § 516. The legislation inaugurating the initiative and referendum and recall can find ample scope for its operation by giving it a reasonable interpretation and confining its operation to matters not elsewhere specifically provided for, and limiting its application to subjects of general concern to the people of the entire county over which they may properly legislate. For example, they may vote on the question of the removal of the county seat. Pol. Code, § 3973. The county may vote bonds to provide funds for the construction of roads, bridges and highways. Id. § 4088. There are numerous powers given the board of supervisors, as the legislative body of the county, enumerated in section 4041 of the Political Code, some of which would probably be held to be within the province of the people to initiate under section 4058.

However, the view we have taken gives effect to both laws without doing violence to either, and this we think it our duty to do. Any other view would lead to great confusion in the administration of the law and would inevitably bring about a repeal of ordinances in force in some of the counties and prevent their successful enactment in others. In short, it would render the local option law of little or no value. We can find no warrant for bringing about such regrettable results.

Our attention is called to the recent decision in the case of *Giddings v. Board of Trustees of San Buenaventura*, 130 Pac. —, <sup>1</sup> and also to section 22 of the local option law, supra, which provides that "nothing in this act shall be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, towns and counties." The limitations "positively stated" in the act can be none other than the powers given to the "qualified electors of any incorporated city or town, or the electors of that portion of any supervisorial district not included within the boundaries of any incorporated city or town," to petition the appropriate legislative body "to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city, town or supervisorial district outside of incorporated cities or towns." The section simply means that the police powers of cities, towns, and counties are not limited by the act except that the question "whether the sale of alcoholic liquors shall be licensed" is a matter which the act has specifically conferred upon the incorporated cities or towns and the supervisorial districts outside such cities and towns to be acted upon by each in its separate capacity. In other words, the county as such cannot, under its general police

<sup>1</sup> Rehearing pending.

power, deprive the electors of incorporated cities or towns or the electors of a supervisorial district outside such cities and towns, from deciding for themselves the question confided to them by the act. Had the Legislature intended to extend the operation of the local option law to counties to pass ordinances on the specific subject dealt with in the act, the Legislature would have so said in section 1, where the power is given to the enumerated subdivisions of the county. In mentioning the subdivisions of the county to which was given the power, the county as a whole was excluded. *Expressio unius, exclusio alterius*. We cannot impute to the Legislature the intention by section 22 to reserve to the county, by a vote of all the electors therein, the power to prevent or undo legislation which the act empowers incorporated cities and towns and supervisorial districts only to enact.

The Giddings Case, above cited, does not, as respondent claims, "settle the question in the present matter." In August, 1911, the electors of San Buenaventura, under the local option law, voted in favor of licensing the sale of alcoholic liquors, and the board of trustees passed an ordinance accordingly. On April 1, 1912, a petition by electors of the city was presented to the board, requesting it either to enact the accompanying ordinance, prohibiting the traffic in alcoholic liquors in said city, or submit the question to a vote of the electors of the city. The petition was presented under the provisions of the act of January 2, 1912 (Stats. 1912, p. 131), which gives to incorporated cities and towns the initiative and referendum as does the act of the same date to counties. The board refused to comply with the petition "upon the theory that under the local option act the people at a popular election once determined the question and under the provisions of such act a second election should not be called until after the lapse of two years." But the court held that this local option law "only purports to wrest from such board of trustees the power to grant licenses after the electors shall have determined not to make such city 'no-license territory.'" Said the court: "It does not interfere with their power, in the event no election has been held under the act, nor where one has been held and the electors have determined not to make such city 'no-license territory.'" The writ of mandate was issued for the reason that the ordinance enacted in April, 1911, was not such expression as was prohibited by the act from being resubmitted. Had the vote been in favor of "no-license territory," the opinion shows, by implication, that the local option act would have prevented its resubmission until after the lapse of two years. The court said that the question of the repeal by implication of the local option law by virtue

of the initiative act was not involved. Indeed, that act was not involved except that under it the board of trustees were asked to do what it had the undoubted right to do under its general police powers with which its action in April, 1911, in no wise interfered. The initiative act gave the electors the right to compel action on the question submitted, but the right or power to act on the particular subject did not come from the initiative act; that power was already lodged in the board.

[4] Respondent concedes that habeas corpus will lie to test the constitutionality of an ordinance, but he contends that "the rule should be that the constitutionality of a law or ordinance should only be considered after a conviction or after the judgment in the lower court." Why should the liberty of a citizen be taken from him and he be put to the expense and ignominy of a criminal prosecution upon a complaint having no warrant of law to support it? A void law is no law, and a prosecution under it is a prosecution without the authority of law. But the rule is otherwise. Pen. Code, § 1487; *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34; *In re Smith*, 143 Cal. 368, 77 Pac. 180.

The prisoner must be discharged, and it is so ordered.

We concur: BURNETT, J.; HART, J.

# ZETLER v. TONOPAH & G. R. CO. (No. 1,889.)

(Supreme Court of Nevada. Jan. 4, 1913.)

## 1. CARRIERS (§ 405\*)—BAGGAGE—LIMITATION OF LIABILITY.

If it be conceded that passenger carriers by specific regulations which are reasonable, and not inconsistent with statute or with their duties to the public, and which are distinctly brought to the knowledge of the passenger, may protect themselves against liability as insurers of baggage exceeding a fixed value except upon payment of an additional compensation proportioned to the risk, a contract so limiting the amount of liability does not relieve the carrier of liability for baggage lost through its negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544–1549; Dec. Dig. § 405.\*]

## 2. CARRIERS (§ 405\*)—BAGGAGE—NEGLIGENCE—WRONG DELIVERY.

The delivery of a passenger's baggage at the carrier's baggage room to a person not entitled to receive it is such negligence as makes the company liable, notwithstanding a contract limiting its liability to a fixed value.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544–1549; Dec. Dig. § 405.\*]

Norcross, J., dissenting.

Appeal from District Court, Esmeralda County; Theron Stevens, Judge.

Action by Anton Zetler against the Tonopah & Goldfield Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.



Campbell, Metson & Brown, of Tonopah, Huger Wilkerson, of Goldfield, and Walter Shelton, for appellant. James Donovan, of Bakersfield, Cal., for respondent.

**TALBOT, J.** This is an appeal from a judgment in favor of the plaintiff for \$783.95 for damages for the loss of baggage and from an order denying defendant's motion for a new trial.

[1] The baggage was checked on a ticket which bore a number of written conditions, among which was the one: "It is agreed that the value of the baggage transported under this ticket shall not exceed one hundred dollars." Under the contentions made it may be conceded for the purposes of this case that "it is competent for passenger carriers by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk." *Moore on Carriers*, § 52. Even if so, it has been held, where such is acknowledged to be the law by decision or even by statute, that the carrier is liable for baggage lost through his negligence, notwithstanding a valid contract limiting the amount of the liability. *Tewes v. North German Lloyd S. S. Co.*, 42 Misc. Rep. 148, 85 N. Y. Supp. 994; *Holmes v. North German Lloyd S. S. Co.*, 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. (N. S.) 650; *Saleeby v. Central R. Co. of New Jersey*, 99 App. Div. 163, 90 N. Y. Supp. 1042; *Williams v. Central R. Co. of New Jersey*, 93 App. Div. 582, 88 N. Y. Supp. 434; *Saunders v. Southern Ry. Co.*, 128 Fed. 15, 62 C. C. A. 523; *Bank of Kentucky v. Adams' Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wall. (84 U. S.) 357, 21 L. Ed. 627.

[2] As it appears that the damage was occasioned by the delivery of the trunk by the plaintiff at the baggage room to some person not entitled to receive it, we think this was such negligence on the part of the company as to render it liable for the value of the articles lost, notwithstanding the contract.

Respondent moved to strike the statement from the files because not filed in time, but we think it was filed within the time properly allowed by extensions.

The judgment of the district court is affirmed.

**SWEENEY, C. J.**, concurs.

**NORCROSS, J.** (dissenting). I am unable to concur in the conclusions reached by my associates in this case. The main question involved is of first impression in this court and concerns an important rule of liability of common carriers.

The proofs in the case show that the plaintiff purchased a ticket from the Great Northern Railway Company at Bellingham, state of Washington, for transportation over it and other connecting lines, including that of the defendant, to Goldfield, Nev. The ticket so purchased was a second-class ticket, which contained the following provisions subscribed to by the plaintiff: "Issued by the Great Northern Railway Line. Good for one passage to Goldfield, Nevada. \* \* \* Subject to the following contract: 1st. In selling this ticket and checking baggage thereon, this company acts as agent and is not responsible beyond its own line. \* \* \* 6th. It is agreed that the value of the baggage transported under this ticket shall not exceed \$100. 7th. This ticket must be signed below by the purchaser. \* \* \* No agent or employé has power to modify this contract in any particular. I hereby agree to all the conditions of the above contract. [Signed] A. Zetler, purchaser. Witness: R. M. Smith, agent. A. L. Craig, Passenger Traffic Manager." The baggage in question was checked the day following the purchase of the ticket and a duplicate check given to the plaintiff therefor, reading in part as follows: "Special Duplicate Check. Great Northern Railway, \* \* \* via G. N. Ry. to Seattle, N. P. to Portland, Southern Pacific to ——. Tonopah & Goldfield per destiny, 14157, Form 100, Series J. Baggage consists of wearing apparel and personal effects of the passenger, which may be necessary for the journey. The liability of this company and all others over which the baggage passes is limited to \$100. All baggage valued in excess of this amount will be transported at proportionate rates."

The principal question involved in this case relates to the amount of damages the plaintiff is entitled to recover. The plaintiff alleged and recovered judgment for damages in the sum of \$783.95. There is no testimony upon the part of the plaintiff or proof in this case that the plaintiff did not have knowledge of the terms and conditions of the ticket purchased by him at the time of such purchase and at the time of checking his baggage. So far as the evidence goes, the ticket was offered in evidence by the defendant, the plaintiff acknowledged his signature thereto, and the matter of the ticket was allowed to rest. Presumptively, at least, one who subscribes to an instrument has knowledge of its contents, and, in the absence of evidence that will relieve him from the effect of his apparently voluntary act, he is bound by the provisions of the instrument, otherwise valid, which he has executed. If the ticket upon its face was in effect a valid contract binding upon the plaintiff, the burden was upon the plaintiff to show facts, if such existed, that would relieve him from its otherwise binding force. One of the conditions of the ticket to which the plaintiff sub-

scribed was "that the value of the baggage transported under this ticket shall not exceed \$100." Unless it can be said that this condition is unreasonable or contrary to some provision of statute, or against public policy, plaintiff is bound by it. It appears that the railroad company selling the ticket had made provision for the carrying of baggage of a higher value than that carried free upon the ticket which could be carried at the company's risk upon the payment of additional proportionate rates. This provision was printed upon the trunk check received by the plaintiff. Plaintiff in his testimony makes no contention that he was not aware at the time of the provision printed on his check, or that his attention was not called thereto.

Provisions included in railroad tickets, attempting arbitrarily to limit liability for loss of baggage beyond a certain prescribed amount, have been held by the courts to be invalid, as contrary to the rule of the common law. However, as succinctly stated by Moore on Carriers, § 52, the authorities very generally recognize that: "It is competent for passenger carriers by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk." 3 Hutchinson on Carriers, § 1297, says: "In general, it may be stated that there is no distinction between the baggage of a passenger and ordinary goods in respect to the rights of the parties to enter into contracts limiting the liability of the carrier." And again, in section 1299, the author says: "Conditions intended to restrict the carrier's common-law liability in respect to the carriage of baggage are frequently written or printed upon passenger tickets, and the question arises as to the extent to which such conditions will be binding on the person accepting the ticket. If the ticket imports a special contract, the presumption will arise that the person accepting the ticket knew of and thereby assented to such of its lawful limitations as were plainly written or printed upon it as a part of the contract." In the recent case of Hooker v. Boston & Maine Railroad, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669, cited by respondent, the Supreme Court of Massachusetts, while holding the defendant company to full liability for the loss of baggage in question, because regulations limiting liability were not brought to the knowledge of the plaintiff or assented to, said: "The common-law rule fixing the rights of the parties is not open to doubt. It is that respecting the transportation of baggage or merchandise a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It

may not exonerate itself, however, by regulation or by contract from liability for its own negligence, but it may make just and reasonable stipulations in good faith as to the value of the property intrusted to its care, and the amount for which it shall respond in case of loss, even though occurring through its own negligence. Such stipulations must be brought home to the knowledge of the shipper through either a formal contract, or express or inferable notice, under circumstances warranting the assumption of actual assent"—citing many authorities. In the leading case of Railroad Company v. Fraloff, 100 U. S. 24, 25 L. Ed. 531, the court by Harlan, J., says: "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger which are reasonable in their character, and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." The distinction between cases where there has been an agreement between the carrier and the passenger or shipper as to value and where there has been an attempt to limit liability, regardless of value, is illustrated by the recent case of Wells v. Great Northern Railway Company, 59 Or. 165, 176, 116 Pac. 1070, 1071, 34 L. R. A. (N. S.) 825, wherein the court said: "Defendant also mistakes the effect of the seventh clause of the contract, limiting the liability of the company. It is not a stipulation of the value of the goods shipped, but limits the liability to \$100 in any case, and is not an agreed value of the goods shipped. 'The baggage liability is limited to wearing apparel only, not exceeding \$100 in value,' and the passenger does not participate in fixing the amount. He is required to accept the stipulation on the ticket, or leave his baggage. This is conceded in the second brief filed on this motion, where it is contended that the limitation is fixed by the schedule of rates filed by the company with the Interstate Commerce Commission, and has the force and effect of a law. Without assenting to that statement, certainly there was no agreement as to the value of the goods shipped. Mr. Justice Wolverton, in Normie v. Oregon Nav. Co., makes the distinction between an attempt by the carrier to stipulate against liabilities, regardless of the value, and a stipulation fixing the value of the freight to be carried; and counsel for defendant claim that this case comes within the latter class, but in this he is in error. It is said at page 184 of 41 Or., at page 930 of 69 Pac.: 'It is a sound and wholesome doctrine, based upon consideration of public policy and fair dealing, that a common carrier will not be permitted to stipulate against liability for the loss or injury of property intrusted to it for carriage and transportation, occasion-

ed by its own negligence. \* \* \* Nor can the carrier be permitted to stipulate or contract for partial or limited exemption from liability occasioned by its negligence with any more reason than it may for a total exemption.' And, on the other hand, he recognized that the shipper may agree with the company upon the value of the goods shipped, and be bound thereby, and 'if the plaintiff freely and without restraint—that is, was laboring under no such inequality of conditions as that he was compelled to enter into the contract, whether he would or not, in order to have his stock carried—executed the contract in question, he is bound by the stipulations as to the value.' Here there is no stipulation as to value, but there is an attempt to limit the liability, regardless of value." In the case at bar, the evidence shows, without contradiction, that the plaintiff entered into what purports to constitute a mutual contract between himself and the carriers (8 Cyc. 570, 574; *Rose v. N. P. Ry. Co.*, 35 Mont. 70, 88 Pac. 769, 119 Am. St. Rep. 836; *Donlon v. Southern Pacific Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. [N. S.] 811, 12 Ann. Cas. 1118), wherein it was agreed that the value of his baggage to be transported under his ticket should not exceed \$100. It also appears from the evidence that upon the payment of an additional proportionate charge the carrier would have transported the baggage and assumed the risk up to the value claimed.

It cannot be said, I think, under the facts of this case, that the stipulation as to value was unreasonable. *Tewes v. N. G. L. Steamship Co.*, 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909; *Rose v. N. P. Ry. Co.*, supra; *The New England* (D. C.) 110 Fed. 418; *The Priscilla* (D. C.) 106 Fed. 739. Nothing in the sections of our statutes cited by counsel for respondent (Rev. Laws, §§ 3553, 3558, 3559), I think, militates against a passenger or shipper contracting with a carrier and agreeing in advance as to the value of the baggage or other property shipped, so as to estop such passenger or shipper from asserting a higher value than that stated in his contract upon which the rate of transportation has been fixed, based upon such value. *Rose v. Railway Co.*, supra; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. In the *Hart* Case, supra, the Supreme Court of the United States said: "The limitation as to value has no tendency to exempt from

liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and, where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." It is the policy of both the federal and state governments to require common carriers to fix passenger and commodity charges, as far as possible, on a basis of service rendered. It is universally recognized that the value of any article transported is a proper matter to be considered in fixing the charge. Theoretically, and presumably practically, liability for loss or injury enters into the consideration in fixing a charge for the transportation of freight or baggage. If the carrier may not by mutual contract or regulation fix a reasonable limit upon the value of baggage which it will carry upon a ticket without additional charge, then the carrier is bound to assume a greater liability, which, presumably, would result in a greater charge. Doubtless, the great mass of passengers on railroads do not carry baggage of a value in excess of \$100, and such passengers ought not to be compelled to pay an additional charge to cover the liability which the carrier would have to assume in the cases of passengers carrying baggage of a higher value. The fixing of a reasonable limit upon the value of baggage to be carried free upon a ticket, providing the passenger is permitted to carry baggage of a higher value at the carrier's risk, upon paying an additional proportion to charge, violates no rule of public policy and is fair and just to all passengers.

For the reasons given, I think a new trial should be granted.

**LAS VEGAS & T. R. CO. v. SUMMERFIELD  
et al. (JOHNSON et al., Interveners).  
(No. 1,975.)**

(Supreme Court of Nevada. Jan. 4, 1913.)

**1. EMINENT DOMAIN (§ 178\*)—PARTIES—INTERVENTION.**

Persons claiming an interest in land sought to be condemned, and for that reason claiming an interest in the award, were expressly authorized to intervene by St. 1907, c. 128, § 8, providing that all persons in occupation of or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear; plead, and defend, each in respect to his own property or interest or that claimed by him in like manner as if named in the complaint.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 479, 484-487; Dec. Dig. § 178.\*]

**2. MINES AND MINERALS (§ 43\*)—PATENT—RELATION.**

A patent to a mining claim relates back to the original location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125-129; Dec. Dig. § 43.\*]

**3. MINES AND MINERALS (§ 55\*)—CONVEYANCE OF SURFACE—RIGHTS OF GRANTEE.**

Grantees of a portion of the surface of a mining claim under meane conveyances from the original locator are entitled to possession of the surface so conveyed, under the rule that equity will control the patent title in favor of the party holding the equitable title.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-155; Dec. Dig. § 55.\*]

**4. MINES AND MINERALS (§ 55\*)—CONVEYANCE OF SURFACE.**

Reference to a mining claim as a placer, instead of a lode claim, in an agreement for the sale of a portion of the surface, was immaterial where the property was otherwise so described as to leave no doubt as to what was intended.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-155; Dec. Dig. § 55.\*]

**5. EMINENT DOMAIN (§ 152\*)—RIGHT TO AWARD—OWNER OF MINING LOCATION.**

The owner of a valid, subsisting, but unpatented, lode mining claim, is entitled to an award for condemnation of a portion of the surface for a railroad right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 403-406; Dec. Dig. § 152.\*]

Appeal from District Court, Esmeralda County; Peter J. Somers, Judge.

Condemnation proceedings by the Las Vegas & Tonopah Railroad Company against W. G. Summerfield and W. S. Johnson, doing business as Summerfield & Johnson, and another, in which E. S. Johnson and the Band Goldfield Mining Company intervene. From a judgment distributing an award of damages, W. G. Summerfield and W. S. Johnson appeal. Judgment affirmed in so far as it made an award in favor of the Band Goldfield Mining Company, and reversed as to intervenor E. S. Johnson, with direction to enter judgment in favor of appellants in the sum of \$657.

James F. Dennis and Walter Shelton, of Oakland, Cal., for appellants. C. O. Whittemore, of Los Angeles, Cal., for respondent. Dennis H. Kehoe, of Goldfield, for intervenor Johnson. Detch & Carney, of Goldfield, for intervenor Band Goldfield Mining Co.

\* **NORCROSS, J.** This is a proceeding brought by the plaintiff under the provisions of "An act to regulate the exercise of the right of eminent domain" (Stats. 1907, p. 279) to condemn a right of way for its railroad across a certain parcel of land in the town of Columbia, Esmeralda county, occupied and used by the defendants as a feed corral in connection with what was known as the branch Pioneer Livery Stable. Commissioners were appointed, as provided by the act, to assess the damages, and the commission rendered a report awarding the defendant C. E. Deanor the sum of \$1,000, and Summerfield & Johnson \$500. C. E. Deanor, who was the lessee of Summerfield & Johnson of the stable and corral, accepted the award in his favor which was paid by the plaintiff. Summerfield & Johnson objected to the award made to them, and there was a further submission of the question of their damages and a subsequent award of \$1,000 to them, provided that they establish their title to said property.

The plaintiff paid into court the sum of \$1,000 subject to the provisions of the award. Subsequent to the award last mentioned, and on January 31 and March 4, 1910, respectively, the Band Goldfield Mining Company and E. S. Johnson severally intervened, and alleged ownership, respectively, of the Yellow Rose quartz mining claim and the Sleepy Hollow mining claim, upon which claims the right of way sought to be condemned in the action was located, and prayed that the entire award be decreed to them in proportion to the area of their respective claims affected. The defendants Summerfield & Johnson objected to the jurisdiction of the court to entertain the petitions in intervention, which objection was overruled. They also filed answers to the petitions denying ownership in petitioners, alleging ownership in themselves by purchase from their grantors and predecessors in interest, and also setting up a right of possession under statute of limitations. Prior to the trial of the issues between defendants and intervenors, and on the 23d day of April, 1910, a stipulation was entered in the minutes of the court between the plaintiff, defendants, and intervenors "that the report of the commissioners be confirmed, and that the different claimants to the fund of \$1,000 may continue the litigation as to ownership of said fund or any part of it without holding the Las Vegas and Tonopah R. R. Company responsible for any more or further

sum than the said \$1,000 or further costs." The court found the interveners to be the owners of the property for which the award in damages was made, and rendered several judgments in favor of the said E. S. Johnson in the sum of \$657, and the said Band Goldfield Mining Company in the sum of \$343. From the judgments and from orders denying motions for a new trial defendants have appealed.

[1] The contention that the trial court was without jurisdiction to permit the interventions is, we think, without merit. Section 8 of the Act of 1907, *supra*, provides: "All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint." This section clearly authorizes any person interested either in the property or the award to intervene and assert his rights. Whether such an intervention ought to be permitted at a time subsequent to the award by the commissioners by a party not named in the complaint, and whose rights would not, therefore, be affected by the award and judgment, we need not now consider. Permission at such a time might be erroneous, but, if error at all, it is an error within, and not in excess of, jurisdiction. However that may be, the stipulation entered in the minutes of the court and quoted *supra* we think amounts to a waiver of any objection that may have been otherwise well taken.

Upon the merits, we think the court erred in determining that the defendants were not entitled to any portion whatever of the award, and in rendering judgment in favor of interveners for the total amount thereof. The interveners neither alleged nor proved any damages to themselves other than might be held to follow from a bare allegation and proof of ownership of the two mining claims in question. Doubtless the main element of damage considered by the commissioners was the injury to the corral and stable owned by the defendants, the lessee of whom was deemed to have been damaged to the extent of \$1,000 for the injury to his business. The said lessee was paying defendants \$85 per month rental.

The defendants and the intervener, E. S. Johnson, assert title from the same original source as shown by the following: June 3, 1903, W. H. Harris located the Wild Cat quartz lode claim, the certificate of location of which was recorded in Book J, p. 171, Records of Esmeralda County. October 19, 1903, W. H. Harris located the Yellow Rose claim. April 20, 1904, W. H. Harris entered into the following agreement with W. A. Marsh and E. C. Courtney: "That the party of the first part (W. H. Harris) in consider-

ation of the sum of \$100.00 United States gold coin paid to him, hereby agree that the party of the second part, may occupy and use the surface of a certain tract of land situated on the north side of Columbia town-site and known as the corral situated on the Yellow Rose placer claim. Said tract of land is (184) feet fronting on Main St., in the town of Columbia, and (200) feet deep toward Columbia Mountain. And further agree to give the said second party, a deed to such ground, so soon as he obtains patent to the mining claim on which said tract is situated." July 11, 1904, W. A. Marsh and E. C. Courtney executed a quitclaim deed to W. J. Sinclair of property described as follows: "One corral situated in the town of Columbia on the Yellow Rose placer claim, said tract of ground is 184 feet fronting on Main St., and 200 feet deep toward Columbia Mountain." December 31, 1904, W. J. Sinclair and wife executed a quitclaim deed to defendants Summerfield & Johnson of property described as follows: "Fronting 184 feet on Main Street, 200 feet deep from the north side of said street, commonly known and designated as the branch Pioneer Livery Stable." June 24, 1904, W. H. Harris deeded to John E. Lutz certain mining premises described as "'Wild Cat' placer mining claim, the location certificate of which is duly of record in the office of the county recorder at Book J, p. 171, especially reserving and excepting from this conveyance the surface rights only of a strip of land 184 feet in length, more or less, and 175 feet in width, more or less, along the southerly end of the said 'Wild Cat' placer, which has heretofore been leased by the grantor herein to William A. Marsh and E. C. Courtney for a corral, and which is now enclosed by a wire fence. Also all those certain lode mining claims situated in said Goldfield Mining District, known, located and recorded as the 'Granite' and 'Yellow Rose' lode mining claims." February 15, 1905, deed from John E. Lutz to E. S. Johnson of Yellow Rose lode mining claim, also Granite, White Rose, and Pink Rose lode mining claims, containing the following reservation: "Especially reserving herefrom all that portion of the surface rights of the south 800 feet of the said Yellow Rose mining claim, leased or sold by the party of the first part prior to the date hereof; and the party of the first part, for the consideration hereinabove mentioned, does hereby sell, assign and transfer said leases and contracts, together with all covenants, rights and interest of party of first part therein, unto the party of the second part, his heirs or assigns." February 27, 1908, patent of the United States to E. S. Johnson for Yellow Rose lode mining claim.

[2] The patent obtained by the intervener, E. S. Johnson, relates back to the original location of the Yellow Rose claim made by

W. H. Harris on October 19, 1903. Lindley on Mines (2d Ed.) § 783.

[3] The defendants, their grantors and predecessors in interest, holding possession of a portion of the surface of the Yellow Rose claim, under mesne conveyances from the original locator, W. H. Harris, are entitled to possession of the portion of the claim in controversy for "equity will control the patent title in favor of the party holding the equitable title." Lindley on Mines (2d Ed.) § 719.

[4] The fact that the Yellow Rose claim is described as a placer instead of a lode claim in the agreement between Harris, Marsh, and Courtney of date April 20, 1904, we think is immaterial, for the property is otherwise so described as to leave no doubt as to what was intended. In the conveyance from Harris to Lutz of June 24, 1904, the Wild Cat claim is described also as a placer, although the certificate of location referred to shows it to have been located as a lode claim. We think the intervener, E. S. Johnson, is entitled to no portion of the award.

[5] The right of the Band Goldfield Mining Company to a portion of the award rests upon the fact that at the time of intervention it was the owner of the Sleepy Hollow lode mining claim, an unpatented but valid and subsisting claim located on December 1, 1903, subject to whatever legal rights defendants may be entitled to by reason of the claim of adverse possession. Contrary to my own views of the question, my associates are of the opinion that as to the Sleepy Hollow mining claim defendants have not established an adverse possession, and are not entitled to the amount of the award which the judgment gave to the Band Goldfield Mining Company. The judgment in favor of the Band Goldfield Mining Company is affirmed.

The judgment in favor of E. S. Johnson is reversed, and the court below is directed to enter judgment in favor of the appellants in the sum of \$657. It is so ordered.

#### STATE v. URLE. (No. 2,002.)

(Supreme Court of Nevada. Jan. 4, 1913.)

#### 1. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of improper evidence is not as a rule prejudicial, where subsequently withdrawn, with directions to the jury to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

#### 2. CRIMINAL LAW (§ 1169\*)—TRIAL—APPEAL—CURING ERROR.

The court admitted accused's alleged confession in evidence, and afterwards, upon it appearing that it was made after the sheriff had told accused that it would be better for

him to tell the truth, ordered the confession stricken and directed the jury to disregard it, and also instructed that the jury must not consider any evidence stricken by order of the court, but must decide the case solely upon the evidence actually given and allowed. *Held*, that any error in admitting the confession in evidence was cured by the court's action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

#### 3. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting an alleged confession in evidence could not have prejudiced accused where he testified to substantially the same facts stated in the confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

#### 4. WITNESSES (§ 305\*)—WAIVER OF CONSTITUTIONAL PRIVILEGE.

When accused waives his constitutional privilege not to testify, and becomes a witness for himself, he cannot testify to that part of a transaction favorable to himself and claim his privilege as to the remainder.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.\*]

#### 5. CRIMINAL LAW (§ 1178\*)—APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO DISCUSS.

Accused's counsel waived assignments of error not discussed in his brief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.\*]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Nimrod Urle was convicted of first-degree murder, and he appeals from the judgment of conviction and order denying a motion for new trial. Affirmed.

James H. Wise, of Twin Falls, Idaho, for appellant. Cleveland H. Baker, Atty. Gen., for the State.

NORCROSS, J. Appellant was jointly indicted with one J. Frank Tranmer by the grand jury of Humboldt county for the murder of one Eugene Quilici. Upon a separate trial before the Sixth judicial district court he was convicted of murder in the first degree, and the penalty of death was imposed by the jury. From the judgment based on the verdict and from an order denying a motion for a new trial, the defendant has appealed.

The case was finally submitted to this court on briefs. Although the record contains some sixteen assignments of error, only two propositions involving alleged error are considered in the briefs filed.

The court admitted as a part of the state's evidence, over the objection of defendant, the following written confession of the defendant: "My full name is Nim R. Urle. My age is 23 years on August 1st. I know Diffendarfer. I knew Diffendarfer about 14 years. I knew Frank Tranmer since last April. Next day after Tranmer returned from having taken Diffendarfer to Dutch Flat. I told him that he could look after things

there at the ranch, and I would come up here at Winnemucca to see if I couldn't get work, and he told me, 'It is no use going to work. You don't need to work,' he says. 'I will tell you how we can make some easy money,' and I says, 'All right, how is that?' And he says, 'We will go up here, and hold up the Dago saloon.' I told him that I didn't want to do anything of that kind, and I could go to work in a few days. I could sell the horses anyway, and we didn't need to do anything like that. He says, 'Well, we are going to do it anyhow;' and then he went to work and told me how easy it would be to get this money, and I hold him, 'No;' that I didn't want to make that kind of money. And he says, 'We are going to do it, and you have got to do it; if you show any signs of turning me down or running off, I will kill you.' And then the next day we still talked about it, and I told him that day that if we did have to do it, and would kill any one, it would be bad, that we would be caught, and would both get in trouble, and he says, 'We won't need to kill him at all; we will go in there and throw our guns on him, and tell him to throw up his hands.' And I told him I didn't want to do it at all. And he told me again that I had to do it, and I came up here to Winnemucca the day before this happened, and before I left he told me that if I tried to run off, or get away or anything, that he would kill me if he had to follow me for 10 years to do it. I thought when I started that I would go anyhow, and I stayed up here one day thinking about it, and then I thought that I would talk him out of it, and I went back. I went down home that night, and he asked me what I thought of it by that time, and I asked him if he wouldn't let me go, and go some place and go to work, and he said, 'No, you got to do this, and there is no use saying any more; you have got to do it.' Then I didn't say any more to him till the night that we started, and he got up the horses and came in to me and says, 'You might as well get ready; we are going to do that.' And then he went in and fixed up these masks. And then we got supper, and then we went out and got on our horses, and he took the guns, and, when we got within 200 or 300 yards of the Dago saloon, he tied my horse and took a rope, and tied my hands to the saddle horn. I was standing off to the side of the horse, and then he went up to Slaughter's saloon and got a bottle of whisky. And he came back and says, 'Throw some of this into you, and maybe you will feel better afterwards.' I took three or four big drinks, and then we put the masks on, and then he loaded the rifle and handed it to me, and told me to go ahead, and I went ahead until we got to the saloon. And, when I got to the saloon door, I said, 'Frank, let's not do it;' and he shoved his gun up against my back, and said, 'Go on.' We went inside of the door, and I threw down on the Dago. Frank says, 'Throw up your hands,'

and the Dago didn't do it. He got up, and grabbed my rifle, and Frank shot; the Dago started to run out the door. Frank turned around to me, and says, 'What have you got that gun for? Why don't you use it?' He grabbed it out of my hands, and shot just as the Dago went out the door. Then he turned around, and handed the gun to me, and the Dago woman started to run, and he shot her with the six-shooter, and then he says to me, 'Lay your gun on the bar and go in, and get the money out of the register.' And then told me to put the money in my pocket. Then he told me to go in and search the rooms. And, when I went into this back room, these two boys were there. I went back and told Frank, 'There is some in there;' and he says, 'Take your gun, go back, and make them hold up their hands, and ask them where the money is.' And then he says, 'We will go out the back door now.' And we went out the back door, and we went down to where our horses was, and I threw the cartridge out of my rifle, and he said, 'Give me that gun.' Then we got on our horses, and rode down home. Then we got off and he told me to pull off the overalls and jumper and the things I had on, and then he took me in the house and locked the door, and told me to give him the money that I had. Then he went off and rode off some place, and was gone about one-half hour. And then he came back. He came back into the room. He told me, 'Now you don't dare squeal. You are in for it just as bad as I am;' and he told me, 'Now you want to play sick in the morning;' and he says, 'Tell them that, when I went up town last night, I went up to get some whisky and medicine for you.' And he says, 'Now, if they catch us, you want to act as if nothing is wrong, and that you didn't know anything about it and that you were home sick;' and he says, 'If you don't do this and we get out of it if you show any weak signs, I will kill you.' When I gave him these clothes, he asked me where the mask was, and I says, 'I guess I have lost it.' He says, 'You are a pretty son of a bitch. I ought to plug you right here.' I told him that I didn't do it intentionally, that I didn't mean to lose the mask. We went to bed about 10:30 slow time. When we got to where he tied the horses, he said that he would have to go up and see how things were. That I make this confession freely and voluntarily and without persuasion or promise of leniency of any kind either by Sheriff Lamb, Mr. Rich, J. A. Callahan, or any other person or persons whomsoever."

Subsequently the court ordered the confession stricken out, and at the time directed the jury to disregard the same. The court also in its instructions embodied the following: "The jury must not regard or consider any evidence which has been excluded by the court or stricken out by the order of the court, but they must decide the case solely

upon the evidence actually given and allowed." It is contended that the court erred in the admission of this confession, and that the error was not cured by the court subsequently striking out the same. At the time the confession was offered witnesses testified to the effect that, although the confession was made while the defendant was in the custody of the sheriff, it was a voluntary confession made without force, threats, or promises or inducements of reward or leniency. Objection was made to the testimony offered in support of the confession that the questions of the district attorney were leading and calling for the opinion of the witnesses. The objections were overruled. Counsel for the defendant declined at the time to cross-examine the witnesses or to offer evidence showing, or tending to show, that the confession was not voluntary. After the confession was admitted in evidence, and at a later period in the trial, counsel for defendant placed the defendant on the witness stand, and had him testify relative to the circumstances of his making the confession. The gist of his testimony was that the sheriff and district attorney told him that "it would be better for him if he would tell the right story." Counsel for defendant also called the sheriff and other witnesses to the confession for cross-examination. As a result of this testimony, the court, among other matters, stated: "As it appears in the record here that the sheriff, who had the prisoner in custody at that time, admits in the record that he might have said that. As a matter of course Constable Rich later on testifies that he thinks that he didn't say it; but there is some doubt. There is some doubt in the court's mind as to whether that was said down there at that time by the sheriff. And for that reason, although the court is quite certain that on account of your not making the cross-examination at the proper time, and offering your testimony at that time when the foundation was being made, it would be no error. I am going to take plaintiff's Exhibit W, containing the alleged statements of the defendant, as read to the jury and admitted in evidence, from the consideration of the jury. And it will be so ordered."

[1, 2] It is a general rule that the admission of improper evidence is not deemed prejudicial error when the same is subsequently withdrawn, and the jury directed to disregard it. A number of authorities supporting this well-recognized rule are cited in the brief of the Attorney General. It cannot be said, we think, under the facts shown, that any error which might have been committed in the admission of the confession was not cured by the subsequent action of the court.

[3] Even if we were to concede error in the admission of the confession, and that the

same was not cured by its subsequent exclusion, no prejudicial error could be shown, for the reason that the defendant became a witness in his own behalf, and testified substantially in accordance with his confession. *State v. Johnny*, 29 Nev. 203, 219, 87 Pac. 3; *State v. Williams*, 31 Nev. 360, 102 Pac. 974.

Error is assigned in the overruling of certain objections to the cross-examination of the defendant by the district attorney. The defendant was called as a witness in his own behalf and questioned by his counsel concerning a portion of his actions and those of his codefendant on the night of the murder and robbery. He detailed the events which transpired up to the time of the entry of the saloon of Quilici, but stopped short of detailing the circumstances of the actual shooting of Quilici. Upon cross-examination, the district attorney, over defendant's objection, was permitted to examine the defendant upon the events which transpired beyond the time covered by his direct examination. We think this was clearly proper.

[4] When defendant waives his constitutional privilege of remaining silent and becomes a witness in his own behalf, he cannot assume a right to detail a part of a transaction which he deems favorable to himself and claim an exemption upon subsequent facts forming a part of the entire transaction. *Brown v. Walker*, 161 U. S. 597, 16 Sup. Ct. 644, 40 L. Ed. 819; *Commonwealth v. Pratt*, 126 Mass. 462; *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *People v. Freshour*, 55 Cal. 375; 1 Greenl. Ev. § 451. "The general rule may be stated to be that, where a defendant takes the stand as a witness in his own behalf, he waives his right to refuse to answer questions which tend to incriminate him concerning all matters which were touched upon in his direct examination, and upon all other matters which are so related to his direct examination as to come within the proper limits of cross-examination. In other words, the defendant loses his character as a party, becomes a mere witness, and may be examined as fully as any other witness. If he makes any statement respecting the transaction, he may be required to state all." Note to *Evans v. O'Connor*, *supra*, 75 Am. St. Rep. 332.

[5] The fact that counsel for appellant did not refer in his briefs to any of the other assignments of error warrants the assumption that he places no reliance upon them. Such an examination of the assignments as is justified under the circumstances discloses no apparent prejudicial error.

The judgment and order appealed from are affirmed, and the court below is directed to fix a time and make all necessary and proper orders for having its sentence carried into effect by the warden of the state prison.



**TONOPAH & G. R. CO. v. FELLEBAUM**  
et al. (No. 1,847.)

(Supreme Court of Nevada. Jan. 4, 1913.)

On rehearing. Former opinion affirmed.

For former opinion, see 32 Nev. 278, 107 Pac. 882.

**TALBOT, J.** Upon further consideration, after rehearing, we see no reason for changing the views which we expressed in the original opinion, and we think justice and the law will be best subserved by allowing it to stand. 32 Nev. 278, 107 Pac. 882.

As therein directed, the judgment of the district court is reversed, and the case is ordered remanded for a new trial.

**SWEENEY, C. J.,** concurs. **NORCROSS, J.,** dissents.

**EUREKA COUNTY BANK HABEAS CORPUS CASES.**Ex parte **SMITH** et al.

(Nos. 1,978, 1,989, 1,991.)

(Supreme Court of Nevada. Jan. 4, 1913.)

**HABEAS CORPUS (§ 90\*)—DISCHARGE—REHEARING.**

After an order in a habeas corpus proceeding discharging the prisoner, a rehearing will not be granted, since this would suspend the former order and result in the rearrest of the prisoner, contrary to the express provisions of the habeas corpus act, § 29 (Rev. Laws, § 6254).

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 80; Dec. Dig. § 90.\*]

On petition for rehearing. Denied.

For former opinion, see 126 Pac. 655.

**James Glynn** and **Oscar J. Smith**, both of Reno, for petitioners. **Cleveland H. Baker**, Atty. Gen., **Thomas A. McParlin**, of Eureka, **Chas. R. Lewers**, of San Francisco, Cal., and **Geo. S. Brown**, of Reno, for respondent.

**PER CURIAM.** Respondents have petitioned for a rehearing. The effect of granting a rehearing would be to suspend the former order discharging the petitioners. 3 Cyc. 219. This would subject petitioners to rearrest upon the very charges upon which they have been discharged in violation of section 29 of the habeas corpus act. Rev. Laws, § 6254. Under statutes like ours, the Supreme Court of California has held that there is no practice in that state allowing petitions for rehearing in cases of habeas corpus. Ex parte **Robinson**, 71 Cal. 608, 12 Pac. 794. Except where there is statutory provision therefor, an order discharging a prisoner has generally been held not subject to review. 21 Cyc. 335 et seq. It has been held that to allow a review of an order of another court made in a habeas corpus case is inconsistent with the object of the writ. **Wyeth v. Richardson**, 10 Gray (Mass.) 240; **Knowlton v.**

**Baker**, 72 Me. 202; **State v. Miller**, 97 N. C. 451, 1 S. E. 776; **People v. Schuster**, 40 Cal. 627; **Grady v. Superior Court**, 64 Cal. 155, 30 Pac. 613; **In re Clasby**, 3 Utah, 183, 1 Pac. 852.

The petition for a rehearing is denied.

**ROUND MOUNTAIN MINING CO. v. ROUND MOUNTAIN SPHINX MINING CO.**  
et al. (No. 1,942.)

(Supreme Court of Nevada. Jan. 4, 1913.)

**1. APPEAL AND ERROR (§ 1011\*)—CONCLUSIVENESS OF FINDINGS—CONFLICTING EVIDENCE.**

Findings of the lower court upon conflicting evidence are binding upon the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**2. MINES AND MINERALS (§ 31\*)—RIGHT ACQUIRED—EXTRALATERAL RIGHTS—CROSS VEIN OR LODGE.**

Where a mining claim containing the apex of a cross lode, lying entirely within the surface boundary of a prior claim or group owned by the same party, is held invalid, the side lines of the prior claim constitute end lines in determining the extralateral rights on the cross vein, across which, as they extend vertically downward, the lode cannot be followed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 75-77; Dec. Dig. § 31.\*]

**3. MINES AND MINERALS (§ 38\*)—ACTION TO DETERMINE RIGHTS—BURDEN OF PROOF.**

Where the location certificate of a junior mining claim recited that the claim was wholly within the boundaries of another claim, such certificate was sufficiently ambiguous or conflicting to cast upon the subsequent locator the burden of showing that the prior claim was invalid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**4. MINES AND MINERALS (§ 38\*)—ACTION TO DETERMINE RIGHTS—ADMISSIBILITY OF EVIDENCE—LOCATION CERTIFICATE.**

In determining the priority of mining claims, the declarations contained in the record, by which the subsequent patent was obtained, were admissible in the absence of proof that the record did not state the truth.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**5. MINES AND MINERALS (§ 27\*)—VALIDITY OF LOCATION WITHIN VALID EXISTING LOCATION.**

The location of a mining claim, based upon a discovery of mineral within the limits of a valid existing claim, was valid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. § 27.\*]

**6. MINES AND MINERALS (§ 44\*)—PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS OF DECISION.**

The issuance of a patent by the Land Department after adjudication by the proper tribunal is conclusive and not subject to collateral attack as to all matters before the tribunal for adjudication and as to all persons who were parties to such adjudication, and hence, where the owner of a mining claim did not file an adverse to a subsequent application for patent,

the Land Department's patent to the applicant is conclusive as to the rights of the parties to the surface ground included in the application.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 130; Dec. Dig. § 44.\*]

**7. MINES AND MINERALS (§ 9\*)—LANDS OPEN TO LOCATION—UNOCCUPIED AND UNAPPROPRIATED MINERAL LANDS.**

Land legally segregated from occupancy or appropriation may be conveyed by the United States government as a mining claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.\*]

**8. MINES AND MINERALS (§ 9\*)—VALIDITY OF LOCATION—CLAIMS ALREADY CONVEYED.**

Where a claim to land legally segregated from occupancy or appropriation is conveyed, the government has no further right to patent a claim located wholly within its boundaries, since it cannot convey the same tract of land twice.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.\*]

**9. MINES AND MINERALS (§ 38\*)—PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS.**

In an equitable action to quiet title to a lode or vein involving questions of extralateral rights not involved in the proceedings for patent, defendant, who filed no adverse thereto, is not estopped from questioning the validity of the location of the claim under which plaintiff seeks to enforce such extralateral rights as against him.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**10. MINES AND MINERALS (§ 38\*)—EQUITABLE ACTION TO ESTABLISH RIGHTS—DEFENSES.**

In an equitable action to determine rights to mining claims, the invalidity of plaintiff's patent may be pleaded as a defense and tried upon the same principles as an original bill in equity.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**11. MINES AND MINERALS (§ 41\*)—PROCEEDINGS IN LAND OFFICE—JURISDICTION TO DETERMINE PRIORITY.**

The Land Department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 116-119; Dec. Dig. § 41.\*]

**12. EVIDENCE (§ 274\*)—DECLARATIONS—SELF-SERVING DECLARATIONS BY AGENT.**

In an equitable action to quiet title to a mining claim, field notes made by plaintiff's surveyors, containing an exclusion of conflict area from one claim in favor of another, were properly excluded as self-serving acts by an agent of the plaintiff which could not be binding on the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.\*]

**13. MINES AND MINERALS (§ 38\*)—ACTION TO ESTABLISH RIGHTS—JURISDICTION OF DISTRICT COURT—DETERMINATION OF PRIORITY.**

In an equitable action to quiet title to a lode or vein, where the Land Department did not determine the question of priority of claims in the same group, but made a double grant of the conflicting area, appearing upon the face of the later patent, the district court had jurisdiction to determine such priority.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

Appeal from District Court, Esmeralda County; Theron Stevens, Judge.

Action by the Round Mountain Mining Company against the Round Mountain Sphinx Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

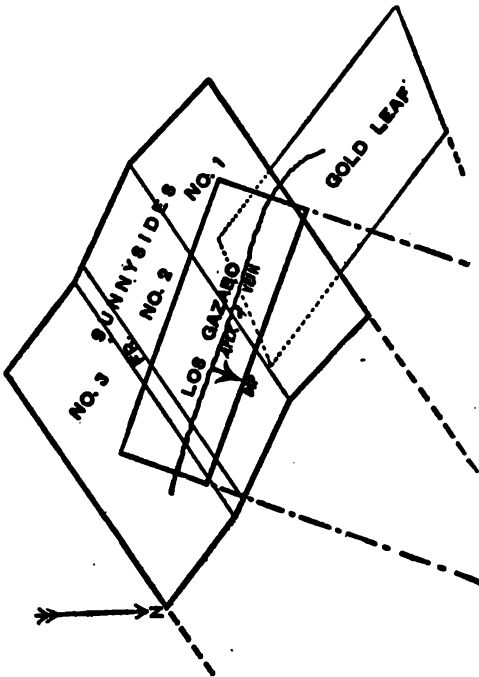
R. G. Withers, of Reno, and Dickson, Ellis, Ellis & Schulder, of Salt Lake City, Utah, for appellant. Curtis H. Lindley, of San Francisco, Cal., Detch & Carney, of Goldfield, Wm. E. Colby and Grant H. Smith, both of San Francisco, Cal., and McIntosh & Cooke, of Tonopah, for respondents.

**PER CURIAM.** This is an appeal from a judgment in favor of respondents in an action to quiet title in the plaintiff, appellant herein, to the Los Gazabo lode mining claim. The Round Mountain Red Top Mining Company and John F. Davidson, defendants in the court below, are not affected by the questions raised by the appeal in this case. The complaint, among other matters alleges: "That, under and by virtue of a patent from the United States therefor, the plaintiff is the owner, and for a long time past has been and now is in the possession and entitled to the possession of the Los Gazabo lode mining claim and location, Survey No. 2,815, in said Round Mountain or Jefferson mining district; and said Los Gazabo location has parallel end lines, and it is described by metes and bounds as follows: [Here follows the description.] That said Los Gazabo lode or vein so far departs from a perpendicular on its dip and on its downward course into the earth, and within vertical planes drawn downward through the end lines of said Los Gazabo location, so continued in their own direction, as that it extends outside of the vertical side lines of said Los Gazabo location on the surface, and into, through, and across the underground portion of certain lands claimed by the defendants as being the Gold Leaf and the Black Hawk so-called lode mining locations, and as being the property of the defendants."

The defendant Round Mountain Sphinx Mining Company, respondent herein, in its amended answer denied the validity of the said Los Gazabo lode mining claim, and alleged that said Los Gazabo claim was located entirely within the surface boundaries of certain prior existing mining claims known as and called the Sunnyside No. 1, Sunnyside No. 2, Sunnyside Fraction, and Sunnyside No. 3 lode mining claims. And as a further answer the defendant alleged: "That it is the owner of, possessed of, and entitled to, the possession of that certain lode mining claim called the Gold Leaf lode, situate in the Round Mountain or Jefferson mining district, county of Nye, state of Nevada, and more particularly described as follows: [Here follows description of claim.] That within the

exterior boundaries of said Gold Leaf claim there is disclosed in the discovery a lode, vein, or ledge, \* \* \* the general course or strike of the top or apex of which is northerly and southerly, said lode, vein, or ledge entering the southerly end line and running parallel to the side line thereof, passing out of the northerly end line of said claim; that said Gold Leaf lode, vein, or ledge on its dip from the apex extends to, beneath, and beyond the northeasterly side line of said claim, and the defendant Round Mountain Sphinx Mining Company is the owner of said vein within vertical planes drawn downward through the end lines of said claim extended in their own direction indefinitely, and includes the vein claimed by the plaintiff as the pretended Los Gazabo veins."

The following diagram shows the relative locations of the Sunnyside claims, the Los Gazabo claim, and the Gold Leaf claim, the ledge and its dip, and the ledge on its dip in controversy.



At the trial, plaintiff introduced a patent issued by the United States as evidence of its ownership of the Los Gazabo mining claim. This patent was a group patent of the Sunnysides and Los Gazabo claims, and on its face the description of the Los Gazabo claim is in conflict with Sunnysides Nos. 1, 2, 3, and Sunnyside Fraction location; all these claims being described in and the patent purporting to grant them all as described by metes and bounds. Only a minute portion of the Los Gazabo location projects beyond and is free from conflict with the other locations. No portion of the apex of the lode in controversy is situated in this nonconflicting

area. It is the contention of the respondent, and the lower court so held, that, in view of this conflict appearing on the face of the patent itself, the patent was ambiguous, and it was competent to go behind the patent and determine the question of priority between the Los Gazabo and the Sunnyside claims described by the patent. The respondents contended, and the trial court so held, that the Sunnysides were entitled to priority over the Los Gazabo, thus rendering the Los Gazabo invalid as far as it conflicted with the Sunnysides. Outside of certain legal questions involved, the main question of fact was as to the priority of locations of the Sunnysides as against the Los Gazabo claim.

[1] As repeatedly held by this court, findings of the lower court upon conflicting evidence are binding upon this court. This case appears to have been tried with great care by the lower court, and, after a careful examination of the record and the briefs of counsel, we are satisfied that the trial court arrived at a correct conclusion. The opinion filed in the case by Judge Stevens covers the case so fully that this court has adopted the greater portion thereof as the opinion of this court. From the opinion rendered by the trial judge, we quote with approval the following:

"The Gold Leaf claim filed no adverse to the application for patent, made by the plaintiff company, for the Sunnyside and Los Gazabo claims, and the patent for said claims therefore includes so much of the surface ground of the Gold Leaf as conflicted with the Sunnysides and Los Gazabo, and there is no controversy in this action respecting the surface rights of the respective parties, and, the defendant Round Mountain Sphinx Company having dismissed its counterclaim for damages alleged in its separate answer, the only issue to be determined is as to the extralateral rights acquired by the plaintiff by its patent to the Los Gazabo claim. The evidence clearly shows that the lode or vein, known as the Los Gazabo, and which has its apex within the surface lines of the Los Gazabo or Sunnyside claims, on its dip beneath the surface, extends toward and through the Gold Leaf and Black Hawk claims, and that the plaintiff, in prosecuting the development on the Los Gazabo, has entered into the Gold Leaf and Black Hawk claims, and has extracted and removed a large amount of ore therefrom.

[2] "The evidence further shows that the lode or vein, known as the Los Gazabo lode, is a cross vein of the Sunnyside claims, and that, in prosecuting the development of said lode, the plaintiff has departed from the westerly side line of Sunnyside No. 1, which would constitute the westerly end line of the claim in determining the extralateral rights of the plaintiff, and, if the Los Gazabo location should be held invalid, the side lines of the Sunnyside claims would become the end

lines, across which, as they extend downward vertically, the plaintiff cannot follow the vein, and could not enter upon or into the premises in dispute, which are shown to be outside of vertical planes drawn downward through those lines. *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463 [25 L. Ed. 253]; *Wolfley v. Lebanon M. Co.*, 4 Colo. 112.

[3] "The record shows that the Los Gazabo location was a junior location, and the location certificate filed by Scott et al., the locators of said claim, and introduced in evidence by the plaintiff, recites that the claim is wholly within the boundaries claimed by Sunnyside Nos. 1, 2, and 3." This declaration of itself is sufficient to cast the burden upon the locators to show that the Sunnyside claims were invalid. The mining acts of Congress authorize location of mining claims upon the unoccupied and unappropriated mineral lands of the United States. Nowhere in the recitals contained in the original location certificate of the Los Gazabo does it appear that the land in question was of a character which the law authorizes a location upon. \* \* \* If the Sunnyside claims were valid and existing locations at the time the Los Gazabo was located, it is clear that the latter location was void. *Belk v. Meagher*, 104 U. S. 284 [26 L. Ed. 735]; *Reynolds v. Pasco* [24 Utah, 219] 66 Pac. 1064; *Armstrong v. Lower*, 6 Colo. 393.

"I think the proof is clear that the Sunnyside locations Nos. 1, 2, and 3 were made on the 20th day of February, 1906. The location and amended location certificates of the several claims show that all the acts necessary to constitute valid locations were performed by the locators and within the time required by law. The amended and additional location certificates filed by the plaintiff company allege the date of the discovery to be on the 20th day of February, 1906. The evidence of McDonald shows that the monuments were erected and the discovery shafts on those claims sunk within the prescribed limit. Page 273, Transcript of Evidence.

[4] "Counsel for plaintiff contends that as the law does not make the location certificate prima facie evidence of discovery, that such a declaration is not binding upon the plaintiff; but I am of the opinion that, while it might not be sufficient evidence as against the defendants, the declarations contained in the record by which the patent was obtained is some evidence that can be considered in the absence of proof that the record does not state the truth. If more were needed, I think the evidence of the president of the plaintiff company, James R. Davis, is conclusive upon this point.

[5] "I can reach no other conclusion but that on the 3d day of March, 1906, the date of location of the Los Gazabo claim, the Sunnysides Nos. 1, 2, and 3 were valid existing locations, and that the location of the Los Gazabo was based upon a discovery of mineral within the limits of the Sunnyside

claims, and was therefore void. *Belk v. Meagher*, supra, 104 U. S. 284 [26 L. Ed. 735]; *Reynolds v. Pasco* [24 Utah, 219] 66 Pac. 1064; *Tuolumne Con. Co. v. Maier* [134 Cal. 583] 66 Pac. 863; *Golden Terra Co. v. Mahler*, 4 Morr. Min. Rep. 390 [2 Dak. 377, 11 N. W. 98]; *Armstrong v. Lower*, supra, 6 Colo. 393.

[6] "Counsel for plaintiff contends, however, that a patent, having been issued to the plaintiff by the Land Department, is a conveyance of the legal title to the patentee after the matter has been adjudicated by the proper tribunal, and like other judgments is impervious to collateral attack, and I think this contention is correct so far as the adjudication of any matters which were before the tribunal for adjudication and as against all persons who were parties to the adjudication. I am satisfied that the defendants would be estopped to deny the validity of the patent so far as the Sunnyside claims are concerned, and defendants do not question its validity with reference to the surface ground within the boundaries of those claims, nor any extralateral rights which accrue to plaintiff by virtue of the patent to the Sunnyside claims.

"As the Gold Leaf failed to file an adverse to the application of plaintiff for patent, the adjudication of the Land Department is conclusive as to the rights of the parties to the surface ground included in the application, but the validity of the Los Gazabo claim was not before the Department, and could not be questioned by the Gold Leaf in that proceeding. There was nothing at that time to show that the plaintiff was attempting to acquire any rights which could conflict with the rights of the defendants.

[7, 8] "The government had a right to convey the land included within the surface boundaries of the Sunnyside locations, as the Sunnyside claims, which had been regularly and legally segregated from occupancy or appropriation by another, and, the Los Gazabo being wholly located within the boundaries of claims already segregated being void, the government had no further rights to convey by the Los Gazabo patent. *Rose v. Richmond M. Co.*, 17 Nev. 26 [27 Pac. 1105]; *South. End Mining Co. v. Tinney et al.*, 22 Nev. 19 [35 Pac. 89].

[9] "Again, this is an equitable action to quiet the title to the Los Gazabo lode or vein, which involves the question of extralateral rights which were not involved in the proceedings for patent, and the defendants are not estopped from questioning the validity of the location of the claim under which the plaintiff seeks to enforce such extralateral rights as against them. *United States Min. Co. v. Lawson*, 134 Fed. 769 [67 C. C. A. 587]; *Lawson v. United States Min. Co.*, 207 U. S. 1 [28 Sup. Ct. 15, 52 L. Ed. 65]; *Bunker Hill Co. v. Empire State Co.* [C. C.] 108 Fed. 189.

[10] "The invalidity of such patent may be

pleaded as a defense in any action, and may be tried upon the same principles as an original bill in equity. *South End M. Co. v. Tinney et al.*, supra, 22 Nev. 19 [35 Pac. 89]; *Rose v. Richmond*, supra, 17 Nev. 26 [27 Pac. 1106].

"To sustain its contention in this case, the plaintiff cites the case of *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co.* [C. C.] 125 Fed. 408 (decided by Judge Hawley), but the facts in that case are entirely different from the facts in this case. In the case cited it clearly appears that a discovery of mineral was made by the junior location entirely outside of the boundaries of the senior location. In this case the contention is not and cannot be made that any discovery of mineral was made outside of the boundaries of the Sunnyside claims.

"Judge Hawley, in his decision in the case cited, used the following language: 'Conceding, as we have throughout this case, that the location of a mining claim, based exclusively on a discovery of mineral within the limits of another existing and valid location, is void.' He also quotes the language of the Supreme Court of the United States in the case of *Gwillim v. Donnellan*, 115 U. S. 45 [5 Sup. Ct. 1110, 29 L. Ed. 348], as follows: 'That the location as made by the locator must be one which entitles him to possession as against the United States, as well as against another claimant, if it is not valid as against the other. The location is the plaintiff's title. If good, he can recover. If bad, he must be defeated. A location on account of the discovery of a vein or lode can be made by a discoverer, or one who claims under it. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery falls, so must the location which rests upon it.'

"I cannot find that any of the authorities cited sustain the location of the so-called Los Gazabo lode, and I can reach no other conclusion than that such location was void, and that the patent, issued by the Land Department, could give such location no legal vitality. \* \* \* Having found, as a matter of fact, that the patent to the so-called Los Gazabo is invalid for any purpose, as a conclusion of law, the court finds that the plaintiff should take nothing by its suit, and that the defendants should have judgment for their costs herein expended."

That the government cannot convey the same tract of land twice has been too frequently decided to require citation of authorities. It cannot convey conflicting areas of mining claims to two parties, for in such case one of the grants must of necessity be void. It follows as a necessary sequence that, where the government issues a patent to a group of mining claims purporting to grant the same surface to different claims constituting the group, all the several grants

cannot be valid, so far as the conflicting area is concerned. So far as the surface conveyed by the group patent is concerned, it makes no difference, but when it comes to extralateral rights, as in this case, it becomes of the greatest importance which particular grant carries the surface including the apex.

[11] It may be conceded that the Land Department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application, but in the case of the Sunnyside-Los Gazabo application it failed to exercise such jurisdiction. The patent under consideration contains no exclusion of conflict area from one claim in favor of another. Neither in the verified application for patent, the published notice, nor its final application to purchase, did the appellant make any exclusion in favor of the Los Gazabo. It applied for and received a patent to these conflicting claims which made no mention of the conflict.

[12] The field notes made by appellant's surveyors contained such an exclusion, made upon the direction of appellant's attorney. Appellant offered these notes in evidence, and error is assigned in their exclusion. We think no prejudicial error could have thus been committed, for the exclusion in the notes, under the circumstances, was a self-serving act by an agent of the plaintiff which could not be binding on respondent. While these surveyors' field notes were before the Land Department, there was also the sworn statement contained in the application for patent that the Sunnyside locations were prior to the Los Gazabo.

[13] It is manifest that the Land Department did not determine the question of priority, but made a double grant of the conflicting area. This appearing upon the face of the patent, the question of priority was a matter which the trial court had power to consider and determine. This was not a collateral attack upon the patent, but a determination of the effect of a patent containing ambiguous provisions. As appellant was relying on the patent as a valid grant of the Los Gazabo location, the patent on its face being ambiguous in that it did not show a priority of location in favor of any of the claims granted by the patent and which covered the conflicting area, the burden of proof was upon the appellant to explain the ambiguity and establish the priority of the Los Gazabo location.

The contention that the defendant Round Mountain Sphinx Mining Company, as owner of the Gold Leaf claim, not having filed an adverse claim to plaintiff's application for patent, it is now precluded from questioning its validity, is, we think, without merit. It cannot, of course, question the validity of the surface conveyed, but as the patent contains grants of distinct mining claims described by metes and bounds, in conflict

with each other, and controlling extralateral rights in different directions, it can insist on a determination to which particular claims the apex of the ledge belongs as controlling the extralateral rights.

The judgment is affirmed.

**TIEDEMANN v. TIEDEMANN. (No. 2,046.)**

(Supreme Court of Nevada. Jan. 4, 1913.)

**1. PROCESS (§ 119\*)—SERVICE—IMMUNITY.**

Where a nonresident brought habeas corpus within the state against his wife for the possession of their minor child, he was not immune, while in the state for such purpose, from service of summons in a divorce suit; Rev. Laws, § 5445, exonerating persons from arrest in a civil action while attending court as a witness, not protecting him from being served with a summons or applying to him while voluntarily in the state maintaining his own suit.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 148, 149; Dec. Dig. § 119.\*]

**2. APPEAL AND ERROR (§ 78\*)—FINAL ORDER—QUASHING SERVICE.**

An order quashing personal service of summons, made on a nonresident defendant while within the state, was a final order from which an appeal would lie under Civil Practice Act, § 383 (Rev. Laws, § 5325).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 459-462; Dec. Dig. § 78.\*]

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Action by Gertrude Eleanor Tiedemann against Rudolph Ernest Tiedemann for divorce and other relief. From an order quashing service of summons, plaintiff appeals. Reversed, with directions.

Alfred Chartz, of Carson City, for appellant. Samuel Platt, of Carson City, for respondent.

**SWEENEY, C. J.** It appears that Rudolph Ernest Tiedemann, a resident of Norwich, Conn., came to Carson City, Ormsby county, state of Nevada, and, through the institution of habeas corpus proceedings, attempted to obtain possession of the minor child of plaintiff and defendant. The petition for the writ was resisted by Gertrude Eleanor Tiedemann, his wife, and, after a hearing of the application for the writ upon its merits, the mother was allowed to retain possession of the child, awarded the custody thereof, and the proceedings dismissed. The respondent, while here, was sued by his wife, who filed a complaint in an action for divorce against him, alleging that she was a resident of Ormsby county, state of Nevada, stating her grounds of divorce, and prayed for alimony pendente lite, an accounting and division of community property, custody of the same child, alimony, maintenance for the child, attorneys' fee, decree of divorce, and other relief. Upon filing the said complaint, a summons was legally issued thereon and regularly served

upon the defendant and respondent while in Carson City, Nev. Upon the return of the summons, Samuel Platt, Esq., who represented respondent in the contested habeas corpus proceedings, appeared specially and moved to set aside and quash said summons upon the ground that the respondent, Tiedemann, was immune from service while in Nevada for the purpose of prosecuting the habeas corpus proceedings above adverted to. The lower court sustained his position, and made an order setting aside and quashing service of said summons. It is from this order appellant has appealed, and the respondent, Tiedemann, appearing through Samuel Platt, Esq., specially moves a dismissal of this appeal upon the ground that an appeal will not lie from an order setting aside and quashing a service of summons. Two questions are involved for our consideration: First, did the trial court err in setting aside and quashing the service of summons; and, secondly, if so, is the order setting aside and quashing the return of summons under the circumstances appealable?

[1] We believe that the trial court erred in making the order appealed from. Section 5445 of the Revised Laws of Nevada provides as follows: "Every person who has been in good faith served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom."

Counsel for appellant, invoking the maxim *inclusio unius est exclusio alterius*, contends that, in view of the fact that our Legislature has seen fit to enumerate under what circumstances certain parties may be immune from service of process, and having made no express provision which would exclude respondent from service under the circumstances in this case, under this well-known maxim we must hold that he is not immune from service. The argument made goes partially to the solution of the construction we should place on the ruling we make, but we have more conclusive reasons, which we deem sufficient to support our conclusion, that the respondent was not immune from the service under the circumstances of this case. It has been properly held that "the exemption of a nonresident of a state from arrest while in attendance upon court does not extend to a writ of service of summons." *Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560.

The respondent, Tiedemann, it must be remembered, did not come to Nevada under compulsion as either a witness or as a suitor. He came voluntarily for the purpose of presenting a suit in his own behalf, seeking the aid of our law and our courts, as was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his right to do, and in this respect our courts were open to him, and he was given a fair and impartial hearing on his contentions, and, after due consideration, his contentions were found without merit. While here, his wife, alleging herself to be a resident of Ormsby county, Nev., saw fit to bring an action for divorce against him, wherein she too desired to have awarded to her, in a proper proceeding, the custody of the same child in question, an accounting and division of the community property, she asserted title to, alimony for herself and maintenance for her child, and other substantial rights, which she desired to invoke our laws and our courts to award and protect, and regularly commenced her action and had served our process on the respondent while he was here and within the jurisdiction of the court. It is quite impossible for us, either as a matter of law or equity, to say that a nonresident can come here seeking the relief of our courts when he desires, and at the same time deny the same right to one of our Nevada citizens to sue him when substantial rights are claimed and pleaded and service made within the jurisdiction of the court in accordance with our law. Both parties are equal before the law; both entitled to invoke the aid of our law and our courts to enforce their legal and substantial rights. Both are entitled to a hearing, and the respondent having used our court, and through its process having forced the appearance of appellant to answer the demands of the rights he contended for, there is no good or sufficient reason in law or equity why he should not be compelled to submit to the same process issued from the same court when he has been regularly served within the jurisdiction of the court, and to show cause, if any he has, why such relief prayed for by the appellant should not be awarded. As was held in the case of *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333, 134 Am. St. Rep. 886, "The exemption of a suitor or witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay, and witnesses or parties from the temptation to disobey process." In the present case it cannot be successfully contended that the respondent is in a position to claim immunity for either of the reasons assigned in the foregoing authority.

There seems and there ought to be a well-defined distinction recognized in the authorities between those who may be entitled to immunity from arrest when within the jurisdiction on civil process, as distinguished from immunity from service of civil process, and also a well-defined line of distinction between those who may be immune from civil process when they are brought into a state through compulsion, and where they are in attendance or obedience to some char-

acter of subpoena or other civil process, and where they may come voluntarily. In nearly all cases where they come within the jurisdiction by force or compulsion to attend court as a suitor or witness, they are invariably immune from criminal arrest, and nearly always from all character of civil process; but where one, as in the case at bar, comes within our jurisdiction voluntarily and without compulsion, or because of any action having been started previously against him or process attempted to be served upon him by publication or otherwise, and comes prepared to adjudicate his right to some subject-matter, as respondent was in this action, and is personally and regularly served when within the jurisdiction on matters affecting the same correlated subject-matter, and the action is brought in good faith and calls for the adjudication of substantial rights, he is in no position to resist the lawful process of the court nor claim the exemption which was successfully pleaded and decreed in the lower court in setting aside the service and quashing the summons regularly served in the action therein started.

[2] Is the order complained of of such a final nature as will permit of an appeal therefrom? Section 383 of our civil practice act provides: "A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise." In view of the substantial rights pleaded in the complaint, the order complained of, blocking, as it does, appellant's right to proceed to a complete and effective recovery of these rights, should they be decreed to her, is, we believe, in effect a final judgment. Like a final judgment there remains nothing to be judicially determined between the parties in the trial court which can be legally proceeded with until this order, which bars a complete and effective recovery, is reversed. To hold that appellant should be forced to proceed to procure a further service on the defendant in Connecticut, or without the jurisdiction or elsewhere, when she already has a valid personal service within the jurisdiction, and to force appellant to proceed through to final judgment before she could appeal, would be a senseless construction to place upon our civil procedure act affecting final judgments and orders, and an unquestioned deprivation of the plain, speedy, and adequate remedy to which appellant is entitled.

The order of the lower court, if allowed to prevail, would deprive plaintiff of her substantial rights and the benefit of a personal service and such rights as flow from that service, to which she may be entitled. The service having been regularly made, as we have heretofore pointed out, it follows that any other service would be a mere nullity, as the summons has already served its purpose when it is served regularly and becomes *functus officio*. Where a service is insuf-

sufficient, a second or further service to remedy or replace the faulty service is oftentimes allowable, but the first service which is regularly made renders the others which may follow of no effect. *Mayenbaum v. Murphy*, 5 Nev. 383; *Ency. of Pl. & Pr.* vol. 19, p. 575.

The order appealed from is reversed, with instructions to the lower court to allow the defendant such reasonable time to plead or answer as may be deemed meet and proper. It is so ordered.

**TALBOT, J.** I concur in the opinion and order as written by the Chief Justice. If the defendant were residing in this state, so that a new personal service of summons could be made upon him, I would regard any order of a district court quashing the service of summons as not final and not appealable, because the order would then be interlocutory, for a new service of summons could be had to remedy the defect for which the first service was quashed, and the case could be carried on to a binding final judgment. With the defendant residing on the other side of the continent—in Connecticut—and resisting the service which was made upon him when he came here voluntarily for an important special purpose, it is apparent that personal service in this state cannot again be obtained upon him in the action, and that the service already made is final in so far as a judgment upon personal service in this state may be obtained. True, if the order quashing the service were sustained or held not to be final and appealable, a new service could be obtained by publication, but a judgment upon such service, regarding the custody of children and property rights, is not of the same force in other states as one obtained upon personal service, and when for divorce has been held by some of the courts of the Union not to be binding out of the state in which it is granted. As to these benefits which flow from a judgment on personal service, and which are not attainable through a decree obtained upon service by publication, the order quashing the service is final, for, if the order is allowed to stand, they cannot be obtained in cases like this, where another personal service cannot be had in the state.

Therefore I conclude that the order quashing the service is appealable in this particular case.

**NORCROSS, J.** I concur in the views of my Associates that the court below erred in quashing the summons. I am inclined to the view that the order could properly have been reviewed by writ of error; but, as this court has never had occasion to consider in what character of cases the writ of error will lie, if at all, I express no definite opinion upon that question.

**GOLDFIELD MOHAWK MINING CO. v. FRANCES-MOHAWK MINING & LEASING CO.** (No. 1,955.)

(Supreme Court of Nevada. Jan. 18, 1913.)  
**APPEAL AND ERROR (§ 979\*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.**

An order of the trial court granting a new trial for insufficiency of conflicting evidence will not be disturbed, in the absence of a clear abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.\*]

Appeal from District Court, Esmeraldo County; Theron Stevens, Judge.

Action by the Goldfield Mohawk Mining Company, a corporation, against the Frances-Mohawk Mining & Leasing Company, a corporation. From an order granting a new trial, plaintiff appeals. Affirmed.

W. H. Bryant, of Denver, and Henry M. Hoyt, of Goldfield, for appellant. Thompson, Morehouse & Thompson, of Goldfield, for respondent.

**PER CURIAM.** This is an appeal from an order granting a new trial, and is the second appeal in the action. 33 Nev. 491, 503, 112 Pac. 42, 47. Respondent upon this appeal was appellant upon the former appeal, and the question there determined was whether the order denying the motion for a new trial had been improvidently entered because "the trial judge in the present case, misconceiving his judicial duty, fell into grave error in failing and refusing to pass upon this ground (insufficiency of the evidence to justify the verdict) assigned by the defendant for a new trial." For this reason the order denying the motion for a new trial was "set aside, with instructions to the court below to consider and pass upon the ground for a new trial interposed by defendant, 'of the insufficiency of the evidence to justify the verdict,' for which purpose the case is herewith remanded."

In passing upon the motion originally, the trial judge said: "I was not surprised that the defendant was dissatisfied with the verdict. A verdict of this kind could hardly result otherwise than as a surprise, and defendant naturally feels that justice has been outraged." 33 Nev. 493, 112 Pac. 43. In passing upon the motion for a new trial the second time, in pursuance of the order of this court, the trial judge granted a new trial upon the ground of "insufficiency of evidence to justify the verdict," and in his opinion rendered thereon said: "I have neither the time nor the inclination to review the evidence presented to the jury, and presumably upon which the verdict was based, but will simply say that my judgment of the facts was and is utterly at variance with the verdict of the jury. In my judgment, the verdict was not supported by a preponderance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the evidence; that the verdict of \$75,000 in favor of the plaintiff rendered by the jury was not justified by the evidence. The motion of the defendant to vacate and set aside the verdict and grant a new trial on the ground of 'insufficiency of the evidence to justify the verdict' should be sustained, and it is so ordered." Hayne on New Trial and Appeal says: "Where there is a substantial conflict in the evidence, the appellate court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion for a new trial. \* \* \* The rule as to conflict does not apply to the court below. The judge of such court should set aside the verdict whenever it is against the weight of the evidence, notwithstanding the fact that there is a substantial conflict in the testimony." Hayne, Revised Edition 1912, vol. 2, § 288, pp. 1614, 1645.

In *Golden v. Murphy*, 27 Nev. 392, 75 Pac. 626, this court, considering the rule governing an order of this kind, said: "On behalf of appellants it is urged that the order granting a new trial is error, because an invasion of the province of the jury, even if the evidence is conflicting. \* \* \* It was held in *Worthing v. Cutts*, 8 Nev. 121, that, when a new trial is granted in the lower court upon the ground that the verdict is not warranted by the evidence, the rule invariably governing the appellate tribunal is not to disturb the action of the judge below if there is a material conflict in the evidence. In *Treadway v. Wilder*, 9 Nev. 70, this court stated: 'It must be borne in mind that the nisi prius courts, in reviewing the verdicts of juries, are not subject to the rules that govern appellate courts. They may weigh the evidence, and, if they think injustice has been done, grant a new trial, where appellate courts should not or could not interfere. The question under consideration has been so often presented that opinions have become stereotyped. Nothing need be added to, or taken from, the rule, so well established, often declared, and always followed.' The numerous cases in this state and California cited in respondent's brief, and Hayne on New Trial and Appeal, § 97, and Hilliard on New Trials, p. 488, are to the same effect." In *Albian M. Co. v. Richmond M. Co.*, 19 Nev. 231, 8 Pac. 484, this Court by Hawley, J., said: "The jury were primarily the judges of the credibility and weight of the testimony of the respective witnesses. The district judge, however, 'has jurisdiction, on motion for a new trial, to decide, as a question of fact, whether the scale of evidence which leans against the verdict very strongly predominates' (*Phillipotts v. Blasdel*, 8 Nev. 76), and, if there is in his opinion a 'clear

preponderance of evidence against it,' he 'should not hesitate to set aside the verdict' (*State v. Yellow Jacket S. M. Co.*, 5 Nev. 422); but, in the exercise of this power, he 'should be careful not to invade the legitimate province of the jury, when they have manifested a fair and intelligent consideration of the evidence submitted to them.' *Solten v. V. & T. R. R. Co.*, 13 Nev. 135. The district court 'ought not to grant a new trial when there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict.' If the district court grants a new trial upon this ground, 'the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the district court.' *Treadway v. Wilder*, 9 Nev. 70." This court in *Edwards v. Water Co.*, 21 Nev. 492, 34 Pac. 389, by Murphy, C. J., said: "The granting or refusal of a motion for a new trial on the ground of the insufficiency of the evidence to support the findings is addressed to the sound discretion of the judge who presided at the trial of the case in the lower court, and on an appeal from such order, where the court below, in the exercise of a sound discretion, grants a new trial on conflicting evidence, appellate courts have always refused to disturb the order. *Kellenberger v. Market Str. Cable Railway Co.*, 33 Pac. 901." See, also, *McLeod v. Lee*, 14 Nev. 398; *McCafferty v. Flinn*, 32 Nev. 269, 107 Pac. 225.

The contention of counsel for appellant "that in violation of law he (the trial judge) has merely substituted his judgment of the facts for the judgment of the jury," and hence has not yet legally disposed of the motion for a new trial, is not well taken. He has definitely passed upon the ground of the motion "insufficiency of the evidence to justify the verdict," and has granted the motion on that ground. It becomes a question then for us to determine, under the established rules, whether he has abused the discretion given him by the statute. That there is a conflict in the evidence is not disputed. That there is evidence sufficient to support the verdict under the well established rule applicable in case the motion for a new trial has been denied must, doubtless, also be conceded. But a new trial having been granted upon the ground of insufficiency of the evidence, under the many authorities cited in this and the former opinion rendered in this case, we are not permitted to disturb the order, unless we can say that the trial judge manifestly abused the discretion reposed in him by the statute. In *re Martin*, 113 Cal. 479, 45 Pac. 813. This we are unable to say. The order appealed from is affirmed.

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 88 Cal. xviii.

**STATE v. WILLIAMS. (No. 2,025.)**

(Supreme Court of Nevada. Jan. 4, 1913.)

**1. GRAND JURY (§ 15\*) — GRAND JURORS — QUALIFICATION—OPINION.**

Rev. Laws, § 7005, provides that a grand juror may be disqualified when a state of mind exists on his part with reference to the case, or to either party, which will prevent him from acting without prejudice to the rights of the challenging party, but that no person is disqualified as a grand juror by reason of having formed or expressed an opinion on the matter submitted, founded on public rumor, statements in public journals, or common notoriety, provided it appears by his oath or otherwise that he will, notwithstanding such opinion, act impartially on the matters submitted to him. *Held*, that a grand juror, who had formed a belief or opinion from statements made to him that defendants were keeping a gambling place, was not disqualified where he further testified that his opinion was not such as would justify him in making a charge against accused.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 35-41; Dec. Dig. § 15.\*]

**2. CRIMINAL LAW (§ 511\*)—ACCOMPLICES—CORROBORATION.**

In a prosecution for permitting unlawful gambling in defendant's place of business, evidence that other unlawful games were played there, and that the game in question, as testified to by the participants and other witnesses, was carried on with the door locked and attended by defendant's brother, furnished sufficient corroboration of the testimony of accomplices required by Rev. Laws, § 7180, to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.\*]

**3. CRIMINAL LAW (§ 721\*)—TRIAL—MISCONDUCT OF ATTORNEY—DEFENDANT'S FAILURE TO TESTIFY—REFERENCE.**

In a prosecution for permitting gambling on defendant's premises, a statement by the district attorney in argument, "Why didn't the defendant call any witnesses to the stand? Why didn't he put his brother on the stand, his attendant? \* \* \* I will tell you why, he didn't dare do it," was not objectionable as a reference to defendant's failure to testify in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Franklin Williams, indicted under the name of F. M. Williams, was convicted of permitting unlawful gambling in his place of business, and he appeals. Affirmed.

Salter & Robins, of Winnemucca, for appellant. Cleveland H. Baker, Atty. Gen., for the State.

**PER CURIAM.** The defendant was indicted by the grand jury of Humboldt county for the crime of knowingly permitting unlawful gambling in his place of business in Winnemucca. From a judgment of conviction and an order denying a motion for a new trial, he has appealed.

[1] It is urged that the case ought to be reversed on different grounds, first of which is the one that a grand juror was disqualified. His frame of mind is illustrated by the

following extract from the testimony which he gave upon the motion to set aside the indictment: "A. Well, I don't know as I have any belief. I don't know that a man could form an opinion unless they had some tangible evidence. It was rumored, and of course I had the impression, that they were gambling, but I had no belief of the gambling until the men were put under oath. You can hear a rumor, but you cannot form an opinion upon a mere rumor. I had heard it stated several times that they were gambling or conducting a gambling place, but I never had heard until I got into the grand jury room that they were gambling—that he was gambling there. When I went into the grand jury room I had no idea that the case was coming up. Q. Then you had no opinion one way or the other? A. I didn't think I did until after we heard the evidence. Q. You had no opinion on the 31st of January, before you were sworn as a grand juror, as to whether this man had been gambling or was running a gambling place? A. I didn't have any opinion that I could come in and make any charge against him; I didn't have an opinion that I could have charged him with anything. Q. I think I understand what you mean, but you will be fair with me, I know. Still you did have an opinion or belief about it—about this man—didn't you? A. Why, sure, I have had for some time, that there was something wrong there. Q. And that belief or opinion, if it was such, was formed upon what you had heard? A. Yes, on rumors. Q. And the persons who had informed you, you had no reason to disbelieve, did you? A. I couldn't recall any one, outside of that one evening, who spoke positively on the case. He didn't say that he had seen anything; he simply said it was an open secret. Q. After that you considered it was an open secret, didn't you? A. I didn't pay any attention to it, Judge. Q. You took it for what it was worth, and believed it, and let it go at that? A. I just took it for what it was worth and let it go. I would not want to injure Mr. Williams by saying that I had an opinion, or denying an opinion if I had one. I don't believe—I couldn't say that I had an opinion. I had the impression that there was gambling going on there, but I didn't trace it, and didn't try to trace it. Likely there is very few men in the county that has not heard the same thing." There is nothing in this or the other evidence to indicate that he had a fixed or settled opinion regarding the guilt or innocence of the defendant, and such a prejudice or state of mind as tended to disqualify him as a grand or trial juror.

The sixth subdivision of section 7005 of the Revised Laws provides that an individual juror may be challenged on the ground: "That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

of the party challenging; but no person shall be disqualified as a grand juror by reason of having formed or having expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety: Provided, it satisfactorily appears to the court upon his declaration, under oath, or otherwise, that he will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." The fact that a man hears rumors or statements and forms impressions from them, as every intelligent person may be expected to do, is far from sufficient to disqualify under this statutory provision and our practice.

[2] It is also contended that the conviction cannot be sustained upon the uncorroborated evidence of witnesses who were allowed to play the unlawful game while the defendant was not one of the players. Section 7180 of the Code provides that a conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which, in itself, tends to connect the defendant with the commission of the offense. On behalf of the state are cited cases tending to sustain the claim that the persons who actually play the game are not accomplices of the owner of the premises or the proprietor who permits the game to be played, and that a conviction can be sustained against him on the testimony of the player. As to whether, under that section, the witnesses who might be guilty of playing an unlawful game are accomplices of the proprietor who is guilty of the offense of allowing an unlawful game to be played on his premises, which may be considered a different crime, need not be determined, for we think there is sufficient corroborative evidence in the testimony of Lamb and Miller, witnesses who did not participate in the game. The fact that other unlawful games, and that this game, as testified to by the participants and other witnesses, were carried on with the door locked and attended by the defendant's brother, although slight, may be sufficient to corroborate the evidence of an accomplice. The corroborating evidence here seems to be as strong as in the case of *State v. Streeter*, 20 Nev. 403, 22 Pac. 758, in which this court said that all the statute requires is that the circumstances should be such as to convince the jury and to make them believe that the accomplice had sworn truly, and that the charge was true, and, if the jury are satisfied with the weight of the corroborating circumstances, it is enough. *State v. Lambert*, 9 Nev. 321. This view also makes it unnecessary to determine regarding the objection to the instruction relating to accomplices. Evidence that the de-

fendant permitted other unlawful games to be played on the premises was properly admitted to show his knowledge of, and consent to, the playing of this particular game. *State v. McMahon*, 17 Nev. 375, 30 Pac. 1000, and *State v. Roberts*, 28 Nev. 375, 82 Pac. 100.

[3] The district attorney, in his opening address to the jury, stated: "Why didn't the defendant call any witnesses to the stand? Why didn't he put his brother on the stand, his attendant? Why didn't he make a defense by calling witnesses to the stand, his brother, the attendant? I will tell you why, he didn't dare to do it." Counsel for the defendant, interrupting, said: "We desire at this time, so that the reporter may get it in the record, to state that the district attorney has commented on the failure of the defendant to take the stand in his own behalf, or to produce any witnesses on behalf of the defense, and we assign it as prejudicial error on his part, and ask the court to instruct the jury to disregard his remarks." The district attorney said: "I wish to deny that I made any allegation of that kind as to the defendant's failure to take the stand."

The state and federal Constitutions provide that persons accused of crime shall not be compelled to testify against themselves, and the statute (section 7161) directs that "in all cases wherein the defendant in a criminal action declines to testify the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause."

It has been held error for a prosecuting attorney to argue to the jury that the defendant is guilty because he failed to testify. In this case the district attorney did not criticize or mention the failure of the defendant himself to testify, but his remarks appear to relate to his failure to put on the stand his brother, who apparently was in charge of the room where the game was played, or other witnesses. We think, under the circumstances, the language of the district attorney was not improper argument. Nor ordinarily are remarks of a prosecuting officer, provoked by or made in reply to statements of the attorney for the defendant, objectionable.

We conclude that the evidence is sufficient to sustain the conviction of the crime of knowingly permitting unlawful gambling. As some of the points involved were in doubt until given consideration, and there was honest difference of opinion regarding them entertained by opposing counsel, we issued a writ of probable cause and stayed the execution, under section 7294, pending the determination of this appeal.

The judgment and order of the district court are affirmed.

EMERSON v. BUTTE ELECTRIC RY. CO.  
et al.

(Supreme Court of Montana. Dec. 7, 1912.)

1. CARRIERS (§ 316\*)—INJURIES TO PASSENGERS—PRESUMPTION OF NEGLIGENCE.

A presumption of negligence by a common carrier arises from the happening of an accident resulting in injury to a passenger, due to some agency over which the carrier has control.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.\*]

2. CARRIERS (§ 313\*)—INJURIES TO PASSENGER—PARTIES—ACTIONS—PARTIES.

The superintendent of a street railway company, whose negligence caused an accident, was properly joined with the company as defendant in a passenger's action for resulting injuries.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 313.\*]

3. EVIDENCE (§ 119\*)—RES GESTÆ.

In a street car passenger's action for personal injuries in a derailment, evidence as to how many people were on the car, and where they were located, was admissible as *res gestæ*, though such evidence did not bear on the negligence alleged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303-306; Dec. Dig. § 119.\*]

4. EVIDENCE (§ 553\*)—HYPOTHETICAL QUESTIONS—QUOTATIONS FROM MEDICAL WORKS.

A quotation from a standard work on medical jurisprudence may, in the court's discretion, be permitted to be incorporated in a hypothetical question to a physician.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.\*]

5. CARRIERS (§ 318\*)—PASSENGERS—INJURIES—INSUFFICIENCY OF EVIDENCE.

Evidence, in a street car passenger's action for injuries in a derailment, held to support a verdict in some amount for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

6. DAMAGES (§ 130\*)—SUFFICIENCY OF EVIDENCE.

Evidence, in a street car passenger's action for personal injuries in a derailment, held not to show injuries of such severity as to sustain a verdict for \$2,750.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.\*]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by J. P. Emerson against the Butte Electric Railway Company and another. From a judgment for plaintiff and an order denying a motion for new trial, the named defendant appeals. Reversed and remanded for new trial.

George F. Shelton and Peter Breen, both of Butte, for appellant. Alexander Mackel and William Meyer, both of Butte, for respondent.

SMITH, J. This action was commenced on May 18, 1911, by the plaintiff, Emerson, against the Butte Electric Railway Company, a corporation, and J. R. Wharton, defendants, to recover damages for personal injuries alleged to have been suffered on the 9th

day of May, 1911, while plaintiff was traveling on one of the cars of the defendant company as a passenger. The complaint alleges that the car upon which plaintiff was riding was derailed by reason of the carelessness and negligence of the defendant company and Wharton, its superintendent, and that, by reason of such derailment, plaintiff was thrown about the car, at and against various objects and persons, and injured in his spine and back, in his hip bones, in his right side, his lumbar sacral regions, his head, and various other parts of his body. He was 30 years of age, capable of earning \$3.50 per day, and it is alleged that he is suffering from traumatic neurasthenia and is permanently injured. Defendants filed a general demurrer to the complaint, which was overruled. They then jointly answered, admitting the car was derailed and plaintiff "was thrown about somewhat, but not with great or serious force or any violence." Substantially all other allegations were denied. The court granted a motion for a nonsuit as to the defendant Wharton. The trial resulted in a verdict for the plaintiff and against the defendant corporation for \$2,750. From a judgment on the verdict and a motion denying a new trial, defendant appeals.

[1] 1. Plaintiff having been a passenger, the complaint is sufficient under the rule laid down in *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Knuckey v. Butte El. Ry. Co.*, 41 Mont. 314, 109 Pac. 979; and *John v. Northern Pac. Ry. Co.*, 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N. S.) 85. A presumption of negligence on the part of the carrier arises from the mere happening of an accident resulting in injury to a passenger, which is caused by some agency over which the carrier has control.

[2] 2. There was no misjoinder of parties defendant. *Knuckey v. Butte El. Ry. Co.*, *supra*.

[3] 3. It was competent to show how many people were on the car and where they were situated, not as an attempt to prove a different ground of negligence from that stated in the complaint, but as part of the *res gestæ*, illustrating the situation of the plaintiff.

[4] 4. Dr. Horst, a witness for the defendant, had testified in chief, in answer to a hypothetical question, that he did not think the plaintiff could have been permanently injured. Counsel for the plaintiff on cross-examination, evidently reading from a medical work entitled "Accident & Injury" by Bailey, asked: "Well, this author states a case as follows: [Then followed a narrative of the case of a woman who was in a street car accident, giving her symptoms, etc., described as 'the customary neurasthenic symptoms,' and concluding with the statement that she became worse rather than better after a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

settlement with the street car company.] Do you agree with that statement as a case of traumatic neurasthenia?" The answer (over objection) was: "It is not a typical case, because we start in with a sick woman. She was a neurotic woman. This is not a typical case." It is now contended that the court erred in allowing the question. We do not think so. At least we do not think the court abused its discretion. This court in *State v. Penna*, 35 Mont. 535, 90 Pac. 787, by Mr. Chief Justice Brantly, held, in effect, that counsel might properly incorporate into a question a quotation from a standard work on medical jurisprudence for the purpose of asking a witness whether he agreed with the statement embodied in it as correct.

5. It was contended, in argument before the bar of this court, that the case of *May v. Northern Pac. Ry. Co.*, 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, 4 Ann. Cas. 605, should be disapproved and overruled. In that case it was held that, in an action for personal injuries, the district court, in the absence of legislation, might not compel the plaintiff to submit to a physical examination by physicians or surgeons appointed by the court. However, as no request for such examination was made in this case, the question is not before us.

6. It is also claimed that the defendant by its evidence overcame the presumption of negligence raised by the derailment of the car. We cannot agree with this. While much of defendant's evidence was uncontradicted, the jury were not obliged to credit it or give it the weight contended for by counsel. It was still for them to decide whether the charge of negligence was substantiated.

[§] 7. It is also contended that the evidence fails to support the verdict. Plaintiff testified: "This particular car that I took was crowded. I did not get a seat. The first thing I knew the car was off the track. I noticed it was off because I was thrown from one side of the car to the other. I was not the only person standing. The car was full. Everybody went down, as far as I could see, on the first bump of the car. I went down. I was first thrown to the right. The seats of the car were facing each other, and the sides of both seats were full. As I was thrown forward, I landed right close to my hip bone, touching the point of my hip bone on a gentleman's knee. I fell on a gentleman's knee with my body. This fall was violent. As I fell, the car still bumped up and down. The next motion was that I was thrown on the other side with my back against the side of the seat. The position that I was thrown to then was that I went to the floor. The car bumped considerable as it went along there. I was still lying on the floor when they came to pick me up. I got to the hospital by them calling for a taxicab. When I got down to the hospital the doctor examined me. I guess it was Dr.

Kistler. After I was examined at the hospital, they called for a cab to send me to my room. When I got there I went to bed. I was suffering with pain in my side and the point of my hip bone. I will say that my back was bothering me, and also my right knee. When I went to bed there I was not able to sleep. I got a hot water bottle and used to put it on my side and on my back. I kept on with that treatment for at least two weeks. I stayed all night in my room on that same night. I went back to the hospital every day. I was taken back to the hospital from my room about 10 o'clock that night. My side was bothering me, and I called for the doctor to come down, and he suggested that I go back to the hospital. I stayed at the hospital until 4 or 5 o'clock the next day. I then came back to my room. They didn't give me anything in the way of treatment at the hospital, but when I got back to my room they ordered electric treatment. After I went back to my room, I again went to the hospital to consult a doctor. I did that until between the 17th and 18th. It was something like eight or nine days that I went to the hospital. Went back to work on the 23d of May. The only treatment I received was electric treatment consisting of sitting in an electric chair for 10 or 12 minutes, and sometimes longer, which was ordered by Dr. Kistler. I suppose it was the street car company that sent me to the hospital and paid the bill and so forth. I don't know who it was that furnished me a doctor; suppose it was the street car company. During the time from the 10th to the 17th I was suffering in my back and in my hip. My knee was stiff all the time. I couldn't sleep nights only just at spells. Twenty minutes was the longest I ever slept. I was suffering from dizziness in my head. I was dizzy when I woke up in the morning, and even after starting to work, if I stooped down any length of time at all, I would hoist up and was dizzy, and lots of times I would have to catch the sides of the wall of the drift to keep from falling down. After I went home from the hospital I was spitting blood for two days. That has entirely disappeared now. There was not any treatment with reference to putting bandages or plaster on my back. I did not apparently get any benefits from these treatments. About the 19th I went to Dr. Monahan, and he gave me a bottle of liniment to rub on my back, and he also gave me some powder tablets to take. He gave me some potash to rub on my side. As a result of this treatment, I seemed to improve a little. On the 23d I went to work with a drill. We drilled until noon, and, as long as I was standing up, I could drill first rate, but after dinner I had to go mucking, and I stood it until about half past one, and my back would not stand it any longer and I had to get out. I again went to work on the 10th of June. When I went off shift I went

home, and from that time to the present time I have been under Dr. Monahan's care. He said what I needed was to lay off from work, but I wasn't able to because the landlady that I was boarding with wanted her money, and she forced me to go to work. I was broke. During all of that time I particularly suffered with my hip and my back. My knee was a little stiff, but I worked the shift. I still have the dizziness, but I ain't quite so bad as it was. During the last month or six weeks, I have improved but very little. When I work, it has the effect on me that I can hardly get out of the mine, especially if I have to run cars. Lots of times I have to run cars, and then I can hardly get out of the mine in the night. It affects me in the hip and back. I am not as good a workman now as I was before the injury. After I work a shift, my hip bone stiffens so that I can hardly walk for a little while; but, if I can sit down and rest for an hour or so, it gets a little better. My back bothers me all night. I can't lay on my back all night at all. I have to keep turning. During the time since I went to work in June, I have not worked regularly. I have been compelled to lay off. I lay off a day at a time. I am not entirely over the pain in my hip or back. Before the accident I weighed 181 pounds, and I now weigh 173 pounds. I do not know whether it was a gentleman or a lady that I was thrown against. As to the visible evidence I had of the injury, I will say that my hip became very stiff. There were no bruises or blackening on me outside of my knee. My knee was bruised. I did not mention my knee in my complaint. I did to Dr. Monahan. I did not mention my knee to any doctor that waited on me at the hospital; I never mentioned that at all. I did not mention that until it was something like nine days along. I always was very healthy. I don't know that my appetite was affected to any great extent. When I was crippled in this hip I walked with a cane all the time. I could not run any. I could not dance. I worked at the Badger State mine yesterday, and I expect to go back again after the trial. I have never been criticised, nor has there been any fault found with my work by my foreman or shift bosses. I frequently have to sit down on the side of the drift with my back to the drift. I certainly would get up if I saw the shift boss coming. I received the same wages as any other miner in the mine during that time. I never made any complaint to my foreman or shift boss, or asked for any easier place because of the injury I had. I have complained to my fellow workmen that I was not able to do a shift's work. I don't know their names. When I went to work on the 10th of June I went to work steady. I think the first I laid off was on the 23d or 24th of June. I was off one shift in July. I couldn't go out on account of my hip. I laid off two

days outside of May 23d. I haven't been off lately. The extent of my laying off is two days. Dr. Monahan told me there were no subjective symptoms at all."

Dr. Monahan testified: "I made a physical examination of Emerson about the 17th of May. I made notes which I will read: 'Found right hip bone very tender on pressure. Abdominal muscles on right side pain on pressure. Pain on pressure lumbar sacral region [small of back]. Right knee contused and swollen; measured 15 inches; left 14½ inches. Pain existing over right crest of hip bone without cessation, necessitating discontinuing work for a day or two at intervals of every week or ten days. Conditions remain practically the same.' Those are conditions that I discovered from the examination of Mr. Emerson. From that time to this time I have at different occasions made examinations of him to ascertain what the condition of these various injuries were, whether they improved or otherwise. His condition to-day, over the right hip bone, remains practically the same. As to what his condition will be in the future, I will say that I have treated him, and we treat all kinds of cases, and cannot determine what the results will be until the treatment has been tried. In the plaintiff's case the first step in the treatment would be absolute rest. I am not able to say how long it will take before he will be entirely recovered, nor would I give my opinion as to whether he will be ever entirely well again. At the present time his condition has not improved very much. The history of such cases, statistics show that it extends over a period as a rule of several years. I do not know whether he will ever entirely recover from the pains in his hip from which he is suffering now. There is a small percentage of them where the condition becomes chronic before getting well. The majority of the cases never become entirely well. My opinion is that it will be a long time, and perhaps never will he be able to follow his occupation without it interfering with him. The only objective symptom which I found was the swelling and contusion of the knee. That was the only marked contusion I saw. From its appearance, it was acute. I would say that there should have been some pain there first where I found the objective symptom of an injury to the knee. I would myself, without his stating anything, have discovered trouble in the right hip and pain on the abdominal muscles of the right side; they were sore and tender on pressure; and also there was pain on pressure on the lower lumbar sacral region, the small of the back. There were no surface indications to indicate any trouble there. There was nothing whatever to indicate any trouble there until I applied the pressure, only his statement. He told me that he had pains in various parts of his body. He told me that he had pain in the

lumbar region, and I looked at it, and there was nothing there to indicate, no contusion or swelling, to indicate any pain whatever. The tissues were normal. When I began to press on that he winced. He told me that he had pains in the back and on the right side. There was nothing there to indicate it from looking at it. I am only impressed with the fact that he has pain there, and he says so, and it is illustrated by the physical examination. There is pain there. You can usually tell that on a rigid examination whether there is or not. All the other symptoms have subsided with the exception of this right side. He could be in the condition he is in and work. His general appearance always indicated to me that he was in pain. I know that he was suffering pain from his statements to me and his physical examination; that simply went to pressing on the parts. There was no discoloration other than the knee. There was no sign of an external injury any place else. If that injury to the hip was caused by a blow, very recent blows, there should have been surface indications of it. If it was caused by being thrown against the knee of a gentleman, I would not say that there should be some surface indications of an injury caused by that. A blow and a fall would be decidedly different. The fall might result in a muscular injury or deep-seated injury in which there would not be a contusion or mark of any kind on the surface. He might get hurt without there being a surface indication, but he might feel it. I would say that that injury could be caused by falling against a man's knee."

Mrs. Anna Bloom testified: "Mr. Emerson was rooming with me. When he was first brought from the hospital he called me, and I gave him a hot water bottle. He was in pain. I noticed a short time after the injury there were streaks of blood in the cuspidor in his room."

Hubert Tonkin, assistant foreman of the Badger State mine, testified: "Emerson has been doing everything as a miner. He ran a machine, shoveled, set up the machine, ran car, and timbered. I never saw him limping around the mine, or staggering, or acting sore or stiff. He filled the bill perfectly. I never saw him exhibiting any symptoms of pain or agony or suffering of any kind."

P. F. Tallon, also an assistant foreman, gave similar testimony. He also testified: "I never noticed him limping or having to use a cane or any support around the mine."

Mrs. Chas. Noyes testified: "Mr. Emerson was a boarder of mine on the 10th of May and for about two months after. During the time he was in the house and before he went to work I observed his appearance and his walk and manner. I would say that he was, not a man who was falling in weight or failing in health or suffering pain. If he said he lost eight pounds, I will say I

think he gained eight pounds. (This statement may possibly be attributed, in part at least, to a feeling of professional pride on the part of the good lady.) After the accident, I saw him three times a day, regular, after a day and a half. He was regular to his meals after that time. I observed his general appearance as to health and so forth, both before and after the accident, and I thought his general appearance improved greatly. After the accident his appearance was that of a pretty husky looking man; there was no appearance of anything the matter with him only a little lame. I never saw him with the appearance of being in pain or suffering at all. He was jovial as usual. In my judgment he gained flesh rapidly after the accident. The day after he was hurt he told me he was going to start a suit."

Mrs. George Noyes testified: "I used to see Emerson every evening going to dinner. I observed him walking on the street both before and after the 9th of May. I did not observe any difference in his walk only that he had a cane with him, and that was all. I observed him when he would meet street cars. He would limp a little bit more then. And he would limp a little bit more when he came across any one whom he knew. I also observed him when he was going along Park street one day, and he was going a pretty swift gait. I knew I would have to run to keep up with him. He was limping about every other step or so; he would take a step, and then he would think about it. I used to see him every day on the street. He had a cane walking on the street, and every other step or so the cane would reach the ground. I observed him changing his gait coming into the dining room, and then he would limp. I waited on him after the 9th of May. His appetite always appeared very good to me. I did not see any difference as to being in pain or otherwise. I did not see anything that would indicate that he was suffering or in great pain. As to who I first told of seeing Mr. Emerson taking a step or two and then taking a limp or two, I will say we were joking about it at the house."

Dr. P. H. McCarthy, in answer to a hypothetical question embodying the evidence, testified: "I am positive that the injury was not very severe. If it were a genuine injury, the only place you would expect to find it would be in an injury to the spine. If it were an injury to the softer tissues, this pain would disappear before, or cause some acute trouble that would justify you in doing something that would do away with that pain before now. If it is an injury to the spine, five months afterwards you are bound to find changes in the tissues. The muscles would become weakened, the man's gait would change, he could not work in a raise; I know that; nor he could not run a car,

nor a machine in the mine. If you had any injury whatever to the spinal cord, you would not be able to work in the mine. You would become dizzy, and if you exerted yourself the chances are you would fall down. Taking into consideration the facts set forth in the hypothetical question and from the showing of the length of time the patient followed the occupation of mining under the conditions stated, and judging from the following of the occupation that this patient has followed since the time of the injury, I would say that he was not injured at all. Q. In view of the facts stated in the hypothetical question addressed to you, and in view of the further fact that at all of the times while Dr. Monahan was testifying he stated positively that there was nothing to indicate any pain, injury, or suffering, permanent or otherwise, other than the history of the case as stated by him by the patient himself and the yielding under pressure, and in view of the employment followed by the patient, and for the length of time and steadiness of that employment, would you say that those injuries were simulated or real and legal? A. I would say it was simulated."

Dr. C. H. Horst, in answer to the same hypothetical question, replied: "I would say that it was an injury of a mild character, a moderate grade injury, but of no permanency whatever. I do not consider that a man who could work and do the work described in this question could be possibly permanently injured. The fact that a man has not any objective symptoms does not conclude the matter that he was not injured." Both doctors testified that a physician who was in personal attendance on a patient was in a better situation to judge of the severity and extent of his injuries than one who was simply called upon to answer a hypothetical question.

Dr. H. H. Hanson answered the hypothetical question thus: "That is the history of a first-class able-bodied man. That injury was just simulated; that's all. If the injury claimed by the patient continued for five months, and he pursued the vocation he did, and did the character of work he did, I will say, if the man was able to do a good day's work for that length of time, he must be in first-class condition."

In view of this evidence we cannot say, as a matter of law, that a verdict for the plaintiff was not justified.

[§] 8. But it is also contended that the verdict is excessive; so much so that it evinces passion and prejudice on the part of the jury. With this contention we agree. In view of the evidence of how the accident occurred, the history of plaintiff's injuries, the fact that it was within his power to simulate and thus deceive his physician, the further fact that not any of his symptoms, save those observable in his knee, were ob-

jective, and his conduct since the accident, together with the amount of the verdict, we do not believe that the jurors were moved by that sense of responsibility and regard for the evidence that should have characterized their deliberations.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### PENWELL v. FLICKINGER et al.

(Supreme Court of Montana. Jan. 21, 1913.)

##### 1. PAYMENT (§ 52\*)—VOLUNTARY PAYMENT—EFFECT.

Plaintiff, being under no obligation to make good the default of defendants to another, and having, without their authority, made a payment to do so, extinguished the debt, so far as the creditor was concerned, it not having at the time assigned its claim to him, and there being no understanding that it should be assigned or kept alive for him; so that he took nothing by its subsequent assignment to him.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 136; Dec. Dig. § 52.\*]

##### 2. PAYMENT (§ 52\*)—ACTS CONSTITUTING PAYMENT.

Where plaintiff, merely because he had induced a company to buy an automobile of defendants and pay for it, and they had not delivered it, bought for the company another automobile from another, for less money, and paid it the difference, this constituted a payment of their debt as regards any further right of the company.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 136; Dec. Dig. § 52.\*]

##### 3. PAYMENT (§ 63\*)—NECESSITY OF PLEADING.

Plaintiff suing on an assignment of a claim, and having the burden of sustaining his action, the fact of extinguishment of the claim by payment before assignment, when shown by the evidence, availed the defendant without being pleaded.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63.\*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Lewis Penwell against C. M. Flickinger and another, partners as Flickinger & Strong. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

C. A. Spaulding, of Helena, for appellants. Wight & Pew and Walsh & Nolan, all of Helena, for respondent.

SANNER, J. The original complaint in this action was filed on September 16, 1910. Issue was joined, but afterwards, and on January 26, 1911, an "amended and supplemental complaint" was filed, alleging, in substance, that in June, 1910, defendants agreed to sell to the Beaverhead Ranch Company, a corporation, a certain automobile, for which they were fully paid in the sum of \$956.50; that they never delivered the automobile, and never returned the purchase

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



price, or any part of it, though demanded so to do; that on August 8, 1910, plaintiff paid said Beaverhead Ranch Company the full sum of \$956.50, and said company "did heretofore duly make, execute, and deliver to the plaintiff herein a full and complete transfer and assignment of its claims and demands against the defendants herein growing out of the transactions hereinbefore alleged, and plaintiff now is the owner and holder of said claims and demands." The answer admits all the allegations of the amended and supplemental complaint, except it alleges that the defendants sold the machine to the company through the plaintiff as its agent and representative, denies any demand by the company for a return of the money paid, denies nondelivery of the car, and disclaims any knowledge of plaintiff's payment to the company or its assignment to him. A reply was filed, denying the affirmative matters set forth in the answer. The case was tried to the court, sitting with a jury. There was a verdict and judgment for the respondent for the full amount claimed, and from that judgment this appeal is taken. The errors assigned are the giving and refusal of certain instructions, including, among those refused, a direction to find for the appellants; and the question presented here is whether upon the case made the respondent was entitled to recover.

So much of the evidence as was deemed necessary to raise the matters of law involved is before us by bill of exceptions incorporated in the record. This evidence tended to show the agreement as alleged between the Beaverhead Ranch Company and the appellants, the payment by the company to the appellants, their failure to deliver the car, or to return the money, notwithstanding demand, the payment by respondent to the company in August, 1910, the commencement of this action in September, 1910, and the company's assignment in January, 1911; also that respondent's act was without any request from the appellants and against the express dissent of one of them; that respondent was an officer of the company, sustained friendly relations with it, and did not like to see it lose any money on account of this transaction with appellants. Touching this matter the respondent himself testified: "I had represented to the Beaverhead Ranch Company that the thing to do was to buy this particular car from these particular people. I sort of stood sponsor for the whole transaction; and the Beaverhead Ranch Company had paid out over \$900, and they had not got any car. They were out the money, and I was largely responsible for it, I supposed. At any rate, I felt so, and I was naturally somewhat exercised about it, and, of course, I told defendant Flickinger very plainly how I felt about it. I will state that in the meantime the Beaverhead Ranch Company were out the money, and did not have any car. I

went to Butte and bought them a car, a Hupmobile, that cost \$161 less than the car we bought from Flickinger & Strong. I paid for that car out of my own pocket, and gave the Beaverhead Ranch Company that car and \$161, so that they were entirely reimbursed for all they were out. I was the only one that was out."

[1] That the respondent proceeded under a delicate and praiseworthy sense of business ethics may be granted; but that he was under no legal obligation to make good the default of the appellants, and that he did so without their authorization, are facts patent upon the face of the record. Equally certain is it that there was no subsequent ratification or promise to repay, and there is not a suggestion in the record of any oral assignment of its claim from the company to the respondent when he made the payment, or of any understanding that it should be assigned or kept on foot for his benefit. Under such circumstances the general rule is that the payment extinguishes the debt, at least so far as the creditor is concerned. 30 Cyc. 1183, 1121; note to *Crumlish's Adm'r v. Central Imp. Co.*, 23 L. R. A. 120; *Martin v. Quinn*, 37 Cal. 55.

Now the question here is, not whether, by the respondent's act, the debt became extinguished as to the debtor, but what did the respondent take by virtue of the assignment here pleaded? This assignment is a formal, written instrument, given and dated nearly five months after the respondent's payment to the company and nearly four months after the commencement of this action; and it purported, in consideration of \$956.50 "heretofore paid by Lewis Penwell," to assign to him such claims, demands, or causes of action as the company then had by virtue of the premises. But if, when the payment was made, the obligation was extinguished so far as the company was concerned, it had not, on January 4, 1911, any claims, demands, or causes of action which it could assign, and the respondent took nothing by virtue of the assignment. *Tanner v. Bowen*, 34 Mont. 121, 85 Pac. 876, 7 L. R. A. (N. S.) 534, 115 Am. St. Rep. 529, 9 Ann. Cas. 517; *Moran v. Abbey*, 63 Cal. 56; *Orystal v. Hutton*, 1 Cal. App. 251, 81 Pac. 1115.

[2] It is urged, however, that the record does not show that respondent ever intended to pay appellants' debt, or that the company ever accepted respondent's act as a discharge of appellants' obligation. We think otherwise. If the intention of the respondent or the company had been the one to relieve and the other to be relieved of an inconvenient situation due to the lack of a car when a car was needed, different and more obvious means would doubtless have been employed. But respondent not only bought the company a car; he also paid to it a sum of money equal to the difference between the cost of the car he bought and the one ordered from appellants, all of which the company received

and kept; and thus, as he himself said, it was "entirely reimbursed."

[3] Finally, it is contended that, since the answer contains no affirmative plea of payment, the appellants should not be heard to say that respondent's act operated as a discharge. So far as the complaint disclosed, the action was on the assignment of a valid, existing claim, and the burden was on the respondent to sustain his action as laid. When the evidence disclosed, what the complaint did not, that the assignment was made under circumstances destructive of its force as a cause of action, that situation became as available to appellants as though a special plea to the same effect had been interposed. *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

The judgment is reversed, and the cause remanded to the district court to enter judgment that the plaintiff take nothing, and that defendants have their costs in this action incurred.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### LACKMAN v. SIMPSON et al.

(Supreme Court of Montana. Jan. 20, 1913.)

##### 1. TRIAL (§ 165\*)—NONSUIT.

On motion for nonsuit, the trial court must view the evidence in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

##### 2. MASTER AND SERVANT (§ 80\*)—ACTIONS FOR WAGES—EVIDENCE.

In an action for compensation for services rendered, evidence held sufficient to take the case to the jury on the theory of waiver of defects or acceptance of plaintiff's work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 107-127; Dec. Dig. § 80.\*]

##### 3. CONTRACTS (§ 322\*)—BREACH—WAIVER—EVIDENCE.

Part payment under a contract, with full knowledge of the facts, tends to prove waiver of any defects in performance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492; Dec. Dig. § 322.\*]

##### 4. PLEADING (§ 427\*)—MASTER AND SERVANT—ACTION FOR WAGES.

In an action for compensation under a contract for services, where defendants pleaded plaintiff's breach, evidence of defendants' waiver of defects and acceptance will be given full consideration where admitted without objection, though those affirmative defenses were not pleaded.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1428-1432; Dec. Dig. § 427; *Trial*, Cent. Dig. § 266.]

Appeal from District Court, Carbon County; Sydney Fox, Judge.

Action by Henry Lackman against Edgar Simpson, Harry Simpson, and David Simp-

son, partners doing business under the name of Simpson Bros. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. L. A. Calder, of Laurel, and Hathhorn & Brown, of Billings, for appellant. John G. Skinner, of Red Lodge, for respondent.

HOLLOWAY, J. This action was brought to recover \$760 alleged to be a balance due for work and labor performed by the plaintiff for the defendants under a written contract. The contract is made a part of the complaint. It discloses that the defendants, who own a ranch in Big Horn county, Wyo., employed the plaintiff to prepare the ground, seed, cultivate, and harvest sugar beets on 42½ acres of their lands during the season of 1909. The defendants were to furnish the seed, tools, work stock, and feed, and the plaintiff was to perform the labor. It was left optional with the defendants whether the plaintiff should be required to top any or all of the beets. The contract specifies somewhat in detail the character of work required of the plaintiff, but it also contains these provisions: (1) That the work shall be done "in a good and farmer like manner and according to the rules of husbandry practiced in the neighborhood, reference being had to the nature of the crop"; and (2) "said first parties [defendants] shall be the exclusive judges of the efficiency of the work to be performed by the second party [plaintiff] herein." The defendants agreed to pay the plaintiff \$35 per acre for beets which were topped, and \$31 for those not topped. Plaintiff alleges that he fully performed the contract in all things by him to be performed; that he topped the beets from 20 acres, and at defendants' request did not top the remainder; that defendants paid him \$637.50, and refused to pay him the balance. The answer of the defendants admits the execution of the contract; that at their request plaintiff topped only 20 acres of the beets; that they paid plaintiff \$637.50; and that they refused to pay him anything more. They deny that plaintiff performed the contract according to its terms, and further deny that there is anything due to him. They plead a counterclaim for damages, and therein allege that plaintiff "so negligently cultivated, tilled, blocked, weeded, and irrigated said crop, and neglected and delayed the necessary labor thereon until said crop was not tilled or matured in season, thereby causing a partial failure in said crop of more than 180 tons, which defendants would have otherwise harvested and received the benefit thereof to their damage in the sum of \$810." The affirmative allegations of the answer were put in issue by reply. The cause was brought to trial before the court sitting with a jury, and plaintiff introduced evidence

tending to show performance of the contract on his part, and other evidence to which reference will be made hereafter. At the close of plaintiff's case, the trial court directed a nonsuit, and it is from the judgment entered in favor of the defendants and from an order denying him a new trial that plaintiff has appealed.

Since the cause must be remanded for a new trial, we shall not discuss the evidence in detail. In passing we may say we are inclined to the opinion that the evidence is sufficient to make out a prima facie case of performance according to the terms of the contract, but whether or not that be so is not of consequence now.

[1, 2] The contract provides that plaintiff shall be paid for his work as follows: \$5 per acre when the beets are seeded, \$5 per acre when the beets are thinned and ready to be irrigated, \$5 per acre when the beets are ready to be dug, and the balance when the beets are harvested; and plaintiff had fully performed all the conditions of the contract by him to be performed. Without objection, plaintiff introduced evidence to the effect that defendants were present at all times while the work was in progress; that they observed the work done by the plaintiff and the manner of its performance; that they made no objection whatever to it, and without objection made payment of each of the first three installments substantially as it became due under the contract; and that it was only after plaintiff had completed all of his work under the contract that defendants refused to make final payment, and then only on the ground that plaintiff had not thinned the beets early enough in the thinning season. Under the terms of the contract, the beets were to be thinned before they were irrigated and before the second payment to the plaintiff became due.

Upon the motion for nonsuit, the trial court was required to view the evidence in the light most favorable to the plaintiff, and to assume that it proved whatever it tended to prove. This rule has been stated too often by this court that it may now be treated as elementary. *Stewart v. Stone & Webster E. Co.*, 44 Mont. 160, 119 Pac. 568, and cases cited. Considered in the light of the rule just mentioned, and it is not open to doubt that plaintiff made out a prima facie case upon either of two theories: (1) Acceptance of his work by the defendants, after they had passed judgment upon it or, in other words, a determination by defendants that plaintiff had performed the work according to the terms of the contract and to their satisfaction as to its efficiency; or (2) a waiver by the defendants of any want of, or defect in, performance of the terms of the contract on the plaintiff's part.

1. It is to be observed that by the terms of the contract these defendants reserved to themselves the right to be "the exclusive

judges of the efficiency of the work" which plaintiff was required to do under the contract. When the seeding was completed and defendants were called upon to make the first payment, they might have objected to the manner in which the plaintiff had prepared the ground or planted the seed, but with full knowledge of the facts they made the first payment and by their act gave evidence that they accepted the work done up to that point; in other words, this evidence tended to show that they had exercised the judgment which they had a right to exercise, and, by paying for the work up to that point, were satisfied with the manner of its performance. So, likewise, when the beets were thinned and ready to be irrigated, and the second payment was due, defendants might have objected to the work done; but with knowledge of the facts they made the second payment and again gave evidence that in their judgment the work had been performed according to the terms of the contract as interpreted by them. And so, likewise, when the beets were ready to be harvested and the third payment was due, the defendants might have raised the question that plaintiff had not performed the work since the second payment was made, at least according to the terms of the contract; but with knowledge of the facts they made the third payment and again evidenced the acceptance of the work as done according to the contract and in a manner satisfactory to them. Since their only contention now is that plaintiff failed in the performance of the contract with relation to work done, or which should have been done, prior to the time the third payment became due, and since the evidence tends to show acceptance of all the work prior to that date, plaintiff was entitled to have his case submitted to the jury and determined on the merits.

[3] 2. That part payment with full knowledge of the facts tends to prove a waiver of any defects in the performance, the authorities are all agreed. *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 883; *Monroe Waterworks Co. v. City of Monroe*, 110 Wis. 11, 85 N. W. 685; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 841.

[4] But counsel for respondents contends in his brief that the question of waiver was not before the court for the reason that waiver was not pleaded; and the same objection to the defense of acceptance might be interposed. It is true that either of these defenses, like estoppel, is an affirmative one which must be pleaded. This is the general rule; but the rule is equally well settled in this state that, where evidence, which might have been excluded as not tending to reflect upon any issue made by the pleadings,

has been admitted without objection, it will be given the same consideration as though fully warranted by the pleading of the party offering the evidence, or, in other words, the pleading will be treated as if it had been amended to admit the introduction of the evidence. *Archer v. Chicago, M. & St. P. Ry. Co.*, 41 Mont. 56, 108 Pac. 571, 137 Am. St. Rep. 692; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 106 Pac. 724; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994. Applying the rule just announced, and the error of the trial court in granting a nonsuit is apparent. We are not to be understood, however, as holding that part payment with full knowledge of the alleged defects constituted either acceptance or waiver, as a matter of law. Our language is to be understood, in view of the rule stated above that, on the motion for a nonsuit, the evidence will be deemed to prove whatever it tends to prove. The evidence of part payment with knowledge was competent and should have gone to the jury as tending to prove either acceptance or waiver. *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

#### SPAULDING v. STONE et al.

(Supreme Court of Montana. Dec. 18, 1912.  
On Motion for Rehearing, Jan. 15, 1913.)

##### 1. STIPULATIONS (§ 14\*)—PURPOSE.

The purpose of a stipulation that, unless otherwise shown by the evidence, one inch of water an acre was deemed sufficient to irrigate any lands mentioned in the pleadings, was to relieve the parties from introducing evidence as to the ultimate fact, which, if material, bound the court, amounting to a special finding under Rev. Codes, § 6769.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

##### 2. WATERS AND WATER COURSES (§ 152\*)—IRRIGATION—RIGHT TO WATER.

If an owner's original appropriation of water did not include a greater amount than that awarded him by the court without condition, he was only entitled to that amount, irrespective of whether his land required a greater or less amount per acre.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

##### 3. WATERS AND WATER COURSES (§ 180\*)—IRRIGATION—DEVELOPING NEW SUPPLY.

If defendants by constructing a ditch developed a new supply of water or collected water from lands which form no part of the source of the natural flow of a creek, the water of which was previously appropriated by plaintiff, defendants were entitled to the exclusive use of such flow for any purpose; but the burden was on them to show that their supply was newly developed and the amount developed, especially

if it was commingled with water to which another is entitled.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 145; Dec. Dig. § 180.\*]

##### 4. WATERS AND WATER COURSES (§ 152\*)—IRRIGATION—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a prior appropriator of the waters of a brook to have his prior right adjudged and to enjoin defendants' use thereof, held not to sustain a finding that defendants by constructing their ditch increased the natural flow of the brook.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

##### 5. WATERS AND WATER COURSES (§ 152\*)—IRRIGATION—NECESSITY OF DEMAND.

A riparian owner entitled to the waters of a brook for irrigation by priority of appropriation need not make a demand upon defendants for the use of such waters; defendants not disputing his right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Holloway, J., dissenting.

Appeal from District Court, Gallatin County; El. K. Cheadle, Judge.

Action by Nelson Spaulding against Leonard Stone and others. From a judgment for defendants, plaintiff appeals. Remanded, with directions to set aside decree and enter decree as directed.

Walter Aitken, of Belgrade, and Hartman & Hartman, of Bozeman, for appellant. B. B. Law, of Bozeman, for respondents.

BRANTLY, C. J. Plaintiff brought this action to obtain a decree adjudging him a prior right to the use of all the water flowing in Spaulding brook, in Gallatin county, for agricultural purposes and for watering his stock, and enjoining the defendants from diverting any portion thereof from its natural channel. The stream has its source in the southeast portion of section 21, township 1 north, range 4 east, and flows in a northwesterly direction through sections 21, 16, 17, 8, and 5 into East Gallatin river. The lands belonging to plaintiff include the east half of section 5. Portions of them are arid and require artificial irrigation. The lands owned by the defendants are situated in sections 21, 8, and 7, and the west half of section 5. These also require artificial irrigation. The plaintiff bases his claim upon an appropriation of 100 inches made in 1898. He alleges a diversion by means of ditches constructed by himself, and continuous use up to the time of the bringing of the action, except that during the year 1910 the defendants constructed a ditch by which they diverted all the water entirely away from his lands. He also alleges that defendants threaten to continue their unlawful conduct to his irreparable injury. While the defendants controvert the material allegations of the complaint, they do not assert claim to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any water flowing in the stream. They allege, in substance, that the defendant Stone owns land to the extent of 320 acres in section 21, which are valuable for agricultural purposes only; that the general slope of the portion of Gallatin valley upon which these lands lie is toward the northwest; that to the south and east and above these lands are large areas which are irrigated two or three times each year with the result that they become saturated with water, which, by seepage and percolation, finally reaches the lands of defendant Stone, rendering portions of them wet and swampy and unfit for cultivation unless they are drained; that this condition had increased to such an extent that the said Stone induced his codefendants to construct during the years 1908, 1909, and 1910 a drainage ditch for the purpose of draining his lands and preventing them from becoming wholly useless, the consideration being that his codefendants should have the exclusive use of the drainage water thus collected, upon their lands situated further to the northwest; but that the said ditch did not in any way interfere with the natural flow in Spaulding brook. By stipulation of counsel at the opening of the trial these allegations were deemed denied by plaintiff, and each of the parties was accorded the right to show abandonment, adverse use, etc., without formal pleading, if he should be able to do so. It was also stipulated that, unless otherwise shown by the evidence, one inch per acre was to be deemed sufficient to irrigate any of the lands mentioned in the pleadings.

The court found: (3) That three-fourths of a statutory inch of water per acre is a reasonable allowance for the irrigation of any of the lands belonging to any of the parties; (4) that on May 1, 1899, the plaintiff by means of dams and ditches diverted from the stream for use upon 80 acres of his lands, 60 inches of water, and he has continuously used this amount up to the present time; (5) that during the spring and summer of the year 1910 the defendants J. H. Green, Mary E. Green, William James, and Robert Gover constructed a drainage ditch traversing section 21, in which Spaulding brook has its source; that this ditch for the distance of half a mile is nearly parallel with the channel of Spaulding brook, and intersects it at several points, the last point being near the south line of section 16, from which it leaves the course of the brook and continues in a northwesterly direction, and the depth of the ditch is greater than that of the channel of the stream; (6) that by reason of its greater depth the ditch intercepts and carries away a considerable portion of the water which would otherwise flow in Spaulding brook and reach the lands of the plaintiff, and also, by reason of its greater depth, carries away a considerable quantity of water which would not naturally

rise and flow into Spaulding brook; (7) that one half of the water flowing in the ditch would otherwise find its way into the stream, while the other half is derived from drainage from water percolating below the surface of the soil which would not naturally rise and flow in Spaulding brook; (8) that on June 1, 1910, the said defendants diverted all the water so collected in the ditch and applied it to their own use; (9) that a considerable portion of the water flowing in Spaulding brook has its source below the lowest point at which the defendants' ditch intersects the natural channel. From these findings the court concluded that the plaintiff is entitled to the use of 60 inches as of date May 1, 1899, including one-half of the flow in defendants' ditch, and that the defendants are entitled to the remainder. The decree adjudges the rights of the parties accordingly. It specifically requires the defendants, other than Stone, to construct and maintain at their own expense a suitable dam, with headgate and measuring box, in the ditch at the point where it last crosses the channel of the stream, and to deliver to plaintiff, whenever he demands it, one-half of the water flowing in the ditch. The plaintiff has appealed from the decree and from an order denying his motion for a new trial.

1. The first contention made is that the court erred in failing to find that the purpose of plaintiff's appropriation was not only to irrigate his lands in section 5, but also to water his live stock and to furnish a supply for domestic use, and in omitting to formulate the decree so as to include this latter right. Counsel for defendants concede that the findings and decree should be amended in this particular. We are therefore relieved from the necessity of determining the right of this contention.

[1, 2] 2. No evidence was introduced by any of the parties tending to show what amount of water is necessary to irrigate any of their lands. Aside from the stipulation made at the commencement of the trial, the record is silent on this point. Counsel for plaintiff insist that the finding that three-fourths of a statutory inch per acre is sufficient is not justified by the evidence. The purpose of such a stipulation is to relieve the parties from the necessity of introducing evidence as to the ultimate fact covered by it. If the fact is material, the court is, as to it, bound by the stipulation. It amounts to a special finding. Rev. Codes, § 6769. Under the circumstances disclosed by the record, however, we think the finding is immaterial. It appears that the flow of water in Spaulding brook is intermittent. Except during the high-water season early in the spring, and late in the fall after the irrigation season is over, the flow at any point is never equal to the amount the decree awards to the plaintiff. The flow was measured by an engineer several times during the

years 1910 and 1911. A measurement made in April, 1911, during the high-water season at the point where the ditch diverges from the course of the stream which included also all the water flowing in the ditch, showed a flow of 62 inches. This was the largest volume shown by any measurement. The evidence shows almost conclusively, as the court found, that the original appropriation of plaintiff did not include any greater amount than that awarded him. This being so, and his right to the use of this amount being awarded to him without condition, it is wholly immaterial whether his lands require a greater or less amount per acre.

[3] 3. The third contention is that there is no substantial evidence tending to show that any of the water flowing in the ditch comes from sources other than those which supply Spaulding brook, and hence that findings 6 and 7 are not justified by the evidence. Since the defendants do not assert the right to the use of any of the water naturally flowing in the brook, the plaintiff is entitled as against them, to the use of all of it without interference by them. Such right as they have is founded upon the claim that they have intercepted water which would not flow into Spaulding brook by drainage from Stone's lands. The brook has its source within the area of these lands. The defendants' ditch has its head in section 22 and traverses section 21, running substantially parallel with the brook (in fact crossing it at four different points) from its source to the south boundary line of section 16, where it diverges from it at a wide angle. The map of the locality which we find in the record demonstrates that the defendants' purpose in constructing it was to provide a new channel for Spaulding brook down to the point of divergence, and thus facilitate the flow of water which they would be able to collect from sections 21 and 22 for their own use. The evidence conclusively shows that it diverts the entire natural flow of the brook into its own channel and conveys it all down to the point at which it diverges from the channel of the brook. If by the construction of the ditch the defendants have developed a new supply of water, or, in other words, have collected from the lands in sections 21 and 22 water which forms no part of the sources of the natural flow in the brook, they are entitled to the exclusive use of it for any purpose to which they may choose to devote it (*Beaverhead Canal Co. v. Dillon El. L. & P. Co.*, 34 Mont. 135, 85 Pac. 880); but the burden is upon them to show that the supply claimed to be new and independent is really such. In *Smith v. Duff*, 39 Mont. 382, 102 Pac. 984, 133 Am. St. Rep. 587, this court said: "Whoso asserts that he is entitled to the exclusive use of water by reason of its development by him must assure the court by satisfactory proof that he is not intercepting the supply to which his neighbor is rightly entitled. Thus the

burden was on the respondents to prove that they developed the 160 inches of water awarded them by the court." The burden thus made to rest upon the one who claims such developed supply includes also the obligation to establish by satisfactory proof the amount which he has developed, especially so when he has mingled his alleged new supply with that to which another is entitled, for he cannot justify an interference with a right which he does not question. While he may be entitled to the use of the natural channel of the stream out of which the prior appropriation has been made, or to change it, in order to serve his own convenience or save expense, he cannot for this reason impose any additional burden upon the prior appropriator. When he comes to divert from it his developed supply, he must make his diversion in such a way as not to interrupt or diminish the natural flow, and must at his peril take no more than he is entitled to.

[4] When we come to analyze the evidence, we do not find any statement by any witness, even in the form of an opinion, which justifies the conclusion that the defendants by the construction of their ditch increased the natural flow of Spaulding brook by any substantial amount which can be ascertained definitely by measurement. It is true that some of the witnesses testified that portions of Stone's lands are dryer than they were before the ditch was constructed; but this evidence falls far short of establishing the fact that the natural flow in Spaulding brook was thereby increased. So far as this fact furnishes the basis for any inference, it is that the ditch merely by accelerating the flow, has accomplished the drainage of these lands in part. An engineer, who seems to have acted for all the parties, made several measurements of the volume flowing in the ditch. He expressed the opinion that one-half of it was surface water and that the remainder came in by percolation and seepage. He did not express the opinion, however, that by the construction of the ditch the defendants had increased the natural flow by any definite amount. On the contrary, he was of the opinion that both surface and seepage water coming down from above the ditch would, but for its interception by the ditch, naturally find its way into the stream. One witness, Gibson, who had been acquainted with the stream for 20 years, stated that the flow in the ditch did not differ substantially from the natural flow in the stream as he knew it before the ditch was constructed. This is all the evidence, of any substantial character, in the record. Under the rule stated in *Smith v. Duff*, supra, it is wholly insufficient to support findings 6 and 7 as to the volume of water developed by defendants' ditch. It rather justifies the inference that defendants have succeeded partially in the ostensible purpose which they sought to accomplish, viz., the draining of Stone's lands, while incidentally they have cut off in part, if not

wholly, the source of supply to the brook and diverted it to their own use. Let it be conceded that Stone may lawfully resort to any suitable device in order to reclaim his lands, still he may not adopt a method which incidentally operates to the detriment of plaintiff's right.

[5] In this connection we may notice a feature of the decree which we do not think would be warranted under any evidence, however convincing it might be as establishing the right asserted by the defendants. It requires defendant to deliver to plaintiff one-half of the water flowing in the ditch "upon demand." The plaintiff is entitled under the evidence to the uninterrupted use of all the water flowing in the stream. It is incumbent upon the defendants, if they desire the use of any of the water, to ascertain that they may divert it without infringing upon plaintiff's rights. Plaintiff may not lawfully be required, when he desires to avail himself of his right which the defendants do not question, to submit to the inconvenience of making demand upon them for its use.

We are of the opinion that under the evidence in the record the plaintiff is entitled to findings and a decree awarding him all the water flowing in Spaulding brook to the full amount of 60 inches whenever the necessities require it, including the entire amount flowing in the ditch when necessary; that the defendants are entitled to such surplus water, if there is any, as is collected in the ditch, but in taking it they must refrain from decreasing the flow at any time below the amount to which the plaintiff is entitled; that the cause should be remanded to the district court with directions to set aside the decree heretofore entered and to reform the findings so as to make them accord with the views herein expressed; and that a decree be entered in conformity therewith. It is so ordered.

Remanded.

SMITH, J., concurs.

HOLLOWAY, J. I dissent. I agree that the decree should be amended so that it will secure to plaintiff his water right for domestic and other lawful purposes, and this, too, without imposing upon him the burden of making demand; but further than this I am unwilling to go. In my judgment, the evidence is ample to justify the trial court's finding that only one-half of the water in the Gover ditch constitutes any part of the natural source of supply of Spaulding brook.

#### On Motion for Rehearing.

SANNER, J. The motion for rehearing is denied, but to the order heretofore entered we make the following addition: That the district court of Gallatin county, within such reasonable time as it may allow, not be-

yond the next irrigating season, hear such further evidence as may be offered touching the amount of water flowing in the Gover ditch directly attributable to the respondents' development, and award such amount to them as may then be warranted by all the evidence in the case. If no such evidence be offered, or if after such further hearing the evidence is still insufficient to fix the amount with reasonable precision, then to proceed as directed in the opinion.

BRANTLY, C. J., and HOLLOWAY, J., concur.

129 P. 33 45 Mont 437  
MYERS v. BENDER.

(Supreme Court of Montana. Jan. 20, 1913.)

#### 1. ATTORNEY AND CLIENT (§ 148\*)—EMPLOYMENT CONTRACT—CONSTRUCTION.

Under a clause of a contract between an attorney and client, providing that the attorney should receive 12½ per cent. of the value of all the land and money recovered by compromise or in any manner whatsoever in an action pending against a railroad company over the title to certain land, the attorney was entitled to 12½ per cent. of the value of all lands to which his client secured title by a compromise agreement, though such title was obtained through a relinquishment by the railroad company to the government, in order that the client might obtain title directly from the government.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 352, 353; Dec. Dig. § 148.\*]

#### 2. ATTORNEY AND CLIENT (§ 148\*)—EMPLOYMENT CONTRACT—CONSTRUCTION.

Under such clause the attorney was entitled to recover the 12½ per cent. in money and not in land, though the preceding clause provided that plaintiff should receive "12½ per cent. of all land and money recovered."

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 352, 353; Dec. Dig. § 148.\*]

#### 3. ATTORNEY AND CLIENT (§ 148\*)—EMPLOYMENT CONTRACT—CONSTRUCTION.

The attorney's compensation in such case became due when the compromise agreement was signed; and hence the 12½ per cent. was based on the value of the land at such time, though the patent from the government was not obtained until a later date.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 352, 353; Dec. Dig. § 148.\*]

#### 4. ATTORNEY AND CLIENT (§ 149\*)—EMPLOYMENT CONTRACT — BREACH — MEASURE OF DAMAGES—"OBLIGATION ARISING FROM CONTRACT."

Failure of a client to pay an attorney his fee when it became due under the contract between them was "a breach of an obligation arising from contract," within Rev. Codes, § 6048, providing that the measure of damages for such a breach, unless otherwise expressly provided, is the amount which will compensate the aggrieved party for the detriment approximately caused thereby, or likely to result therefrom; and hence the measure of damages for such breach was the principal amount due, together with interest at the legal rate up to the time of tri-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

al, allowing credit for payments made at their respective dates.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 351-357; Dec. Dig. § 149.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4683-4883.]

#### 5. EVIDENCE (§ 113\*)—VALUE OF LAND—TIME.

In an attorney's action for compensation under a contract entitling him to a certain per cent. of the value of land recovered, estimated at the time of the signing of a compromise agreement, evidence of the value of the land at a time subsequent to such agreement was improper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

#### 6. APPEAL AND ERROR (§ 204\*)—OBJECTION BELOW—ADMISSION OF EVIDENCE.

An objection to the admission of evidence could not be considered on appeal when not made below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.\*]

#### 7. EVIDENCE (§ 113\*)—VALUE OF LAND—AVAILABILITY FOR CERTAIN USAGE.

In an action for a certain per cent. of the value of land as an attorney's fee, evidence that the land was available for city lot purposes was competent to establish its market value at the time the debt accrued, though it was not then being used for such purposes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

Appeal from District Court, Custer County; Sydney Sanner, Judge.

Action by George W. Myers against Henry Bender. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Geo. W. Farr, of Miles City, for appellant. Donald Campbell, of Miles City, and Fred H. Hathhorn, of Billings, for respondent.

BRANTLY, C. J. Plaintiff brought this action on April 8, 1908, to recover a judgment for services as an attorney and counselor at law, rendered to the defendant in an action in the United States District Court, at Helena, Mont., in which the defendant was plaintiff and the Northern Pacific Railway Company and others were defendants. The purpose of that action was to obtain a decree declaring the railway company a trustee of the title to lands hereinafter described, lying within the limits of the federal grant originally made to the Northern Pacific Railway Company, for the benefit of the defendant herein; he claiming that he had made settlement upon them and filed his declaratory statement prior to the definite location of the line of the railway, and that the patent under which it then held the entire section, which included the lands embraced in his settlement, had been issued to it by the federal authorities in violation of his right as a settler. At the time the action was brought it was verbally agreed that the plaintiff should receive as his compensation \$150 in cash and 12½ per cent. of the value of any lands recovered in the action, or to which title should be secured by suit,

compromise, arbitration, or otherwise. Subsequently the agreement was reduced to writing and signed by the parties. The writing bears date January 16, 1906; the action being then about to be determined by compromise agreement. Omitting formal parts, it reads as follows: "The said G. W. Myers agrees to use due diligence in prosecuting said suit to a final determination in said court or by compromise settlement out of court; and it is agreed and understood by both parties hereto that the said G. W. Myers is to be paid for such legal services by said Henry Bender the sum of \$150 cash, and is to be further paid by the said Henry Bender twelve and one-half per cent. of all the land and money recovered either by suit or by compromise in said case. This contract includes all of plaintiff's claims known as D. S. No. 3,621, comprising the west one-half of the southwest one-fourth, and the southeast one-fourth of the southwest one-fourth, and lot four, of section 27, in township 8 north, of range 47 east, containing 133 and 25/100 acres, intending hereby that said G. W. Myers is to be paid for such legal services the said sum of \$150, and twelve and one-half per cent. of the value of all the land and money so recovered either by suit, compromise or arbitration or otherwise in any manner whatsoever; and should land other than the above described be obtained or recovered by said suit, compromise or arbitration then the said G. W. Myers is to further receive for such legal services twelve and one-half per cent. of the value of all such land so obtained or recovered, and it is understood and agreed by both parties hereto that the valuation to be placed upon any part of the claim known as D. S. No. 3,621 that may be recovered is not to be less than \$75.00 per acre, and further the said Henry Bender agrees to pay all expenses connected with said suit. It is further agreed to and understood that the said \$150 is to be paid before the termination of said case, and if not so paid before termination or settlement of said case then to be paid out of any money or land so obtained or recovered at the time of settlement of the said case."

On February 17, 1908, an agreement was reached between Bender and the railway company; its codefendants being its grantees of a part of the lands in controversy, and one of its purposes in defending the action being to protect them as such. By the terms of the compromise Bender agreed to waive his claim to the S. ½ of the S. W. ¼ of section 27 by executing and delivering to the company a quitclaim deed, and to dismiss the action. The railway company on its part agreed to quitclaim to the United States the N. W. ¼ of the S. W. ¼ and lot 4 of said section 27, containing 53.36 acres, and to convey to Bender by warranty deed lot 3 and that portion of lot 2 lying south of a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



line extending east and west across this lot at a distance of 50 rods south from the north line of the section and parallel therewith, and containing 34.02 acres. The railway company also agreed to pay to Bender \$2,000 in cash. The purpose of the quitclaim by the railway company to the United States was to enable Bender to secure a patent to the 53.36 acres directly from the United States, under the provisions of the act of Congress approved July 1, 1898 (Act July 1, 1898, c. 546, 30 Stat. 597 [U. S. Comp. St. Supp. 1911, p. 1711]). The agreement was executed, with the result that Bender became vested with title to the 34.02 acres by deed from the railway company, dated June 14, 1906, and to 53.36 acres by homestead patent from the United States, dated December 5, 1907.

The complaint alleges, in substance, that the plaintiff fully performed the services required by the contract, and that they resulted in securing to the defendant title to lands to the extent of 87.38 acres, together with \$2,000 in cash; that these lands were at the date of the compromise, and ever since have been, of the value of \$75,000; that under the terms of the contract plaintiff became entitled to receive from the defendant the sum of \$9,375 in addition to the sum of \$150, which he was entitled to receive in any event, or a gross sum of \$9,525; and that no part of this has been paid, except the sum of \$916.50, leaving a balance of \$8,609.40, which the defendant has failed and refused to pay, though demand has heretofore been made for payment. Judgment is demanded for this amount, with interest at 8 per cent. per annum from January 12, 1907, the date at which demand was made. The controversy at the trial was as to the value of the lands acquired by the compromise settlement, and hence as to whether plaintiff was entitled to recovery in any amount; the defendant insisting that, inasmuch as title to the 53.36 acres was obtained by patent directly from the United States, they constituted no part of the recovery had in the action, and that the evidence as to them should be excluded. The court held that under the terms of the contract the plaintiff was entitled to 12½ per cent. of the value of all the lands obtained through the services rendered by him in connection with the settlement, whether title was obtained directly from the railway company or not. Evidence was also admitted, over defendant's objection, as to such value at any time subsequent to the date at which the compromise was reached and up to the date of the commencement of the action; and the jury were instructed that in determining the amount, if any, which they should find the plaintiff entitled to recover they should take into consideration the highest reasonable market value of the lands shown by the evidence at any time from the com-

pletion by the plaintiff of his services under the contract until the commencement of the action. The jury found for the plaintiff, and awarded him damages in the sum of \$2,244. Judgment was entered accordingly. The defendant has appealed from the judgment and an order denying his motion for a new trial.

The brief of counsel contains many assignments of error upon specific rulings made during the progress of the trial. It will not be necessary to notice them in detail. The principal questions submitted for decision are whether the court correctly construed the agreement, and whether the rule adopted for the ascertainment of damages, as indicated by the admission of the evidence referred to and the instruction submitted to the jury, is the one applicable to this case.

[1] The plaintiff and the defendant both stated that the writing contains the terms of their agreement as it was originally made. The intention is expressed that the plaintiff should, in addition to the cash payment, receive 12½ per cent. of the value of all lands to which the defendant should secure title at the final outcome of the action; for the language employed is: "Intending hereby that said G. W. Myers is to be paid for such legal services the said sum of \$150, and twelve and one-half per cent. of the value of all the land and money so recovered either by suit, compromise or arbitration or otherwise in any manner whatsoever." This language clearly indicates that the parties intended to make all the lands obtained by the defendant, in connection with this action, from whatever sources the title might be derived, together with any amount of money paid to him, the basis upon which his contingent compensation should be calculated. The court's construction of the agreement was therefore correct.

The very purpose of the action was to have determined Bender's right to the area covered by his settlement. When the parties came to arrange their compromise, Bender might have taken a conveyance of the 53.36 acres directly from the railway company; for it held title under patent from the United States. Instead of pursuing this course, for some unexplained reason of his own he preferred, as the evidence shows, to obtain title directly from the United States. That he accomplished this result by requiring the railway company to relinquish its title under the provisions of the statute, so as to put him in position to obtain recognition of his settlement right by the authorities of the Land Department and the issuance of patent directly to himself, did not render these lands any less a part of the recovery in the action.

[2] It was not the intention that the plaintiff should have any interest in the lands recovered; for, though it is recited in the agreement that the plaintiff "is to be further paid by the said Henry Bender twelve and

one-half per cent. of all the land and money recovered," the clause immediately following this, and quoted above, expresses in explicit terms that the intention was that, aside from the \$150 in cash to be paid in any event, the amount of the additional compensation was made contingent upon the money value of the recovery, and was to be payable in money.

[3] It is equally clear, from the last clause of the agreement, that whatever amount plaintiff became entitled to receive he was entitled to receive it when his services had been completed. These were completed when the compromise agreement was effected; for he did not, under the terms of the agreement, assume the obligation to perform any other service than to secure a settlement of the controversy over the title, and this was accomplished by the signing of the compromise agreement. The result of it was that the defendant, so far as plaintiff was concerned, became the owner of the lands in controversy, though he received formal conveyances at times subsequent to the time at which it was signed by the parties. The basis upon which his percentage was to be calculated was therefore the value at that time of the lands recovered, with the cash payment added. The obligation of the defendant to pay then became absolute, the amount to be paid to be determined by the reasonable market value of the recovery at that time, subject only to the condition that the value of the 53.36 acres, for which patent was thereafter to be obtained, should not be fixed at less than \$75 per acre.

[4] The failure of the defendant to pay the amount which thus became due was a breach of his obligation to discharge the contract by payment. "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Rev. Codes, § 6048. If the defendant had made full payment upon the completion of plaintiff's services, he would have fully performed his contract. Since he did not make such payment, he is to be held to compensate plaintiff for the detriment "proximately caused" by the delay. "In the ordinary course of things" the only detriment which could result to him was the loss by plaintiff of the use of the money. Therefore full compensation for the detriment thus caused is to be measured by the principal amount due, together with interest at the legal rate up to the date of trial, allowing, of course, credit for such payments as have been made, at their respective dates.

[5] The court was therefore in error in admitting evidence to show the value of the recovered lands at any time subsequent to the date of the compromise agreement, and

in directing the jury to consider it in ascertaining the basis for calculating the amount plaintiff was entitled to recover. It is true the complaint alleges a demand on January 12, 1907, and the prayer is for the balance due, with interest from that date. Except in so far as by this allegation the plaintiff shortened the time during which he was legally entitled to interest, and to this extent diminished the amount which he would otherwise have been entitled to recover, the case should have been submitted to the jury upon the theory we have indicated. The statute embodies the common-law rule, and the authorities generally agree that the damages recoverable in such cases must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. In no case is the plaintiff entitled to recover anything more than he would have received had the contract been performed by the defendant on his part, assuming that it had been performed. *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; *Bates v. Diamond Crystal Salt Co.*, 36 Neb. 901, 55 N. W. 258; *Mihills Manfg. Co. v. Day Bros.*, 50 Iowa, 250; *Wells v. Abernethy*, 5 Conn. 222; *Hickok v. Adams Co.*, 18 S. D. 14, 99 N. W. 77; *Ross v. Carter*, 1 Humph. (20 Tenn.) 415; *Marr's Adm'r v. Prather*, 3 Metc. (Ky.) 196; *Alexander v. McCauley*, 6 Md. 359; 1 *Sutherland on Damages*, § 50. Because of the error in this behalf, the defendant must be awarded a new trial.

[6, 7] The Bender lands adjoin the corporate limits of Miles City. It appears that after the title was secured by Bender a part of the lands were platted and made an addition to the city. The lots were then put upon the market for sale. Evidence was introduced tending to show the value of this portion of the lands for city lot purposes. It is argued that the court erred in admitting it. A sufficient answer to this contention is that the evidence went in without objection on the ground now urged; but the objection, if made, would properly have been overruled. The competency of such evidence to establish market value of land was considered by the Supreme Court of the territory in the early case of *Montana Ry. Co. v. Warren*, 6 Mont. 275, 12 Pac. 641. In that case the court said: "Respondent was allowed to prove the value of the land for town lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not as to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not he so used it." The rule thus stated has since been recognized and

followed by this court. See, also, *Railway Cases v. Forbbs*, 15 Mont. 452, 39 Pac. 571, 48 Am. St. Rep. 692; *Sweeney v. Montana Central Ry. Co.*, 25 Mont. 543, 65 Pac. 912.

The contention is made that the evidence is insufficient to sustain the verdict. We shall not undertake to examine it in detail. Very little of it tends to establish definitely the value of any portion of the lands in controversy at or within a year subsequent to the date of the compromise agreement. We shall not presume that the plaintiff on another trial will not be able to show that their value at that time was such as to warrant the jury in awarding him a substantial amount.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

HOLLOWAY, J., concurs.

SANNER, J., being disqualified, did not hear the argument, and takes no part in the foregoing decision.

ROBINSON v. HUFFAKER, County Com'r.  
(Supreme Court of Idaho. Dec. 30, 1912.)

*(Syllabus by the Court.)*

1. COUNTIES (§ 204\*)—CONTRACTS—VALIDITY.

Where a member of the board of county commissioners enters into a contract with the board of county commissioners of which he is a member, for the sale of personal property to the county by such member, and such contract is void under the statute, the board of county commissioners has no authority to allow the claim for such purchase price as a claim against the county. Such claims are illegal and are not authorized by law. Sections 255, 1946, and 1956, Rev. Codes.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 312, 316-321, 337; Dec. Dig. § 204.\*]

2. COUNTIES (§ 122\*)—CONTRACTS—VALIDITY.

A member of the board of county commissioners cannot lease, or contract with the board for the use of, real or personal property owned by him, where the statute forbids the making of such contract; nor can a claim for the contract price be filed as a claim against the county, and an allowance of such claim is void.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 82, 136, 181, 182; Dec. Dig. § 122.\*]

3. COUNTIES (§ 46\*)—COUNTY COMMISSIONERS—COMPENSATION—EXTRA SERVICES.

A member of the board of county commissioners cannot file or claim a compensation for extra services rendered to the county which are not authorized by law, where such member is paid a salary under the law for his services as such member of the board, although such extra services are rendered for the benefit of the county.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 54; Dec. Dig. § 46.\*]

4. COUNTIES (§ 122\*)—COUNTY COMMISSIONERS—COMPENSATION—EXTRA SERVICES.

Where a member of the board of county commissioners presents a claim against the

county for the purchase price of a book press, or for services in inspecting roads and bridges at \$4 per day, or for services in viewing roads and bridges on behalf of the county, or for superintending the transcribing of records where the county is created out of another county, or for any other services, and such claims are not specially provided by law to be paid by the county, such claims are void, for the reason that the statute provides for the compensation of the commissioner by fixing his salary and expenses as his full compensation.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 82, 136, 181, 182; Dec. Dig. § 122.\*]

5. COUNTIES (§ 47\*)—COUNTY COMMISSIONERS—REPORTS.

Where the statutes of the state impose certain duties upon the board of county commissioners, and require certain reports and the performance of certain duties, the county commissioners have no right or authority to exercise the arbitrary judgment that such reports are unnecessary and impracticable, for the reason that it is the duty of a public officer to obey the law, and he cannot justify his acts upon the ground that he does not believe that it will be necessary to obey such law.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 55; Dec. Dig. § 47.\*]

6. OFFICERS (§ 94\*)—EXTRA COMPENSATION.

Where an officer accepts an office with compensation fixed by law, he is bound to perform the duties for the compensation, and such officer has no legal claim for extra compensation, and a promise by the board to pay him an extra fee or sum beyond that fixed by law is not binding although he renders services and exercises a degree of diligence greater than could legally have been expected of him.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 132, 133, 136-138, 140, 141; Dec. Dig. § 94.\*]

Appeal from District Court, Bonneville County; James G. Gwynn, Judge.

Action by B. A. Robinson to remove W. D. Huffaker, County Commissioner, for allowing illegal fees and charges against the county and for failure to do his duty. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. S. Dickinson, of Blackfoot, and Phil Averitt, R. S. Meyer, and C. E. Crowley, all of Idaho Falls, for appellant. Wm. L. McConnell and St. Clair & St. Clair, all of Idaho Falls, for respondent.

STEWART, C. J. This action was instituted in the district court of the Ninth judicial district of Idaho for Bonneville county, on the 1st day of April, 1912, and was brought under section 7459 of the Rev. Codes. The information charges W. D. Huffaker with knowingly, intentionally, and illegally charging and collecting fees to which he was not entitled by law as a member of the board of county commissioners for said county, and with knowingly, intentionally, and illegally failing, neglecting, and refusing to perform his official duties as a member of said board, of county commissioners.

Two causes of action are stated wherein it is alleged that the defendant filed various bills at different times for allowance to him-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

self by said board, and wrongfully, intentionally, and illegally assisted in allowing the same, collected the money therefor, and converted the same to his own use, when in truth and in fact said bills on their face show that they were illegal charges against the county, and that they were for services which, if rendered by the defendant to the county, he could not lawfully make a charge and collect pay therefor. Among these items mentioned in the first cause of action are charges for services rendered the county in viewing roads and bridges, for certain articles furnished said county by the defendant, and for services rendered in the overseeing and transcribing of the records of Bingham county for Bonneville county. In the second cause of action the defendant is charged with knowingly, willfully, and intentionally failing and neglecting and refusing to perform certain duties of his office as a member of the board of county commissioners which are imposed upon boards of county commissioners by law.

On the filing of such petition a citation was issued. The defendant appeared and filed an answer. In the answer he admits that he is a member of the board of county commissioners of Bonneville county; admits that he filed for allowance each and all of the bills set out in the information; admits that he assisted in causing the same to be allowed; admits that he collected the money therefor and appropriated the same to his own use; but he denies that he knowingly, unlawfully, and intentionally collected any illegal fees from said county; and affirmatively alleges that said bills were not for the purposes and charges stated therein; and alleges that they were expense items which were a lawful charge against the county; and denies that he unlawfully appropriated any funds of the county to his own use. He also alleges that said bills were not for services rendered to the county as shown upon their face, notwithstanding they were sworn to by him, but that they were for the use of team and buggy furnished by defendant, and for feed for such team, and for board and lodging of defendant while viewing roads and bridges and rendering other services as commissioner of said county.

Answering to a part of the information as to articles furnished the county, and the overseeing and transcribing of the records of Bingham county for Bonneville county, he seeks to justify his acts by alleging that he saved Bonneville county money, and that he was hired by the recorder of Bingham county, J. T. Carruth, to do said overseeing and transcribing.

In answer to the second cause of action, the defendant admits that as a member of the board of county commissioners he has failed and neglected to make, or assist in making, or cause to be made, or in assisting in causing to be made, any of the reports

mentioned in the information, but denies that he willfully or knowingly did so, and seeks to justify his failure to do so on the ground that it would do no good, and on the further ground that the board was advised by the prosecuting attorney of Bonneville county that the reports could serve no useful purpose.

The cause was tried by the court, and on the 27th day of May, 1912, the court made its findings of fact and conclusions of law, and rendered a judgment in favor of the defendant.

The findings of the trial court are substantially as follows:

(1) That the bill of \$5.50 rendered to Bonneville county for book press was a reasonable charge, and that the defendant in allowing the county to have said book press and in putting in his bill therefor and in receiving warrant and collecting the same acted with an honest purpose and intention and believed he had a right to so act, and that the book press was reasonably worth \$5.50, and that the charge for such book press was not a fee within the meaning of section 7459.

(2) That the item of \$14.15, for which a bill was rendered for insuring the pesthouse, was a reasonable charge, and that the defendant acted with an honest purpose and honest intention, and did not defraud the county, and it was not a fee under section 7459.

(3) That the bill of January 13, 1912, rendered to the county for 13 days inspecting roads and bridges, amounting to \$52, was honestly intended for expenses in viewing roads and was not for services in viewing roads.

(4) That the item of July 10, 1911, of \$56, for expenses on roads, and the item of October 12, 1911, for \$24, for expenses inspecting roads, and the item of January 13, 1912, for \$52, were each and all for expenses honestly incurred by the defendant in viewing roads and bridges, and covered the use of team and buggy furnished by the defendant and used by him, and board of defendant while doing such work, and the feed for such team while engaged in such work, at \$4 per day, and that the charge was reasonable, and that the defendant acted honestly and with good intentions, and did not defraud the county, and that in doing so he acted upon the advice of the county attorney; that he was legally entitled so to do.

(5) The court finds that as to the item of October 7, 1911, for overseeing the transcribing of Bonneville county records, amounting to \$345, and the item of July 10, 1911, for \$270, for overseeing the transcribing of Bonneville county records and in rendering a bill for the same, the defendant acted upon the advice of the county attorney; that he had a legal right so to do, and in overseeing the transcribing and receiving the warrant and collecting the same the defendant acted honestly and in good faith; that such charges

were reasonable and saved the county several thousand dollars; that the commissioners of Bonneville county agreed that the defendant should oversee the transcribing; and that the work was done with the consent of J. T. Caruth, the recorder of Bingham county, whose legal duty it was to transcribe such records or cause the same to be done.

(6) The court finds, as to the item of January 13, 1912, of \$50 for barn rent, that the same was a reasonable charge, and that the use of said barn and adjacent premises was reasonably worth more than \$5 per month, and that the defendant acted with an honest purpose and intention and without any intent to defraud, and that such claim was not for fees, under the provisions of section 7459.

(7) As to the charges of the second cause of action, the court finds as to the failure to file road reports with the clerk of the board of said county and with the highway commission, and the report of the financial condition of the county as to highways, and the filing and publishing of the same, that the board of county commissioners, of which the defendant was a member, prior to the time the same should have been filed and made, consulted the county attorney of Bonneville county with reference to the same, and that the board of county commissioners, including the defendant, honestly understood from said county attorney that such reports need not be made because it was not practical to do so. But the court finds, however, that the county attorney did not actually advise the defendant or the board that the reports need not be made, but that in the hurry of business the county attorney, being consulted, said that he did not see that it would be of any benefit to make the reports, but that the defendant honestly believed that the county attorney did advise him that such reports need not be made.

From the foregoing findings of fact the court concluded as a matter of law that the defendant has not been guilty of charging or collecting illegal fees for services rendered, or to be rendered, in his office, and that the defendant has not refused or neglected to perform the official duties or any of the same pertaining to his office, and the court finds that the information herein should be dismissed.

Judgment was rendered by the court that the information be dismissed. A motion for a new trial was made and overruled, and the motion was denied. This appeal is from the judgment and the order overruling the motion for a new trial.

The information in this case is based upon section 7459, Rev. Codes, which provides: "When an information in writing, verified by the oath of any person, is presented to a district court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in

his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases."

This section includes two offenses for which a defendant may be removed from office: First, the charging and collecting of illegal fees; second, the neglect to perform official duties pertaining to his office. The information charges a cause of action upon each of the grounds specified in the foregoing statute. The first cause of action consists of eight different charges of collection of illegal fees, and the second cause of action contains three charges of failure to perform duties of office. The trial court in its findings found for the defendant upon both causes of action. The appellant argues that the evidence does not support the findings.

We shall first consider the charges made in the first cause of action, and the evidence presented in support of and against the court's finding upon the different items involved. In the consideration of the different items contained in the first cause of action, and which are designated by the court in its findings, we will determine whether the allowance of the different items constituted the charging and collection of illegal fees.

[1] In finding No. 1 the claim of \$5.50 was for a book press furnished by defendant to the county. There is evidence in the record that the county was intending to buy a book press, and the defendant offered the one in question for the price allowed. The evidence also shows that the book press was worth \$5.50. Section 255, Rev. Codes, provides: "Members of the Legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." The contract, therefore, in making this purchase, was in violation of the provision of this statute. The book press was the property of the defendant. He was a county commissioner at the time the purchase was made, and as a member of the board of county commissioners participated with himself for the purchase, and therefore brought the contract within the provisions of this statute. *Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163.

Section 1946, Rev. Codes, provides: "No county officer must, except for his own services, present any claim, account or demand for allowance against the county, or in any way advocate the relief asked on the claim or demand made by another. Any citizen and tax payer of the county in which he resides may appear before the board and oppose the allowance of any claim or demand made against the county." Section 1956 provides: "No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, nor in any purchase or sale of property belonging to the county, nor in any contract made by the board or other person on behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes." The contract, therefore, made by the defendant and the county for the purchase of the book press, was void under the last two sections quoted above.

In finding No. 2 the item of \$14.15 was for premium upon a policy of insurance wherein the defendant, as agent for the insurance company, wrote a policy upon the pesthouse, and in so doing was the agent of the insurance company and likewise the agent of the county, and as there was nothing in particular for the county to gain, or the defendant himself by reason of the contract, we think the finding of the court was correct.

[3] In finding No. 3 the item of \$52 was upon a claim for 13 days at \$4 per day for inspecting roads and bridges. At this time the defendant was county commissioner and as such was acting for the county, and, by reason of being such commissioner and so acting, he drew from the county the fee allowed commissioners as such, and the defendant was not entitled to collect from the county additional pay and compensation for the services rendered, and the allowance of such sum was illegal and not authorized by law.

[4] In finding No. 4 the item of \$56 was for expenses on roads, and the item of \$24 was for expenses in inspecting roads, and the item of \$52 was for viewing roads and bridges, and the court found that these several items were for expenses honestly incurred by the defendant in viewing roads and bridges, and covered the use of team and buggy furnished by the defendant and used by him, and included board of defendant while doing such work, and the feed for such team while engaged in such work at \$4 per day, and that the charge was reasonable. There can be no question but that the defendant was entitled to his actual expenses when inspecting and viewing roads and bridges for the county, and looking after the public affairs of the county; and, if it cost \$4 per day to secure a team and for board, the defendant should have been allowed for these various sums, as it was a legitimate expense, for the payment of which the county was liable.

In finding No. 5, the two items of \$345 and \$270 for overseeing the transcribing of Bonneville county records, for which a bill was presented to the county and ordered paid, arose out of the division of Bingham county and the creation of Bonneville county, under an act of the Legislature, and the transcribing of the public records of Bingham county affecting and relating to the territory created into Bonneville county was provided for in the act creating such county, and under that act the recorder of Bingham county was authorized to prepare such transcription of record. At the time such records were ordered the defendant was a member of the board of county commissioners of Bonneville county, and the recorder of Bingham county was authorized to prepare such records, and was looking for some one to supervise the transcription of such records, and the defendant apparently was anxious for the job, and he was employed for that purpose. Of course, he was interested in seeing that the record was properly prepared, but at that time he was a county commissioner, and, under the statutes that have been cited above, he could make no contract by which the county, of which he was a county commissioner, could agree to pay him any fees or reward or compensation other than that earned as county commissioner, and the charges he made as superintendent certainly did not give him any legal right to any compensation. That was his duty as county commissioner, and there is very little evidence in this case that shows he did in fact render any services which were of the value of that charged and allowed.

[2] In finding No. 6 the item of \$50 was for barn rent, where the defendant was the owner of a barn, and work was being done on the road of the county, and they needed a place to keep the implements and teams, etc., and the defendant rented a barn to the county—another contract made by him which was void under the statute.

We think there is no question in this case upon the evidence and the character of the contract made, but that the charges to which we have alluded above were illegal, and for fees and services which were not authorized by law, and that the general course and disposition of the defendant was a continuous effort on his part to receive compensation for himself and his own personal gain upon every opportunity where he might sell his own property or use it, or contribute his own services and receive compensation during the time he was county commissioner, and under the law such demands and charges were unauthorized and in violation of the law.

This court in a number of decisions has disapproved and condemned claims and contracts made similar in many respects to those disclosed in the present case. Rankin v. Jauman, 4 Idaho, 394, 39 Pac. 1111; Miller

v. Smith, 7 Idaho, 204, 61 Pac. 824; Ponting v. Isaman, 7 Idaho, 581, 65 Pac. 434. See, also, San Luis Obispo County v. Pettit, 100 Cal. 442, 34 Pac. 1082; Skeen v. Chambers, 31 Utah, 36, 86 Pac. 492.

[6] We will now consider the charges made in the second cause of action. The charge is the neglect to perform certain official duties pertaining to the office held by the defendant, in that the county commissioners, including the defendant, neglected and refused to comply with the provisions of sections 887c and 887d of chapter 60 of the Session Laws of Idaho of 1911. The defendant claims that the board acted upon the advice of the county attorney, and that the board had no means at hand to make the report, if the advice had not been given.

It appears from the evidence in the case that the matter of making the report, as required by the enumerated sections of the statute, was considered by the board, and that the board talked over the making of the report, and it was asserted that it could not be made at that time; and, while they were talking about it, the county attorney came into the office, and one of the members of the board asked the county attorney if there was a state highway commission, and the county attorney said he did not know anything about it, and that the inquiry was then made of the county attorney as follows, "What is the good of making a report?" and the county attorney said, "I don't know of any," and the county attorney said he did not think it would do any good, and for that reason the report was not made. The county attorney, however, testifies that he did not advise the board of county commissioners upon the question, and did not advise them to fail to make the report. Upon this evidence the court found that the board honestly understood from the county attorney that such report need not be made, because it was not practical to do so at the time when they first became aware of the law, or thereafter up to the time such report was required to be made, and that in the hurry of business the report was not made.

Section 887c, Sess. Laws 1911, p. 169, being a section in an act amending the Code and approved by the Governor after passage on March 8, 1911, provides: "On or before the first day of February in each year, the board of county commissioners shall make a report of the condition of the work, construction, maintenance and repair of all the highways within the county, accompanied by a map or maps thereof, together with any other facts necessary for setting forth generally the situation and condition of the highways within such county. Such report shall be made in duplicate, and one of such reports should be filed in the office of the state highway commission and one with the clerk of the board of county commissioners." This report was not made, and the evidence shows that such action was not based upon

the legal advice of the prosecuting attorney; but, whether the advice was given or not, the statute imposes this duty upon the board of county commissioners, and from reading the section it would seem that such report would be a matter of great concern to the state and the highway districts of the state, and the general improvement of the roads of the state and the common good of the people; and the defendant and the board of county commissioners of Bonneville county had no authority to exercise the arbitrary judgment that it could be of no service. The Legislature which enacted such law believed it would, and the Legislature had the right to pass such a law, and it is the duty of a public official to obey the law, and he cannot justify his acts upon the ground that he does not believe it will be necessary to obey such law.

It is also alleged in the complaint, and such allegation has been proven, that the board of county commissioners, which included the defendant, failed to make the report provided for by section 887d of the foregoing act. This section requires the board of county commissioners to make and file in their office a full, true, and correct statement of the financial condition of the county in respect to highways, on or before the 1st day of February of each year, and of their expenditures and appropriation for highway purposes during the preceding year; and that a copy of such statement shall be published in at least one issue of some newspaper published in the county. This section would seem to be of great importance, and properly requires the commissioners to give public notice of the expenditures and appropriation for highway purposes during the preceding year. Yet the defendant and his associates repudiated this statute, and did not comply with the law, and disregarded the command of the Legislature and used their own individual judgment, rather than the judgment of the Legislature.

[6] By the provisions of an act approved March 7, 1911 (Sess. Laws 1911, p. 558), relating to the fixing of the annual salary of county commissioners in the several counties of the state, Bonneville county is put in the second class, and the act fixes the salary of a county commissioner of the second class at \$500 per year, and actual and necessary expenses. So, at the time the defendant performed the services for which he made claim, and which were allowed, and which are now alleged to have been illegal contracts and claims, he was a county commissioner, and for his services as such he received a salary from the county of \$500 per year and necessary expenses. Taking together these various sections of the statute enumerated in this opinion, including the latter section, it is clear that the Legislature intended to place a limit upon the power of a board of county commissioners in order to

protect the public interests and prevent the collection of illegal fees and false and fraudulent claims from the county, and to prohibit the county commissioners from making contracts with the county whereby the officers would receive benefits or profits, and to prevent the sale or transfer from commissioners to the county, or the purchasing of property which belonged to the county, or the making of contracts with the county which are prohibited by law.

In this case it is apparent that the defendant and the county commissioners assumed the right to make any kind of a contract with the county each thought proper and right as individuals, without reference to the legal and lawful power of the individual while acting in his official capacity. In the case of *Irwin v. Yuba County*, 119 Cal. 686, 52 Pac. 35, the Supreme Court of California says: "It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial. Nothing is better settled than that a person who accepts an office with compensation fixed by law is bound to perform the duties for the compensation." In that same case the court quotes from *Dillon, Municipal Corporations*, § 233, wherein the author sets forth the following rule: "The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay foundation for extra compensation would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the Legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by the courts of justice, it may lead to great abuse." The same author also says, in section 234: "Not only has an officer, under such circumstances, no legal claim for extra compensation, but a promise to pay him an extra fee or sum beyond that fixed by law is not binding, though he renders services and exercises a degree of diligence greater than could legally have been expected of him."

In the case of *Hartson v. Dale*, 9 Wash. 379, 37 Pac. 475, the Supreme Court of Washington had under consideration this question, and in that case held in effect that attendance by a member of the board of county commissioners before the state board of equalization to resist the raising of the county assessment roll was no part of his duty as such commissioner, and could not be made

the subject of a claim against the county. A similar rule is also announced in the following cases: *Board of Supervisors v. Ellis*, 59 N. Y. 620; *Moore v. Independent District*, 55 Iowa, 654, 8 N. W. 631; *Ewing v. Ainger*, 96 Mich. 587, 55 N. W. 996.

The trial court found, with one or two exceptions, that the several items alleged in the first cause of action and described in the findings of the court were not fees within the meaning of section 7459, Rev. Codes. This was clearly an error. This court held to the contrary in the case of *Rankin v. Jau-man*, 4 Idaho, 53, 56 Pac. 502. In that case the defendant was accused of having charged for 79 days' service at \$6 per day and 430 miles at 40 cents per mile in excess of what was actually due him. The objection was made there, as here, that the information did not accuse the defendant of having charged and collected illegal fees. This court said: "It is urged that the information does not accuse the defendant of charging and collecting illegal fees for services rendered, or to be rendered, in his said office. If it does not, we are at a loss to know how such an accusation was made. The information accuses defendant with having charged and collected, as county commissioner, pay for 96 days' service as such commissioner during the first quarter of the year 1896, when in fact he had rendered not to exceed 17 days' service; and it also accuses him of having charged and collected mileage for 430 miles' travel, when in fact he had not traveled any number of miles whatever. It also alleges that he charged and collected 40 cents per mile for said travel, when in fact the law allows only 20 cents. The allegations of the information are very pointed and specific, \* \* \* and come clearly within the provisions of said section."

In the case of *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487, the Supreme Court of Utah had this identical question under discussion in the same kind of an action we are now considering, and specifically announced what we approve as the correct statement of the law and liability under a similar statute to section 7459. In that case the Supreme Court said: "It is conceded that the construction of the section of the statute under which this action is brought depends more upon the sense in which the term 'fees' is therein used than upon the technical definition of the word as contradistinguished from other terms denoting the compensation of public officers. The terms of this section of the statute, wherein it refers to public officers and the 'charging and collecting illegal fees,' are general, and not confined to the fees charged and collected by any one class of public officers not liable to impeachment. Now, it is a well-recognized rule of statutory construction that general terms and expressions of a statute are to be given a general construction unless some other provision of the statute or the context



itself shows that the Legislature intended them to be used and applied in a limited or restricted sense. \* \* \* By its very terms the statute includes any officer (not liable to impeachment) who has been guilty of charging and collecting illegal fees. To bring the charging and collecting of illegal fees within the statute, it is not necessary that such fees be obtained from any specific source or sources, nor that they be charged and collected by an officer who is authorized by law to collect fees for specific services. The charging and collecting of illegal fees from the state, county, or municipality, by a public officer for private gain, is as clearly within the statute as the charging and collecting of illegal fees from a private individual. It would seem that, if it were intended to limit proceedings of this kind to include only a certain or specified class of public officers that might become delinquent, the Legislature would have said so."

There can be no question but that the section applies to a claim or charge made by a public officer for services, or under any contract with the municipality of which such officer is an official, where such officer makes a claim against the municipality whereby the officer seeks to receive a compensation not provided or authorized by law, and for which no payment or fee is provided by law.

The judgment in this case is reversed, and the cause remanded for further proceedings in accordance with this opinion. Costs awarded to appellant.

**ALLSHIE and SULLIVAN, JJ., concur.**

### **CROWLEY v. EMPEY.**

(Supreme Court of Idaho. Dec. 30, 1912.)

Appeal from District Court, Bonneville County; James G. Gwynn, Judge.

Action by B. C. Crowley against John Empey. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. S. Dickinson, of Blackfoot, Phil Averitt, R. S. Meyer, and O. E. Crowley, all of Idaho Falls, for appellant. Wm. L. McConnell and St. Clair & St. Clair, all of Idaho Falls, for respondent.

**STEWART, C. J.** This case is here on appeal from the district court of Bonneville county. The respondent is a member of the board of county commissioners of Bonneville county, and the facts are similar, and present the same character of questions, both of fact and law, as passed upon and determined by this court in the opinion this day filed in the case of Robinson v. Huffaker. While the claims are for different amounts, and in some instances upon different contracts, the claims are of the same general character as those in the Robinson-Huffaker Case, and it is unnecessary to discuss the facts or the law governing the same.

Upon the authority of Robinson v. Huffaker, 129 Pac. 334, the judgment in this case is reversed, and the cause remanded for further proceedings in accordance with this opinion. Costs awarded to appellant.

**ALLSHIE and SULLIVAN, JJ., concur.**

### **STOLTZ v. SCOTT et al.**

(Supreme Court of Idaho. Dec. 14, 1912.)

(Syllabus by the Court.)

#### **1. LIABILITY OF CORPORATE DIRECTORS—PAYMENT OF ILLEGAL DIVIDENDS.**

Under the provisions of section 2732, Rev. Codes, the directors of a corporation are prohibited from making dividends except from the surplus profits arising from the business of the corporation, and the directors are also prohibited from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, and are prohibited from reducing or increasing the capital stock except as in the statute provided.

#### **2. LIABILITY OF CORPORATE DIRECTORS—PAYMENT OF ILLEGAL DIVIDENDS.**

For a violation of the provisions of said section of the statute (Rev. Codes, § 2732) certain directors are in their individual and private capacity made jointly and severally liable to the corporation and to its creditors, in event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced.

#### **3. CORPORATIONS (§ 610\*)—DISSOLUTION—VOLUNTARY PROCEEDINGS—STATUTORY PROVISIONS.**

Section 5185, Rev. Codes, provides that a corporation may be dissolved by the district court upon its voluntary application for that purpose, and section 5186 provides what the application for that purpose must contain. Those provisions of the statute apply to the voluntary dissolution brought about by the stockholders themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2424-2430; Dec. Dig. § 610.\*]

#### **4. CORPORATIONS (§ 605\*)—OFFICERS—LIABILITY—ILLEGAL DIVIDENDS—"DISSOLUTION."**

Under the provisions of said section 2732, Rev. Codes, certain liabilities are imposed on certain directors in event of dissolution of the corporation, and under the provisions of that section it is not necessary that the dissolution should have been a voluntary one, declared by a court of competent jurisdiction, but, when a corporation ceases business because of its insolvency and is put in the hands of a receiver, it is "dissolved" within the meaning of section 2732, Rev. Codes, relating to the personal liability of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2389; Dec. Dig. § 605.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2127, 2128; vol. 8, p. 7639.]

#### **5. CORPORATIONS (§ 625\*)—OFFICERS—LIABILITY—ILLEGAL DIVIDENDS.**

The foundation of an action brought under the provisions of said section 2732, Rev. Codes, is based on the illegal payment of dividends in fraud of the creditors, and the receiver, as the representative of the creditors, may maintain an action to recover the amount of such dividends so illegally paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

#### **6. LIMITATION OF ACTIONS (§ 95\*)—CORPORATIONS—ILLEGAL DIVIDENDS.**

Held, that the statute of limitations, under the allegations of the complaint, had not run prior to the commencement of this action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 473, 474; Dec. Dig. § 95.\*]

**7. CORPORATIONS (§ 625\*)—STOCK—ILLEGAL DIVIDENDS—RECOVERY.**

*Held*, that it was not necessary to allege that at the time said illegal dividends were paid the creditors were then creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

**8. CORPORATIONS (§ 625\*)—STOCK—ILLEGAL DIVIDENDS—RECOVERY.**

*Held*, that it was not necessary to allege in the complaint that at the time said illegal dividends were paid the corporation was insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

**9. CORPORATIONS (§ 625\*) — STOCK — ILLEGAL DIVIDENDS—RECOVERY.**

*Held* that, where a statute prohibits the directors of the corporation from declaring a dividend from its capital stock, it is not necessary for a recovery against them that the assets of the corporation be first exhausted or its liability be first adjudicated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

**10. CORPORATIONS (§ 625\*)—STOCK—ILLEGAL DIVIDENDS—RECOVERY.**

The complaint *held* to state a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

*(Additional Syllabus by Editorial Staff.)*

**11. CORPORATIONS (§ 625\*)—STOCK—ILLEGAL DIVIDENDS—LIABILITY OF DIRECTORS.**

Under Rev. Codes, § 2732, prohibiting corporate directors from making dividends except from surplus profits, and from paying to the stockholders any part of the capital stock, and making the directors liable individually for violation of this provision in the event of dissolution of the corporation, except where they have caused their dissent to be entered in the minutes, it is not necessary to render a director liable that he should be such at the dissolution of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.\*]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Fred A. Stoltz, receiver, against J. T. Scott and others. From a judgment sustaining demurrers to the complaints and dismissing the action, plaintiff appeals. Reversed, with directions.

Reed & Boughton, of Cœur d'Alene, for appellant. Smith & Ulrich, McFarland & McFarland, and J. L. McClear, all of Cœur d'Alene, for respondents.

**SULLIVAN, J.** This is an appeal from three judgments of dismissal which were entered upon sustaining demurrers of the three defendants, Barton, Chainey, and Scott; they being the only defendants who appeared in the action. General demurrers were filed to the complaint by Chainey and Scott, and the demurrer of Barton was based on an additional ground, to wit, that the action was barred by the statute of limitations and that the complaint was ambiguous and uncertain.

It appears from the complaint that the appellant, Stoltz, was the duly appointed

and qualified receiver of the Winn-Barr-Chainey Company, Limited, a corporation, and brought this action against Scott, Barr, Winn, Chainey, and Barton. Barr and Winn did not appear, but the other defendants appeared and filed demurrers as above stated. The action was brought to recover several sums of money aggregating \$3,895, with interest thereon.

It is alleged that said corporation is indebted to numerous individuals and corporations in the sum of \$40,000; that the corporation is insolvent and unable to meet its indebtedness; that said corporation ceased to do business on or about July 15, 1910, and at said time converted all of its business and property into cash and paid the proceeds thereof pro rata among its creditors; that said corporation has not elected any officers since said time and has not operated under its franchise as a corporation since that date; that said corporation has abandoned the business for which it was incorporated, and to all intents and purposes is entirely broken up and dissolved, and there is no property or assets of said corporation out of which the creditors can be paid; that in February, 1912, said receiver made application to the proper court and was granted the right to bring this suit against the above-named defendants for the recovery of dividends alleged to have been illegally paid to them out of the capital stock of said corporation. Then follow allegations of the annual meeting of the stockholders of said company and of the directors; that on January 14, 1908, said directors, at a meeting of the board of directors of said company, declared and ordered paid a dividend of 10 per cent. on the capital stock of said company; that the dividend so declared amounted to the sum of \$3,895; that no part of said dividend was paid from the surplus profits arising from the business of said company, and at the time said dividend was declared and paid there were no surplus profits of said corporation; that all of said dividend was paid out of the capital stock of the corporation; that said dividend was paid under the administration of said defendants as directors of said company; that none of said directors caused their dissent from the declaration or payment of said dividend to be entered at large upon the minutes of said directors; that all of said directors were present at the meeting at which said dividend was declared, approved, and ordered paid; that all of said directors consented thereto and voted therefor; that, by reason of the payment of said dividend out of the capital stock, the said corporation and its creditors sustained a loss amounting to \$3,895; that the creditors of said corporation first discovered and learned that said dividend was not paid out of the surplus

profits of said company on or about March 30, 1911; that neither the stockholders nor said corporation has taken any action to recover said \$3,895 from said directors, or any part thereof; that this action is brought for the purpose of collecting from the directors of said corporation the money illegally paid out as dividends for the benefit and on behalf of the creditors of the corporation. Then follows a prayer for judgment for said amount.

[1, 2] This action is evidently brought under the provisions of section 2732, Rev. Codes, which section is as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they reduce or increase the capital stock, except as in this title specially provided. For a violation of the provisions of this section, the directors, under whose administration the same may have occurred (except those who may have caused their dissent therefrom to be entered at large in the minutes of the directors at the time, or, when not present, when the same did occur) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence."

Said demurrers having been sustained and the plaintiff refusing to further plead, three judgments of dismissal were entered, one in favor of each of said defendants. The appeal is from those judgments. The sustaining of said demurrers and the entering of said judgments is assigned as error.

It is contended by counsel for respondents that the action of the trial court was not error for the following, among other, reasons: (1) That the complaint does not show that said corporation has been legally dissolved so as to make these directors liable; (2) that the complaint shows on its face that the statute of limitations has run against the action; (3) that the complaint does not show in what manner the property of the company was converted into cash at the time it is alleged to have ceased business in July, 1910.

[3, 4] 1. Counsel for respondents contend that this action could not be maintained until the corporation had been legally dissolved, as said section of the statute provides that the directors are only liable under the provisions of said section in event of dissolution, and that the only way a corporation can be dissolved under our statute is provided by section 5185, Rev. Codes, which pro-

vides that a corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose. Section 5186 provides what the application must contain, and is to the effect that the application must be in writing and must set forth that, at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members, and that all claims or demands against the corporation have been satisfied and discharged. It will be observed from the provisions of said sections that a voluntary dissolution could not be had unless brought about by the stockholders themselves, and, if it would take a voluntary dissolution to fix the liability of such stockholders, they certainly would not apply to the court for such dissolution. That section of the statute seems very clear, as it provides that for a violation of its provisions certain directors therein named "are in their individual and private capacity jointly and severally liable to the corporation." Now, under that clause of said section, the corporation in its corporate capacity could bring suit against the directors who had declared such dividends, but, in case the corporation refuses, the creditors may bring such action in the event of dissolution, but, after the corporation is placed in the hands of a receiver, it is the duty of the receiver to proceed and collect whatever is due the corporation. Of course, in the event of dissolution there could be no receiver in existence. However, in case of dissolution the creditors may proceed and collect such unlawful dividends or other claims occasioned by the fraud, gross negligence, or willful breach of duty of the officers of such corporation.

[5] Where the corporation has quit business and has disposed of all of its assets, and the corporation is in the hands of a receiver, it then becomes the duty of a receiver to proceed and collect such illegal dividends and all other claims and losses caused by the fraud, gross carelessness, or willful breach of duty. However, the authorities clearly hold that for the purpose of an action of this kind the corporation will be held to be dissolved by insolvency or cessation of business, and that a judicial dissolution is not necessary to give the receiver authority to maintain such action. We think that is the correct rule in this case under the allegations of the complaint. Its corporate functions were at an end, at least until its debts were paid and the receiver discharged. See *Cook on Corporations*, § 631; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *High on Receivers*, § 317a, p. 392; *McDonnell v. Alabama Life Ins. Co.*, 85 Ala. 401, 5 South. 121.

In 10 Cyc. 723, it is stated as follows:

"Statutes and constitutional provisions exist in many states, which, in various forms of expression, impose a liability upon shareholders to pay such debts of a corporation as may exist at the time of its dissolution. An examination of them will show that they generally predicate the right to proceed against the shareholders upon the fact that the corporation becomes dissolved, leaving debts unpaid. \* \* \* It is not necessary that the forfeiture and dissolution should have been declared by the judgment of a court of competent jurisdiction. \* \* \* But an adjudication of bankruptcy or a cessation of business by reason of utter insolvency will equally have that effect."

In *McDonnell v. Ala. L. I. Co.*, supra, it is held that a corporation is dissolved, within the meaning of the statute relating to the personal liability of stockholders, when it makes an assignment for the benefit of its creditors or ceases to do business.

In *High on Receivers*, at section 250, the author is discussing the question as to whether certain set-offs are admissible as a defense in an action by a receiver to recover dividends which have been illegally paid and says: "The foundation of the action being the illegal payment of dividends in fraud of the creditors, and the reparation sought being the restoration of the funds for the creditors' benefit, the receiver is regarded as the representative of the creditors and not of the corporation, and hence the defense is unavailable."

The action at bar is prosecuted by the receiver to recover dividends alleged to have been illegally paid, and the action is for the benefit of the creditors, and we have no doubt of the receiver's right to maintain this action.

[§] 2. Is this action barred by the statute of limitations?

It is stated in 10 Cyc. p. 1064, that knowledge of the corporate officer or agent will not be imputed to the corporation where the fact is one which the officer or agent is interested in concealing from it, except in cases where a contrary rule is necessary to save the rights of innocent third persons. Under the allegations of the complaint, it would be presumed that the directors, if they had declared and paid illegal dividends, were interested in concealing that fact, and no presumption can be drawn that the receiver or the creditors knew that fact, and it is alleged in the complaint that the creditors did not know of the illegal payment of dividends until March, 1911. It is the rule in actions of this character that the receiver represents the creditors and not the corporation. *High on Receivers*, §§ 250, 314, 320, and 321. It might be conceded in this proceeding that the action is barred as to the corporation; but, under the allegations of the complaint, it is certainly not barred as to the receiver, and he represents the cred-

itors in this action. We cannot concede that the statute had run simply because the creditors might have discovered when said dividends were paid had they made certain investigations. Where it is positively alleged in the complaint that the creditors did not discover that illegal dividends had been paid until shortly before bringing the action, it is a matter of defense to show that they failed to discover that fact because of negligence on their part.

[7] 3. It is contended that it was necessary to allege in the complaint that at the time the dividend was declared the creditors were then creditors of the corporation. We cannot concede that contention. The statute makes the directors liable to all creditors—those who became creditors before such dividend is paid as well as those who became creditors afterward, if they declare a dividend out of the capital of the corporation and thus deprive the creditors of the payment of their debts.

In *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521, the court said: "The officers, if liable at all, are liable to all the creditors of the corporation—those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors. As to the subsequent creditors, could it be said the cause of action accrued before they became creditors? The action must be for their benefit, as well as that of all others, and yet they may not have become creditors of the corporation until more than five years after the first assenting to excessive indebtedness." *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084; *Patterson v. Stewart*, 41 Minn. 84, 42 N. W. 926, 4 L. R. A. 745, 16 Am. St. Rep. 671; *Low v. Buchanan*, 94 Ill. 76.

[8] 4. The question is raised by respondent Scott that the complaint does not allege that at the time the dividends were declared and paid the corporation was insolvent, and for that reason does not state a cause of action against Scott. We are unable to concede that contention. It appears from the allegations of the complaint that the rights of creditors were injuriously affected by the payment of said dividends, and it was held in *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364, that the complaint in that case was not objectionable for failure to allege that the company was insolvent at the time of the purchase, since said purchase operated to reduce the available resources of the company which subsequently became insolvent, which resources would otherwise have been applicable to the claims of creditors. So in the case at bar, if the said capital stock had not been reduced by the payment of said dividends, the subsequent creditors might have received payment at least to the extent of the dividends illegally paid.

[11] It is also suggested that respondent

Scott was not a director of nor in any way connected with the Winn-Barr-Chainey Company at the time of the dissolution, and was therefore not liable. It does not matter whether a person is a director of a corporation at the time of its dissolution in order to be held liable for dividends illegally paid to him. The statute makes all of the directors liable who have received illegal dividends. If the law were otherwise, directors might declare and pay dividends out of the capital stock for their own benefit and then dispose of their stock and thus avoid liability, regardless of the fact that they had received illegal dividends which had reduced the capital of the corporation.

[9] In *Swartley v. Oak, etc., Co.*, 135 Iowa, 573, 113 N. W. 496, it was held that, where a statute renders directors liable for declaring a dividend from its capital stock, it is not essential to a recovery against them that the assets of the corporation be first exhausted, or even that its liability be first adjudicated.

[10] It is also contended that the complaint did not state facts sufficient to constitute a cause of action because it does not show that there were any legal, bona fide creditors or claims against said corporation. We think the complaint amply shows that said corporation had creditors and that there remained an indebtedness of about \$40,000 unpaid. It is alleged in the complaint that said corporation is insolvent and unable to pay its indebtedness, or any part thereof. There is no merit in that contention. We are fully satisfied that the complaint states a cause of action. The complaint clearly alleges that said corporation is insolvent and unable to pay its debts; that it has paid illegal dividends out of its capital stock; that all of its assets have been disposed of and applied in partial payment of its indebtedness; and that there remains indebtedness still due. We think the complaint states a cause of action and is sufficient to put the respondents upon their defense.

The judgments of dismissal must therefore be set aside, and the defendants permitted to answer, and it is so ordered, with costs of this appeal in favor of the appellant.

STEWART, C. J., concura.

#### MOORE v. MOORE.

(Supreme Court of Utah. Dec. 31, 1912.)

#### 1. DIVORCE (§ 256\*)—ENFORCEMENT OF DECREE FOR ALIMONY—FORECLOSURE OF LIEN.

Where parties entered into an agreement in compromise of a judgment against the husband for alimony, whereby each was to deed to the other certain lands, conditioned upon the husband paying his wife \$40 within two days, and by consent of the parties the wife's motion for an order to sell land, which was subject to her judgment, was continued to a day certain, and the husband refused to tender the \$40,

the wife was entitled on the date to which the continuance was taken to a decree that the land covered by her judgment lien be sold to satisfy the judgment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 725, 726; Dec. Dig. § 256.\*]

#### 2. DIVORCE (§ 255\*)—COLLATERAL ATTACK.

A sale of land made under an order and judgment in a case in which the court had jurisdiction of the parties and subject-matter could not be assailed in a subsequent proceeding by the judgment debtor against the judgment creditor to enforce specific performance of a contract entered into between them in compromise of the judgment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 722-724; Dec. Dig. § 255.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by John Moore against Harriet G. Moore for specific performance. From decree for defendant, plaintiff appeals. Affirmed.

This is an action for the specific performance of an agreement for the sale of real estate. The appeal is taken on the judgment roll.

The findings of fact made and filed in the case, so far as material to the question presented by the appeal, are as follows:

"That on the 5th day of February, 1906, there was an action pending in the district court of Salt Lake county, state of Utah, wherein Harriet G. Moore, the defendant in this action, was plaintiff, and John Moore, the plaintiff in this action, was defendant, and on the date last named this court made and entered its decree, whereby it was adjudged that the defendant in said action pay to the plaintiff therein the sum of \$25 on the 15th day of February, 1906, and the sum of \$25 on the 15th day of every month thereafter until the further order of said court. Said decree further provided that the defendant in said action pay to the plaintiff therein the sum of \$75 as attorney's fees for counsel in said action and that said sum of \$75 was to be paid on the 15th day of February, 1906. Said decree further provided that said defendant in said action pay to the plaintiff therein the sum of \$20.70 as costs of court, which sum was to be paid on the 15th day of February, 1906. The court further finds that there was due and owing to this defendant from the plaintiff in this action on the 18th day of December, 1908, under the terms of said decree including attorney's fees and costs of court a sum in excess of \$941, no part of which at that time had been paid. The court further finds: That by the terms of said decree the payments above referred to and all of them were made and declared to be a lien on the real estate hereinafter first described. That said decree was duly recorded in the office of the county recorder of Salt Lake county, state of Utah, on the 7th day of February, 1906, in Book 2-J of Liens and Leases, at pages 206, 207. That the real estate last referred to is described as follows:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(Here follows a description of the land by metes and bounds.) That said decree further provided that this court retain jurisdiction of said case for the purpose of enforcing the terms of said decree. That on the 5th day of December, 1908, the plaintiff in said action served upon the defendant therein a written notice notifying said defendant that on the 18th day of December, 1908, the plaintiff therein would move the court to make and enter its order adjudging and decreeing that the real estate hereinbefore described should be sold to pay the judgment that had theretofore been entered in said action as hereinbefore set forth in these findings, together with costs and expenses of said proceedings; and on the said 18th day of December, 1908, pursuant to said notice, the defendant in said action with his counsel, one Adam Duncan, an attorney at law of this court, appeared before the court for the purpose of participating in the hearing of said motion, whereupon and on the 18th day of December, 1908, the said plaintiff and the defendant entered into an oral compromise agreement, conditioned as hereinafter set forth, whereby it was agreed that the defendant in said action should convey by good and sufficient deed to the plaintiff therein 30 acres of land, the same being a part of the land before described in these findings and was as follows, to wit: (Here follows description of the land by metes and bounds.) And as a part of said agreement to compromise the plaintiff in said action agreed to convey by good and sufficient deed of conveyance to the defendant therein 10 acres of land, situate in Salt Lake county, state of Utah, described as follows, to wit: (Giving description of land by metes and bounds.)

"The court further finds: That the plaintiff in said action agreed to convey the land hereinbefore described to said defendant with the express understanding and condition, and not otherwise, that the defendant in said action would pay to the plaintiff therein the sum of \$40 within two days after the 18th day of December, 1908. That said agreement of compromise further provided, among other things, that one of the chief objects of making said compromise agreement was that the plaintiff in said action would not be required to incur any additional expense in the sale of the real estate upon which said judgment constituted a lien as hereinbefore set forth to satisfy said judgment and costs, and, if the plaintiff in said action was required to expend further money or incur additional expense in the sale of said real estate to satisfy said judgment, then the plaintiff therein would not convey to the defendant therein the real estate as heretofore described in these findings. Said compromise agreement further provided that neither of said deeds were to be delivered to the respective parties until the said sum of \$40 had been paid as before provided in these

findings, then only on condition that the said plaintiff was not to incur any further indebtedness as hereinbefore provided; that both of said deeds were to be held by said attorneys, subject to the terms of said agreement of compromise as hereinbefore set forth and delivered in accordance therewith and not otherwise. That both of said deeds were executed and placed in the hands of the attorneys of the respective parties for the purposes heretofore set forth in these findings and not otherwise. That the plaintiff in this action neglected and refused to pay the sum of \$40 within two days from the 18th day of December, 1908, or on or before the 8th day of January, 1909, or at any time, or at all. That the hearing of said motion in the case first referred to in these findings was by the court continued from the 18th day of December, 1908, to the 8th day of January, 1909, with consent of H. A. Smith, counsel for the plaintiff in said action, and Adam Duncan, counsel for the defendant in said action, and on the said 8th day of January, 1909, the district court of Salt Lake county made and entered its order and decree directing that the real estate upon which said judgment constituted a lien as before described in these findings should be sold in the manner provided by law in such cases made and provided to satisfy the judgment so rendered in said original cause, and the court further finds that said real estate was sold in partial satisfaction of said judgment under the terms of said decree. The court further finds that the defendant in said action neglected and refused to comply with the terms and conditions of the compromise agreement as set forth in these findings, and in consequence thereof the plaintiff in said action was compelled to and did incur and pay more than \$30 costs in causing the real estate to be sold to satisfy said judgment as before set forth in these findings. The court further finds that the defendant in said original action did not tender to plaintiff therein the said sum of \$40 within two days from the 18th day of December, 1908, or at any other time on or before the 8th day of January, 1909, but that on or about the 4th day of March, 1909, Adam Duncan, who was then attorney for defendant in said action, went to the City and County building at Salt Lake City, Utah, where H. A. Smith, who was attorney for the plaintiff in said action, was engaged in the trial of a case before the court, and offered to pay the said H. A. Smith and there produced \$40 in cash on account of the transaction mentioned in these findings, which sum the said H. A. Smith then and there refused to accept. The court further finds that the plaintiff in said original action agreed with the defendant therein, and as a part of said oral agreement, that if he complied with all of the other terms and conditions of said oral agreement as before set forth in these findings, and not

otherwise, that the said plaintiff would release the said defendant from all indebtedness which the said defendant was then owing or which should thereafter accrue as alimony theretofore awarded to the plaintiff from the defendant."

It is admitted in the pleadings that the defendant in this action, plaintiff in the former action, purchased the real estate here involved at the sale mentioned in the foregoing findings of fact.

As conclusions of law the court found: "That the plaintiff is not entitled to a judgment in this cause against the defendant of any character, but that the defendant is entitled to a judgment against the plaintiff for the costs of this action."

A decree was entered in favor of defendant and against the plaintiff adjudging that "plaintiff is not entitled to a judgment of any character against the defendant \* \* \* and that plaintiff has no cause of action against the defendant."

Plaintiff appeals.

James D. Pardee, of Salt Lake City, for appellant. Smith & McBroom, of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). Appellant, in his assignment of errors, assails the conclusions of law and the decree on the ground that they are not responsive to and are not supported by the findings of fact, and that they are contrary to law. We think the assignment is without merit and should be overruled.

[1] It appears from the findings of fact, above set forth that in a former action between the parties to this action a decree was entered adjudging that this appellant, who was defendant in that action, pay to respondent a certain amount of money for costs and attorney's fees, and the further sum of \$25 per month thereafter until further order of the court. On December 18, 1908, there was, under the terms of the decree in that action, due and owing from appellant to the respondent herein the sum of \$941, which, under the decree, became and was a lien on the 30 acres of real estate herein mentioned. On December 5, 1908, respondent served on appellant a notice in writing notifying him that she would on the 18th day of December, 1908, move the court for an order adjudging and decreeing that the tract of land referred to be sold to pay the judgment in said action. Appellant, pursuant to this notice, appeared in court with his counsel for the purpose of taking part in the hearing of the motion. On December 18, 1908, the oral compromise agreement mentioned in the findings of fact was entered into between the parties, and "the hearing of the motion \* \* \* was by the court continued from the 18th day of December, 1908, to the 8th day of January, 1909." It further appears that "the plaintiff (appellant) in this action neglected and refused to

pay the said sum of \$40 within two days from the 18th day of December, 1908, or at any time or at all," and on the 8th day of January, 1909, the day to which the hearing of the motion was continued, the court "made and entered its order and decree directing that the real estate upon which said judgment was a lien \* \* \* should be sold in the manner provided by law \* \* \* to satisfy the judgment." It will be observed that the hearing on the motion for an order and decree directing the sale of the land in question was, by consent of the parties, continued to a day certain and the matter held in abeyance by the court from December 18, 1908, until January 8, 1909, to enable appellant to fulfill his part of the compromise agreement. This he "neglected and refused" to do during the time the proceedings were thus temporarily suspended by the court. Nor did he make any offer to carry out the terms of the agreement until long after the order and decree of sale was made. Respondent, therefore, under these circumstances, there being no question raised as to the regularity of the proceedings, was entitled to an order and decree of court directing that the land covered by her judgment lien be sold and that the proceeds of the sale be applied to the payment of the judgment. Moreover, to grant the relief asked for by appellant would necessitate the setting aside, or treating as an absolute nullity, the sale made in pursuance of the order and decree mentioned. Appellant in effect concedes this, because in his prayer for relief he asks "that the sale heretofore made by the sheriff of Salt Lake county of said \* \* \* land \* \* \* be set aside," etc.

[2] No claim is made that the sale was irregular, or that the court was without jurisdiction to make and enter the order and decree under which it was made. In fact, all that appellant's petition or complaint contains on this point is a recital that the sale was made in pursuance of an order and decree of the court, and in the prayer of the complaint appellant asks, as above stated, that the sale be set aside. The sale was made in pursuance of an order and decree made and entered in a cause in which the court had jurisdiction of the parties and of the subject-matter of the action. It cannot therefore be successfully assailed in a collateral proceeding. This would be so even though there were some informalities or irregularities in the proceedings leading up to and surrounding the sale. 24 Cyc. 38; 17 A. & E. Ency. L. 994, 999. But, as we have stated, no such claim is made. A question similar to the one here involved was before the Supreme Court of Wisconsin in the case of *Tallman v. McCarty*, 11 Wis. 406, and that court, in a well-considered opinion, lays down what we think is the correct principle. It is there said: "This is not a bill of revivor, but an original bill, and the question arises: Could the bank impeach the order or

decree of sale in such collateral proceedings? We think not. The only ground upon which it could do so would be by showing that it was an absolute nullity, either for want of jurisdiction of the subject-matter or the parties, or because the court had no power to make such an order in the action. Neither of these objections exist here. \* \* \* No order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law, or the previous state of the case. The only question in such a case is: Had the court or tribunal the power, under *any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon *those circumstances* becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us it was for the circuit court to determine in the first instance when and how the authority with which it was invested to direct a sale should be exercised; and, if in so doing it committed an error, no matter how egregious, whether in the construction of a statute or otherwise, still the order was valid until reversed upon appeal. It was a mere error or irregularity which could only be taken advantage of by appeal, but cannot be inquired into in this proceeding."

In *Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863, it is said: "While the party seeking relief may resort to his bill in equity he may (and, indeed, it is said to be the preferable practice) apply by motion to the court which has decreed the sale, and in applying to such court he may base his application upon any equitable principle of relief which would give jurisdiction to a court of equity in any other case of sale—fraud, mistake, accident, or other ground of purely equitable cognizance."

Appellant not having alleged fraud or other cause which would as a matter of law vitiate the proceedings leading up to and ending in the sale, we are of the opinion that, if he thought he was entitled to have the sale set aside for any reason that would authorize the court in the exercise of its sound discretion to set it aside, he should by motion have applied to the court for such relief in the former proceedings.

The judgment is affirmed, with costs to respondent.

FRICK, C. J., and STRAUP, J., concur.

#### LOCHHEAD et al. v. JENSEN.

(Supreme Court of Utah. Dec. 30, 1912.)

#### 1. NEGLIGENCE (§ 134\*)—AUTOMOBILE ACCIDENT—DEATH OF GUEST—SPEED—EVIDENCE.

In an action for the death of an invited guest riding in defendant's automobile, as the

result of the machine skidding and turning over into a ditch, evidence held to require a finding that the machine was not running at a greater speed than 15 to 18 miles an hour at the time.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

#### 2. NEGLIGENCE (§ 134\*)—AUTOMOBILE ACCIDENT—DEATH OF GUEST—SPEED.

Under Laws 1909, c. 113, limiting the speed of automobiles in the highways outside of incorporated cities to 18 miles an hour, evidence that at the time decedent, an invited guest of defendant, was killed by the turning over of defendant's automobile it was being driven on a country highway, described by plaintiffs as in good condition and smooth, and by defendant as somewhat rough, with chuck holes in it, at from 15 to 18 miles an hour was insufficient to justify a finding of actionable negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

#### 3. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

In an action for the death of a guest by the turning over of defendant's automobile while being driven along a country highway, the complaint charged negligence solely in that the machine was being run at a dangerous rate of speed. Held, that instructions authorizing a verdict for plaintiffs, not only on a finding of the negligence alleged, but also if the evidence showed negligent or careless operation, or failure to preserve a reasonable lookout for obstructions or dangers in the road, were erroneous, as beyond the issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

#### 4. NEGLIGENCE (§ 93\*)—IMPUTED NEGLIGENCE.

Where decedent accepted an invitation by defendant to ride in defendant's automobile, and decedent sat in the back seat, exercising no control over or direction of the operation or handling of the machine prior to the time it was thrown over an embankment, and decedent was killed, defendant's negligence, if any, in operating the machine could not be imputed to decedent.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Pearl H. Lochhead and others against Jacob Jensen. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial granted.

J. E. Bagley and J. G. Heywood, both of Ogden, for appellant. Richards & Boyd, of Ogden, for respondents.

STRAUP, J. This is an action to recover damages for the death of William S. Lochhead, alleged to have been caused by the negligence of the defendant. In the complaint it is alleged that the deceased, at the invitation of the defendant, entered the defendant's automobile to take a ride, and that "the defendant acted as operator or driver of his said automobile, and determined and regulated the speed at which it should run, and while the deceased was so riding with him as his guest, at or near Pleasant View, in ut-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ter disregard of his duty in that respect, the defendant negligently, carelessly, and recklessly caused his said automobile to run at a furious and dangerous rate of speed, to wit, at the rate of about 50 miles an hour, and so fast that the automobile violently jumped and overturned, thereby forcibly throwing the deceased upon and against the ground," by reason of which he was injured and killed. The foregoing allegations with respect to the speed at which the automobile was operated are the only charged acts of negligence. They were put in issue. The trial resulted in a verdict and judgment in favor of the plaintiffs. The defendant appeals. He claims that the evidence is insufficient to support the allegations of negligence, and that the court erred in the charge.

The evidence shows that the deceased entered the defendant's automobile at the defendant's invitation, and that the automobile was operated by the defendant along a highway in the country. The accident happened between 3 and 4 o'clock in the afternoon. There were three persons in the automobile, the defendant, the deceased, and one Sanderson. Sanderson, a witness called by the plaintiffs, testified that the speed of the automobile at the time of the accident was about 15 miles an hour; that at the place of the accident there were "dust holes" or "ruts" in the road; that it was "pretty rough"; that the ruts or holes were partially covered or filled with dust or sand; and that the automobile struck or "bumped" into one of the holes or ruts and "slid" or "skidded" first to the one side and then to the other of the road, and left it and ran into or over a ditch and "somersaulted," casting the deceased out. He further testified that "it would not have been possible for us to observe that there was a depression or ditch where this machine went off of the main line;" that "there was nothing to obscure our vision ahead when we were approaching this place," but, "approaching the place where the machine went down, looking ahead it presented the appearance of the level of a street." Other witnesses for plaintiffs testified that the road at the place of the accident was smooth and in good condition, except for dust and small ruts; that shortly after the accident they noticed tracks of the automobile, showing that it had moved from one side of the road to the other and went down the embankment. Another witness testified that he saw the tracks where the automobile left the road, and that they led to a "chuck hole" in the road, which was struck by the automobile. Other witnesses for the plaintiffs testified that between 2 and 3 o'clock they, some distance from the place of the accident, met an automobile going "very fast," in which were three men; but they were unable to identify or describe either the automobile or the occupants. Still another witness, about 350 feet away, drying fruit, testified that she heard the noise of the

automobile, glanced down the road, and it appeared to her "like the machine raised right up in the middle of the road, like the front wheels went in the air," and "then turned to the south of the road" and went over. The defendant testified that, while operating the automobile in about the center of the road, along the place of the accident, at a speed of about 15 or 18 miles an hour, "the machine skidded to the north and then to the south and went off the road, and, as I was trying to get back on the road, struck something and turned over. \* \* \* Just before this there were chuck holes in the road." The machine "struck the chuck holes. There were three or four right close together. \* \* \* That caused me to turn over this way a little and then to the left. \* \* \* The machine skidded and then jumped off into the ditch."

[1] Now, upon this evidence, what was the highest speed the jury were licensed to find the automobile was run at the time of the accident? We think at 15 or 18 miles an hour. The testimony of those that they, some distance from the place of the accident and half an hour or more before it occurred, met an automobile going "very fast," in which were three men, but were unable to identify or describe either the automobile or the occupants, is of no consequence. Nor is the testimony of the fruit dryer that she glanced down the road and saw what appeared to her the "front wheels of the automobile go in the air," the machine go off the road, and down the embankment, without even an opinion as to the speed at which it was operated.

[2] Now, were the jury licensed to say that operating an automobile on a public highway outside of an incorporated city or town at a speed of from 15 to 18 miles an hour was negligent? Under the statute (chapter 113, Sess. Laws 1909) it was lawful at such a place to operate an automobile at a speed not to exceed 20 miles an hour. Of course, a jury is permitted to say in some instances, dependent upon the particular attendant facts and circumstances, that the operation of an automobile within the speed limit as fixed by statute or ordinance is nevertheless negligent. Were they permitted to do so here? We think not, for the reason that sufficient facts and circumstances attendant upon and surrounding the case were not shown upon which the conclusion of negligence in such particular may be predicated. Certainly a jury could not be permitted to predicate such negligence on the mere fact that the automobile was operated at a speed of from 15 to 18 miles an hour. No facts or circumstances were here shown, except that the road at the place of the accident was dusty or sandy; that there were ruts or chuck holes in the road, but the character or extent of them not shown or described; and that the road was "pretty rough." The plaintiffs in this particular, by their evidence, endeavored to show that the road was in

good condition and smooth; the defendant that it was somewhat rough. The former to prove themselves out of court; the latter in. For whatever license the jury had to predicate negligence upon a speed of from 15 to 18 miles an hour because of a bad condition of the road, the plaintiffs did all they could to destroy it by showing that the road was smooth and good; and the defendant tried as hard to keep himself in by endeavoring to show that the road was bad. We do not think he quite succeeded. We think the evidence was not sufficient to let the case to the jury on the alleged negligence.

[3] Now as to the charge. Notwithstanding the single act of alleged negligence—running the automobile at a high and dangerous rate of speed—the court nevertheless charged that if the jury found that the defendant “was driving said car negligently or carelessly, or if you believe that he was driving at a reckless or dangerous rate of speed,” and that “the death resulted directly and proximately from such negligence or carelessness, then you should find” for the plaintiffs. Again, the court charged that if the jury found that “the defendant was not in the exercise of reasonable care in the operation of his said car, and that by reason thereof the injury occurred to the said deceased, and the said negligence of the said defendant was the direct and proximate cause of the said injury,” then the defendant was liable. The court also charged that it was the duty of the defendant in operating the automobile “to use due diligence in the driving of the same, so as to have it under reasonable control at all times to avoid injury; and it is the duty of the driver of said car to keep a reasonable lookout for any obstructions or dangers that may be in the road upon which he is driving, and if he fails to do so, and through his negligence causes injury to others, then he is liable therefore.” The court further charged that in determining whether or not the defendant “was exercising reasonable care” the jury might consider “the manner in which the defendant was driving” and “the speed at which he was driving.” It is thus seen that the charge clearly presented to the jury questions of negligence far beyond that charged in the complaint, and permitted the jury to base a verdict, not only upon the negligence alleged, but also upon any negligent or careless operation, management, control, or driving of the automobile, or failure to observe or keep a reasonable lookout for obstructions or dangers in the road. That the charge, in view of the alleged negligence, was erroneous and prejudicial needs no argument.

[4] Since the judgment, for the reasons indicated, must be reversed and a new trial granted, it is also proper to say that the contentions of the appellant that he was entitled to go to the jury upon the question of con-

tributory negligence of the deceased and of “imputed” negligence of the defendant, if any, to the deceased are wholly groundless. There is no evidence to show that the deceased did or said, or failed to do or say, anything, except that he, at the invitation of the defendant, sat in the back seat of the automobile, and was thrown over the embankment and killed. There is no evidence to show that he had or exercised any control over or direction of the operation or handling of the automobile, or that he in any particular consented to or acquiesced in the manner of its operation. The appellant has urged that “the ride in the automobile was the mutual enjoyment of all three” occupants, and since the plaintiff did not show that the deceased protested against the manner of its operation it must be presumed that he acquiesced therein; and therefore the negligence, if any, of the defendant must be imputed to the deceased. In view of the evidence, the appellant is wrong, both as to the burden of proof and the law. The ruling of the court in refusing to submit such questions to the jury on the evidence adduced was right.

For the reasons heretofore given, the judgment of the court below is reversed and a new trial granted. Costs to the appellant.

FRICK, C. J., and McCARTY, J., concur.

#### VOTA v. OHIO COPPER CO.

(Supreme Court of Utah. Dec. 31, 1912.)

##### 1. MASTER AND SERVANT (§§ 286, 289\*)—INJURIES TO SERVANT—OPERATION OF MACHINERY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an inexperienced servant while assisting in moving timbers by a hoisting engine by his arm becoming crushed between a timber and the hoist drum, evidence held to require submission of the questions of defendant's negligence and plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289\*]

##### 2. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, an inexperienced servant, was directed to assist in unloading timbers from a car by means of a hoist, and his arm was crushed by the engineer negligently drawing a timber against the drum of the hoist when he had been directed to lower the timber onto a truck, after it had once come to rest to enable plaintiff to adjust the truck so as to balance the timber, plaintiff did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288\*]

##### 3. MASTER AND SERVANT (§ 181\*)—INJURIES TO SERVANT—FELLOW SERVANTS—“SUPERINTENDENCE OR CONTROL”—“SAME GRADE OF SERVICE.”

Comp. Laws 1907, § 1343, provides that all persons who are engaged in the service of the same employer, and in the same grade

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of service, and working together at the same time and place and to a common purpose, neither being intrusted with any superintendence or control over his fellow employes, are fellow servants; otherwise not. *Held* that, since the term "superintendence or control" covers every question of authority, the term "same grade of service" does not relate to superintendence or control or refer to the power of one servant to direct or control the actions of another, but refers, instead, to the particular kind of work or duty which the different servants of a common master are regularly engaged in doing; and hence, where a mucker in a mine was called to assist in removing certain timbers from cars by means of a hoisting engine, he was not a fellow servant of the engineer by whose negligence he was subsequently injured.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 360, 369, 370; Dec. Dig. § 181.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6322, 6791-6792.]

#### 4. MASTER AND SERVANT (§ 179\*) — FELLOW SERVANT RULE—MODIFICATION.

The Legislature has power to modify the fellow servant rule or to abolish it altogether.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Martino Vota against the Ohio Copper Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Weber & Olson, of Salt Lake City, for appellant. King & Nibley, of Salt Lake City, for respondent.

FRICK, C. J. Appellant brought this action to recover damages for an injury to his arm which he alleges was caused through the negligence of respondent. In his complaint he, in substance, alleged that on the 1st day of February, 1910, he was employed by respondent as a mucker in its mine in Bingham Canyon, Utah; that on that day he was ordered, with five others, to go to the surface of the mine and unload some timbers from a flat car which was to be done by means of a hoisting engine in charge of an engineer and cables; that, in obedience to the order aforesaid, he, with his fellow workmen, went to the place where said timbers were to be unloaded by hoisting them to a higher level with said hoisting engine on an incline, and when hoisted were to be loaded one or two at a time on certain trucks and taken to a storage place; that while appellant was proceeding to place one of said timbers on one of said trucks, and "was performing said work according to instructions given him by the said engineer, and while the plaintiff (appellant) was using due care for his own safety and was ignorant of any danger, the defendant (respondent) through its said engineer in charge of said work carelessly and negligently operating said engine drew said timber so being handled by the said plaintiff up to a revolv-

ing wheel around which the cable connected with said engine was drawn, instead of lowering the timber upon the truck as should have been done and thereby carelessly and negligently drew the right arm of the plaintiff into said revolving wheel, breaking and crushing the same between the elbow and the wrist, etc., to appellant's damage, etc. Respondent in its answer denied negligence on its part, and as affirmative defenses pleaded contributory negligence and assumption of risk.

[1] Appellant testified on his own behalf, and his testimony, so far as material here, is to the effect that on the morning of the accident he was detailed with others to go to a certain place to help unload a car load of timber; that he had been in the employ of respondent only a short time, and up to that time had performed the duties of a mucker in the mine, and had not helped to unload timbers; that the timbers to be unloaded were on a railroad car and were to be hoisted up an incline which was about 15 or 20 feet in length, and the incline was about 10 feet higher at its upper end than the top of the car on which the timbers were; that the timbers were about a foot square and about 10 feet in length, some a little longer than others; that the timbers were hoisted by means of the hoisting engine, and a cable at the end of which were hooks which were fastened into the end of the timber, and, when so fastened, the man on the car who fastened the hooks would give a signal to the engineer in charge of the hoisting engine to hoist up the timber; that, when such a signal was given, the engineer would slowly pull up the timbers on the incline aforesaid and in doing so the cable would pass around a sheave wheel, which was about six or seven feet higher than the floor on which appellant was standing, and the timbers would be drawn up to within a foot of said wheel, sometimes a few inches more than a foot from the wheel, and sometimes a few inches nearer than a foot of the wheel; that, when the timbers were drawn up near said wheel as aforesaid, it was the duty of appellant to shove or place a truck about three feet in length and of sufficient strength under the timber, placing the same as near the center of it as possible in order to balance the same on said truck; that, when the truck was placed in proper position, appellant would inform the engineer, who was near and in plain sight of him, to lower the timber, and while it was being lowered appellant with his hand or arm would steady or guide the same so as to place it properly on the truck, and when the timber was in proper position on the truck the hooks and cable would be detached from the timber, and the truck with the timber would be pushed along by two or three oth-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ers of the gang of men who were employed with appellant to unload said timbers to the place where the timbers were being stored by respondent; that while these men were unloading one truck appellant and the engineer would haul up on the incline and load another truck in the manner we have just detailed. Appellant further testified that at the time he was hurt about six timbers or loads had been hauled up the incline, and that they all were hauled up with the front end of the timber higher than any part of it, and all were hauled up within a foot or so from the sheave wheel; that, when he was hurt, he was placing the truck under the timber, and in doing so had his arm on or around the timber, at which time the engineer, instead of lowering the timber onto the truck, raised the same, and caught appellant's arm between the timber and the wheel, and broke one of the bones in his arm. Appellant very frankly testified that he knew that, if the timber should be raised up against the wheel, he would be hurt; that everything was open, and any one could see what the effect would be in case his arm should remain on the timber if the timber was drawn up against the wheel. He said, however, that on that morning none of the timbers had been drawn up to the wheel and the nearest the timbers were drawn up to it was from eight to sixteen inches. One other witness testified on behalf of appellant, but his testimony did not materially differ from that given by appellant.

Upon substantially the foregoing evidence appellant rested. Respondent then moved for a nonsuit, which was denied. After this five witnesses on behalf of respondent testified, giving their version of the accident and the circumstances surrounding and leading up to it. After respondent had introduced its evidence, it requested the court to direct the jury to return a verdict in its favor upon substantially the grounds following: (1) Because the evidence, without conflict, shows that the respondent was not guilty of any negligence; (2) because the evidence shows without conflict that the injury complained of by appellant was received by him as the result of his own carelessness, negligence, and imprudence; (3) because the evidence shows without conflict or dispute that, if appellant was injured through the negligence of another, such negligence was that of a fellow servant; and (4) because the contradicted evidence is to the effect that the injury was received as the result of risks and hazards which the appellant had voluntarily assumed. The court granted the request, and directed the jury to return a verdict for respondent which they did, and judgment was duly entered thereon.

Appellant presents the record on appeal, and now insists that the court erred in directing a verdict, and in entering judgment

as aforesaid. We remark that the case was submitted without argument at the May, 1912, term of this court, and an opinion affirming the judgment upon the ground that the appellant was guilty of contributory negligence as matter of law was handed down in July following. Appellant's counsel, in due time, filed a petition for a rehearing, in which they vigorously contended that we had erred in holding that under the evidence appellant was guilty of contributory negligence as matter of law. Upon the question of contributory negligence, in the former opinion, we said: "While appellant testified that he was told to steady the timber with his arm or hand, there is absolutely no reason shown why he was required to place his hand or arm upon the timber so as to bring it in contact with the wheel in case the timber should be drawn up close to the wheel." After again carefully reviewing plaintiff's evidence, we were of the opinion that the foregoing conclusion ought to be modified, and we therefore granted a rehearing. The cause was therefore placed on the calendar for the October, 1912, term of this court, and at that term was orally argued and resubmitted. After again carefully scrutinizing the evidence, and upon further reflection, we think the evidence is open to the construction that the engineer in charge of the engine and in handling it while pulling up the timbers in question had in fact stopped the timber at the usual place, and that the appellant had placed and adjusted the truck under it, and while in the act of steadying the timber with his arm over the top of it in the expectation that it would be lowered onto the truck the engineer, instead of lowering the timber as he was directed to do by appellant, somewhat suddenly and without warning raised the timber contrary to what appellant had a right to expect, and in doing so caught appellant's arm between the timber and the sheave wheel. In view of the foregoing, and in view of appellant's lack of experience in doing the work, we are of the opinion that there was some substantial evidence relative to appellant's contributory negligence which ought to have been submitted to the jury. Under such circumstances, we should not determine the question of contributory negligence as one of law, but the case should be submitted to the jury upon the whole evidence as one of fact. Our former ruling is therefore reversed, and for the reasons stated we now hold that the question of appellant's contributory negligence ought to have been submitted to the jury.

In view of our present holding, it becomes necessary now to pass upon the other grounds upon which a directed verdict was asked and granted to respondent. Respondent's contention that the evidence is conclusive that it was not guilty of negligence as matter of law cannot be sustained. If we were called on to make findings upon the whole evidence, it might well be that we should upon that

question find in favor of respondent as matter of fact, but, in view of the request for a directed verdict which was granted, all that can be considered is appellant's evidence, and that must be taken as true. In view of the foregoing, the question of respondent's negligence should also have been submitted to the jury.

[2] The contention that the injury was the result of a risk or hazard which the appellant had "voluntarily assumed" is not tenable. That question, like the one of respondent's negligence, is a question of fact for the jury. If the jury should find that the respondent was negligent, it necessarily follows that the appellant, under the evidence in this case, did not assume the risk or hazard which arose out of its negligence. The further claim that appellant's injury, if it was not the result of his own negligence, was, nevertheless, the result of the negligence of a fellow servant, and that it should be so declared as matter of law, must be denied.

[3] The evidence is such that under our statute (Comp. Laws 1907, § 1343) the jury could have found either that the engineer was intrusted with superintendence or control over the appellant, or they could have found the contrary. If this had been the only element in issue respecting the question of fellow servant, it should have been submitted to the jury, with directions that, if they found that the engineer had superintendence or control over appellant while he was engaged in doing the work in question, they should find that they were not fellow servants, and, if they found that the engineer had not, then they should find accordingly. *Shepherd v. Railroad Co.*, 126 Pac. 602. Whether the engineer had superintendence or control over the appellant was, however, not the only element to be found in determining the question of whether they were fellow servants under section 1343, *supra*. To constitute the engineer and appellant fellow servants within the purview of said section, they had to be employed by a common master, and while so employed be engaged "in the same grade of service," and, further, be "working together at the same time and place and to a common purpose," and neither "being intrusted by such employer with any superintendence or control" over the other. We thus have three affirmative elements and one negative, all of which must unite in order to constitute the employes of a common master fellow servants under our statute. In this case the engineer and the appellant were employed by a common master. They worked together at the same time and place and to a common purpose at the time of the accident. The question as to whether the engineer had control over or could direct appellant in the discharge of his duties we have seen must, under the evidence, be determined as a question of fact. The other element, namely, whether they were engaged in the

same grade of service or not, must be determined as a question of law. What is meant by the phrase "the same grade of service"? In *Shepherd v. Railroad Co.*, *supra*, the trial court, in an instruction, defined the phrase as follows: "The term 'same grade of service' does not mean whether they earn the same amount of wages, or whether they are doing exactly similar work; but it means whether they are on the same level so far as exercising authority over each other is concerned." (Italics ours.) We refused to approve the definition in that case, and upon further reflection still refuse to do so. It is manifest that our statute, in using the phrase "same grade of service," does not mean what is said it means in that portion of the quotation which we have italicized. The statute, as a separate and distinct element, expressly provides that when servants do not stand upon an equality with regard to the exercise of authority—that is, if one has superintendence or control over the other—they are not fellow servants, although they may be employed in the same grade of service. The phrase "superintendence or control" covers every possible question of authority, and hence "grade of service" cannot refer to authority. The term "same grade of service," therefore, could not have been intended to refer to the power of one servant to direct or control the actions of another, but it must have been intended to refer to the particular kind of work or duty that the different servants of a common master are regularly engaged in doing—the work which they usually and habitually do in earning their wages. For example, all trainmen who are regularly engaged in operating the trains of a railroad company may be said to be engaged in the same grade of service, although those who belong to different crews may not be working together at the same time and place within the purview of the statute. Again, some of the trainmen may have superintendence or control over others. So may it be said of all those servants who are directly and habitually engaged in mining ore or coal. It cannot be said however, that a station agent or telegraph operator of a railroad company is engaged in the same grade of service with the trainmen or the sectionmen, although at a particular point of time they may all be working together at the same time and place and to a common purpose. Where, therefore, as under the provisions of our statute, servants are divided into grades of service, the statute does not mean that such a division refers to the question of authority among the servants, since that question or element is expressly provided for in another portion of the statute, and constitutes a separate and distinct element in determining whether particular servants sustain the relation of fellow servants or not. Under the undisputed facts in this case, appellant's regular and usual employment was that of a mucker in

respondent's mine. He was temporarily transferred from the mine to assist in unloading timbers from railroad cars. The engineer in charge of the engine which was used to hoist the timbers was engaged in operating the engine. The two were, therefore, not, before they came together in unloading the timbers, engaged in the same grade of service within the meaning of our statute, although they were at the time of the accident working together at the same time and place and to a common purpose.

It may be said that in one or two of the Texas cases there are some expressions from which it might be implied that the court intended to adopt the definition of the phrase "same grade of service" that we have italicized. The servants referred to in the Texas cases were, however, actually and habitually engaged in the same grade of service as that term is herein defined, so that the question here presented was not involved, and hence what the court said was not controlling in the case. If that definition should be adopted, then that part of the section which expressly excepts those servants who have authority or control over other fellow servants from the relationship must be ignored. It is our duty to give effect to every word or phrase contained in the statute, and, if a particular element is covered by what is said in one part of the statute, other parts must nevertheless be given effect if it can be done, although such other parts might, under some circumstances, be construed differently. In the statute in question, therefore, while the phrase "same grade of service" under some circumstances might be said to refer to the question of authority or control by one servant over another, yet this may not be done under the statute in question, because the question of authority or control is covered by an express provision contained in the same section. The expression, "same grade of service," therefore, must be given effect, and this can only be done by giving it the meaning we have given it. Nor can there be any legal objection to doing so. It is manifest that the Legislature by adopting the statute intended to modify the common-law rule applicable to fellow servants.

[4] The Legislature had the power to do this, or to abrogate the rule altogether. The lawmaking power having acted in a matter entirely within its power the courts have no choice save to enforce the law as promulgated. No doubt the Legislature intended that only those who habitually and usually are engaged in the same grade of work should come within the relationship. This seems to be reasonable, since all those it may be assumed are familiar with the character of the work and the usual dangers and risks incident thereto. The relationship was not intended to apply to one who, like appellant, for merely a temporary purpose, was trans-

ferred from his regular and usual employment to another. While no hard and fast rule can be laid down which will control in every case, yet it is reasonably clear that in this case the engineer and appellant were not engaged in the same grade of service. Moreover, if that term were restricted to the particular point of time when the accident occurs, then the phrase "working together at the same time and place and to a common purpose" would practically be nullified. From what has been said, therefore, appellant and the engineer were not fellow servants, and the court should have so declared as a matter of law. The case, under the evidence, with proper instructions, should therefore have been submitted to the jury upon the propositions, namely, the negligence of the respondent, the contributory negligence of the appellant, and whether he had voluntarily assumed the risk or hazard in view of all the evidence in the case.

For the reasons aforesaid, our former judgment is reversed, vacated, and set aside. This opinion is hereby substituted for the former one, and is hereby declared to be the controlling opinion in the case, and will be published as the only opinion in the case. The judgment of the district court is reversed, and the cause is remanded to that court, with directions to grant the appellant a new trial, and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs on appeal.

McCARTY and STRAUP, JJ., concur.

#### IN RE PICKARD'S ESTATE.

##### Appeal of VALLERY.

(Supreme Court of Utah. Dec. 30, 1912.)

#### 1. WILLS (§ 759\*)—ADVANCEMENTS—STATUTORY PROVISIONS.

Comp. Laws 1907, § 2801, in the chapter relating to interpretation of wills, provides that advancements or gifts are not adoptions of general legacies unless such intention is expressed by the testator in writing. Sections 2841, 2842, in the chapter relating to succession, provide the manner of adjusting advancements upon distribution. Section 2843 provides that all gifts and grants are made as advancements if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement or acknowledged as such by the child or other successor or heir. The testatrix, who had given or loaned an amount to her son, gave the residue of her estate to her son and daughter equally, except so far as sums had been or should be set off against the interest which either would be entitled to. *Held*, that it was immaterial whether the chapter on succession applied in case of a will, and whether it was necessary for the testatrix to designate the advancement as such in some writing other than the will itself, since the testatrix, regardless of the statute, had a right to provide that the daughter's share should be greater than that of the son by the amount of the gift or loan.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. § 759.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—23

## 2. WILLS (§ 488\*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

A will, providing for equal distribution of the estate between a son and daughter, except so far as sums had been or should be set off against the interest which either would be entitled to under the provisions of the will, indicated an intention that some sort of set-off should be made, and because of its ambiguity, and for the purpose of aiding the court in ascertaining the intention of the testatrix, justified parol evidence that the testatrix had borrowed and advanced a sum to the son under an agreement that he should repay it, or, if he failed to do so, that it would be regarded as a part of his interest in the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.\*]

## 3. WILLS (§ 487\*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

Where a testatrix provided for an equal distribution between a son and daughter, except so far as sums had been or should be set off against the interest which either would be entitled to under the will, and there was evidence that she had borrowed money and given it to her son under an agreement that he should repay it, or, if not repaid, that it would be a part of his interest in the estate, the evidence showed that the intention of the testatrix was that this amount so given to the son, it not having been repaid, was to be taken out of his share or interest in the division of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.\*]

## 4. WILLS (§ 759\*)—ADVANCEMENTS—ADJUSTMENT.

A testatrix provided for an equal division of the estate between a son and daughter, except so far as sums had been or should be set off against their interests. There was testimony that the testatrix borrowed money and gave it to the son under an agreement that he should repay it, or, if not repaid, that it should constitute a part of his interest in the estate. He testified that he received it, not as a gift, but to be repaid, but that there was no agreement that it should be taken out of his share of the estate. *Held*, that it was immaterial whether it was advanced to him as a gift or to be repaid, since in either case an amount equal thereto should be first given to the daughter before an equal division of the residue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. § 759.\*]

## 5. APPEAL AND ERROR (§ 854\*)—BURDEN OF SHOWING ERROR.

On appeal from a final order settling an executrix' account and refusing distribution, where there might have been reasons for refusing the distribution, and the trial court's reason did not appear, the court would not search the record to ascertain whether a distribution should be ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Petition by Martha E. Vallery for the settlement and allowance of her final account as executrix of Eliza Emily Pickard, deceased. From the final order, the executrix appeals. Reversed and remanded in part, with directions, and affirmed in part.

Howat & Macmillan, of Salt Lake City, for appellant. M. M. Warner and Smith & McBroom, all of Salt Lake City, for appellee.

STRAUP, J. The testatrix, Eliza Emily Pickard, by her will executed in May, 1903, so far as here material, bequeathed and devised her property: (1) To the payment of debts and funeral expenses; (2) to her invalid husband, William L. Pickard, Senior, a sum sufficient to support him as long as he lived and remained single, not to exceed \$30 per month; and (3) "all the residue of my property, real, personal and mixed, wherever situate, I give and bequeath and devise to my trustee hereinafter named, or in case of her death or refusal or inability to act, to such person as may be duly appointed in her place as trustee, to have and to hold in trust for the benefit of my said daughter (Martha E. Vallery) and of my son, William L. Pickard, Junior, equally, except so far as sums have been or shall be set off against the interests which either would be entitled to under the provisions of this will, respectively, in case such sums had remained a part of the assets of the estate; the shares of my said daughter and son to be determined as of the date of my decease." Her daughter was by the will appointed the executrix and trustee without bonds, and as such was given power to control, manage, partition, and sell the property in accordance with and subject to the trusts as in the will expressed. A petition was filed by the executrix for settlement and allowance of her final account, and for distribution. The account was allowed. There is no controversy over that. In the petition she alleged that she, W. L. Pickard, Sr., and W. L. Pickard, Jr., were the only heirs and legatees. She further alleged that in August, 1903, before the will was made, the testatrix "advanced out of the funds of her estate, for the use and benefit of W. L. Pickard, Jr., the sum of \$2,750," \$2,500 of which she for such purpose had borrowed upon her note secured by mortgage on her realty, and that \$250 was paid by her as interest on the loan; and that "it was understood" between Pickard, Jr., and the testatrix that such sum so paid by her to him was paid "out of her estate by way of an advancement"; and it was alleged "that such sum should be so considered at the distribution." She therefore prayed that, in the making of the distribution, there be deducted from or set off against Pickard, Jr.'s, interest in and to "the residue of the property" the sum of \$2,750. Pickard, Jr., answered, denying the allegations of the petition in such particular. That constituted the triable issue of this litigation.

At the trial the petitioner and Pickard, Sr., in support of the allegations of the petition, and over the objection of Pickard, Jr., testified that the testatrix at Pickard, Jr.'s, request, and for his use and benefit to engage in the automobile business, paid to him the sum of \$2,500, which she for that purpose had borrowed and secured by mortgage on

her realty, upon the understanding that he was to repay it; "that, if he couldn't pay it, it would have to go as a part of his interest in her estate"; that he failed in his adventure, and paid only a part of the interest, and wholly failed to pay any part of the principal; and that the testatrix herself paid the principal and the unpaid interest, amounting in all to the sum of \$2,750. They further testified that, after the death of the testatrix, Pickard, Jr., admitted to them that he owed that amount to the estate. Pickard, Jr., himself testified that while he received the \$2,500 from the testatrix at his request, and for his use and benefit, as testified to by his sister and his father, and that he received it under circumstances not of a gift but of repayment, he nevertheless denied that he received it under an agreement or understanding of any kind that it was to be taken out of his share of his mother's estate if he failed to repay it.

The court, at the conclusion of the evidence, over petitioner's objection struck the testimony on the theory that under the statute such an agreement, to be binding, must be evidenced by a writing made at the time of the payment. The evidence not disclosing any such writing, the court thereupon ruled that such money was not paid as an "advancement" or "ademption," and hence should not be set off against or ademed from the interest which was by the will awarded to Pickard, Jr., construed by the court to be in equal proportion with the petitioner in and to "the residue of the property" mentioned in the will. From such ruling and the final order of the court refusing distribution as prayed, the petitioner, the executrix, has prosecuted this appeal.

The sections of the statute referred to are: Section 2801, C. L. 1907, under the chapter relating to "interpretation of wills," that "advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing"; section 2841, under the chapter relating to "succession," that "any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child or other lineal descendant towards his share of the estate of the decedent"; section 2842, under the same chapter, that, "if the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement, and, if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent"; and section 2843, also under the

same chapter relating to succession, that "all gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child, or other successor or heir."

It is asserted by the appellant, and denied by the respondent, that section 2801, relating to "wills," alone is applicable to the case, and that none of the other three sections relating to "succession," defined by the statute to be the taking of "property of one who dies without disposing of it by will," is applicable; and that, in accordance with section 2801, the intention of the testatrix as to "an advancement" to the respondent or an "ademption" of his legacy is "expressed by the testator in writing" in the will itself. On the contrary, the respondent claims (1) that no such intention is evidenced by the will itself; and (2) when all of the provisions of the statute referred to are considered, such an intention of an advancement or ademption must be evidenced by some writing dehors the will, and must be expressed in the gift or grant when made, or otherwise in writing, charged by the testatrix, or so acknowledged by the respondent, when made.

[1] We find it unnecessary to consider these divergent views, for we think the determination of the question in hand is dependent upon the interpretation and construction to be given the will itself with respect to what was in fact devised and bequeathed to the two contestants, the daughter and son. To determine that, so far as concerns this controversy, we must look to the third clause of the will. As between these two contestants, it was the right and power of the testatrix to will the whole of such "residue" of her property to the one or to the other, or in equal or other proportions, as she saw fit. Had the testatrix recited in her will that she had theretofore given or paid to her son the sum of \$2,750, and for that reason she by her will bequeathed and devised to him out of the residue of such property that much less than she devised and bequeathed out of it to her daughter, certainly it could not be said that the will could not be given such effect because the testatrix had not, when such money was paid to her son, evidenced such payment by some writing as an advancement, or that the son himself had not then so acknowledged it in writing. So, had she the right and power without any such recitals, and without setting forth reasons therefor, to give to her daughter out of the residue of such property any amount greater or less than was given to her son.

[2] We therefore look to the will to see what she did in such particular. The respondent asserts that by the will the two contestants were given equal proportions without qualifications of any kind in and to the residue of such property. The appellant



asserts the contrary. We think, on the face of the will, the contention of the respondent cannot prevail, for it is clear that the testatrix, by the language used by her, "except so far as sums have been or shall be set off against the interest which either would be entitled to under the provisions of this will," etc., intended some sort of set-off against the respective interests of such legatees. If it be assumed that by such language she meant and intended the sum or sums of money paid by her to one and not to the other, or the excess that the one had received over the other, then was parol evidence admissible to show the amount or amounts thereof. If on the other hand it be assumed that such language is ambiguous and the intention of the testatrix in such particular uncertain when the whole of the will is looked to, then, again, was parol evidence of pertinent facts and circumstances admissible to aid the court in ascertaining and determining the real or actual intention of the testatrix as evidenced by the language so used by her. And it would seem that on the latter, and not the former, theory was such parol evidence admissible.

[3] We think, with the aid of such evidence as was adduced, the intention of the testatrix, by the language so employed by her, is reasonably certain; and that by such language, so aided by the clear and manifest weight of the evidence, it was her intention that sums which had been paid, or other interests given, to either contestant by the testatrix, were to be regarded, if not repaid, as a set-off against, or otherwise to be taken from or out of, their share or interest in an equal division of the "residue of the property" mentioned in the will. Hence we are of the opinion that the trial court erred in striking the evidence. So, too, does it follow that the court erred in the ruling that the contestants were entitled to an equal proportion of the residue of such property. The ruling ought to have been that a sum of \$2,750, or its equivalent—the amount which was paid to the respondent—should, out of the residue of such property, first be given to the daughter, the petitioner, and the balance of the residue of such property equally divided between the two contestants.

[4] And, so far as concerns the respondent in this controversy, it matters not whether such moneys were paid to him under the circumstances as testified to by his sister and father; that, in the event of his failure to repay it, it was to be taken out of his interest in his mother's estate, or whether it was paid as claimed by him under circumstances not of a gift, but of repayment. For, as between him and his sister, the only persons whose interests are here in controversy as to the residue of such property, it matters not to him whether he pay the sum of \$2,750 into the estate, and then the residue of such

property augmented by such sum be equally divided between him and his sister, or whether she out of the residue of the property be first given \$2,750, or its equivalent, and the balance of such residue then equally divided between them.

The judgment of the court below, therefore, defining the respective rights of the contestants, is reversed, and the cause remanded, with directions to define and adjudge the interest of each as indicated.

[5] There is a further question: The court, after defining the respective interests of the contestants as shown, nevertheless refused to make a distribution. This is also complained of. It is not made to appear upon what ground such refusal was based, nor has counsel pointed out or advised us for what reason the court erred in such particular. All that we are told in such regard is that no one objected to a distribution. Until the contrary is shown, we may assume that the court had good reason for then refusing distribution. It may have been based upon the ground that the interests of the two contestants were subject to the allowances and provisions of the will for the support of Pickard, Sr., or subject to or controlled by other trust provisions of the will, or that the estate had not been fully administered. And until some error of the court in such particular is pointed out, we do not feel called upon to search the record to ascertain whether we should now direct, or refuse to direct, a distribution.

So, as to the first question, the judgment is reversed; as to the second, it is affirmed. The taxable costs of the appeal are divided between the contestants, each to pay one-half thereof. Such is the order.

FRICK, C. J., and McCARTY, J., concur.

#### CHILD v. GILLIS CONST. CO.

(Supreme Court of Utah. Dec. 31, 1912.)

#### 1. PRINCIPAL AND AGENT (§ 189\*)—UNDISCLOSED AGENCY—ACTION BY PRINCIPAL—COMPLAINT.

Allegations, in an action on a written contract, that defendant entered upon plaintiff's land and removed gravel therefrom under the express agreement to pay for it at a certain rate, were sufficient to admit proof of the express agreement and that it was made with the plaintiff's agent for her benefit, though she was not mentioned.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. § 189.\*]

#### 2. PLEADING (§ 407\*)—DEFECT—WAIVER.

Where a complaint stated a cause of action and was sufficient to admit evidence of a written agreement without formal allegation thereof, the defect therein, if any, was waived by failure to object by special demurrer, being in the nature of a defective statement rather than the omission of a material averment of fact.†

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1360; Dec. Dig. § 407.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
†State v. District Court, 114 Pac. 142.

### 3. PRINCIPAL AND AGENT (§ 143\*)—UNDISCLOSED AGENCY—RIGHT OF ACTION BY PRINCIPAL.

A contract, although in writing, if not under seal, when made in the name of the person signing it, may be sued upon by the one in whose behalf it was made.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502-512; Dec. Dig. § 143.\*]

### 4. EVIDENCE (§ 459\*)—PAROL EVIDENCE—UNDISCLOSED PRINCIPAL.

Parol evidence is admissible to show that the person who made and signed a written contract was acting as the agent of the undisclosed principal by whom action thereon is brought; such evidence being explanatory of, and not contradictory to, the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

### 5. PRINCIPAL AND AGENT (§ 143\*)—RIGHTS OF UNDISCLOSED PRINCIPAL—EQUITIES OR DEFENSES OF THIRD PERSON AGAINST AGENT.

Where an undisclosed principal may sue in his own name upon a contract made in the name of his agent, the other party thereto may set up any counterclaim or defense he may have against the agent, arising out of the contract, and which existed before he had notice that the contract was made for an undisclosed principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502-512; Dec. Dig. § 143.\*]

### 6. APPEAL AND ERROR (§ 1062\*)—REVIEW—HARMLESS ERROR—SUBMISSION OF ISSUES.

Any error in not submitting to the jury the question whether a written contract was the contract of the one by whom it was made or of his undisclosed principal, in an action where there was no dispute upon the question of agency and where defendant was protected against any claim of the agent, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by Mary E. Child against the Gillis Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dey, Hoppaugh & Fabian, of Salt Lake City, for appellant. Agee & McCracken, of Ogden, for respondent.

FRICK, C. J. Respondent, after making the necessary formal allegations of ownership and corporate capacity and giving a description of the land in question, for a first cause of action alleged as follows: "That on certain portions of said land there existed beds of gravel suitable for use in making concrete and which were overlaid with soil and other material. On or about the 15th day of September, 1910, the defendant was desirous of obtaining large quantities of said gravel and entered upon said land and took and removed large quantities of said gravel from said land upon the express agreement that it would pay for said gravel at the rate of \$50 per acre for all lands worked or mined over and would replace all the soil and material which might be removed from the sur-

face of said land in order to obtain said gravel during the process of mining and removing said gravel. That in pursuance of said agreement the defendant, between the 15th day of September, 1910, and the 1st day of December, 1910, mined and worked over 2.66 acres of said land and removed therefrom great quantities of gravel, and, in order to enable it, to remove said gravel, removed from the surface of said land and placed in great piles or mounds large quantities of soil and other material, and neglects and refuses to pay for the gravel so taken from said land except the sum of \$50, though often requested so to do, and also neglects and refuses to replace said soil and other material, or any part thereof. Plaintiff alleges that it is reasonably worth and will cost the sum of \$314.20 to replace the said soil and other materials so removed from the surface of said land and which said defendant promised and agreed to replace, and that said defendant refuses to replace the same, or any part thereof, to the damage of the plaintiff in the sum of \$314.20, and that there was on the 1st day of December, 1910, due and unpaid from the defendant to the plaintiff for gravel so taken from said land, the sum of \$83, no part of which has ever been paid." She set forth two additional causes of action in the complaint; but there is no controversy with respect to them, and hence we shall not refer to them farther. Appellant, in its answer to the first cause of action, in effect denied respondent's ownership of the land and gravel beds, denied that it agreed to pay respondent for gravel the sum of \$50, or any other sum, per acre, and in effect denied the allegations contained in that portion of the complaint we have quoted. Many of the denials were, no doubt, based upon the fact that the agreement alleged in the complaint was made, as we shall see, in the name of one person for the use and benefit of an undisclosed person. A trial to a jury resulted in a verdict in favor of respondent on the first cause of action for the sum of \$219.75 and for \$3.40 interest. The court entered judgment for the amount aforesaid, and the appellant asks us to reverse said judgment for the reasons hereinafter stated.

At the trial respondent, to sustain the allegations of her complaint, offered in evidence the written agreement hereinafter set forth, which, it was conceded by the parties, was signed by respondent's husband and by appellant's agent, both of whom were duly authorized to sign the same. Before offering the writing in evidence, counsel for respondent called her husband as a witness, and in referring to the transaction evidenced by said writing her counsel propounded to the witness the following question: "In these negotiations were you acting for yourself or for somebody else?" To this question counsel for appellant interposed the following ob-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jection: "I object to that as irrelevant, immaterial, and incompetent. The complaint alleges an express contract. There is no allegation that it was made by Mr. Child or by any one acting for the plaintiff in the case." The court overruled the objection, and the witness answered that in making the contract he was representing his wife, the title to the property from which the gravel was to be taken being in her, which was a matter of record. The writing was then offered in evidence, and appellant's counsel objected to its admission upon the further ground that upon the face of the writing it purported to have been made on behalf of "H. H. Child, the husband, and no one else, and that it was not alleged in the complaint that the agreement was made in the name of Mr. Child for the benefit of his wife, the respondent. After the witness had testified that, while the agreement was signed by him and upon its face appears to be his contract, yet, notwithstanding that fact, he acted as the agent of his wife, who was the owner of the real estate upon which the gravel beds were located, the court, over appellant's objection, admitted the writing in evidence. The writing is as follows: "Riverdale, Utah, July 21, 1910. Gillis Construction Co. Salt Lake City, Utah—Gentlemen: To enable you to proceed with your concrete work on the Davis and Weber County Canal, I will allow you to use my land to dump material on not to exceed three rods from canal, and will permit you to use gravel from my land for the sum of \$50.00 per acre, \$5.00 to be paid on acceptance of this offer and \$45.00 to be paid on or before September 1, 1910, stripping for gravel to be put back in a satisfactory state. Yours truly, H. H. Child. Accepted by Gillis Construction Co., by Thomas Owens."

Counsel for appellant contend that the court erred in admitting the writing in evidence for substantially the following reasons: (1) "That the plaintiff (respondent) set forth no theory in her complaint under which she could have a standing on the written contract," and that she could not recover under the allegations of the complaint because she did not allege that she was a party or privy to the contract either directly or through her agent; (2) because the written contract upon its face purported "to be the personal contract of the agent only," and hence "should not have been admitted in evidence as the contract of the plaintiff made through her agent, the complaint not having so alleged"; (3) that, inasmuch as the contract upon its face purported to be the personal contract of Mr. Child for his own behalf, therefore the court erred in permitting respondent to show by parol that her husband acted as her agent.

[1, 2] With respect to the first ground of objection, we are clearly of the opinion that, in view that the complaint was not assailed by special demurrer, appellant cannot now complain. The allegations, in our judgment,

were sufficient to admit proof of the "express agreement" referred to in the complaint. In a well-considered case (*Chandler v. Coe*, 54 N. H. page 568), in referring to a similar question, it is said: "We see no serious objection, in an action upon an express contract, against declaring that the agent promised, or that the principal promised, without mentioning the name of the agent; nor, where the contract is in writing in the name of the agent, against declaring that he made it, or that the principal made it by the name of the agent." The legal effect of the allegation of the complaint in the case at bar is that appellant expressly agreed to pay respondent for the gravel, and the proof was to the effect that the agreement or promise was made to her husband for her benefit. Such proof is permissible, especially where there is no direct attack upon the pleading upon the ground of defective statement. Moreover, it is not made to appear that appellant was in any way prejudiced or misled by reason of the fact that the allegations of the complaint were not more specific with respect to the making of the agreement. It perhaps would have been better, and would have been more perfect pleading, if respondent had alleged that the contract was made in the name of her husband for her benefit. The complaint, however, stated a cause of action, and the allegations are sufficient to admit evidence of the agreement without such formal allegations, and hence the defect in the complaint, if there was any, was in the nature of a defective statement rather than an omission of an essential averment of fact. *State v. District Court*, 114 Pac. 143. Under such circumstances, the objection, not having been taken by special demurrer, must, in this jurisdiction, be deemed as waived.

[3, 4] Nor is the second ground assigned tenable. Whatever in early times may have been the law, it is now well settled by the overwhelming weight of authority that a contract, although in writing, if not under seal, when made in the name of the person signing it, may, nevertheless, be sued on by another in whose behalf it was in fact made, and, further, that it may be shown by parol that the person who made and signed the contract was acting as the agent of the person who brings the action and who remained undisclosed at the making of the agreement. The rule generally prevailing is very clearly stated in 31 Cyc. 1600, in the following words: "The rule that an undisclosed principal may maintain an action on a contract made by his agent in his name alone, on proof that in making the contract the agent was acting for the principal, is not varied by the fact that such contract was in writing. There are, however, exceptions to the rule. In jurisdictions where the distinction between sealed and unsealed instruments is still recognized, a contract under seal made by an agent in his own name cannot be sued upon

by the principal; and in the case of a negotiable instrument, made payable to the agent, the principal cannot maintain an action thereon, unless he obtains the right to sue by indorsement or transfer." In *Mechem on Agency*, § 769, the general rule and the exceptions thereto are clearly stated. See, also, section 772 of the same book. In the case of *Chandler v. Coe*, 54 N. H. 504-577, the question is exhaustively considered and the general rule is defined and the exceptions are clearly stated. At page 569 it is said: "If an undisclosed principal may be sued upon an express contract made by his agent, he may, on the other hand, sue in his own name upon it." See, also, *Wilson v. Groelle*, 83 Wis. 534, 53 N. W. 900; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129; *Crosby v. Watkins*, 12 Cal. 87, 88; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618. If the reader desires to pursue the subject, he may do so by referring to the numerous cases cited by Mr. Mechem and Cyc. at the places indicated above.

The foregoing authorities also settle the proposition that the real transaction may be shown by parol. There are also exceptions to this rule, which are clearly pointed out in the cases. For example, in *Chandler v. Coe*, supra, 54 N. H. at page 571, the rule is briefly stated in words adopted from Mr. Justice Grier, as follows: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein; and, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted by parol, it is well settled that the principal may show that the agent who made the contract was acting for him. This proof does not contradict the writing; it only explains the transaction." See *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36.

[5] Where the law permits the undisclosed principal to maintain an action in his own name upon a contract made in the name of his agent, it also protects the other party to the contract by permitting him to set up any counterclaims or defenses he may have against the agent arising out of the contract and which existed before he obtained notice that the contract was in fact made for the undisclosed principal. The rule does not permit either party to escape any of the obligations assumed, nor to obtain an advantage over the other. The latter question is, however, one relating to the relief that may be granted rather than to the application of the rule. In view that nothing of that kind arises in this case, we need not consider that phase of the matter. The whole question is thoroughly discussed in *Mechem*, supra.

What we have already said meets all of appellant's objections set forth above.

[6] It is next contended that since the contract in question upon its face purported to be the personal contract of Mr. Child, and in view that the court permitted parol evidence

to show that the contract was not what it purported to be, therefore the question of whether it was Mr. Child's contract or not was a question of fact which should have been submitted to the jury to pass on. Assuming, without deciding, that such is the law, yet in this case there was no conflict upon the question of agency, nor is there any reason shown why that question should have been submitted to the jury, or, for that matter, to any one, to pass on. No reason is made to appear, or is even suggested, wherein appellant's rights were in any way or to any extent affected by the assumption indulged by the trial court that the contract was in fact made for the benefit of respondent instead of her husband. Appellant, under all the authorities, is protected as against any claim that Mr. Child may prefer against it under the contract. That question being put at rest, there is absolutely nothing shown how the fact whether Mr. Child was principal or agent could in any way affect appellant's legal rights, and hence the error, if in fact the court committed such by not submitting the question of agency to the jury as requested by appellant, is wholly harmless. To reverse a case for such a reason under such circumstances would amount almost to a travesty.

The next assignment relates to the amount of damages allowed upon the first cause of action. It will be observed that by the terms of the written contract the appellant agreed and could be required to pay only \$50 per acre for every acre or fraction thereof from which gravel was removed, and in addition thereto to pay the cost of replacing the "stripping" removed from the surface in case of failure to replace the same. It is contended that under the instruction of the court the jury was authorized or permitted to charge appellant at the rate of \$50 per acre for 1.31 acres of gravel removed, and further to charge it at the same rate for 1.35 acres of ground covered by the stripping which was removed from the surface to get at the gravel, and in addition to the foregoing to also charge appellant with the full cost of replacing the stripping. It must be conceded that the court's charge with regard to what the jury could allow for gravel and for replacing the stripping is not as clear as it should have been. The contract is plain and unambiguous with respect to the amount appellant should pay for gravel. In addition to that, all it was required to pay was the cost of replacing the stripping, which, in the contract, was equally plain. If therefore it were not clear from the evidence that the jury did not allow double damages, we would be required to reverse the judgment. From the evidence it is, however, clear and unmistakable that the amount of acreage for which the jury could allow for gravel taken was 1.31 acres, amounting to \$65.50 for that item. Under the evidence the amount that could be

allowed for replacing the stripping amounted, according to the evidence of the engineer who made careful computation, to the sum of \$314.20, and the sum of the two is \$379.70. Of this sum \$50 had been paid, leaving a balance of \$329.70 which the jury could have allowed under the evidence without allowing double damages. The amount they did allow was, however, only \$219.75, or \$109.95 less than was justified by the evidence. It is thus clear enough that the jury did not allow respondent double acreage, as is claimed by appellant. Had the jury done so, they could have added the sum of \$66.50 to the \$329.70, which would have made the amount \$396.20, or \$176.45 more than was in fact allowed. It is elementary that all presumptions are in favor of the correctness of the verdict and judgment, and that a judgment cannot be reversed unless it is made to appear that it is based on some prejudicial error. This, in view of the whole record, is not made to appear in this case.

There are one or two other questions argued in the brief, but upon examination we have found them entirely without merit, and hence they need no special consideration.

The judgment is affirmed, with costs to respondent.

McCARTY and STRAUP, JJ., concur.

#### GARDNER'S ESTATE v. GARDNER et al.

(Supreme Court of Utah. Dec. 16, 1912.)

##### DESCENT AND DISTRIBUTION (§ 35\*)—RIGHT TO INHERIT—"OF THE BLOOD."

Comp. Laws 1907, § 2840, provides that kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of the ancestor must be excluded. *Held*, that the phrase "of the blood" includes half blood as well as whole blood; and hence, where a mother died leaving children as the issue of two marriages, and had taken by inheritance property belonging to a deceased son, such property was properly distributed among his half brothers and sisters and their descendants, as well as brothers and sisters of the whole blood.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 102-107; Dec. Dig. § 35.\*]

For other definitions, see Words and Phrases, vol. 1, p. 811.]

Appeal from District Court, Provo County; J. E. Booth, Judge.

Judicial settlement of the estate of Serena Evenson Gardner. From an order distributing the estate Nell L. Gardner and others appeal. Affirmed.

Harvey Cluff, of Provo, and A. Saxey, of Spanish Fork, for appellants. Jacob Evans, of Provo, for respondent.

FRICK, O. J. This is an appeal from a decree of final distribution.

The question of law which arises upon the decree of distribution is substantially as follows: The decedent, Serena Evenson Gardner, died intestate, leaving her surviving the following children, namely, Henry Gardner, Serenus Gardner, Serena Gardner Andrus, and Annie Francis, all of whom were children by her second marriage. The deceased also was the mother of three other children by her first husband, whose name was Evenson, namely: Even Evenson, Erastus Evenson, and Regina Evenson Gardner. Even Evenson died intestate, leaving as his only heir at law his mother, the decedent. Regina Evenson Gardner also died, leaving surviving her the following children as her only heirs at law, to wit, Nell L. Gardner, Margaret Gardner Evans, Brigham E. Gardner, Ida G. Robertson, Anna S. Stanton, Delliha Gardner Hughes, Edna G. Brockbank, and Effie Gardner Barclay, all of whom are grandchildren of the decedent. The decedent, therefore, had three children by her first husband, two of whom are dead, and four by her second husband; all of the latter surviving her. In addition to the foregoing children, she also left surviving her the grandchildren above mentioned. The district court, in making the final distribution of the decedent's estate, distributed to each one of the four children, the issue of the second marriage, one-sixth, to Erastus Evenson, the only surviving child of the first marriage, one-sixth, and the remaining one-sixth in common to the grandchildren as the representatives of their deceased mother, Regina Evenson Gardner. The grandchildren and Erastus Evenson appeal.

It is conceded that under the laws of succession in force in this state the decedent, as the mother of Even Evenson, was his only heir at law, and thus succeeded to all of his estate at his death. It is further conceded that Even Evenson acquired all of his property by purchase. It is also uncontroverted that the decedent left some property or estate in addition to that which she inherited from her son, and that such property was acquired by purchase.

The appellants contend that the court erred in distributing any of the estate to the four children the issue of decedent by her second husband. The contention of appellants' counsel, given in their own language, is as follows:

"(1) When the estate of an intestate came by gift, devise, or descent from an ancestor, the rule that those only who are of the blood of such ancestor can inherit, excludes kindred of the half blood.

"(2) The descendants of the sister of the whole blood to Even Evenson occupy the same situation which their mother did, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are, under the law, preferred to the brothers and sisters of the half blood."

The contention is that the grandchildren of the decedent, as heirs and descendants of the daughter by the first marriage, have preference over the decedent's children by her second husband. It is insisted that such is the conclusion reached by the territorial Supreme Court in *Amy v. Amy*, 12 Utah, 333-336, 42 Pac. 1121, and in the cases there cited. We shall not now stop to analyze the facts in that case. It must suffice to say that the *Amy* Case in no way controls the question involved in the case at bar. Counsel, however, vigorously contend that under the provisions of Comp. Laws 1907, § 2840, their contention must prevail. That section reads as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance."

That section has been in force in this jurisdiction at least since February, 1876. Comp. Laws 1876, p. 276. The section was carried into the compilation of 1888. 2 Comp. Laws 1888, § 2749, p. 125. And from thence into the Revised Statutes of 1898, of which revision it was section 2840, the same number as in the present compilation above referred to. It is true that in *Amy v. Amy*, supra, the court referred to said section, and, in part at least, based its ruling thereon. The court in the *Amy* Case, however, did not construe, nor attempt to construe, the meaning of the phrase "of the blood," as the same occurs in the foregoing section. That phrase, it is generally, if not universally, held, includes the half blood as well as the whole blood. If, in the case at bar, counsel's contention were applied, it is not easy to see how, under our statute of succession, those appellants, who are the grandchildren of the decedent, could inherit any part of the property that she inherited from her son, Even Evenson, who was the ancestor of the mother. As to him, the appellants aforesaid are all of the half blood, and not of the whole blood. True, counsel insist that since these grandchildren are the issue of Even Evenson's sister, who was of the full blood, therefore they take as her representatives, and as such are preferred. There is absolutely nothing in our statute that authorizes such a conclusion, while every rule of construction leads to a contrary result. The cases cited by the court in *Amy v. Amy* directly pass upon and construe that phrase where it occurs in statutes precisely like ours, and in doing so also arrive at a conclusion diametrically opposed to the contention of counsel as stated above.

The following cases are cited and relied on

in support of the conclusion reached in *Amy v. Amy*, supra: *Gardner v. Collins*, 2 Pet. (U. S.) 89, 7 L. Ed. 347; *Cuttler v. Waddingham*, 22 Mo. 264; *Valentine v. Wetherill*, 31 Barb. (N. Y.) 660; *West v. Williams*, 15 Ark. 693; *Wheeler v. Clutterbuck*, 52 N. Y. 70; *White v. White*, 19 Ohio St. 534.

Referring to these in the order in which they are cited we find that in 2 Pet. 58-92 (7 L. Ed. 347), it is said: "The phrase 'of the blood' in the statute includes the half blood. \* \* \* A half brother or sister is of the blood of the intestate; for each of them has some of the blood of a common parent in his or her veins."

In 22 Mo. 206-264 the Supreme Court of that state says: "The words 'of the blood' (in the statute) exclude only those who have none of the blood of the ancestor from whom the estate came."

What is said in the case reported in 31 Barb. 655-661 is merely obiter. The parties in interest in that case were not before the court; hence the court said, "If these parties were before us," the holding would be as follows. Then follows the decision, which, while it sustains the conclusion reached in the *Amy* Case, also directly sustains the decree in the case at bar.

In the next case, 15 Ark. 681-693, the court, after deciding that the phrase "of the blood," as found in a statute in legal effect like our section 2840, supra, covers the half blood as well as the full blood, says: "And this is in exact harmony with the provisions of the statute in excluding the half blood and their descendants from inheritance *only* when *these* are *ancestral* and *they* not of the blood of the transmitting ancestor."

The case in 52 N. Y. 70 again supports the conclusion in the *Amy* Case, but it just as strongly supports the decree entered by the district court in the case at bar.

The last case, namely, in 19 Ohio St. 534, is a case practically "on all fours" with the case at bar, and sustains the decree.

See, also, *Cornett v. Hough*, 136 Ind. 387, 35 N. E. 699, and *Oglesby Coal Co. v. Pasco*, 79 Ill. 166. Numerous other cases could be cited in support of the decree based on statutes like ours, but it is unnecessary to do so. Indeed, under such a statute we have found no decisions to the contrary. We have not referred to the California cases (In re Pearson's Estate, 110 Cal. 524, 42 Pac. 960, and Estate of Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358) because those cases, while based upon a statute of which our section 2840, supra, is a transcript, nevertheless extend the right of inheritance by the half blood far beyond what it is necessary to extend that right in this case. Those cases also extend the right beyond the holding in *Amy v. Amy*, supra. In view of the foregoing, it is unnecessary to determine whether the rule laid down by the California Supreme Court, or the one de-

clared in *Amy v. Amy*, is the correct one. That question can only be authoritatively determined when a case like those passed on by the California Supreme Court arises in this jurisdiction.

We are quite clear that under all the authorities the decree of distribution as entered by the district court is right. There can be no possible doubt that if the decedent had died before Even Evenson, her son by her first husband, no one would have questioned the right of the half brothers and sisters of Even Evenson to inherit his entire estate, and that his nephews and nieces would only take by representation. That being so, it is not easy to perceive how the mere fact that the mother survived the son can change the right of inheritance by her children who are the issue of the second marriage jointly with those who are the issue of her first marriage. They all were her children.

In view of the foregoing conclusions, the other questions relating to the appointment of the administrator and the accounting by him became unimportant, if not quite immaterial. Appellants could gain nothing, even if their contention in that regard were sustained. For that reason we refrain from passing upon the question.

The judgment is affirmed, with costs to respondent.

MCCARTY and STRAUP, JJ., concur.

### QUINN v. UTAH GAS & COKE CO.

(Supreme Court of Utah. Dec. 30, 1912.)

#### 1. NEGLIGENCE (§ 32\*)—DEFECTIVE PREMISES—PLACES OPEN TO PUBLIC.

A gas company maintaining an office to which the public was invited to pay gas bills owed to customers while so engaged only the duty of exercising ordinary care and diligence to provide and maintain a reasonably safe place for ingress and egress, and to exercise the same degree of care to prevent injury to them and to their property while lawfully in its place of business or on its premises; the company not being an insurer of the safety of its customers, nor required to avoid all accidents to them or to their property at its peril.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

#### 2. NEGLIGENCE (§ 121\*)—DEFECTIVE PREMISES—PLACE OF BUSINESS OPEN TO PUBLIC—INJURY TO PROPERTY OF CUSTOMER.

Plaintiff, a customer of defendant gas company, approached the cashier's window to pay her gas bill as one of a line of several customers, and when she reached it placed her bag in ink that had been spilled on the counter, which dripped down onto and ruined her gown. There was no evidence that the ink was negligently spilled. Defendant's cashier thereafter took steps to have it removed. *Held*, that the facts did not raise a presumption of negligence under the rule *res ipsa loquitur*, and were insufficient to show actionable negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Mary Davis Quinn against the Utah Gas & Coke Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to grant a new trial.

Stephens, Smith & Porter, of Salt Lake City, for appellant. Stokes & Bagley, of Salt Lake City, for respondent.

FRICK, C. J. Respondent brought this action to recover damages for injury to her wearing apparel, which she alleged was caused through the negligence of appellant while she was lawfully in its place of business. Respondent, in her complaint, after alleging that she was a customer of appellant, and that she, at the time of the accident and injury to her dress, was in its place of business to pay her gas bill, alleged appellant's negligence as follows: That "at the particular time that the plaintiff called at the office of the defendant company \* \* \* the defendant \* \* \* negligently allowed and suffered to remain upon its counter, near the point where it received money from its patrons, an overturned ink bottle, from which ink had run onto the counter, and was dripping therefrom onto the floor. \* \* \* While plaintiff was lawfully engaged in transacting the business with the defendant company, \* \* \* a part of the contents of said ink bottle dripped from the said counter upon the plaintiff's dress, making large and unsightly blotches upon it." It was also alleged that said dress was of the value of \$100, and that by reason of the ink stains thereon was rendered worthless, and that by reason of the loss of said dress, and for other reasons, she was damaged to the extent of \$256.25, for which she prayed judgment.

The appellant interposed both a general and a special demurrer to the complaint, which were overruled. It is now urged that the complaint does not state a cause of action, in that it is not alleged therein that the appellant knew, or ought to have known, or had notice, that the ink bottle had been overturned, or that ink was dripping from the counter where respondent was required to pay her gas bill. It will be observed that all that is alleged in that regard is that the appellant "negligently allowed and suffered to remain upon its counter," etc., said overturned ink bottle, from which ink was dripping. We think that, in view of the duty that appellant owed respondent as hereinafter stated, the allegation was sufficient to permit her to prove that the ink had been spilled for such a length of time as ought to have apprised appellant of that fact. If such proof had been made, it would then have become a question for the jury to say whether, under all the circumstances, appellant ought to have warned respondent, and thus protect-

ed her against the consequences that might ensue from the dripping ink, and whether the failure to so warn her constituted negligence. True in making such proof it might also have been made to appear that respondent ought to have seen the dripping ink, and should have avoided it. This, however, in no way affects the sufficiency of her allegations. Whether she was also guilty of negligence or not in not avoiding the dripping ink would have been a question of fact for the jury, under all the facts and circumstances. We think the allegations of the complaint were sufficient in substance to permit the respondent to prove a prima facie case upon the question of appellant's negligence, and that was all that she was required to do.

It is also insisted that the court erred in overruling the special demurrer. The terms of that demurrer were so general that we do not feel inclined to review the ruling of the court thereon.

Appellant also insists that the court erred in overruling its motion for a nonsuit, and, further, in refusing its request to direct the jury to return a verdict in its favor for the reason that respondent had failed to prove that appellant was guilty of negligence.

It is only necessary to consider the last assignment. The undisputed facts developed at the trial are substantially as follows: The appellant is engaged in the business of manufacturing and distributing gas to its customers for domestic use; that respondent had been a customer of appellant since June, 1910, and from that time to the time of the acts complained of had frequently called at appellant's place of business to pay her gas bills; that on the 10th day of October, 1910, she went to appellant's place of business for the purpose of paying her gas bill; that on entering appellant's office some customers were already standing in line taking their turns in reaching the cashier's window to pay their gas bills; that respondent also fell in line, so that she might in turn reach the cashier's window, which was an opening in a wire screen or railing through which the customers paid their bills to the cashier; that as the men who preceded respondent were paying their bills, and in approaching the cashier's window, she noticed what appeared to her like a blue pocket handkerchief or blue cloth lying on the shelf or ledge immediately to the left of the opening through which the cashier received the money; that after the men who preceded her had paid their bills, which took but a very short time, she approached the cashier's window to pay her bill, and in doing so laid her hand bag, or what she called her large purse, near to and immediately to the left of the cashier's window, and took from the large purse her small purse, and from the latter she took the money to pay the bill; that in paying the cashier she received back some change from him and placed the same into her small

purse, which she replaced in the large one. We now give the remainder of her testimony in her own language, as the same is given in the printed abstract, which is as follows: "When I took it up and looked at my gloves, they were all ink. I laid the purse right within the course of the ink, where the ink was running. I didn't see that there was any ink running at the time I laid my purse down. I don't say that there was no ink running. I said I didn't notice any ink. I didn't see the bottle at the time I laid the purse down. I suppose the bottle was under it [the cloth]. I am not positive I saw the bottle, although I think I did. \* \* \* When I stepped up to the desk, I didn't see any ink running off. I didn't look. If anything had been running off there after I had looked at the cloth, running over the edge and dripping on the floor, I would have seen it, if it had been running down. I didn't even look down; always looked up. I don't know whether it was running before these men got out of the way. I know it was running off when it splashed my dress. Mr. Netzel was at a table to the right. He stepped forward and called my attention that there was ink running off the desk. \* \* \* Before Mr. Netzel called my attention to it, the ink had run off the counter, splashed on the floor, and splashed on my gown. About half of one side of my purse was covered with ink. I did not see any ink running off before. If there had been any, I might have noticed it. \* \* \* When I looked on the floor, I could see there was a stream of ink that had splashed down in front of the desk, and also on the floor. The ink had ruined my dress." The foregoing is substantially all of the evidence produced by respondent.

Appellant called the cashier, and he in substance said that he remembered the occurrence; that he did not overturn the ink bottle, but as soon as he discovered that the ink was dripping down from the shelf or ledge near the cashier's window he called upon a clerk to wipe it up. The clerk referred to immediately responded, and he testified that he placed some blotters on the dripping ink and called the janitor of the building to come and wipe up the ink that had dripped on the floor; that respondent's dress had already been soiled with the ink when the cashier directed his attention to the ink dripping on the floor.

Respondent's counsel first contended that the clerk's attention was called to the dripping ink before respondent's dress had been soiled; but on the hearing of the case, when their attention was specifically directed to the witness' testimony, they frankly conceded that his testimony was to the effect stated above.

[1, 2] Is the foregoing testimony sufficient to support a finding of negligence on the part of appellant? Counsel for respondent very frankly conceded at the hearing that,



unless the evidence, when considered in its entirety, justified a finding of negligence on the part of appellant, their client cannot recover in this action. We think the evidence is clearly insufficient to support a finding of negligence. What legal duty did appellant owe respondent as one of its customers? It was its duty to exercise ordinary care and diligence to provide and maintain a reasonably safe place for ingress and egress to and from its place of business for its customers, and to exercise the same degree of care and diligence to prevent injury to them and to their property while they were lawfully in its place of business or on its premises. Appellant, however, was not an insurer of the safety of its customers; nor was it required to avoid all accidents, either to them or to their property, at its peril. The respondent, therefore, was required to show that appellant in some way had omitted to exercise that degree of care and diligence for her safety stated above, and that by reason of such want of care her dress was injured as alleged. The law in this regard is well stated in a case similar in principle to the one at bar by Mr. Justice Morton, who, in *Toland v. Paine Furniture Co.*, 175 Mass. 476, 56 N. E. 608, said: "The plaintiff was bound to show by a fair preponderance of the evidence that the accident was due to negligence on the part of defendant. She was herself unable to tell what caused it." In the case at bar there is not the slightest evidence with respect to who overturned the ink bottle, or how or when it was overturned. There is, in truth, no evidence of just where the offending bottle was placed just before or at the time it was overturned. In view of the evidence, how could the appellant guard against an accident such as the overturning of an ink bottle or ink well in use by the defendant's servants?

Counsel for respondent contend that negligence may be inferred in this case in view of the duty that the law imposes on appellant, but negligence must be deduced from facts. From what fact or facts, as they appear in this case, is it to be inferred? The doctrine is elementary that in cases where the maxim of *res ipsa loquitur* does not apply negligence may not be presumed or inferred merely because an accident occurred. In this case all that is shown is that a bottle or well containing ink, in some way unknown, was overturned, and that the ink was spilled, and some of it dripped upon respondent's dress and damaged it. At most, therefore, the case falls within the familiar doctrine that "when a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to show neither." *Ewing v. Goode* (C. C.) 78 Fed. 444. Is it not just as reasonable to infer that the ink was accidentally

spilled as to infer that it was negligently done? Indeed, if we consider the evidence in its entirety and apply it most strongly in favor of respondent, yet the inference that the spilling of the ink was accidental is, in our judgment, much stronger than the inference that it was otherwise. Under such circumstances a finding of negligence can only be based upon conjecture. Mere conjecture, however, cannot support a finding of negligence. We are clearly of the opinion that the evidence is such that reasonable men can arrive at but one conclusion, and that is that the spilling of the ink was purely accidental. But if it were assumed that this were not so the proof that appellant could have, by the most exacting care, avoided the injury is wholly lacking.

The following cases are directly in point on the question of whether the evidence is sufficient to support a finding of negligence. *Toland v. Paine Furn. Co.*, 175 Mass. 476, 56 N. E. 608; *Reeves v. Fourteenth St. Store*, 110 App. Div. 735, 96 N. Y. Supp. 448; *Dudley v. Abraham*, 122 App. Div. 480, 107 N. Y. Supp. 97; *De Velin v. Swanson* (R. I.) 72 Atl. 388. The case at bar, in so far as the question of insufficiency of evidence is concerned, is not distinguishable from the case of *Rowbottom v. U. P. Coal Co.*, 117 Pac. 871.

The case of *Dent v. Grimm*, 65 App. Div. 81, 72 N. Y. Supp. 471, cited by respondent, is not in point. That case was one where a customer was injured in passing over an incline, which he was required to do in order to transact the business in hand with the owner. It was contended by the customer that the incline was not maintained in proper condition to pass over. The court very properly ruled that whether the defendant was guilty of negligence in maintaining the incline in the condition in which it was, or whether the plaintiff was guilty of contributory negligence in passing over it, were questions for the jury. The other cases cited by respondent, namely, *Quirk v. Siegel-Cooper Co.*, 43 App. Div. 244, 60 N. Y. Supp. 228, and *Graham v. Bauland Co.*, 97 App. Div. 141, 89 N. Y. Supp. 595, are in principle precisely the same as *Dent v. Grimm*, supra.

From what has been said, it necessarily follows that the court erred in not directing the jury to return a verdict for appellant, as requested by it.

In view of the foregoing, it is unnecessary to pass upon the other assignments of error, since those all relate to appellant's requests to instruct the jury.

The judgment is reversed, and the cause remanded to the district court, with directions to grant a new trial. Appellant to recover costs on appeal.

MCCARTY and STRAUP, JJ., concur.

## VANCE et al. v. HEATH et al.

(Supreme Court of Utah. Dec. 31, 1912.)

## 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—CONTRADICTING CONTRACT.

Where plaintiff entered into a written contract with defendant's tenant to erect a fence, ticket office, and seats, which implied an absolute sale of such improvements, parol evidence that plaintiff and the tenant, before executing the contract, orally agreed that title should remain in plaintiff until paid for was contradictory to the written contract, and hence inadmissible.<sup>1</sup>

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.\*]

## 2. APPEAL AND ERROR (§ 1078\*)—BRIEFS—SPECIFICATION OF ERROR.

An assignment of error, not mentioned in the brief, will be deemed abandoned.<sup>2</sup>

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

## 3. JUDGMENT (§ 650\*)—CONCLUSIVENESS—PENDING ACTION.

Under Comp. Laws 1907, § 3490, providing that an action is pending until final determination on appeal, or until the time to appeal is passed, a judgment is not final before expiration of the time for appeal, and hence is not admissible in evidence to prove a material issue in another case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1162; Dec. Dig. § 650.\*]

## 4. ABATEMENT AND REVIVAL (§ 17\*)—ANOTHER ACTION PENDING—OBJECTION HOW TAKEN.

Under Comp. Laws 1907, § 2962, providing that defendant may demur to a complaint when it appears on the face thereof that there is another action pending, section 2966 providing that, when the objection does not appear upon the face of the complaint, it may be taken by answer, the pendency of another suit between the same parties or their privies, involving the same subject-matter, not appearing on the face of the complaint, to be available as an abatement of the action must be set up by answer.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 123-136; Dec. Dig. § 17.\*]

## 5. EVIDENCE (§ 596\*)—WEIGHT AND SUFFICIENCY—CIVIL ACTION—PREPONDERANCE OF THE EVIDENCE.

In civil actions, one holding the affirmative of an issue, to entitle him to prevail, need only establish it by a preponderance of the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.\*]

Appeal from District Court, Salt Lake County; F. C. Loofbouroow, Judge.

Action by George Vance and another against J. A. Heath and others, with counterclaim by defendants. Judgment for plaintiffs, and defendants appeal. Reversed, with directions to grant a new trial and to per-

mit defendants, by supplementary answer, to plead a judgment in bar.

The facts of this case are as follows: On June 23, 1909, the defendants (hereafter referred to as Heath & Co.), who were in possession of certain real estate under a lease from the owner thereof, entered into a written contract with two Japanese (hereafter referred to as Masuya & Co.) whereby they agreed to and did lease to Masuya & Co. a portion of the premises covered by their (Heath & Co.'s) lease. The contract is as follows: "This contract and agreement made and entered into this 23d day of June, A. D. 1909, by and between Heath Bros., parties of the first part, and Herasalod & Co., parties of the second part, both of Salt Lake City and county, state of Utah, witnesseth: That the parties of the first part does hereby lease unto the parties of the second part, for two nights per week, Monday and Thursday and Halday from date until the 20th day of September, 1909, the east one-third part of lot 14, block 22, plat A, five acre, Big Field survey, for the sum of \$300.00 (three hundred dollars), payable \$25.00 (twenty-five) weekly in advance, the parties of the second part agree to build a board fence around said grounds, also to build bleachers to seat the public, and are responsible for all damages and bills contracted by them. It is still further agreed that the said grounds can be leased or used by either parties on all remaining nights not specified, and that the profits shall be divided equally between both parties. It is hereby agreed and understood, that should the parties of the second part fail to live up to all agreements in this contract, same shall be void, and the grounds, together with all improvements, shall go to the parties of the first part; it is also agreed that should the parties fail to obtain a re-lease for the season of 1910, the parties of the first part agree to purchase all lumber used on the said grounds at 50 per cent. of the cost of new fences and benches." This contract was signed by H. O. Heath and J. F. Heath, as parties of the first part, and by T. Masuya and G. W. Herasalod, as parties of the second part, and was duly witnessed.

A few days after the execution of the foregoing contract, Masuya & Co. entered into a contract with the plaintiffs herein, Vance and Larsen (hereafter referred to as Vance & Co.), whereby it was agreed that Vance & Co. should build a fence, ticket office, and seats for Japanese polo grounds on the premises leased by Masuya & Co. from Heath & Co. This contract, consisting of two writings, is as follows:

"Salt Lake City, June 28, 1909. Contract: It is hereby agreed between G. W. Vance & Co. and T. Masuya & Co. that said G. W. Vance & Co. contracts to build fence, ticket

<sup>1</sup> Groome v. Ogden City, 10 Utah, 54, 37 Pac. 90; McCormick v. Levy, 37 Utah, 134, 106 Pac. 660.

<sup>2</sup> Firman v. Bateman, 2 Utah, 268; Jenkins v. Min. Co., 34 Utah, 513, 68 Pac. 845; France v. Salt Lake & O. Ry. Co., 81 Utah, 302, 88 Pac. 1; Morris v. Salt Lake City, 85 Utah, 474, 101 Pac. 378; Railroad Co. v. Board of Education, 35 Utah, 13, 99 Pac. 263.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

office and seats for Japanese polo grounds, to be built at the Salt Palace as follows: Build a fence 467 feet long and seven feet high, said fence to have two gates ten and five foot, respectively, and fence seven foot high shall be built behind the five foot gate, long enough to prevent seeing into ground when gate is open. Build seats around inside the above named fence as follows: Five rows of seats, each are to be two foot wide, each row to be built 17 inches above the preceding row. Build a ticket office four feet wide, six feet long and seven feet high. Said ticket office to be built outside of above named fence. Also it is agreed that the said G. W. Vance & Co. shall complete above named seats—fence by July 1st, and shall complete and guarantee above named seats against collapse when occupied, by the evening of July 3d. G. W. Vance and Larsen. T. Masuya. G. W. Herasaliad."

"Salt Lake City, June 29, 1909. Agreement: It is hereby agreed between G. W. Vance & Co. and T. Masuya & Co., that said T. Masuya will pay the said G. W. Vance & Co. the sum of \$850.00 for labor, lumber and all other material required in building the Japanese polo grounds, fence, seats, ticket office, etc., at the Salt Palace grounds. The above named amounts to be paid in the following installments: First payment, June 29, \$100.00. Second payment, July 10th, \$100.00. Fourth payment, July 17th, \$100.00. Fifth payment, July 24th, \$100.00. Sixth payment, Aug. 7th, \$100.00. Seventh payment, Aug. 14th, \$100.00. Eighth payment, Aug. 21st, \$100.00. Ninth payment, Aug. 28th, \$50.00. G. W. Vance & Larsen. T. Masuya. G. W. Herasaliad."

Vance & Co. constructed the fence, ticket office, and seats mentioned in the contract in conformity with the specifications therein contained. The value of the lumber furnished and used by Vance & Co. in making the improvements was \$598. Masuya & Co. gave one performance on the polo grounds, and then permanently abandoned the premises and the improvements erected thereon by Vance & Co., and left for parts unknown. Before leaving they paid Vance & Co. \$100 on the contract price of the improvements. No other payments were made. About July 31, 1909, Vance & Co. commenced taking down the improvements and removing the material and lumber of which they were constructed. Heath & Co. immediately commenced an action against Vance & Co. and Masuya & Co. to restrain them from removing or destroying any of the property in controversy. Vance & Co. were served with process, but no service was had on Masuya & Co. The case was therefore prosecuted against Vance & Co. only, who were ultimately enjoined from removing or destroying any of the property mentioned. Vance & Co. had succeeded, before they were enjoined,

in removing from the premises several thousand feet of lumber. On February 3, 1910, Vance & Co. commenced this action against Heath & Co., and in their complaint alleged that Heath & Co. on or about July 31, 1909, converted to their own use about 15,500 feet of lumber belonging to Vance & Co. Heath & Co. answered, denying the ownership of Vance & Co., and alleged that they were the owners of the lumber (property in controversy), and by way of counterclaim alleged that Vance & Co. on the 31st day of July, 1909, unlawfully trespassed upon the premises mentioned and tore down a portion of the improvements thereon to their damage in the sum of \$400. A trial was had to a jury, which resulted in a verdict for plaintiffs in the sum of \$445. To reverse the judgment rendered on the verdict, defendants Heath & Co. have appealed to this court.

E. A. Walton, of Salt Lake City, for appellants. Hurd & Hurd, of Salt Lake City, for respondents.

MCCARTY, J. (after stating the facts as above). [1] Respondents, Vance & Co., were permitted, over timely objections made by Heath & Co.'s counsel, to introduce oral evidence tending to show that respondents, a few days before the execution of the written contract between them and Masuya & Co., which contract is set forth in the foregoing statement of facts, entered into an oral contract with the same parties, Masuya & Co., whereby it was agreed that the title to the property in controversy should remain in the respondents until paid for in full. Respondents seek to defend the rulings of the court in admitting this testimony on the ground that the contract under which the improvements in question were made was partly oral and partly in writing, and that the oral provisions of the contract, to which the parol testimony referred, were not in conflict with the part reduced to writing. Upon the other hand, appellants contend that the writing itself constituted "a perfect and complete contract," the terms of which the oral evidence in question tended to vary and contradict. We think this latter contention is sound. While the writing does not in express terms so provide, it nevertheless imports an absolute sale of the property in question to Masuya & Co. *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514; *Finnigan v. Shaw*, 184 Mass. 112, 68 N. E. 35; *Thomas et al. v. Scutt*, 127 N. Y. 133, 27 N. E. 961.

The parol evidence tended to change the transaction from an absolute to a conditional sale. The admission of this testimony was therefore error. It violated and was in derogation of the well-established and universally recognized rule that a valid written instrument cannot be abridged, enlarged, varied, or contradicted by parol evidence.

Page, in his excellent work on Contracts, section 1189, says: "If parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intention. It merges all prior and contemporaneous negotiations. Accordingly a contract in writing, complete on its face, cannot be contradicted by extrinsic evidence, nor can prior or contemporaneous parol agreements be used to contradict the written contract, so as to substitute for the intention therein expressed, that expressed in such oral agreements." (Italics ours.) And in section 1191 the author says: "In an action on a written contract, complete in itself, the validity of which is conceded, the parties are not permitted to show that their prior or contemporaneous oral agreements were not all reduced to writing, but remain as oral contracts in full force and effect between the parties. This rule applies as well where the intention of the parties is completely embodied in two written contracts instead of one." And again in section 1192 the author says: "Extrinsic evidence is inadmissible to contradict the intention of the parties as expressed in a written contract by showing a prior or contemporaneous oral agreement contrary to the written agreement. Thus extrinsic evidence is inadmissible to show \* \* \* that, under a written contract of sale, title was really reserved by the vendor." The following are a few of the many authorities that illustrate and declare this doctrine: 17 Cyc. 596-598; Cook v. Nat. Bank, 90 Mich. 214, 51 N. W. 206; Engelhorn v. Reitlinger et al., 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; Harrison v. McCormick, 89 Cal. 327, 26 Pac. S30, 23 Am. St. Rep. 469; R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co., 47 Colo. 68, 104 Pac. 389; 19 Ann. Cas. 540; Groome v. Ogden City, 10 Utah, 54, 37 Pac. 90; McCormick v. Levy, 37 Utah, 134, 106 Pac. 660; Barry-Wehmiller Mach. Co. v. Thompson, 83 Ark. 283, 104 S. W. 137; Housekeeper Pub. Co. v. Swift, 97 Fed. 295, 38 C. C. A. 187, citing many cases.

Appellants offered in evidence, as tending to prove title in themselves to the property, the complaint, answer, and decision of the court in the cause hereinbefore referred to, in which the respondents were enjoined from removing or destroying any of the property in controversy. The decision of the court in that cause, which was filed but a few days before it was offered in evidence, recited, among other things, "that neither of said defendants Larsen or Vance (plaintiffs and respondents herein) had any title or right of possession to said property." The judgment was not pleaded in abatement of, nor as a bar to, the action. In fact, no reference whatever was made to it in either the complaint or answer. Objections were made to the admission in evidence of the judgment roll or any part thereof in that cause

on the ground that it had not been pleaded, and on the further ground that the judgment was not final, as the time for appeal had not expired. The court sustained the objections. Appellants then moved the court to permit them to amend their answer by pleading in general terms the judgment. The purpose of the amendment, so they claimed, was to enable them to introduce in evidence the judgment roll to prove title in themselves to the property. The court denied the motion. These rulings are assigned as error.

[2] Appellants have not discussed, or even mentioned, in their brief the assignment of error directed to the order of the court denying their motion to amend, hence it is deemed abandoned (*Firman v. Bateman*, 2 Utah, 268; *Jenkins v. Min. Co.*, 24 Utah, 513, 68 Pac. 845; *France v. S. L. & O. Ry. Co.*, 31 Utah, 302, 88 Pac. 1; *Railroad v. Board of Education*, 35 Utah, 13, 99 Pac. 263; *Morris v. S. L. City*, 35 Utah, 474, 101 Pac. 373), and we shall not consider it.

[3] It is urged, however, that the court erred in refusing to admit in evidence the judgment roll. The ruling of the court excluding the judgment roll was right. The judgment was not pleaded, nor was it, at the time it was offered in evidence, final. The title to the property was the question or thing that was being litigated. It was the issue upon which the entire case hinged and the judgment, had it been admitted, would have been conclusive as to that issue, and would have operated as a bar to the action. Therefore, even though the amendment had been allowed, the judgment, under these circumstances, would not be admissible for the purposes for which it was offered, namely, to show title in appellants to the property in controversy. Under the California statute, from which ours is taken, it has been held that a judgment is not conclusive as to the matters therein adjudicated until it becomes final. *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23. See *Freeman on Judgments*, 328.

Comp. Laws 1907, § 3490, which was copied literally from the California statute (3 Kerr's Cyc. Codes of Cal. 1049), provides that "an action is deemed to be pending from the time of its commencement until its final determination upon an appeal or until the time for appeal has passed, unless the judgment is sooner satisfied." Clearly, under the statute, the action referred to was pending at the time the action at bar was commenced and at the time the judgment roll was offered in evidence.

[4] Comp. Laws 1907, § 2962, so far as material here, provides that "the defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof \* \* \* (3)

that there is another action pending between the same parties for the same cause." Section 2966 provides that, "when any matters enumerated in section 2962 do not appear upon the face of the complaint, the objection may be taken by answer." Under the foregoing provisions of the statute, the pendency of another suit between the same parties or their privies and involving the same subject-matter, when not appearing on the face of the complaint to be available to the party seeking to invoke it as an abatement to the action, must be pleaded in the answer. Note 22 to section 1049, 3 Kerr's Cyc. Codes of Cal., contains the following clear and succinct statement of what we think is the correct rule: "Where time for appeal has not expired, judgment is ineffectual as evidence in plea of former adjudication, and pendency of former action may be pleaded in abatement until judgment becomes final, when supplemental answer averring proper facts in bar of action would be in order, and proceedings in action are admissible in proof of such plea in abatement"—citing *Harris v. Barnhart*, supra. See, also, 1 Ency. Pl. & Pr. 838, and volume 21, same work, 47.

We do not wish to be understood as holding that a judgment in a case which, under our statute, is still pending, under some circumstances, be admissible in evidence to

prove some fact therein adjudicated. Upon that point we express no opinion. What we do hold is that a judgment, before it becomes final, is not admissible in evidence as a bar to the action. Nor is it admissible where, as in this case, it would operate as a bar.

[5] The court, among other things, charged the jury that, "Before the defendants (appellants) can recover on their counterclaim, they must prove, to your satisfaction beyond a reasonable doubt, all the facts upon which they rely for a recovery," etc. Appellants excepted to this instruction and assign the giving of it as error. That the instruction was erroneous and prejudicial is too plain to admit of serious discussion. In civil actions all that is, or that can legally be, required of a party who asserts the affirmative of an issue raised by the pleadings to entitle him to prevail on such issue is that he establish such affirmative allegations by a preponderance of the evidence.

The judgment is reversed, with directions to the lower court to grant a new trial and to permit appellants by supplemental answer to plead the judgment rendered in the former suit as a bar to this action, should they be so advised. Costs of this appeal to be taxed against respondents.

FRICK, C. J., and STRAUP, J., concur.

## CLIFFORD v. PATEROS TRANSFER CO.

(Supreme Court of Washington. Jan. 25, 1913.)

## 1. JUSTICES OF THE PEACE (§ 119\*)—JUDGMENT—OPERATION AND EFFECT.

Rem. & Bal. Code, § 1766, authorizing service by publication of the summons in justice court actions where personal service cannot be had by reason of defendant's absence from the county, does not give the judgment rendered on such service any effect except that of a judgment in rem against property actually levied upon and seized by attachment or other appropriate process before the judgment is rendered, regardless of whether defendant is a resident or nonresident of the state.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 373-376; Dec. Dig. § 119.\*]

## 2. ATTACHMENT (§ 219\*)—COLLECTION OF BALANCE AFTER SALE OF PROPERTY.

Rem. & Bal. Code, § 668, providing that the sheriff, after selling property attached, shall proceed to collect the balance due on the judgment as in other cases, only applies where the judgment is such as may be satisfied by general execution, and not where jurisdiction was obtained only by the attachment and service by publication.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 609-622; Dec. Dig. § 219.\*]

## 3. ATTACHMENT (§ 1\*)—NATURE AND PURPOSE OF REMEDY.

While, in actions where jurisdiction is obtained by personal service within the court's territorial jurisdiction, attachment is a proceeding merely ancillary to the action, where the service is by publication, the proceeding becomes in substance one in rem against the attached property, and all the other proceedings in the action are incidental to the attachment, so far as jurisdiction is concerned.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1-4, 5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 616-620.]

Department 1. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

Action by Ferdinand J. Clifford against the Pateros Transfer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. R. Sargent, of Chelan, and Chas. T. Borg, of Pateros, for appellant. Peter McPherson, of Brewster, for respondent.

**PARKER, J.** This is an action to recover damages which the plaintiff alleges resulted to him from the seizure and sale of certain of his personal property by a constable of Okanogan county under an execution issued at the instance of this defendant upon a void judgment rendered in its favor against the plaintiff in a justice court of that county. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The assignments of error present the single question, Was the judgment rendered in the justice court against respondent, under which appellant caused the seizure and sale of the property of respondent, a valid personal judgment against him authorizing the seizure

and sale of his property in satisfaction thereof, other than his property which was seized by attachment in the action prior to the rendition of the judgment? The facts determinative of this question are not in dispute, and may be briefly stated as follows: In March, 1910, appellant commenced an action against respondent in a justice court of Okanogan county to recover money due for the care and feed of a team of horses. Appellant caused to be issued a writ of attachment in that action upon the ground "that defendant (this plaintiff) has absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him." By authority of this writ, a constable of that county levied upon and seized certain personal property of the respondent, and held the same pending the action. Because of respondent's absence from the county, summons in the action was duly served upon him by publication only. Thereafter, respondent not appearing in the action, judgment was rendered against him as prayed for in the sum of \$95.65 and costs. Thereafter execution was issued upon the judgment in usual form as though the judgment were personal and had been rendered upon personal service of summons. The attached property not being sufficient to satisfy the judgment in full, acting under this execution at the instance of appellant, the constable levied upon and seized other personal property of respondent and sold the same, together with the attached property, to satisfy the judgment. During the pendency of the action in the justice court, and until after the seizure and sale of his property under the execution, respondent was a resident of Okanogan county, but was then absent therefrom in Spokane county.

[1] Counsel for appellant concede the general rule to be that service of summons by publication only, upon a defendant while absent from the territorial jurisdiction of the court from which such summons issues, will not support a personal judgment against such defendant nor subject any of his personal property to the satisfaction of a judgment rendered upon such service, except such property as has been previously levied upon by attachment or other proper process in the action. Counsel rely, however, upon the provisions of our statute, which they insist render a judgment based upon service by publication sufficient authority to levy upon and subject to its satisfaction any property of the defendant which may be found within the territorial jurisdiction of the court, even though the judgment may not be in its broadest sense personal against the defendant. Our attention is called to section 1766, Rem. & Bal. Code, which provides: "In case personal service cannot be had by reason of the absence of the defendant from the county in which action is sought to be commenced, it shall be proper to publish

the summons or notice, with a brief statement of the object and prayer of the claim or complaint, in some weekly newspaper published in the county wherein the action is commenced; or if there is no paper published in such county, then in some newspaper published in the nearest adjoining county, which notice shall be published not less than once a week for three weeks prior to the time fixed for the hearing of the cause, which shall not be less than four weeks from the first publication of said notice. Said notice may be substantially as follows: (Then follows form.) There is no specific language in this provision or elsewhere in our statutes connecting it in any way with the provisions of our statutes relating to attachment, nor indicating the effect of the judgment which may be rendered upon such a service; and, if it were not for the general rule that such a service will not support a personal judgment, there might be some warrant for concluding that this provision expressed a legislative intent that a judgment, based upon such service, should have some force and effect beyond that of a judgment in rem against property attached in the action prior to the rendering thereof.

[2] Our attention is also called to section 668, Rem. & Bal. Code, which provides: "If, after selling all the property attached by him remaining in his hands, and applying the proceeds, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases." It seems plain to us, however, that this provision can have no effect upon the force or effect of the judgment. It is merely a provision prescribing the manner in which the judgment shall be satisfied, and of course, if it is not such a judgment as may be satisfied by general execution, this provision is of no effect.

It will be of aid in arriving at a correct interpretation of section 1766, above quoted, to notice the general rule touching the force and effect of a judgment rendered upon service by publication only, and the reason upon which it rests. Probably the leading decision in this country upon this subject is that rendered by the Supreme Court of the United States in *Pennoy v. Neff*, 95 U. S. 714, at page 726 (24 L. Ed. 565), wherein there was involved the validity of a judgment of a state court of Oregon, rendered upon service by publication, in so far as there was an attempt to subject the property of the defendant to the satisfaction thereof, which was not brought under the control or custody of the court by attachment or other process prior to the rendition of the judgment; the defendant being a nonresident of the state. Justice Field, speaking for the court, said: "If, without personal service, judgments in personam, obtained ex parte against non-residents and absent parties upon mere publication of process, which in the great ma-

jority of cases would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state, where the tribunal sits, cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. The want of authority of the tribunals of a state to adjudicate upon the obligations of nonresidents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act and afterwards applied by its judgment to the satisfaction of demands against its owner, or such demands be first established in a personal action and the property of the nonresident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only in-

cidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none."

In that case the court was dealing only with a judgment against a nonresident of the state, and it is insisted that this distinguishes the problem there involved from that here involved. But the first part of the remarks of Justice Field, above quoted, clearly indicates that the rule would apply equally to any defendant whose absence prevented the usual personal service of summons upon him. Unless there can be recognized some sound distinction in principle between actions against nonresidents and actions against residents, the doctrine of this famous decision would seem to be controlling in respondent's favor here. If under such a judgment and service a nonresident's property, other than that which is attached in the action prior to the rendition of the judgment, cannot be subjected to the satisfaction thereof, it must be because his rights are superior to the rights of a resident, based upon the mere difference in residence of such defendants. We are clearly of the opinion that there is no such distinction in principle, and that the force and effect of a judgment rendered upon such service is not in the least affected by the place of residence of the one against whom it is rendered. It is the difference between personal and substituted service; there being no appearance by the defendant in the action, which renders the judgment personal or in rem. In *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441, this court followed the law as announced in *Pennoyer v. Neff*.

While apparently conceding that the law is as we have indicated, counsel for appellant contend, in substance, that it is the presence, within the territorial jurisdiction of the court, of the property of the defendant that gives the court jurisdiction to reach such property to the satisfaction of the judgment, rather than the seizure of property of the defendant by attachment or other process before the rendering of the judgment. This contention seems also to be effectually answered by the latter part of Justice Field's remarks above quoted. To meet this view of the general rule, counsel insists that section 1766, above quoted, does not limit the effect of the judgment which may be rendered upon service by publication, and argues that such judgment must therefore at least be given force and effect to the extent of reaching all property within the territorial jurisdiction of the court, whether levied upon by at-

tachment prior thereto or not, though the judgment may not, in its broadest sense, be personal so as to be effectual as such beyond the court's territorial jurisdiction in a proper proceeding there instituted to make it so effective. In *Pennoyer v. Neff*, 95 U. S., at page 720, 24 L. Ed. 565, it is said: "The Code of Oregon provides for such service when an action is brought against a nonresident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the nonresident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, 'unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached.'" This latter provision would seem to furnish some ground for contending that jurisdiction over the property depended only upon its presence within the territorial jurisdiction of the court, rather than upon its seizure by attachment prior to judgment, yet the decision in that case was directly to the contrary. Our attention has not been called to any such provision in our statutes, and we know of none; hence it seems to us there is here even less ground for such a contention than there was in that case. It seems to us that appellant's contention upon this question rests entirely upon the provisions of section 1766, which relate only to the authorization of and manner of service of summons by publication. In view of the firmly established rule, as announced in *Pennoyer v. Neff* and followed by this court, we are constrained to hold that it was not the legislative intent by the provisions of section 1766 to give effect to a judgment rendered upon such service, beyond that of a proceeding in rem against such property of the defendant as may be actually levied upon and seized by attachment or other appropriate process prior to the rendering of the judgment in the case. Had our statutes made some special provision to the contrary, it seems probable that there would be here presented a grave constitutional problem. We express no opinion upon that subject.

[3] Some contention is made, rested upon the general rule that an attachment is a proceeding merely ancillary to the action for the purpose of acquiring a lien upon property to secure such judgment as may be eventually rendered therein. While this is true in actions where the jurisdiction is obtained by personal service upon the defendant within the court's territorial jurisdiction, it is also true that the attachment is one of the principal prerequisites to the court acquiring jurisdiction in the action where service is had upon the defendant by publication only. In such case the whole proceeding becomes, in substance, a proceeding in rem against the



property which has been previously attached and thus brought under the control of the court. In such a case, as said by Justice Field in *Pennoyer v. Neff*: "The jurisdiction of the court to inquire into and determine his defendant's obligations at all is only incidental to its jurisdiction over the property." In other words, while the attachment is merely incidental to the main action in cases of personal service upon the defendant, in cases of substituted service all other proceedings in the action are incidental to the attachment, so far as the jurisdiction of the court in the particular case is concerned.

Some contention is made, rested upon the fact that there was an actual seizure by attachment of some of the property of the defendant prior to the rendering of the judgment. We are quite unable to see, however, that such fact renders any aid whatever to the judgment in so far as its effect upon other property is concerned. It is still a judgment in rem against the property previously attached; nothing more.

The judgment is affirmed.

CROW, C. J., and MOUNT, GOSE, and CHADWICK, JJ., concur.

#### CITY OF SEDRO-WOOLLEY v. LEDERLE et al.

(Supreme Court of Washington. Jan. 24, 1913.)

##### 1. EVIDENCE (§ 474\*)—OPINION EVIDENCE—QUALIFICATION OF EXPERTS.

A property owner who occupies his property and is familiar with the purposes for which it may be used and with land values in the community may testify as to its value in condemnation proceedings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

##### 2. EVIDENCE (§ 474\*)—OPINION EVIDENCE—QUALIFICATION OF EXPERTS.

The fact that persons testifying to the value of realty valued it higher than the price procured for other property in that vicinity did not of itself make their evidence incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

##### 3. EMINENT DOMAIN (§ 133\*)—COMPENSATION.

In proceedings to condemn land for street purposes, the character, condition, and uses to which a building on the condemned property might be put were items for the jury's consideration.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 358-361½; Dec. Dig. § 133.\*]

##### 4. EMINENT DOMAIN (§ 220\*)—CONDEMNATION PROCEEDINGS—VIEW.

Rem. & Bal. Code, § 344, permitting a view of the premises in the court's discretion, applies to condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 558, 559; Dec. Dig. § 220.\*]

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by the City of Sedro-Woolley against Joseph Lederle and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. D. Greene and Coleman & Gable, both of Sedro-Woolley, for appellant. Thos. Smith, of Mt. Vernon, for respondents.

MOUNT, J. This action was brought by plaintiff to condemn certain property for street purposes in Sedro-Woolley, a city of the third class, in Skagit county. After an adjudication of public use and necessity, the value of the property taken was tried to the court and a jury. A verdict was returned fixing the value of the several pieces of property sought to be taken, and a judgment was entered in favor of the defendants for the amounts found. The city has appealed. After the appeal was taken, the defendant Joseph Lederle died. Rose L. Willard, the administratrix of his estate and guardian ad litem of the minor defendants, has been substituted as respondent. A large number of assignments of error are made in the brief.

[1] The first 15 of these assignments are to the effect that certain witnesses for the respondents were not qualified to express an opinion of the value of the property. Each one of these witnesses, however, stated that he was acquainted with the particular property and knew its value.

[2] They placed the value at a higher figure than sales of other property in that vicinity had been made for, but that of itself did not make their testimony incompetent. They testified that values had materially appreciated since such sales. In *Port Townsend So. Ry. Co. v. Nolan*, 48 Wash. 382, 93 Pac. 528, we said: "The owner who occupies his property and is familiar with its character and the purposes for which it may be used, and to a greater or less extent with land values in the community, is a competent witness." The testimony of the witnesses complained of was competent under this rule. The fact that they were interested in the property was a circumstance to be considered by the jury as affecting their credibility. It is argued that the highest value placed upon a certain building was \$750 to \$800, and the jury found this building to be worth \$1,000; and it is contended that the jury was therefore prejudiced. We think there was evidence tending to show that the building was worth about \$1,200.

[3] But, if the estimate of the witnesses placed the value at the figure stated, we think this does not necessarily show prejudice, because the character, condition, and uses to which the building might be put were all items which the jury had a right to consider, and, when it was shown that it would cost \$1,285 to replace it, we cannot say that the jury was actuated by prejudice.

[4] It is also argued that it was error to send the jury to view the premises, and that the court erred in instructing the jury upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that question. The statute permits such view within the discretion of the court. Rem. & Bal. Code, § 344. And it has been held that this section applies to condemnation cases. *Bellingham Bay, etc., Ry. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *In re Jackson Street*, 47 Wash. 243, 91 Pac. 970. An instruction complained of was copied from the case of *Seattle & Montana Ry. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864, where it was approved. The other assignments of error do not require further notice.

There was no error in the record, and the judgment is affirmed.

MAIN, ELLIS, FULLERTON, and MORRIS, JJ., concur.

PETERSON et al. v. NICHOLS.

(Supreme Court of Washington. Jan. 24, 1913.)

1. CONTRIBUTION (§ 9\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by part of the makers of a joint and several note given for the purchase price of a stallion, who had been sued by a transferee and paid the judgment, against another maker for contribution, defendant pleaded a guaranty of the stallion and a breach thereof. A deposition offered by defendant tending to show that the transferee had acted only as a collecting agent in prosecuting the suit was excluded. *Held*, that it should have been admitted on the question of whether the transferee was a holder in due course.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 14, 16-22; Dec. Dig. § 9.\*]

2. CONTRIBUTION (§ 9\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In such action defendant should have been permitted to prove the terms of the guaranty and the breach; the burden then devolving upon plaintiffs to show that the transferee was a holder in due course.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 14, 16-22; Dec. Dig. § 9.\*]

3. JUDGMENT (§ 698\*)—CONCLUSIVENESS—PERSONS CONCLUDED.

A judgment against part of the makers of a joint and several note in an action by a transferee is not conclusive in a subsequent action against another maker for contribution that the transferee was a holder in due course.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1222; Dec. Dig. § 698.\*]

4. CONTRIBUTION (§ 1\*)—LIABILITY.

The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by those demanding contribution.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Department 1. Appeal from Superior Court, Lincoln County; F. K. P. Baske, Judge.

Action by P. Peterson and others against J. J. Nichols. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

Martin & Wilson, of Davenport, for appellant.

GOSE, J. Suit for contribution. Verdict and judgment for the plaintiffs. The defendant has appealed.

The complaint alleges that in the month of January, 1907, the respondents, the appellant, and one other person purchased a stallion of one George W. Souers, for which they agreed to pay the sum of \$4,000, evidenced by their two joint and several promissory notes in favor of Souers, drawn for \$2,000 each, and due respectively in one and two years; that they agreed to hold the horse in shares, the appellant agreeing to take two shares of the agreed value of \$1,000; that they defaulted in the payment of the note last maturing after the respondents had paid \$1,061.35 thereon; that suit was commenced thereon by the Bank of Commerce, a corporation; that a default judgment was entered against the respondents Peterson, Shields, Maurer, and Telford Bros. for the balance due, with interest, attorney's fees, and costs; that thereafter the respondents paid the judgment in full; and that the appellant paid his part of the first note, amounting to \$500, but that he has not paid any part of the last note or of the judgment. The appellant for a second affirmative defense alleged that Souers, the vendor and payee in the notes, in order to induce the makers of the notes to purchase the stallion, warranted that the stallion with reasonable care would get in foal 60 per cent. of the mares mated with him for a period of two years; that, if he did not do so, he would replace the stallion with another of the same breed and price, and that the makers need not pay the note last maturing until they were "satisfied that the stallion . . . was as guaranteed;" that Souers further agreed as a part of the sale of the stallion that he would keep him insured for a period of two years from the date of sale, loss, if any, payable to himself; that, in the event the stallion should die within the two years, he would "replace said stallion with another of the same breed and price"; that they took reasonable care of the horse, and that he did not get more than 30 per cent. of the mares in foal that were mated with him; that the stallion died a natural death in the fall of 1908; that Souers was at once notified of his death and requested to replace him conformably to his guaranty, but that he refused so to do.

The appellant testified that he was the manager of the company that purchased the horse, that the horse was guaranteed, and that he died within the two-year period; and then offered to prove the terms and breach of the guaranty. Objections were sustained to the offer unless he could prove (a) that the Bank of Commerce had notice of the infirmity in the note, or (b) that the respondents, at the time they paid the judgment, knew that the consideration for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

note had failed. The appellant then offered to read a deposition in evidence, which tended to show that the Bank of Commerce acted only in the capacity of a collecting agent in the prosecution of the suit. An objection that it was irrelevant and immaterial was sustained.

[1] The court erred in not admitting the deposition in evidence. It had a slight tendency to prove that the Bank of Commerce was not a holder of the note in due course.

[2] The appellant should have been permitted to offer testimony tending to prove the terms of the guaranty and their breach. The burden would have then devolved upon respondents to prove that the Bank of Commerce was a holder in due course. *National Bank v. Drewry*, 127 Pac. 102; *City National Bank v. Mason*, 58 Wash. 492, 108 Pac. 1071; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801.

[3] The bank had no judgment against the appellant. Its judgment against the respondents does not conclude the appellant on the question as to whether the bank was a holder in due course. "The right to contribution arises from the payment of more than one's share of a common liability, and rests upon an implied promise not declared or made an issue in the suit of the creditor against the common debtors." *Hoxie v. Farmers' & Mechanics' Nat. Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637.

[4] The party from whom contribution is demanded must have been under a legal obligation to pay at the time the payment was made by those who demand the contribution. *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Andrews v. Murray*, 33 Barb. (N. Y.) 354; *Turner's Adm'r v. Thom*, 89 Va. 745, 17 S. E. 323. The pleadings are silent as to how the bank got the note. We have not been favored with the respondents' view of the case, as they have not filed a brief. We think, however, that the court erred in the matters mentioned.

The judgment is reversed, with directions to grant a new trial.

CROW, O. J., and CHADWICK, PARKER, and MOUNT, JJ., concur.

#### GANTENBEIN et al. v. CITY OF PASCO et al.

(Supreme Court of Washington. Jan. 23, 1913.)

#### 1. INJUNCTION (§ 7\*)—JURISDICTION—HEARINGS BEFORE CITY COUNCIL.

A court of equity is not without jurisdiction to declare that a city council had no power to enter into a certain contract, which would call for the levy of special assessments, and to issue an injunction, though the statute provides for objections and hearings before the council.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 6; Dec. Dig. § 7.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 231\*)—CONTRACTS—INTEREST OF OFFICER.

Where councilmen were landowners under a reclamation project outside a city, and with other landowners subscribed to a contract between the company and the city, and thereby were allowed six more acre inches of water free, such contract, which was entered into by such council, was void under Rem. & Bal. Code, § 7702, providing that no officer should be interested in any contract which he entered into for a city; the interest of the councilmen being impossible of segregation so as to leave the main contract unimpaired, and it being presumed that such contract was beneficial to such company.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 657-664; Dec. Dig. § 231.\*]

#### 3. CONTRACTS (§ 123\*)—PUBLIC POLICY—JUDICIAL NOTICE.

Where landowners under a reclamation project outside a city, by subscribing to a contract between the company and a city, were allowed six inches of water free, such contract is void as against public policy as being a source of litigation and because the city would have to pay for the six inches of water.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 570-575; Dec. Dig. § 123.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 241\*)—CONTRACTS—LOWEST BIDDER—FRAUD.

A contract by a city cannot be objected to on the ground that it was not let to the lowest bidder, in the absence of a showing of fraud.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 673; Dec. Dig. § 241.\*]

Department 1. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

Suit by H. Gantenbein and others to enjoin the City of Pasco and others from contracting with a water company. Decree for defendants, and plaintiffs appeal. Reversed.

H. B. Noland and Chas. W. Johnson, both of Pasco, for appellants. M. L. Driscoll and P. F. Leonard, both of Pasco, and Danson, Williams & Danson, of Spokane (Geo. D. Lantz, of Spokane, of counsel), for respondents.

CHADWICK, J. The Legislature of 1911 passed two acts (chapter 98 and chapter 111) each designed to aid and empower cities and towns to acquire the benefits of water for irrigation. The city of Pasco, acting by its council, submitted a proposition to acquire a water system under chapter 98; the system and source of supply suggested being the one owned by the Pasco Reclamation Company. This was defeated. The council then undertook to provide a system under the special assessment provision in chapter 111. An ordinance was passed providing for the laying of pipes throughout the several assessment districts created by the ordinance, and a contract with the Pasco Reclamation Company was authorized. It will be necessary to advert in some slight degree to the history of this company. Reference may be had to the case of *Pasco Reclamation Co. v. Cox*, 127 Pac. 107, where

the plan of organization and the purposes of the company are set forth. The testimony in this case shows that the contract of the company to furnish water to irrigate the lands described in the Cox Case, all of which was outside of the city limits of Pasco, had been entered into under the mistaken belief that 18 inches of water per annum were sufficient to raise and mature crops, whereas it has been practically demonstrated, and further, in the opinion of experts, no less than 24 inches of water per annum are necessary. Certain of the councilmen of the city of Pasco owned land under the irrigation project of the reclamation company and had subscribed to the contract considered in the Cox Case. In the negotiations leading up to the contract, and as it seems as an inducement to the city to enter into the contract with the reclamation company, it was proposed that, in the event the city entered into a contract with the company and issued bonds in the sum of \$50,000 and provided for an annual maintenance charge, all to be collected under the special assessment plan, the company would furnish to each of the contracting parties under its ditches outside of the city, provided they signed up a new contract, six inches of water in excess of the amount originally contracted to be delivered, or a total of 24 inches per annum. That part of the reclamation company's contract with the city of Pasco was as follows: "It is further understood and agreed that certain contracts have heretofore been given to divers and sundry persons granting perpetual water rights to be used upon and appurtenant to certain lands therein described, the quantity of water to be supplied thereunder being only eighteen acre inches per season at \$5.00 and not to exceed six inches additional at thirty-five cents (35¢) per inch on each acre of land; and, a part of the consideration accruing to each and all the parties to this contract, and especially to the city of Pasco, is the agreement herein by the Pasco Reclamation Company to furnish to the holders of said last named contracts twenty-four acre inches per acre of land at \$5 per acre, during each irrigation season between April 1st and October 1st, and in order to expedite at the minimum cost the modification of said contracts so as to give the said contract holders the increased quantity of water herein offered to them, it is further stipulated that said contract holders may have and enjoy the benefit of said twenty-four acre inches of water per acre of land per irrigation season aforesaid by signifying their several and respective acceptances hereof in writing duly acknowledged and addressed and delivered to said Pasco Reclamation Company, or by joining in the execution of this agreement on or before the 1st day of September, 1912, the terms of said contracts to remain in force except as to the formation of said new corporation, the transfer of said system

to it, and the quantity of water to be delivered."

The ordinances having been passed and the contract entered into, work was begun, and shortly thereafter this suit was instituted; plaintiff and others alleging the ordinances and contracts to be void for several reasons which will hereafter be noticed, and praying for a restraining order and, upon final hearing, a perpetual injunction. The case was tried out on its merits, and plaintiffs have appealed from an adverse decision. The jurisdiction of this and the lower court is challenged by the respondents. The challenge is based upon the statute providing for objections and hearings before the council, and upon the following cases: *Broad v. Spokane*, 59 Wash. 268, 109 Pac. 1014; *Renard v. Spokane*, 48 Wash. 345, 93 Pac. 517; *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582; *Chandler v. Puyallup*, 127 Pac. 293; and many cases from other jurisdictions.

[1] This court, in common with others, has held that it is competent for the Legislature to create a special tribunal, either directly or indirectly, to hear and determine all questions going to the regularity of proceedings brought under statutes providing for improvements made under the special assessment plan, as well as the amount to be charged against specific property; that the conduct of such board, commission, or committee will not be controlled through the use of extraordinary writs; that we will not in such proceedings question the motives of the officers; and that the party aggrieved must first submit to the judgment of the legislative tribunal and then appeal. There has been much misuse of the word "jurisdiction" in the cases. There is a vast difference between jurisdiction and the exercise of jurisdiction. That the courts have jurisdiction to construe contracts cannot be denied, for it is granted by the Constitution. If any of the cases cited seem to hold otherwise, they should not be followed, for in the same cases the jurisdiction of the courts is not only admitted but asserted when it is said that the aggrieved party may come to the courts by appeal; the only question decided being that the Legislature may define remedies and direct procedure. The jurisdiction of the court is not defeated or taken away; it is only postponed. "A court of equity has no rightful authority to interfere with the enactment of municipal ordinances merely because it may question the expediency of the measures, the motives inducing their enactment, or the regularity of the proceedings by which they are being enacted; it is limited solely to an inquiry into the question of power." *Broad v. Spokane*, 59 Wash. 268, 109 Pac. 1014. "It undoubtedly is a general rule that the courts will not interfere with an action of a body exercising legislative functions to correct mere errors or mistakes in its proceedings, or to prevent the passage

of a law or ordinance duly pending before a legislative body, because it may conceive that the law or ordinance will be ineffective if passed; but clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen. The courts have exercised this power since the foundation of the government, and it is not necessary now to enter into a discussion of the principles that are thought to justify it." *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

[2] This brings us, then, to the only question open in this case, whether the city of Pasco, acting through its present council, had power to contract as it did. One or two propositions are advanced by appellant, which it is asserted so tinged the whole proceeding with constructive fraud as to void the contract, and that for this reason a court of equity has unquestioned jurisdiction. We shall not go into a discussion of the difference between, and the effect of, the two statutes first referred to in this opinion, or whether the proceeding might be sustained by reference to section 7685, Rem. & Bal. Code, but will assume that the proceedings and contract are good under one or the other of them, unless they are avoided (1) by the interest of the councilmen or some of them who voted upon the ordinance, and (2) by any law or rule of public policy which would prohibit a city from entering into a contract which is beneficial to those residing outside of the corporate limits of the city, when made at the cost of its property owners. To support the first proposition, appellant relies upon the case of *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204, while respondent relies on *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735. These cases were all decided upon the same statute. Section 7702, Rem. & Bal. Code: "No officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof, in their official capacity, or in doing any work or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed, shall not be paid by the treasurer. Any willful violation of the provisions of this section shall be a ground for removal from office, and shall be deemed a misdemeanor, and punished as such."

It is said by respondent that the *Hodgins* Case distinguishes the *Northport* Case, and that under it the city councilmen, when considering the assessment roll, can correct any irregularity and reject all illegal claims. In

the *Hodgins* Case an independent contractor had completed an improvement. He had purchased supplies of various persons, firms, and corporations. Among others, he dealt with the mayor of the town of Snohomish. It was contended that this leaven of illegality voided the whole contract, and that no recovery could be had on any part of it. We held that the contract intended by the statute was the one entered into by the officers; that, when he was denied a recovery, the purpose of the law was accomplished; and that the main contract would be void only pro tanto. In other words, where the nonrecoverable items could be eliminated, the assessment roll would be made up and become a lien for the aggregate of the remaining items. We suggested that possibly the *Northport* Case had failed to note the difference between valid and invalid claims, and said the statute is aimed at the officer and intended to prevent a recovery on his part, or to the extent of his interest, when the claim is asserted by another. But we did not intend to question the broad rule of statutory and general policy as defined in the *Northport* Case. The legality of the principal contract—the one with the city—could in no way be affected by a subsequent dealing with an officer, or a contract on his part to furnish supplies or material; and, if this were a case where a recovery was sought by an officer or one claiming under him, we would not hesitate to apply the rule of the *Hodgins* Case. But it is not. There is no money demand that can be eliminated. The interest of the affected councilmen lies in the collateral benefit to be received by them, which, because of its nature, is impossible of segregation so as to leave the main contract unimpaired. This case, therefore, necessarily falls within that part of the statute which says, "No officer of such city shall be interested directly or indirectly in any contract with such city." Here three of the councilmen, whose votes were necessary, had a direct personal interest—an interest not general to all the citizens within the corporate limits of the city or the assessment districts. If it were so, no legal objection could be urged.

If we assume that the contract was an advantage to the reclamation company (and the law will so presume), the offending councilmen were, to the extent of their interest, sharers in that advantage. They found relief from a contract to furnish an inadequate supply of water, and substituted therefor one that was designed to make their desert land fruitful and remunerative. While the statute does not in terms say that a contract so passed is void, the courts have with one accord held that they are so, for it is within the positive meaning of the words, "no officer shall be interested" in any contract. If we hold that, notwithstanding the prohibition of the statute, such contracts can

be sustained, then we have written the statute out of the books. There can be no middle ground where the prohibition of the statute enters into the letting of the original contract. *State ex rel. Gladwin v. Cheney*, 67 Wash. 151, 121 Pac. 48, was a case of this kind. As said in the *Northport Case*: "Long experience has taught lawmakers and courts the innumerable and insidious evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." The question whether the contract is beneficial cannot enter into the inquiry. When it is made to appear that the councilmen were placed in such a position that their interest might conflict with their fiduciary relation, the inquiry is closed and the bar of the statute falls. Our conclusion is supported by the following texts and the cases cited therein: 2 Dillon, *Municipal Corp.* (5th Ed.) 772; *McQuillan, Munic. Corp.* 513; 28 Cyc. 650.

[3] Coming now to the second proposition, we are of the opinion that the contract is contrary to public policy. We must presume that the original contract between the outside subscribers and the reclamation company was fair; that the company was furnishing all the water that it could supply with fair profit to itself at the price charged; and that it would not have relaxed its contract but for the contract with the city. Now, if the company in consideration of the collateral contract, the cost of which is met by the citizens within the corporate limits of Pasco, voluntarily furnishes this additional water without cost to the landowners, and the testimony shows that there are about 15,000 acres, the presumption follows that the residents within the proposed assessment districts are paying for this extra allowance for the benefit of those outside of the limits of the city. Water in the arid areas of this state is a thing of value; and, in the absence of a positive showing, courts will judicially notice the fact that irrigation companies will not make it a subject of gift. We cannot hold that any public improvement within a city can be allied with separate contract rights outside the municipality. To do so would put the hazard of litigation upon the city or upon the owners of property therein, and this is a consequence which the law would not tolerate.

Counsel for the city of Pasco make the point that the case should not turn upon a construction of the contract, because to do so would be to ignore section 31 of the Public Service Commission Law, which is designed to protect all patrons of public service corporation from impositions in the way

of excessive or unreasonable rates; that, if it should now or hereafter appear that the contract is burdensome to the citizen, the Commission and the courts can force a reasonable rate irrespective of statute or contract. Granting, without admitting, that this might be true if the only question before us was one of rates, the principle cannot enter or control this case, for, the contract being made in contravention of the statute and of public policy, it matters not whether it is beneficial or subject to correction at the end of an inquiry or a lawsuit. In law, it is not merely an irregular contract, but it is as if no contract had ever been entered into.

[4] As a part of the plan, the city let contracts for piping systems to be laid through the assessment districts. These contracts are attacked because not let to the lowest bidder. There is no showing of fraud, and therefore the contract cannot be objected to on the ground urged. The case falls within the rule announced in *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231.

The case is reversed and remanded, with instructions to enter a decree in accordance with this opinion.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

# HANSON v. SHIPLEY.

(Supreme Court of Washington. Jan. 23, 1913.)

## MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—DUTY TO WARN.

Where an experienced employé engaged in gathering logs under the directions of a vice principal, chains double trees to one end of a log which, unknown to either of them, is yet attached to the ground by its roots, and where, while he is walking away, the vice principal starts the team without special warning, and the log, because attached, swings and strikes the employé, the master is not liable for the consequent injuries; a master not being required to warn his servant of dangers which the servant knows or has the same opportunity to know as the master, since such dangers are assumed by the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Martin Hanson against Silas M. Shipley. From judgment of nonsuit and dismissal, plaintiff appeals. Affirmed.

Martin J. Lund, of Seattle, for appellant. Will H. Morris and E. P. Dole, both of Seattle, for respondent.

MOUNT, J. Action for personal injuries. The trial court granted defendant's motion for a nonsuit at the close of the plaintiff's evidence, and dismissed the action. The plaintiff has appealed.

It appears that the plaintiff was in the employ of the defendant, who was clearing some land upon Vashon Island. At the time of the injury to the plaintiff on July 5, 1910, he and two other employes were engaged in gathering up and burning sticks and logs upon the clearing. A team of horses was used in dragging logs too heavy to be carried to the fire. One of these employes, Matson by name, was driving the team. In the course of the work, they came to a cedar log, about 5 to 8 inches in diameter and about 15 or 16 feet long, the top end of which had been cut off. This tree or log had some time previously been blown down, and was for that reason called a "windfall." The roots on the under side of the base were still in the ground, and plaintiff fastened the chain which was used for that purpose near the top of the log. Mr. Matson, who was driving the team, directed him to fasten the chain around the log near the base. Plaintiff did so and put the chain around the log about three feet from the base, and hooked the other end of the chain to the double trees to which the team was attached, and started to walk away between the team and the top of the log. As the plaintiff was walking away, the driver started the team without further warning. The roots held the base of the log and caused the top to swing toward the team. As it did so, it struck the plaintiff and broke his leg.

It is claimed by the appellant that Mr. Matson was a vice principal, and that he started the team without warning the plaintiff or giving him time to escape, and thereby put in motion a dangerous agency; that his duty to warn the plaintiff was imperative under the rule in *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *McLeod v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 65 Wash. 62, 117 Pac. 749; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369, and similar cases. But it is apparent that the starting of the team in this case was not putting into action a dangerous agency, as in those cases. It may well be questioned if Mr. Matson was a vice principal. But, conceding for the purposes of this case that he was such vice principal, the rule is well settled that the master is not required to warn his servant of dangers which the servant knows, or has the same opportunity to know, as the master. *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615; *Props v. Wash. Pulley & Mfg. Co.*, 61 Wash. 8, 111 Pac. 888. It is not shown in this case that the master knew that the base of the log was attached to the ground by its roots, or that he should have known that fact. The plaintiff was an experienced man in this sort of work. He was within three feet of the base of the log. He put the chain around the log at that point, and had a better op-

portunity to see and know the condition of the log than the master, for it was not shown that the master was near that end of the log. It is plain, therefore, that there was no duty upon the master to warn the plaintiff that the top end of the log might swing around toward the team, for neither the master nor the servant knew, or even supposed, that the log was fast in the ground at its base. The plaintiff says the team was started with a jerk. The only evidence of that fact is that the log swung around quickly, but that was caused, of course, by one end of the log being fixed while the other was free. The pull, being near the fixed end, necessarily threw the other end around quickly. It is plain upon the whole record that the master was not negligent. The accident occurred solely because one end of the log was fixed to the ground, and neither the master nor the servant knew that fact. It was one of the risks of the business; one which the servant assumed when he undertook to walk away within the sweep of the log. The log was a small one, five to eight inches in diameter. There was no necessity for the plaintiff to walk in front of it where he knew it was to be dragged. He might readily have stood behind it, where there was no possibility of danger.

The court, therefore, properly directed a nonsuit. The judgment is affirmed.

CROW, C. J., and PARKER, GOSE, and CHADWICK, JJ., concur.

#### SHEERAN v. FORD GRAIN CO.

(Supreme Court of Washington. Jan. 22, 1913.)

##### 1. PRINCIPAL AND AGENT (§ 84\*)—VIOLATION OF INSTRUCTIONS—OFFSET OF DAMAGES BY PRINCIPAL.

Where an agent purchased wheat at a price above that authorized, even when certain charges were included, and reported to his principal that he purchased at the price authorized, and made no mention of the charges or of the excess to be paid, and he violated his instructions to buy upon warehouse receipts so that the principal could direct the time of shipment, and also bought some wheat of a kind which he was not authorized to buy, and where the principal subsequently secured a compromise with the seller whereby the agent's contracts were canceled and new contracts executed for the purchase of the same wheat at a price less than the agent's contracts but greater than the agent was authorized to pay, and greater than the actual value in the case of the unauthorized purchase, the principal was entitled to offset his damages against the agent's commission.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 221; Dec. Dig. § 84.\*]

##### 2. PRINCIPAL AND AGENT (§ 84\*)—RIGHT TO COMMISSION—UNAUTHORIZED PURCHASES.

Where an agent authorized to buy wheat of a certain kind purchased wheat of another kind without instructions, he was not entitled to any commission upon such purchase.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 221; Dec. Dig. § 84.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Action by M. J. Sheeran against the Ford Grain Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Tolman & King, of Spokane, for appellant. Canton & Hensel, for respondent.

GOSE, J. This is an action to recover an alleged stipulated commission on wheat, purchased by the plaintiff for the defendant during the grain season of 1911. The court found that in August, 1911, the plaintiff purchased 7,000 bushels of wheat for the defendant at an agreed compensation of \$15, and that on the 9th day of September following he purchased 53,500 bushels of wheat for it at an agreed commission of one cent a bushel, and a judgment was entered in favor of the plaintiff for \$550. The defendant prosecutes an appeal. There is no controversy over the August purchase.

[1] The respondent testified that he was instructed to purchase No. 1 blue stem wheat upon warehouse receipts at 75 cents per bushel net; that he purchased 28,500 bushels of that kind and grade of wheat from the Waterville Union Grain Company at 78 cents a bushel f. o. b.; that he obligated the appellant to purchase from it 22,000 bushels of the same kind of wheat at the same price, and that he purchased from it 3,000 bushels of Jones' Fife at 75 cents per bushel f. o. b. He further testified that he reported the purchases by telephone "at 75 cents net to the farmer," that he did not report that he had paid 78 cents f. o. b., and that he purchased the 3,000 bushels of Jones' Fife without instructions and upon his own responsibility. The testimony shows that the warehouse charges on wheat at the place of purchase were 1½ cents a bushel up to January 1st, and that the remaining 1½ cents was the "working margin" of the warehouse company in excess of its handling charges. A few days after the respondent had made these purchases, he went to the Spokane office of the appellant, submitted his written confirmations, and the appellant told him that it would not accept the wheat at those prices, and directed him to return and get the price reduced to the level of his authorization. The respondent was unsuccessful in his efforts to get a reduction. He made the purchases on the 9th day of September, and on the 15th the appellant, through one of its salaried employes, secured a cancellation of the contracts and accepted the wheat at 77 cents f. o. b. for the blue stem and 74 cents f. o. b. for the Fife.

The respondent neither purchased the wheat nor reported it according to his instructions. He first advised by telephone that he could get the wheat at 75 cents per bushel net to the farmer, and later report-

ed that he had so purchased it. That spirit of candor and fairness which the law exacts of an agent imperatively required him to observe his instructions, and report the truth. His method of avoidance was both unfair and misleading. He seeks to justify his conduct by saying that the appellant knew the warehouse charges. This may be true, but the straight charges were only 1½ cents a bushel. It was the respondent's duty to report the facts as they actually were, and this he did not do. He was instructed to buy upon warehouse receipts so that the appellant could direct the time of shipment. He purchased of the warehouseman without a warehouse receipt, thus giving the seller the control of the shipping. Moreover, he paid 75 cents a bushel for the Fife, a price, according to the testimony, 3 cents in excess of its value.

The appellant treats the cancellation of the old contracts and the execution of the new contracts as a purchase. But we regard it more in the nature of an adjustment or a compromise. The appellant is entitled to offset its damage as against the respondent's commission. Its damages are, expense of settlement, \$50, 2 cents a bushel on 3,000 bushels of Fife, \$60, ½ cent a bushel on 50,500 bushels of blue stem, \$252.50, making in the aggregate \$362.50. The respondent is entitled to a commission of 1 cent a bushel on 50,500 bushels of blue stem, or \$505, commission on the August purchase, \$15; total, \$520, less the appellant's damages, \$362.50, leaving a balance of \$157.50.

[2] He bought the Fife wheat on his own responsibility, and is not entitled to any commission.

The case will be remanded, with directions to enter a judgment for the respondent for \$157.50. The appellant will recover costs of the appeal.

CROW, C. J., and CHADWICK, PARKER, and MOUNT, JJ., concur.

ARMSTRONG v. SPOKANE & I. E. RY. CO. (Supreme Court of Washington. Jan. 22, 1913.)

1. STREET RAILROADS (§ 98\*)—CONTRIBUTORY NEGLIGENCE—MATTER OF LAW.

A person waiting to take a car at a dark corner on a street which was being paved, who knew the custom was to run cars both ways on the completed side of the street, and that the car which she was waiting for, and was looking at, was standing at a temporary switch waiting for another car to pass, and who was standing so close to the track that such other car, which her companion heard several blocks away, struck her, was guilty of contributory negligence, as a matter of law, warranting a dismissal.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-209; Dec. Dig. § 98.\*]

2. NEGLIGENCE (§ 136\*) — QUESTIONS FOR COURT—"CONTRIBUTORY NEGLIGENCE."

Where the undisputed facts lead the court honestly and conscientiously to a firm conviction



tion that but one determination can be reached in the minds of reasonable men, the duty rests upon it to find as to the question of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

### 3. NEW TRIAL (§ 108\*)—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT.

Where an action for negligent personal injuries was properly dismissed at the trial for plaintiff's contributory negligence, newly discovered evidence tending only to show negligence of defendant was no ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.\*]

Department 2. Appeal from Superior Court, Spokane County; H. L. Kennan, Judge.

Action by Ada Belle Armstrong against the Spokane & Inland Empire Railway Company. From an order dismissing the action, the plaintiff appeals. Affirmed.

Morrill, Chester & Skuse, of Spokane, for appellant. Graves, Kizer & Graves, of Spokane, for respondent.

MORRIS, J. Appellant began this action to recover for injuries claimed to have been sustained through the negligence of the respondent. Upon the trial, the appellant having put in her evidence, the court upon motion of respondent sustained a challenge to the sufficiency of the evidence, and, deciding, as a matter of law, that verdict should be in respondent's favor, discharged the jury and dismissed the action.

The appeal urges error in this ruling. The record does not disclose the reasons for the court's ruling, as it contains neither the argument of respective counsel upon the motion nor any comment made by the court, but is confined in this particular to the formal entry of judgment, with recitals as above indicated. We assume, however, from the briefs that the point considered was contributory negligence, and our discussion will be confined to that question. The appellant, who resides at Spokane, had spent part of the evening of September 23, 1912, at the home of a friend, Mrs. McCauley. At about 7:30 the two ladies started down town and walked a block to the corner of Washington street and Augusta avenue to take a south-bound car on Washington. The night is described as quite dark. There were no street lights on Washington within two blocks of this corner, and shade trees obscured the light one block east on Augusta. Washington street was being paved at this point. The west half of the street was evidently finished, while the east half had only the loose foundation rock laid thereon. Red lights were displayed as a warning of the unfinished condition of the street. Prior to the street being torn up for paving, respondent maintained two tracks, the east track for north-bound and the west track for south-bound cars;

but, while the paving was being laid, it had been the custom to run cars in both directions on one side of the street, while the other was being paved, and to alternate between the east and west tracks according to the condition of the street, the cars always running on the side of the street on which the paving had been completed, and having frequent cross-over switches to enable them to do so. Appellant knew of this custom, as she was a frequent passenger on this line, although for a week prior to the accident she had been using the Division street line to take her down town, and did not know the situation in this particular at this corner. Appellant and Mrs. McCauley, reaching Washington street, crossed over to the west side, looking up and down the street for approaching cars. They saw one turning east into Sinto avenue, three blocks south, and another at Indiana avenue, two blocks north. Sinto avenue is the crest of a hill, and from that point to Indiana avenue is a downgrade. As appellant saw the car at Indiana avenue, she spoke to Mrs. McCauley, saying, "There is a car coming," to which Mrs. McCauley replied, "That car is waiting at the switch for another to come down." Reaching the west side of the street, appellant took a position alongside and apparently quite near the car track, and standing, facing north, centered her attention upon the car at Indiana avenue; Mrs. McCauley standing behind her. She says she heard no bell or other warning of an approaching car. During the short time they so stood, nothing was said until appellant heard Mrs. McCauley call her name, and, turning to the south, was immediately struck in the face by a north-bound car and knocked to the ground. Mrs. McCauley testifies that they stood there a short time, perhaps three or four minutes, when she heard a car bell and, looking around to the south, saw a car coming north apparently between Sinto and Maxwell avenues, which would be between the second and third blocks to the south; that the car was running fast, and she watched it as it came down, and as it approached her she stepped back and looked around at appellant, who just then threw up her hand and said, "Pshaw." Fearing the car was about to strike appellant, she "made a grab for her and called her name to draw her attention to the fact the car was coming," but before she could reach appellant the car struck her. This is, we think, all the testimony in the case that is material upon the question of contributory negligence.

[1] It is apparent that appellant, with her attention riveted upon the car at Indiana avenue, and impatiently awaiting its arrival, was wholly oblivious of her surroundings. The fact that the Indiana avenue car was not approaching, coupled with Mrs. McCauley's remark that it was waiting at the switch

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for another car to come down, the red signal lights indicating an uncompleted condition of the street at that point, her knowledge of what that uncompleted condition meant, and that, while it existed, both north and south bound cars ran on one track, and that track the one on the finished side of the street, the dark night, with its lack of light, all these facts would, it seems to us, indicate to any person of ordinary prudence that some attention must be taken of them as indicating an unusual situation that required at least ordinary care; and that, under such circumstances, it was not ordinary care, nor the act of a woman of ordinary prudence, to stand upon or so close to a street car track as to be struck by a passing car. Her remark to Mrs. McCauley just before she was struck, and her gesture when she threw up her hand and said "Pahaw," indicated her impatience at the delay of the car at Indiana avenue. What was the cause of the delay? Mrs. McCauley had told her in response to her suggestion of a coming car when they first observed it. She had been told that the car was on the switch waiting for another car to come down from the south. With two tracks there would be no necessity for such a wait, but with one there was, and she knew why, although she says she did not know it that night; meaning, we take it, that it did not occur to her or that she forgot it. She was on the completed side of the street, and, although she had not been on this line for a week, her previous experience as a passenger had taught her that the track on the completed side of the street was the one used by cars going in both directions. She says she heard no car approaching, nor any indication of its approach; but how can we escape the conclusion that, if she did not, it was only because she was oblivious of everything except the Indiana car and her strong desire for its coming? Mrs. McCauley, standing just behind her, heard a bell and, turning, saw the car that struck her between two and three blocks away, and watched it as it came down the grade. We know, therefore, that there was a signal of danger sufficient to engage Mrs. McCauley's attention and enable her to take a position of safety. True, Mrs. McCauley says she does not know whether it was a bell on this car that she heard or not. Whatever it was or wherever it was, it served the purpose of conveying information to her that a car was approaching. Had appellant been as alert as Mrs. McCauley, it would have served the same purpose to her and prevented her injury. What was the difference in the attitude of these two women? It seems to us the answer is the difference between a woman of ordinary prudence, exercising ordinary care for her safety and thus enabled to prevent injury, and one who overlooks every present fact calculated to draw her attention to her surroundings, and, impelled by her impatient desire for the

quick approach of her car, forgets everything but that desire. She says she heard no warning bell.

We will overlook the testimony of Mrs. McCauley and, using only the facts that cannot be disputed, we know that a heavy modern street car running at 15 or more miles an hour in an outlying district of the city, no traffic upon the streets, no interfering noises, will make some noise as it approaches, and that its lights, exterior and interior, will convey some evidence of its approach to those who are on the lookout for it. We have said "at 15 or more miles an hour" because the evidence fixes the speed of the car as "very fast," without attempting to approximate its speed, and, as the city ordinance permits a speed of 15 miles per hour in that section of the city, we think it can be safely assumed, under the testimony, that the car was running at least 15 miles an hour. One of two conclusions is irrefutable; the appellant was either standing so close to the track that a car could not pass her with safety, or, attracted by Mrs. McCauley calling her name, she in turning inclined her head and the upper portion of her body towards the track. The fender of the car evidently passed her, and, as she received the blow "about the center of the top of the forehead" and on the right arm and shoulder, it is, we think, the more evident conclusion that, in turning toward Mrs. McCauley, she protruded her head and right shoulder beyond her body and into the passageway of the car. One of these situations is the true one; which one is immaterial. Her act was a proximate cause of her injury.

The law of contributory negligence is so well established and has been written in so many phases that nothing new can be now added. All that any discussion can do is to assert the principles which establish it, and these principles are so well known and understood that there is little room for discussion left. The facts must decide. As was said in *Keefe v. Seattle Electric Co.*, 53 Wash. 448, 104 Pac. 774, "The facts declare the law in such cases." The basic principle of all the cases is, Was the injured person at the time of the injury exercising such care for personal safety as a person of ordinary care and prudence would exercise under like circumstances; and, if not, was such lack of care a proximate cause of the injury? As the question is answered, contributory negligence is or is not established. It does not seem to us that, employing the test used in answering this question as a matter of law, the minds of reasonable men can differ in arriving at the conclusion that appellant was not exercising the required degree of care, and that her lack of it was a proximate cause of her injury. We accept appellant's citation from *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, that: "When a court decides, as a matter of law, that an injured

plaintiff is precluded from recovering damages for his injury, because of his own negligence contributing thereto, the court is in effect deciding that facts have been affirmatively proven which conclusively show, as a matter of law, such contributory negligence." To our minds such facts as we have recited do so "conclusively show, as a matter of law, such contributory negligence."

[2] Much as courts would like to cast the whole burden of finding contributory negligence upon the jury, there are cases in which that duty must be accepted and the court must pass upon undisputed facts, when its honest judgment, conscientiously expressed, leads to a firm conviction that but one determination can be reached in the minds of reasonable men. Counsel for appellant seeks to avoid the legal force of appellant's knowledge of the condition of the street, and that the cars in both directions ran on one track, along the side of the street upon which the paving had been finished, by referring to appellant's testimony that she "did not know it that night," arguing that this brings her within the rule laid down in *Passage v. Stimson Mill Co.*, 52 Wash. 661, 101 Pac. 239, and other cases, that momentary forgetfulness of known dangers does not necessarily bar recovery by an injured servant. Such rule, admitting its value in a proper case, has no application here. As applied in the *Passage Case*, it refers to the relation of master and servant. A better case in support of this contention would be *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114, not cited by counsel, where it was held that knowledge of a defective sidewalk would not in law preclude a recovery, where it appeared that the night was so dark the defect could not be seen and the injured person was using precautions to avoid it. That case, however, and those which it follows, differ from this from the fact that, while knowing the danger, the injured person was using precautions to escape it. Here the appellant was making no use of her knowledge nor attempting in any way to have it contribute to her safety. Had her general knowledge of the situation not occurred to her, the red lanterns upon the street, the car at Indiana avenue waiting, as she was informed by her companion, for another car to come down, would recall to a person of ordinary prudence the fact that this car, following the custom she well knew, would not proceed until another car came down upon the same track.

Appellant cites *Beecher v. Long Island R. Co.*, 161 N. Y. 222, 55 N. E. 899. We can see no similarity between that case and this. There the evidence was such that the jury were justified in finding the railroad company had adopted a certain custom of starting its trains, and had continued it so long as to constitute an invitation to passengers to do the very thing the plaintiff was doing

at the time of the injury, and the fact is pointed out as sustaining the judgment. *North Chicago St. Ry. Co. v. Irwin*, 202 Ill. 305, 66 N. E. 1077, is also relied upon. In that case the accident happened while the deceased was riding a bicycle in the space between the car tracks. He was traveling north, and the evidence tended to show that, hearing the approaching car, he ran on to the west track which was the track customarily taken by south-bound cars, and which would have afforded him a safe passageway had the car been traveling north upon the east track, as he had reason to believe it was. It appeared, however, that the car which killed the deceased was one of two cars that each night were sent to the car barn over the west or south-bound track. There was no evidence that deceased knew that these two cars customarily went north on the west track. These facts are given great prominence by the court in its opinion. The distinction between that case and this will be readily seen. There, there was no evidence of knowledge that the car was proceeding upon the west track. Here the appellant admits she had known such fact for a long time, but attempts to excuse such knowledge by inferring that she did not think of it that night, and had not observed the custom at this particular point. Her knowledge, however, embraced this custom, wherever made necessary by the condition of the street, as to which side was completed and which uncompleted; and that knowledge did, by reason of the significant facts, cover this particular point. It therefore seems to us that the court below was justified in its ruling, and the same is sustained.

[3] Some complaint is made that a new trial should have been granted upon newly discovered evidence. This evidence all went to the negligence of the respondent, and is not material upon the question of contributory negligence, and hence upon that decisive point it was not error to rule against the new trial.

The judgment is affirmed.

MOUNT, ELLIS, FULLERTON, and MAIN, JJ., concur.

ROBINSON MFG. CO. v. BRADLEY et al.  
(Supreme Court of Washington. Jan. 22, 1913.)

1. MUNICIPAL CORPORATIONS (§ 347\*)—PUBLIC WORK—SURETIES ON CONTRACTOR'S BOND—NOTICE.

A materialman's letters, which merely notified the treasurer of a public library board of a bill due for material furnished the contractor for a public library building, was not a sufficient notice to comply with Rem. & Bal. Code, § 1161, providing that no right of action for material furnished upon a public work shall accrue against the contractor's bond, unless a written notice that the material has been so furnished, and that a claim is made against the bond for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

the amount due, shall be filed within 30 days with the board acting for the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.\*]

**2. PRINCIPAL AND SURETY (§ 123\*)—NOTICE OF DEFAULT—SUFFICIENCY.**

Actual notice of the principal's default to only three of the eight sureties on a bond is not binding on the other five.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.\*]

**3. MUNICIPAL CORPORATIONS (§ 347\*)—PUBLIC WORK — SURETIES ON CONTRACTOR'S BOND—NOTICE.**

Actual notice to sureties that a materialman's bill for material furnished a contractor for a public library building was unpaid was not sufficient notice to comply with Rem. & Bal. Code, § 1061, requiring written notice to the municipal board of the material furnished and amount due, and of an intention to look to the bond for reimbursement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.\*]

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by the Robinson Manufacturing Company against R. Lee Bradley and others. From a judgment for plaintiff, defendants appeal. Reversed.

Thomas Smith, of Mt. Vernon, for appellants. Cooley & Horan and R. Mulvihill, all of Everett, for respondent.

MORRIS, J. Action against the sureties upon the bond of the contractor for the construction of a public library building at Anacortes. The sureties sought to evade liability because of the failure of respondent to give such notice as is required under section 1161, Rem. & Bal. Code. Findings and judgment went against the sureties, and they have appealed.

[1] The only question to be considered is sufficiency of the notice. The section referred to provides that no right of action shall accrue upon bonds of this character, unless within 30 days after the completion of the work the person claiming such right of action shall file with the board acting for the municipality a notice, in writing, to the effect that labor or material has been furnished upon such public work, and that a claim is made against the bond for the amount due. The complaint sought to bring the respondent within the terms of this statute by setting forth two letters written by respondent to the treasurer of the library board. The first of these letters is as follows: "Everett, Wash. March 12, 1910. Mrs. George B. Smith, Treas. Library Board., Anacortes, Wash.—Dear Madam: Your favor of March 11th has been received with inclosed as stated and have passed amount to the credit of A. M. Dilling on account of library. Inclosed herewith we hand you statement showing balance due of \$1,098.20. We trust

that you will favor us with an early remittance covering this amount as same is now due. Yours truly, Robinson Manufacturing Co., by C. D. Fratt, Sec'y." To this letter Mrs. Smith replied, claiming an error in arriving at the balance due, upon the receipt of which respondent mailed its second letter, which is as follows: "Everett, Wash. April 8, 1910. Mrs. George B. Smith, Treas. Library Board, Anacortes, Wash.—Dear Madam: Your favor of April 6th has been received. The statement as contained in your letter of March 14th showing balance of \$858.50 on that account, is correct, and if you will send us that amount less freight expense bills we will hand you a receipt for the amount. Thanking you for a prompt response, we are, yours truly, Robinson Manufacturing Company, by C. D. Fratt, Sec'y." At the trial respondent was permitted to amend its complaint by adding that, subsequent to the furnishing of the material, the library board held a meeting with the sureties, at which a representative of respondent was present, and that at this meeting the sureties were informed of the contractor's default, and received actual notice of the fact that respondent's bill was then due and unpaid.

We have held that the giving of this statutory notice is a condition precedent to any action upon the contractor's bond. *Huggins v. Sutherland*, 89 Wash. 552, 82 Pac. 112; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849. It has also been said that, since the primary purpose of the statute is notice, it is not required that the statute be strictly complied with, but that any form of notice, which informs the municipality and the sureties that unpaid bills are due, and which does not mislead either the municipality or the sureties to their injury, is sufficient. *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158. This language, before it is accepted as authoritative, must be read in connection with the facts to which it was applied. In doing so it will be seen that in the *Strandell* case notice was actually filed with the municipality that a claim was made against the bond and the sureties therein named; the only objection being that Freda Strandell, the claimant, was doing business as "A. Strandell, Agent," and the notice was signed "Andrew Strandell," without adding the word "agent." This signature, under the facts, was held sufficient. In the *Cascade Lumber Company* case notice was also given to both the municipality and the surety. The notice failed to state that a claim was made against the bond. In discussing this point it was said: "But they [notices] do say that the claimant has a bill against the high school building for materials furnished to the builders to be used in the building, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the amount thereof. The notices were addressed to the surety company, and served upon it. These notices were the substance of the notice provided for by the statute. When it was addressed to and served upon the surety, that company must have known that the notice was given to them solely by reason of the bond, and that the claimant meant thereby to claim against the bond." Tested by this language, it cannot be said that either one of these letters, or both of them combined, complied with, or attempted to comply with, the substance of the statutory notice. The utmost that can be claimed for them is that they inform the library board of the balance due from the contractor. There is no attempt to file a claim against either the building or the bond. The purpose is apparent to request an early payment of the balance claimed from the library board, without any reference to the bond or the obligations of the sureties thereunder. Respondent had in mind nothing more than the usual correspondence accompanying a bill for an unpaid balance. The letters contain no recognition of any statutory requirement, nor any attempt to comply therewith. To hold these letters sufficient as a notice would be to say that, whenever any creditor of a contractor upon public buildings writes a letter notifying the municipality of the amount due him for labor or materials furnished in the construction of such a building, a liability can, because thereof, be enforced against the sureties upon the contractor's bond. The statute requires something more than this; and it cannot be held that its requirements have been substantially met, conceding that to be all that is required, until there has been an attempt in some form to recognize the demand of the statute, and to obtain rights thereunder, which otherwise would not exist. We therefore hold that these letters cannot avail respondent as a compliance with our statute.

[2, 3] The next question is, Was the meeting notice? The record discloses that four sureties, with their wives, signed the bond. Three of these sureties only were present at this meeting, and none of the wives. Under these circumstances it surely could not be, as found by the lower court, that all four of the sureties, with their wives, were liable. If this meeting is to be given the same effect as the statutory notice, it could bind only those present. But it does not seem to us it can be held that this meeting can take the place of notice. The utmost that could be claimed for this meeting is that the sureties present received actual notice that respondent's bill for materials furnished had not been paid. The statute requires more than actual notice of an unpaid bill. It requires the creditor shall do something that shall signify to the surety his purpose to

look to the bond for reimbursement. We have many statutes requiring the giving of notice before materialmen can enforce a liability against one with whom he has had no contractual relations, such as the sending of duplicate statements of account of materials furnished before a liability can be enforced against the owner of any building for materials furnished for its construction. We apprehend that a materialman could not excuse himself for failing to send these duplicate statements by saying the owner had knowledge that the material had been furnished; that it had not been paid for; and that a claim would be made against him for payment. The Legislature has a right to say under what circumstances a primary liability shall be extended; and when it has so said the liability cannot be enforced, unless there is at least a substantial compliance with its exactions. The statute in cases of this character becomes a part of the bond; and it is just as essential that there be substantial adherence to its requirements as that there should be a default in the obligations of the bond. We therefore hold that actual notice cannot take the place of this written, statutory notice, and that no liability can be enforced against sureties under a bond of this character, without some form of written notice which shall substantially conform to the requirement of the statute. It is generally held that, where notice is required in a legal proceeding, especially where, as a condition precedent, there is some statutory requirement for filing notice, this means written notice. *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Foley v. Mayor*, 1 App. Div. 586, 37 N. Y. Supp. 465; *State ex rel. Burns v. Supervisors*, 34 Wis. 169. Not finding any such notice in this case, we can fix no liability upon these sureties, and the judgment is reversed.

MOUNT, C. J., and FULLERTON, ELLIS, and MAIN, JJ., concur.

#### STATE ex rel. FUGITA v. MILROY, City Police Judge.

(Supreme Court of Washington. Jan. 21, 1913.)

#### 1. COURTS (§ 42\*)—CREATION—CONSTITUTIONALITY OF STATUTES.

Under Const. art. 4, § 1, vesting the judicial power in a Supreme Court, superior courts, justices' courts, and such inferior courts as the Legislature may provide, and section 12 requiring the Legislature to prescribe the powers of inferior courts, the only limitation upon the Legislature in creating the inferior courts is that they shall in fact and law be inferior courts.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.\*]

#### 2. COURTS (§ 42\*)—CREATION—CONSTITUTIONALITY OF STATUTES.

The Legislature had power under Const. art. 4, § 12, authorizing it to prescribe the jurisdiction and powers of inferior courts, to estab-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lish police courts in second-class cities as inferior courts, and give them jurisdiction of the crime of petit larceny committed within the city limits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.\*]

### 2. CRIMINAL LAW (§ 84\*)—JURISDICTION—CRIMINAL CASES.

Since Rem. & Bal. Code, § 7657, expressly gives police courts jurisdiction of the crime of petit larceny, a subsequent change of penalty by statute does not oust that court of jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. § 84.\*]

### 4. STATUTES (§ 120\*)—TITLES—SCOPE.

Laws 1889-90, c. 7, is entitled "An act to provide for the organization \* \* \* and government of municipal corporations," and section 92 (Rem. & Bal. Code, § 7656) establishes police courts for second-class cities, and section 93 (Rem. & Bal. Code, § 7657) gives such courts jurisdiction of petit larceny committed within the city, and all misdemeanors punishable by fine or imprisonment. *Held*, that the provision giving police courts jurisdiction of petit larceny was not broader than the title of the act on the ground that the act included offenses against the state, while the title merely referred to government of municipalities.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168-172; Dec. Dig. § 120.\*]

### 5. JURY (§ 33\*)—RIGHT TO JURY TRIAL.

The summoning of a jury for service in a police court "from the body of your city" violated Const. art. 1, § 22, guaranteeing a trial by an impartial jury in the county of the venue.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.\*]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Certiorari proceedings by the State of Washington, on the relation of Gentile Fugita, against R. B. Milroy, as police judge of the city of North Yakima. From a judgment dismissing the writ, relator appeals. Reversed, with directions to sustain writ.

Floyd Hatfield and H. J. Snively, both of North Yakima, for appellant. Guy O. Shumate, of North Yakima, for respondent.

GOSE, J. This is an appeal from a judgment entered by the superior court of Yakima county, dismissing a writ of certiorari. The writ was sued out by the appellant, and directed to the police judge of the city of North Yakima to review a judgment of the police court of that city. It was based upon the following facts: On the 21st day of December, 1911, a complaint was filed in the police court of the city of North Yakima, wherein the state was the plaintiff and the appellant the defendant, charging the appellant with having committed the crime of petit larceny on the 17th day of December, 1911, "within the corporate limits of the city of North Yakima." The appellant was arrested, appeared in court in person and by counsel, and demanded a jury of 12 persons to try the cause. The police judge thereafter issued a special venire directed to the chief of police or any policeman of the city of North Yakima, commanding him

to summon "sixteen good and lawful men" "from the body of your city," to be and appear in the police court of said city upon a day fixed to act as trial jurors in the case. Upon the return of the venire, a jury was impaneled and the cause was tried, resulting in a verdict of guilty. A judgment was thereafter entered upon the verdict. The appellant made timely objection to the jurisdiction of the court. He also entered an objection to the jury impaneled, on the ground that there was no authority for such a jury or for the venire, that the jurors were not selected from the proper body of citizens or taxpayers, and that the officer who served the venire acted without legal authority.

The points specially pressed here are (1) that the police court of the city of North Yakima was without jurisdiction of the person of the appellant or of the crime charged; and (2) that the jury was selected and impaneled without authority of law. The city of North Yakima, theretofore a city of the second class, had adopted a commission form of government under the provisions of Laws 1911, p. 521, at the time the crime was charged to have been committed. A consideration of these questions requires a reference to the Constitution and the statutes. The provisions of the Constitution applicable to the first contention are as follows: "The judicial power of the state shall be vested in a Supreme Court, superior courts, justices of the peace, and such inferior courts as the Legislature may provide." Article 4, § 1. "The Legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution." Article 4, § 12. On March 27, 1890 (Laws of 1889-90, p. 131), the Legislature passed an act entitled: "An act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency." This act, by section 92 (Rem. & Bal. Code, § 7656), established a police court for cities of the second class. Section 93 (Rem. & Bal. Code, § 7657) provides, among other things, that the police court of such city shall have jurisdiction of "petit larceny" "committed within such city," and certain other enumerated offenses, "and all misdemeanors punishable by fine not exceeding \$500, or by imprisonment not exceeding six months or by both such fine and imprisonment." This section provides further: "10. The police court shall have exclusive jurisdiction of all proceedings mentioned in this section, and no justice of the peace in such city shall have power to try and decide any cases of the class mentioned in said section." Section 94 (Rem. & Bal. Code, § 7658), provides that "the defendant shall be entitled, if demanded by him, to a jury trial." Section 96 (Rem. & Bal. Code, § 7660) provides for appeals to the superior court. Laws 1907, p. 623, § 2

(Rem. & Bal. Code, § 7585), provides that the officers of cities of the second class shall include a police judge. Rem. & Bal. Code, § 7591, provides for the appointment of a police judge. The act providing for a commission form of government (Laws 1911, p. 521) makes no express provision for a police court or a police judge. Section 4 of the act, however, provides: "All existing laws governing cities of the second class or applicable thereto, not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act." The constitutional provisions quoted make it as plain as human language can express a thought, that the Legislature may provide for "inferior courts" and prescribe their "jurisdiction and powers."

[1, 2] In commenting upon these clauses in that instrument, this court said, in *Re Cloherty*, 2 Wash. 139, 27 Pac. 1065: "But to the Legislature of the state the Constitution delegates authority to transfer from one of the constitutional courts to another certain limited portions of the judicial power; and it may also provide new, inferior courts, not specifically mentioned in the Constitution, to which may be assigned such part of the inferior judicial power as it may deem wise to transfer. The natural conclusion from this premise would be that a court for the administration of municipal ordinances must have been created by an act of the Legislature." The only limitation upon the power of the Legislature is that the courts established by it shall be in fact and in law inferior courts. It is equally plain that the Legislature has established police courts in cities of the second class, made them inferior courts, and given them jurisdiction *eo nomine* of the crime of petit larceny when committed within the city. This was within its constitutional powers. *Dillon, Mun. Corp.* (5th Ed.) § 744.

[3] Jurisdiction was given over a particular crime by name, and a subsequent change of penalty does not, as argued, oust the court of jurisdiction. *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043. The intention of the Legislature is apparent. The statute gives the police courts exclusive jurisdiction of certain crimes by name, whilst its jurisdiction of other offenses is limited to cases where the fine does not exceed \$500, or the term of imprisonment does not exceed six months.

[4] The further contention is made that the title of the act is not broad enough to embrace offenses against the state. It provides for the "government of municipal corporations." It is argued that the act is limited by its title to the government of the city. Legitimately extended, the argument means that the body of the act is twofold: (1) That it confers power to exercise municipal functions; and (2) that it confers power to execute the laws of the state for offenses

committed within the corporate limits. If the argument is sound and the title of the act had expressly provided for a police court empowered to execute such state laws, the title would have been subject to the vice that it contained more than one subject, and hence violative of section 19, art. 2, of the Constitution. The title, we think, is sufficiently comprehensive. It can hardly be doubted that the execution of the laws of the state within the municipality pertains in the broadest sense to municipal government. City government in the highest sense means an enforcement of the law within its limits, for without law and order there can be no real government.

[5] There remains for consideration the contention that the appellant was denied the right of trial "by an impartial jury of the county in which the offense is alleged to have been committed," as guaranteed by section 22, art. 1, of the Constitution. As we have seen, the venire commanded the officer to summon the jury "from the body of your city." Act 1889-90, § 101 (Rem. & Bal. Code, § 7685), empowers the chief of police or any policeman of said city to serve, execute, and return all warrants of arrest and all processes directed to him by the police judge, "and to do and perform all acts and duties which in criminal cases any constable of the county may lawfully do." This would seem to authorize such officer to serve a venire in any part of the county wherein the crime is alleged to have been committed, where a violation of a state statute is charged. Rem. & Bal. Code, §§ 679, 1762. This question, however, we do not decide. In *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355, we held that the jury law of 1909 was valid. It provides that each county shall be divided into jury districts; that the name of each qualified juror shall be deposited in the jury box of the district wherein he resides; and that in calling a jury the names shall be drawn in equal numbers from each jury box. We said in answer to the charge that the act was unconstitutional: "The law in question does not attempt to provide for a jury from any division or district less than the whole county." In the case at bar the venire was especially restricted to a definite part of the county. We think the plain intent of the words "jury of the county" is that the defendant is entitled to have the venire extended to the body of the county, and that it may not be restricted to a less unit; at least, without express legislative sanction. *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464. If it may be restricted to the municipality without the sanction of the Legislature, at the caprice of the police judge, we can see no reason why he might not continue the restriction to a precinct or a ward. It would seem that the words "jury of the county" mean a jury of the whole

county, and not a jury of some particular part of the county.

The respondent argues that the venire in question was warranted by the provisions of Rem. & Bal. Code, § 69, which provides that, when jurisdiction is by the Constitution or the statute conferred on a court or judicial officer, all the means to carry it into effect are included; and in the exercise of jurisdiction, if the procedure be not specifically provided, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code. We do not think this section is susceptible of such construction.

We are of the opinion that the jury was illegally drawn, and the judgment is reversed, with directions to enter a judgment sustaining the writ.

CROW, C. J., and CHADWICK, PARKER, and MOUNT, JJ., concur.

#### YAMAOKA v. KLOEBER.

(Supreme Court of Washington. Jan. 21, 1913.)

##### 1. SALES (§ 166\*)—BREACH OF CONTRACT BY SELLER—LIABILITY.

Where a breeder of cattle sold four bull calves, knowing that they were purchased for exportation and sale in Japan, and agreed to furnish certificates of registration, and where he failed to furnish such certificates, though often requested, he was liable for the loss sustained by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391-400, 402; Dec. Dig. § 166.\*]

##### 2. SALES (§ 418\*)—BREACH OF CONTRACT BY SELLER—DAMAGES.

An award in such case of damages equal to the difference of the cattle delivered without registration papers and their value had they been properly registered was not unreasonable, but, though large, was reasonably within the contemplation of the parties, where defendant was familiar with the market conditions in Japan, and knew that the animals were of little value there without the registration certificates.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

##### 3. BROKERS (§ 94\*)—BREACH OF CONTRACT BY SELLER—LIABILITY.

Where a breeder of cattle sold a bull calf under an agreement that he would furnish a certificate of registration, he could not escape liability to furnish the certificate by showing that he acted only as broker for another in the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.\*]

##### 4. DAMAGES (§ 62\*)—BREACH BY SELLER—MITIGATION OF DAMAGES.

Where a person bought four bull calves under an agreement that the seller would furnish certificate of registration, he was under no obligation to mitigate his damages from failure to receive the certificates by himself procuring them, where the procurement of the certificates necessitated information not in his possession, but in the possession of the seller.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-132; Dec. Dig. § 62.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by O. Yamaoka against J. S. Kloeber. From judgment for plaintiff, defendant appeals. Affirmed.

Preston & Thorgrimson, of Seattle, for appellant. Shank & Smith, of Seattle, for respondent.

GOSE, J. This is an action to recover damages arising from the failure of the defendant to furnish the plaintiff with certificates of registration and transfer for one Holstein-Friesian bull and four bull calves of the same breeding. The complaint alleges that the animals were sold to the plaintiff by the defendant, to be shipped and sold in Japan, and that the defendant agreed with the plaintiff at the time of making the sale that he would at once cause the animals to be registered and forward the certificates of registration and transfer to the plaintiff, and that he failed so to do. The court found against the plaintiff upon the issue as to the old bull, and found for him upon the issues as to the four bull calves, and a judgment was entered accordingly. The defendant prosecutes the appeal.

[1] The court found that the appellant failed and neglected to furnish the certificates, despite the repeated demands and his repeated promises to furnish them; that with the certificates of registration the young bulls would have had a market value in Japan of \$2,000, but without the certificates they had a value of only \$100, and were salable in that market only as beef. In a memorandum opinion which was reaffirmed in the findings the court found that the appellant knew that the respondent was purchasing the calves for exportation and sale in Japan. These findings are supported by a preponderance of the evidence. On October 11, 1907, after the sale of the old bull and prior to the sale of the bull calves, the appellant wrote the respondent: "I wish to \* \* \* express my appreciation of the visit of two of your representatives to see my herd of Holstein-Friesians. I showed them some young stock of excellent quality, stock that could not be duplicated in this part of the country at anything like the price I made, and which I made particularly because I foresee a large business with Japan in the dairy industry and was particularly desirous of having my herd represented amongst the herds of your country." On March 24, 1908, he wrote: "I am very glad indeed that you are pleased with your purchase, and will assure you of my very great appreciation of your business in the past and hope that you will favor me with your future patronage for exportation." Again, on March 30th, the date the cattle were shipped from Seattle, he wrote: "I think you have made a good choice of stock for exportation. All of the animals you are taking with you



are representatives of the best families of the Holstein-Friesian breed, and belong to the hardy, strong branches, not the closely inbred and smaller ones that you find in some parts of the East. I think that your country is to be congratulated on having this kind of stock introduced into it as a foundation stock, and I hope we shall be able to [do] a great deal more business along this line with you. \* \* \* The papers of transfer and registration will be here inside of a few weeks and will be forwarded to you." The respondent paid \$575 for the four calves, and received from the appellant a guaranty that he would procure and forward certificates of registration and transfer. Demands for these certificates were made from time to time for a year and a half after the calves were shipped to Japan, and the appellant's promises to comply were iterated and reiterated, but never kept. In these demands the appellant was repeatedly advised that the calves could not be sold in Japan without the registration certificates, a fact which he as a breeder of such cattle must be presumed to have known. The appellant testified that he had been engaged for a number of years in breeding and selling pure bred Holstein-Friesian cattle, and that he was a member of the Holstein-Friesian Association of America, and "very thoroughly" familiar with its rules and regulations. As a breeder of pure bred cattle he knew that certificates of registration are the only accepted evidence of their breeding in the market. This is a general rule.

[2] The appellant strenuously insists that the damages allowed by the court are unreasonable and based upon uncertain evidence, and argues that the appellant was ignorant of the market value of such cattle in Japan, and that he did not know that in that market such cattle, unaided by certificates of registration, had no value except as beef. The vice of the argument is that the appellant testified that he was familiar with market conditions in Japan. Nor was the evidence of the market value uncertain. The shipment comprised 30 head of Holstein-Friesian cattle, made up apparently of 25 cows and helpers, 1 bull four years old, and the 4 bull calves in controversy. The respondent had the registration certificates for the 25 head, and testified that he sold them in Japan, and that he was familiar with the market value of such cattle there. The appellant did not controvert their market value. It is argued that, despite that fact, the court was not required to believe the respondent's testimony. That may be conceded, but the court did believe it, and there is nothing either unreasonable or inherently improbable in his testimony. Respecting the rule of damages in such cases, in *Miller v. Mosely* (Tex. Civ. App.) 91 S. W. 649, it was held that, where one person sells cattle to another, representing them to be registered,

and agrees to deliver registration certificates and fails to do so, the measure of damages "is fixed at the difference between the value of the cattle delivered without registration papers and their value had they been properly registered." The general rule is that, where one contracts to deliver an article of a particular kind or quality and delivers an inferior article, the measure of damages is the difference between the value of the article contracted for and the value of the article delivered. *Seaboard Lumber Co. v. Planning Mill Co.*, 122 Ga. 370, 50 S. E. 121; *Missouri Coal Co. v. Consolidated, etc., Coal Co.*, 127 Mo. App. 320, 105 S. W. 682; *Sloan v. Allegheny Co.*, 91 Md. 501, 46 Atl. 1003; *Deutsch v. Pratt*, 149 Mass. 415, 21 N. E. 1072; *St. Anthony Lumber Co. v. Bardwell-Robinson Co.*, 60 Minn. 199, 62 N. W. 274; *Fargo Gas & Coke Co. v. Fargo Gas & Elec. Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; *Bump v. Cooper*, 19 Or. 81, 23 Pac. 806; *Brock v. Clark*, 60 Vt. 551, 15 Atl. 175; *Flourance Oil Co. v. Farrar*, 119 Fed. 150, 55 C. C. A. 656. "Damages, in legal acceptation, mean compensation for the loss suffered or the injury sustained." *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88. We held in *Sedro Veneer Co. v. Kwapii*, 62 Wash. 385, 113 Pac. 1100, that where a manufacturer of lumber products sold egg case shooks to a jobber who he knew was buying to resell in the market, but who had no existing contracts, and failed to deliver, the measure of damages was the profits lost by the purchaser upon sales which he subsequently negotiated. In *Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184, 116 Pac. 627, we held that where a stallion was sold upon the representation that he was registered, upon a promise to furnish a registration certificate, and the horse was neither registered nor eligible to registration, the measure of damages was the difference between the price paid and the actual value of the horse at the time of purchase. These cases illustrate the principles which underlie an allowance of damages for a breach of contract. It is true, as argued, that the evidence of the amount of damages sustained must be reasonably certain, and that damages may not rest upon speculation or conjecture. While the damages are large, we cannot say that the amount awarded is unreasonable, or that it was not reasonably within the contemplation of the parties. As the learned trial court observed in his memorandum opinion: "This is one of those contracts where profits alone were contemplated. Plaintiff bought the calves to resell in the high market of Japan. The things that evidenced or gave them their value in that market and which were to be furnished were the necessary certificates. The two articles are to go and to be considered together. The calves are but one part, the certificates the other part. The certificates without the calves are worthless."

The calves without the certificates are comparatively worthless as selling commodities in that market." In principle there is no difference between this case and a case where there has been a sale of a good article and a delivery of a defective, inferior, or incomplete article. The appellant represented that the calves were strongly bred in the best families of the breed. The expense of marketing them in Japan was large, a fact which he as a breeder for the market will be presumed to have known. He also knew that the value of a strongly bred young bull of individual excellence is largely a matter of personal fancy, and that a price that will stagger one buyer will not deter another. The animals were four years old at the time of the trial (May, 1911), and the respondent testified that the certificates then tendered were of no value because of the age of the animals, and because of certain unfriendly newspaper comment upon his representing the animals to be pure bred when he did not have the evidence of their breeding, and because of the plague among cattle in that country.

[3] The contention that the appellant acted only as a broker in the sale of one of the calves, and hence is not liable in damages, is not tenable. The evidence supports the finding of the court that he agreed to furnish a certificate of registration for him and failed so to do. The contract of sale and guaranty is as follows:

"Seattle, Wash. 2/17, 1908.

"Received of Mr. Yamaoka (The Oriental Trading Co.) the sum of 2875.00 for the following Registered Holstein Cattle as follows:

4 Head yearlings at 200.00.....	\$ 800 00
6 " 2 yr. old. at 250.00.....	1,500 00
* 2 " Calf Bulls at 200.....	400 00
	<b>\$2,700 00</b>

"All in car at N. P. Stock Yard freight paid

* 1 Calf Bull { Express from } .....	\$ 100 00
* 1 " " { Hot Springs } .....	75 00

**\$2,875 00**

"The same to be Registered & Transferred to O. Yamaoka on the books of the Holstein Friesian Breeders of America.

"[Signed] J. S. Kloeber."

The stars indicate the calves which form the basis of this controversy.

[4] It is argued that it was the duty of the respondent to mitigate the damages by personally procuring the certificates. The appellant testified that one applying to register a Holstein-Friesian calf was required to tender to the association an application signed by the owner of the sire at the date of service, by the owner of the dam at the date of its birth, and by the owner of the calf at the time the application was made. The application must also give the name and registered number of both the sire and the dam.

The respondent did not have this information. The appellant had it, but did not use it.

The judgment is affirmed.

GROW, C. J., and MOUNT, PARKER, and CHADWICK, JJ., concur.

# BARNARD MFG. CO. v. RALSTON MILLING CO. et al.

(Supreme Court of Washington. Jan. 24, 1913.)

## 1. CORPORATIONS (§ 557\*)—INSOLVENCY AND RECEIVERSHIP—GROUNDS FOR APPOINTMENT OF RECEIVER—MISREPRESENTATIONS.

A complaint which charged that the individual defendants induced plaintiff to extend credit to defendant corporation by falsely representing that it had a subscribed capital stock of \$25,000, when in fact, as they well knew, the subscriptions had not exceeded \$13,200, that there was a balance due to plaintiff from the corporation and that it was insolvent stated ground for the appointment of a receiver to collect subscriptions and pay plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230; Dec. Dig. § 557.\*]

## 2. CORPORATIONS (§§ 222, 335\*) — OFFICERS AND SHAREHOLDERS—LIABILITY FOR DEFTS—FRAUD.

A stockholder or officer of a corporation who, by false representations as to the amount of its subscribed capital stock, induced a person to sell goods to it in reliance thereon, resulting in a loss, may be held liable to the extent of the loss, provided it does not exceed the difference between the stock subscribed and the amount represented as subscribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 853, 1453; Dec. Dig. §§ 222, 335.\*]

## 3. CORPORATIONS (§ 67\*)—CAPITAL STOCK—REDUCTION.

Under the express provisions of Rem. & Bal. Code, §§ 3697, 3698, the capital stock of a corporation can only be reduced in the manner therein prescribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.\*]

## 4. CORPORATIONS (§ 542\*)—INSOLVENCY AND RECEIVERSHIP—TRUST FUND DOCTRINE.

Under the doctrine that the assets of a corporation are a trust fund for the payment of its debts, persons who divert and appropriate its capital stock commit a fraud against creditors and are liable therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.\*]

## 5. CORPORATIONS (§ 538\*)—INSOLVENCY AND RECEIVERS — WHAT CONSTITUTES INSOLVENCY—UNSATISFIED JUDGMENT.

The entry of a judgment against a corporation, though at the suit of a third party, on which execution is returned unsatisfied, in itself shows its insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2151; Dec. Dig. § 538.\*]

## 6. CORPORATIONS (§ 240\*)—INSOLVENCY—LIABILITY OF SHAREHOLDERS — UNPAID SUBSCRIPTIONS.

A judgment creditor of an insolvent corporation may maintain an action against the stockholders for their unpaid subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 934-942, 1099-1100½; Dec. Dig. § 240.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. CORPORATIONS (§ 259\*)—INSOLVENCY AND RECEIVERSHIP—FORM OF ACTION.**

Under a complaint against individual defendants for misrepresentations as to the amount of stock subscribed to the defendant corporation, in reliance upon which plaintiff was induced to sell goods to the corporation which was indebted therefor and was insolvent, and which charged that like misrepresentations were made to other creditors, and sought the appointment of a receiver and general relief, the contention that the complaint stated an action at law which could not be maintained in favor of creditors was without force where the facts justified the relief sought, since the form of action was not material.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050-1052, 1067, 2272; Dec. Dig. § 259.\*]

**8. CORPORATIONS (§ 330\*)—LIABILITY OF OFFICERS AND TRUSTEES—COMMENCEMENT OF BUSINESS BEFORE CAPITAL STOCK SUBSCRIBED.**

The fact that a corporation commences and transacts business before all its capital stock has been subscribed does not of itself render its officers and trustees liable to creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1446, 1447; Dec. Dig. § 330.\*]

**9. CORPORATIONS (§ 222\*) — LIABILITY OF STOCKHOLDERS.**

Rem. & Bal. Code, § 3677, relating to the organization of corporations and the liability of stockholders, and section 3698 restraining its issuance of notes, deal only with the contractual liability of the stockholders, and do not exempt them from liability for their actual misrepresentations as to the corporation's subscribed capital stock inducing a third person to extend it a credit which he would not otherwise have given it, and to suffer a loss thereby.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 853; Dec. Dig. § 222.\*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Barnard Manufacturing Company against the Ralston Milling Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Belden & Losey, of Spokane, and John M. Cannon, of Ritzville, for appellant. Adams & Naef, of Ritzville, for respondents.

GOSE, J. Demurrers were sustained to the plaintiff's second amended complaint. Upon its election to stand upon its pleading, a judgment was entered in favor of the defendants. The plaintiff has appealed.

The complaint is long, and contains some conflicting averments. But the essential features may be thus epitomized: After alleging the incorporation of the appellant and the payment to the state of its last annual license fee, it alleges that the Ralston Milling Company has held itself out to the public and to the appellant as a legally organized corporation with a subscribed and paid-up capital of \$25,000; that the individual respondents, since the 5th day of May, 1908, have represented to the public and to the appellant that the milling company was a corporation organized to conduct an elevator and milling business, and that it had a capital stock of \$25,000, "fully subscribed in

good faith"; that it had kept its license fees paid; that the appellant believed and relied thereon, and had no knowledge to the contrary; that not to exceed \$13,200 of its capital stock has been subscribed, the major portion of which has not been paid, all of which the respondents knew; that the corporation, through its officers and managers, since the 5th day of May, 1908, has purchased from the appellant goods, wares, and merchandise upon which there remains a balance unpaid of \$861.33; and that the appellant would not have extended the credit had it not believed the representations of the respondents to the effect that \$25,000 capital stock had been subscribed. It is further alleged that the respondents, "and each of them, have wasted, appropriated to their own use, secreted, or fraudulently transferred all of the regularly subscribed capital stock" of the corporation, and all the proceeds thereof, with intent to defraud the appellant "and others"; that the respondents all assert that the corporation is insolvent; and that it has not paid its license fee to the state for the years 1910 and 1911. It is further alleged that, upon a judgment entered in another case against the corporation, an execution was issued, and a return of nulla bona was made a few days before the commencement of the action. The prayer is for a judgment against the corporation, for the appointment of a receiver empowered to recover any property of the milling company that may have been transferred in fraud of creditors, requiring the receiver to collect all sums due the corporation on stock subscription, "and requiring defendants and each of them to pay, or cause to be paid to said receiver for the benefit of the plaintiff and other creditors of said corporation, the sum of \$11,800, or so much thereof as shall be required to pay all indebtedness of said corporation, and the costs of said receivership, the same to be paid in such proportion by said defendants as to the court may seem just and equitable," and for general relief. The respondents Clodius, Berry, and Mueller joined in one general demurrer to the complaint, and the respondents V. T. Donnell, B. B. Gillispie, E. H. Herring, F. Albershardt, J. A. Helm, and W. C. Reeder joined in another general demurrer.

[1] We think the complaint states a cause of action against both demurrers. It charges, in effect, that the individual respondents induced the appellant to extend credit to the corporation by representing to it that the corporation had a subscribed capital stock of \$25,000, when in truth and fact, as they each knew, not to exceed \$13,200 had been subscribed; that there is a balance due to appellant from the milling company; and that the corporation is insolvent.

[2] A stockholder or officer of a corporation is no more immune for his false repre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sentations which result in a loss to one who relied upon the representations than any other individual. In other words, the rules of common honesty and common sense apply alike to all persons, without regard to the capacity in which they act. If the charges are true, the appellant has suffered a loss because it relied upon the respondent's representations as to material facts, which representations were false and known to be false when made. This view is elementary and would seem to require no sustaining authority. In *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121, it was held that it was a legal fraud for trustees of a corporation to make false official reports which prejudiced the rights of the creditors of the corporation. See, also, *Hequembourg v. Edwards*, 155 Mo. 514, 56 S. W. 490; *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121. If the several respondents represented that \$25,000 capital stock had been subscribed, and credit was extended on these representations and a loss resulted, there would seem no reason, in law or equity, why they should not be held to make these representations good to the extent of the loss, provided the loss does not exceed the difference between the capital stock subscribed and the amount which they represented had been subscribed.

[3, 4] The complaint is also sustainable on another ground. It charges that the respondents diverted and appropriated the capital stock of the corporation. The capital stock of a corporation can only be reduced in the manner provided by statute. Rem. & Bal. Code, §§ 3697, 3698; *Carstens & Earles v. Hofius*, 44 Wash. 456, 87 Pac. 631; *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Tacoma Ledger Co. v. Western, etc., Association*, 37 Wash. 467, 79 Pac. 992. In the case last cited it is said: " \* \* \* And it is held a fraud on the creditors for the stockholders to withdraw the assets of the corporation, leaving debts of the corporation unpaid." In the *Hofius Case* the court said: "No more will equity require a creditor to waive his right to recover upon the obligation of a trustee, who has permitted all the tangible assets of a corporation to be absorbed by another, in the proceeds of which he has shared." This rule rests upon the principle that the assets of a corporation are a trust fund for the payment of its debts. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810; *Tacoma Ledger Co. v. Western, etc., supra*. It has been held that a director of a corporation, who converts its property or diverts it to purposes other than corporate purposes, is liable for the value of the property so converted or diverted. *Potvin v. Denny Hotel Co.*, 26 Wash. 309, 66 Pac. 376; *Mitchell v. Jordan*, 38 Wash. 649, 79 Pac. 311.

[5] The statute provides that the failure of a corporation to pay its annual license fee for the period of one year after its due date

is prima facie evidence of its insolvency. Rem. & Bal. Code, § 3715. Again, the allegation that a judgment has been entered against the corporation at the suit of a third party, and that an execution issued thereon has been returned unsatisfied, in itself shows the insolvency of the corporation.

[6] This court has held that a judgment creditor of an insolvent corporation may maintain an action against the stockholders for their unpaid subscription. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807.

[7] The complaint charges that like misrepresentations were made to other creditors. The prayer for general relief and for payment through a receiver will protect the respondents and bring the case within the rule applied in *Dunlap v. Rauch*.

[8] It is said that the learned trial court sustained the demurrers upon the authority of *American Radiator Co. v. Kinnear*, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453. In that case the only fraud asserted was that the corporation commenced and transacted business before all its capital stock had been subscribed. It was held that that fact did not render the officers and trustees liable.

[9] The Code (Rem. & Bal. §§ 3677 and 3698) is also relied upon as measuring and limiting the liability of stockholders in a corporation. These sections deal only with their contractual relations. The Legislature did not intend to, and has not, exempted a stockholder in a corporation from liability, when by his actual misrepresentations as to the capital stock of the corporation he has induced a third party to extend it a credit which it would not otherwise have given it, and has suffered a loss in so doing. In short, there was no intention to protect a stockholder against his own fraudulent acts.

The judgment is reversed, with directions to proceed in conformity with this opinion.

CROW, C. J., and CHADWICK, PARKER, and MOUNT, JJ., concur.

## O'BRIEN v. WASHINGTON WATER POWER CO.

(Supreme Court of Washington. Jan. 25, 1913.)

### 1. TRIAL (§ 178\*)—DIRECTED VERDICT—DETERMINATION.

In considering defendant's motion for a directed verdict, the court must accept as true all competent evidence adduced supporting the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

### 2. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTIONS FOR JURY—NEGLIGENCE.

On evidence, in an action against a street railroad for injuries from being struck by a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

car, *held* that the question of its negligence in running at an excessive speed was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**3. STREET RAILROADS (§ 84\*)—OPERATION—“NEGLIGENCE PER SE”—EXCEEDING SPEED LIMIT.**

For a street railroad to exceed the lawful speed limit is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 84.\*]

For other definitions, see Words and Phrases, vol. 5, p. 476q.]

**4. STREET RAILROADS (§ 85\*)—OPERATION—REGULATION OF USE OF STREET.**

Neither Rem. & Bal. Code, § 5569, providing that automobiles shall turn to the right in passing vehicles and persons moving in the same direction, nor the city ordinance, requiring slow moving vehicles to keep close to the right curb so as to allow faster moving vehicles free passage to the left, relates to the use of a street as between street cars and other vehicles.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.\*]

**5. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE.**

It is not negligence per se to drive upon a street railroad track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**6. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.**

On evidence, in an action against a street railroad for personal injuries from a collision with a car, *held* that the question of plaintiff's contributory negligence was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**7. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTIONS FOR JURY—FAILURE TO GET OFF TRACK.**

On evidence, in an action against a street railroad for personal injuries from being struck by a car, *held* that the questions whether plaintiff was prevented from getting off the track after seeing the car because of a passing automobile or the skidding of the wheels of his wagon, and whether his failure was due to his own intoxication, were questions for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**8. STREET RAILROADS (§ 100\*)—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE—INTOXICATION.**

The fact that plaintiff, whose wagon was struck by a street car, was intoxicated was no legal excuse for his failure to clear the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 217; Dec. Dig. § 100.\*]

**9. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTION FOR JURY—AVOIDABLE INJURY.**

On evidence, in an action against a street railway for personal injuries by being struck by a car, *held* that it was for the jury to say whether the motorman should not have had his car under control so as to be able to stop it before hitting plaintiff's wagon.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**10. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTIONS FOR JURY—PROXIMATE CAUSE.**

On evidence, in an action against a street railroad for personal injuries from being struck by a car, *held* that the question whether the motorman's failure to stop his car before a collision because of its excessive speed was the proximate cause of the injury was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**11. STREET RAILROADS (§ 103\*)—OPERATION—INJURY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.**

It is the duty of a motorman, who sees a traveler's position on the track in time to avoid a collision, to stop his car, regardless of the traveler's own negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.\*]

Department 2. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Edward O'Brien against the Washington Water Power Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Morrill, Chester & Skuse, of Spokane, for appellant. Post, Avery & Higgins, of Spokane, for respondent.

ELLIS, J. This is an action to recover damages for personal injuries sustained by the plaintiff as the result of a collision of his wagon and one of the defendant's street cars on Sprague avenue, between Altamont and Cook streets, in the city of Spokane. The pleadings presented, and the evidence was directed to, the usual issues of negligence, contributory negligence, and proximate cause.

The evidence adduced was, in substance, as follows: The plaintiff resided about five miles southeast of Spokane. He was well acquainted with Sprague avenue, generally driving upon it in going to and from the city. At the place of the accident, a suburban portion of the city, the defendant had a single street car track along the avenue near the middle. The street from there east, and for several blocks to the west, was unpaved. There was a space of from 22 to 27 feet between the south rail of this track and the south curb of the street. The track extended east of the place of the accident four or five blocks in a straight line. The accident occurred between 7 and 8 o'clock in the evening of September 30, 1911. The street was dark but for a light at the corner of Cook street and Sprague avenue. The car was lighted within and had an ordinary headlight burning. The plaintiff had started for his home with a team pulling a heavy farm wagon, but without load. He had driven along the south side of the avenue to a point about midway between the intersection therewith of Altamont street on the west and Cook street on the east. He testified that he heard the horn of an automobile behind him and turned to his left to allow it to pass;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

that in so doing the left-hand horse and the two left-hand wheels of the wagon passed upon the street car track; that while in this position he looked down the track toward the east and saw a street car about two blocks away coming rapidly in his direction; that he at once turned his horses to the right and tried to drive off the track; but that on account of the passing automobile and the skidding of the wheels upon the rail of the track, which was about three or four inches higher than the roadbed, he was unable to clear the track with the left hind wheel before the car struck it, threw him to the ground, and inflicted the injuries complained of. He estimated that he had driven upon the track for a distance of about 50 or 60 feet before the collision. A witness who resided at the corner of Cook street and Sprague avenue testified that he and another man were standing on the front porch of his house; that he first heard a signal from the car when it was about 150 feet east of Cook street and about 300 feet from the plaintiff; that he at once looked at the wagon and team and watched it until the car struck the wagon; that, as nearly as he could recollect, the horses' heads were pointed towards the southeast; that in his judgment the car was running at the rate of 80 miles an hour when he first saw it, and did not seem to slacken its speed until probably within two car lengths of the wagon, and was going between 15 and 20 miles an hour when it hit the wagon. The other man who was on the porch did not see the collision, but stated that the car was going faster than cars ordinarily travel in that part of the city. An ordinance of the city in evidence limits the speed of street cars to 10 miles an hour inside the fire limits and 15 miles an hour in other parts of the city. The motorman testified that he detected something on the track when he was one-third or one-half way in the block east of Cook street; that he first discovered that it was a wagon and team when about a car's length, or 50 to 55 feet, away; that when he first saw the object he had on full power, and threw off the power, put on the brakes, and blew the whistle; that at that time he was running 12 or 14 miles an hour; that he had slowed down to a speed of about 7 miles an hour when he discovered what it was upon the track, and that he then applied the emergency brake, and that the car went almost a car's length beyond the wagon before it stopped; that, after the fender of the car had hit the rear wheel of the wagon and shoved it from the track, he released the emergency brake to ease the stop and prevent injury to his passengers, which caused the car to run further than it otherwise would. Two witnesses, who were passengers on the car, testified that it was not running faster than the ordinary speed, and that just before the accident it came almost to a dead stop. A farmer who at the time was driving along

Sprague avenue in an easterly direction, between Altamont and Cook streets, testified that he heard several short blasts of a car whistle, indicating danger, and, looking for the cause, saw the plaintiff in his wagon west of the witness, about 75 or 80 feet, going right up the track toward the car; that the car at the time was about half way in the block east of Cook street; that plaintiff was sitting with his head bent over on his breast, and made no effort to pull the horses from the track; that, just an instant before the car struck the wagon, the horses swung off to the side of the track; and that, when the car came to a standstill, its rear was beside the wagon. All of the witnesses who testified as to the accident, and others who were in the vicinity at the time, were questioned as to the presence of an automobile. None of them, save the plaintiff, saw any automobile in that vicinity. Without specifying the several witnesses who testified upon the subject, it will suffice to say that there was ample evidence from which the jury might have found that the plaintiff was, at least to some extent, intoxicated at the time of the accident; one witness testifying that a short time before starting home the plaintiff was "pretty drunk." The plaintiff denied this and said that he had only had two glasses of beer.

The defendant introduced an ordinance of the city containing the following provisions:

"Section 1. In occupying or traveling upon the streets, avenues, highways and bridges of the city, all vehicles shall keep to the right as near the right hand curb as possible.

"Sec. 2. Vehicles meeting shall pass each other to the right.

"Sec. 3. Vehicles overtaking others shall in passing keep to the left."

"Sec. 18. Vehicles moving slowly shall keep as close as possible to the curb line on the right so as to allow faster moving vehicles free passage to the left."

An expert street car man testified, in behalf of the defendant, that a car of the kind here in question, by throwing off the power and applying the emergency brake, could be stopped, when running 15 miles an hour, in 70 to 80 feet; when running 14 miles an hour, in 50 to 70 feet; and when running 7 miles an hour, in 35 feet. He further testified that, if the car was running only 7 miles an hour when the motorman applied the emergency brake at a distance of 50 feet from the wagon, he would not have hit it at all. At the close of the evidence, the defendant moved the court to instruct the jury to find a verdict for the defendant upon the ground that the evidence conclusively established the contributory negligence of the plaintiff as the proximate cause of the accident. The motion was granted, and judgment entered accordingly. The plaintiff prosecutes this appeal.

{1} In considering the respondent's motion

for a directed verdict, we must accept as true all competent evidence adduced supporting the appellant's complaint. *Fluhart v. Seattle Electric Co.*, 65 Wash. 291, 293, 118 Pac. 51.

[2, 3] We must therefore proceed upon the assumption that the evidence was sufficient to show that the motorman was running the car at an excessive rate of speed when he first discovered something upon the track 300 feet ahead of him; that even then he did not reduce its speed till the car was within two car lengths of the wagon; and that the car was going at the rate of 15 or 20 miles an hour when it struck the wagon. The question of the respondent's negligence was clearly one for the jury. From the evidence the jury might have found that the car was exceeding the lawful speed limit, which would be negligence per se. *Engelker v. Seattle Electric Co.*, 50 Wash. 196, 96 Pac. 1039; *Wilson v. Puget Sound Electric Ry.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044.

[4-6] The respondent contended, and the court held, that the appellant was guilty of contributory negligence, as a matter of law, upon the same principle, namely, that he was violating the city ordinance in that he was not keeping to the right, near the right-hand curb, to allow "faster moving vehicles," such as automobiles, "free passage to the left." The appellant rejoined by a citation of the state law (*Rem. & Bal. Code*, § 5569), which provides that automobiles shall "turn to the right in passing vehicles, teams, and persons moving or headed in the same direction," as justifying his turning to the left. We find it unnecessary to decide whether the statute would supersede the provisions of the ordinance, so far as in conflict therewith, since we think that neither the statute nor that part of the ordinance relied upon by the respondent has any relation to the use of the street as between street cars and other vehicles. Whatever may be said of either statute or ordinance as determining negligence as between the driver of an automobile and the driver of a wagon, carriage, or dray, or of another automobile, the provisions cited were never intended to prohibit a vehicle from being driven upon a street car track. It was not negligence per se to drive upon the track. *Spurrer v. Front Street Cable Ry. Co.*, 3 Wash. 659, 29 Pac. 346; *Traver v. Spokane Street Ry. Co.*, 25 Wash. 225, 65 Pac. 284; *Burlan v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214; *Baldie v. Tacoma Ry. & P. Co.*, 52 Wash. 75, 100 Pac. 162; *Keefe v. Seattle Electric Co.*, 55 Wash. 448, 104 Pac. 774; *Pantages v. Seattle Electric Co.*, 55 Wash. 453, 104 Pac. 629. As said in the *Keefe* case, "The facts declare the law in such cases." The question was for the jury upon the facts.

[7] Whether the appellant was prevented from getting off the track, after seeing the

car, because of a passing automobile and because of the skidding of the wheels of his wagon upon the elevated rail, or whether the failure was due to his own intoxication, were also questions for the jury.

[8] We will say in passing, however, that the fact that the appellant was intoxicated, if it be a fact, was no legal excuse for his failure to clear the track. *Conrad v. Graham & Co.*, 54 Wash. 641, 108 Pac. 1122, 132 Am. St. Rep. 1137; *Vizacchero v. Rhode Island*, 28 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

[9-11] But, even assuming that the appellant was guilty of negligence as a matter of law, there still remains the question as to whether his negligence or that of the respondent was the proximate or efficient cause of the accident. The motorman himself testified that, when about 300 feet distant, he discerned some object upon the track which he discovered to be a wagon and team when about 50 feet away, when he applied the emergency brake, but too late to avoid the collision. When he first saw the object he recognized it as a possible danger, since he claims that he then threw off the power, blew the whistle, and slowed down to seven miles an hour. The respondent's evidence shows that a car, such as the one in question, could be stopped by applying the emergency brake in a distance of 35 feet, and that, if, as the motorman claims, the car was going at the rate of seven miles an hour when he applied the emergency brake, it would never have hit the wagon. It is hardly a sufficient excuse to say that he had the right to assume that the wagon would leave the track, since he testified that he did not know the object was a wagon till within 50 feet of it. If he did not know it was a wagon, he could hardly assume that it would leave the track. The danger when he had approached to within 50 feet was imminent, and it was for the jury to say whether, under the evidence, he should not have then had his car under such control as to be able to stop it before hitting the wagon. Whether, but for an excessive rate of speed, the motorman saw the appellant's danger in time to avoid the collision, was a question of fact. If he did, it was his duty to stop, regardless of any negligence of the appellant, and his failure to do so, if because of excessive speed, was the proximate and efficient cause of the injury. These were questions for the jury. *Morris v. Seattle*, *Renton & So. Ry. Co.*, 66 Wash. 691, 120 Pac. 534; *Nicol v. Oregon-Washington R. & Nav. Co.*, 128 Pac. 628.

The decisions cited by the respondent are clearly distinguishable from this case upon the facts. In *Pantages v. Seattle Electric Co.*, supra, it was merely held that the jury should have been instructed that the motorman had the right to assume, until the danger became imminent, that the automobile would leave the track in time to avoid a collision. As we have seen, there was no

ground for this assumption under the motorman's evidence here. In *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525, the evidence showed that the motorman did not see the plaintiff until he came upon the track 30 or 40 feet ahead of the car. The danger, when first discovered, was imminent, and the motorman had no chance to avoid it. Here the motorman saw the object on the track when 300 feet distant. In *Fluhart v. Seattle Electric Co.*, supra, the plaintiff, a pedestrian unimpeded in any manner, was apparently never on the track, but carelessly walked so close to it as to be struck by the car. Under the evidence before us, the case should have been submitted to the jury upon the questions of the respondent's negligence, the appellant's negligence, and proximate cause.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, MORRIS, FULLERTON, and MAIN, JJ., concur.

### WARD v. MAGAHA.

(Supreme Court of Washington. Jan. 25, 1913.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 122\*)—SPECIAL ADMINISTRATORS — POWERS — "DEBTS."

Rem. & Bal. Code, § 1420, authorizes the appointment of special administrators, and empowers them to collect and preserve the effects of the deceased. Section 1421 requires them to give a bond conditioned to return a true inventory of the goods, chattels, rights, and credits, and to account for all goods, chattels, debts, and effects of the deceased. Section 1422 provides that they shall collect all goods, chattels, and debts, and preserve them for the executor or administrator when appointed. Section 1423 provides that their duty shall cease upon the granting of letters testamentary or of administration. Section 1424 provides that they shall not be liable to an action by any creditor of the deceased. Section 1479 provides that no holder of a claim against an estate shall sue thereon, unless the claim is first presented to the executor or administrator. *Held*, that the powers of the special administrators are limited to the collection and preservation of the estate and to caring for the real property for the general administrator, and they have nothing to do with claims and no power to pay, allow or reject them; the word "debts" in sections 1421 and 1422 meaning debts due the deceased, and hence presentation of a claim to a special administrator is not a sufficient presentation within section 1479.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 494-495½; Dec. Dig. § 122.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

#### 2. PLEADING (§ 408\*)—DEFECTS—WAIVER.

An objection to a complaint for insufficiency may be taken at any stage of the proceedings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1362, 1366; Dec. Dig. § 408.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 431\*)—CLAIMS—NECESSITY OF PRESENTATION.

Failure to present a claim against an estate to the executor or administrator, as required by Rem. & Bal. Code, § 1479, is not a mere matter of abatement, but the presentation is a fact essential to the cause of action.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819, 1854, 1856; Dec. Dig. § 431.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 222\*)—CLAIMS—NECESSITY OF PRESENTATION.

Where a claim against a decedent's estate was rejected by the special administrator and suit brought against him, the executor thereafter appointed, by adopting the pleadings of the special administrator and by failing to plead the nonpresentation of the claim to himself, did not waive the necessity for such presentation, since an executor does not stand in the place of the deceased but is a trustee for the heirs and devisees, and cannot waive, as against them, any requirement of the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764-766; Dec. Dig. § 222.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 222\*)—SPECIAL ADMINISTRATOR—POWERS.

An executor cannot ratify the rejection of a claim by the special administrator, and hence, even if his conduct amounted to a ratification, he was not estopped to raise the objection that a claim, although presented to the special administrator, had never been presented to him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764-766; Dec. Dig. § 222.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by C. M. Ward against Charles F. Magaha, as executor of Robert J. English, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Edgar J. Wright and J. L. Corrigan, both of Seattle, for appellant. J. H. Allen, of Seattle, for respondent.

CHADWICK, J. This is an action brought to recover a debt against the estate of Robert J. English, deceased. English died testate on September 27, 1909, and on December 1, 1909, Robert Boyker was appointed special administrator of the estate, the executor at the time being a nonresident. In August following defendant Charles F. Magaha, who was named as an executor of the will, qualified, and has since administered the estate. After the appointment of Boyker, a claim in due form was presented by plaintiff. It was thereafter rejected, whereupon this suit was brought, pending which and after the answer had been filed the attorneys for the respective parties stipulated that the present executor should be substituted as defendant, and that the case should proceed to trial upon the pleadings as then made up. Upon the trial of the case, it appearing that the claim had never been presented to the executor, the court sustained a motion to dismiss the case, and from a judgment of dismissal plaintiff has appealed. The concrete questions presented are: (1) Is the presentation of a claim to a special administrator a sufficient



presentation under our statute of nonclaim? (2) If the presentation was not formal, was it waived by answering and going to trial on the merits?

[1] It is clearly the policy of our law to keep the administration of estates within the hands of regularly appointed administrators, and to rely upon special administrators only in cases of emergency and for a limited time. Sections 1420-1425, Rem. & Bal. Code. Section 1420, Rem. & Bal. Code, defines the conditions under which a special administrator may be appointed, and defines his duties " \* \* \* to collect and preserve the effects of the deceased \* \* \*." Section 1421 provides for the giving of a bond with condition that he will return a true inventory of the "goods, chattels, rights and credits," and will account for all "goods, chattels, debts and effects" of the deceased. Section 1422 provides that he shall collect all "goods, chattels and debts," and preserve the same for the executor or administrator when appointed. Section 1423 provides that his duties shall cease upon the granting of letters testamentary or of administration. Section 1424 provides that the special administrator "shall not be liable to an action by any creditor of the deceased." In discussing sections 1421 and 1422, it is argued that, because the statute uses the words "rights and credits" and "debts," "debts" must mean debts owing by the deceased. Taking the whole statute, its words and purpose, we think it intends to cover only such debts and choses in action as may be assets of the estate. The only object in appointing a special administrator is to preserve the assets pending a formal administration, and nowhere is the matter of debts owing by the deceased mentioned, except the provision that the limitation for all suits shall begin to run from the time of granting letters, and that the "special administrator shall not be liable to any action by any creditor." Every provision of the law going to the matter of claims is elsewhere covered, and we will not presume that the Legislature intended to leave the right to present a claim to a special administrator concealed in words of doubtful meaning. Counsel says, however, that, although the law may be that a special administrator shall not be liable to suit, it nowhere says that a creditor cannot serve his claim on the special administrator; that it is the duty of the special administrator to keep such claims and turn them over to his successor for approval or rejection. There is much of equity in the argument advanced by counsel, but all claims against estates are collectible under the statute, and not otherwise; and, while the statute does not say in terms that a claim cannot be presented to the special administrator, it does say, inferentially at least, that a special administrator shall have nothing to do with claims. His duties as defined omit all reference thereto. This seems certain when his duties are compared with the duties

of an executor or administrator; it being there provided that they shall give notice to creditors and make provision for the payment of claims. The statute does say that "no holder of any claim against an estate shall maintain an action thereon unless the claim shall have been first presented to the executor or administrator." Rem. & Bal. Code, § 1479. This section has been held mandatory by this court. *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Foley v. McDonnell*, 48 Wash. 272, 93 Pac. 321. The powers of a special administrator are purely statutory, and are limited to the collection and preservation of the personal estate and to caring for the real property for the general administrator when appointed. He has no power to exercise the powers and duties conferred upon a regular administrator "such as the allowance of claims." *State v. Sec. Jud. Dist.*, 18 Mont. 481, 46 Pac. 259; *In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735; *In re Sackett*, 78 Cal. 300, 20 Pac. 863; *In re Wincox*, 186 Ill. 445, 57 N. E. 1073; 18 Cyc. 1326; *Supple's Succession*, 23 La. Ann. 24; *In re Parish*, 29 Barb. (N. Y.) 627. In the first case cited it was held that, the power of a special administrator being statutory, he could neither allow nor reject a claim, and that an order of the district court directing the payment of an indebtedness was void. In *Re Ford's Estate* the special administrator was denied credit for expenses incurred in the appointment of appraisers and the expense of publishing notice to creditors, because he was without authority to incur either, it being held that to sanction his publication of notice to creditors would be to limit the time for the presentation of claims in plain contravention of the statute.

It being clear upon principle and authority as well as the statute that a special administrator has no power to pay claims against the estate, it follows that he has no authority to either allow or reject them.

[2-4] This being so, it follows that the question for us to decide is whether a creditor of an estate who has never made legal presentation of his claim, and who has commenced an action against one who cannot be sued under the statute (section 1424, Rem. & Bal. Code), can recover upon the sole ground that the defendant executor has stipulated to adopt the pleadings filed by the special administrator, and did not raise the objection as to presentation until the trial was in progress. In other words, was the objection urged waived by the executor when he adopted an answer going to the merits and went to trial upon it? Respondent takes the position that the complaint does not state a cause of action, and that under repeated rulings of this court an objection as to the sufficiency of the complaint can be made at any time even in this court. It is unnecessary to collect or review the decisions to sustain this proposition. On the other hand, ap-

pellant contends that the failure to present the claim in proper form is matter of abatement only, and, unless pleaded, is waived. To sustain this position, he relies upon many cases, among them *Clayton v. Dinwoodey*, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *In re Morgan's Estate*, 46 Or. 233, 77 Pac. 608, 78 Pac. 1029. We cite these cases because the statutes of California, Oregon, and Utah are substantially the same as our own. We may grant that these cases sustain appellant's contention, although this court has held contrary to the rule of the Utah case; but they will not be held to control this case, for the general rule of practice in this state is that an objection to a complaint because it does not state a cause of action may be taken at any stage of the proceedings. In view of our special statute of nonclaim, we think the formality of presentment is not entirely a matter of abatement. It is true the debt may live, but the statute is designed for the protection of estates, and to bar a recovery. The reasoning of the cases above noted is not entirely satisfactory, nor are the Californian cases in entire accord with the reasoning of other cases decided by the same court. The general rule is that an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased, that he is bound by the statute, and cannot waive as against the heirs or devisees any requirement of the statute. 18 Cyc. 500; 11 A. & E. Enc. Law, 924; *Cockrell v. Seasongood* (Miss.) 33 South. 77; *Fitzgerald v. Nat. Bank*, 64 Neb. 260, 89 N. W. 813 (syllabus); *Winchell v. Sanger*, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935; *Farwell v. Richardson*, 10 N. D. 34, 84 N. W. 558; *Miller v. Ewing*, 68 Ohio St. 176, 67 N. E. 292; *Thompson v. Hoxsie*, 25 R. I. 377, 55 Atl. 930.

Our views are further sustained by the holding of almost all courts that the plea of the statute of limitations cannot be waived or omitted by an administrator. If so, he cannot by such omission waive the bar of the statute of nonclaim as against the estate. The cases of *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254, *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032, and *Nels v. Farquharson*, 9 Wash. 508, 37 Pac. 697, are also relied on. The *Donnerberg* Case did not decide "that presentation as required by section 1472, Rem. & Bal. Code, was not necessary before commencement of the action." *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239. The action was pending at the time of the death of the defendant in the *Megrath* Case. In *Nels v. Farquharson* it is said: "In the second place, the appellants are not in a position to urge the objection in this court that there was no presentation of plaintiffs' claim or demand to the administrator. The record does not show that the objection was made in the

court below, and it cannot be taken for the first time in the appellate court." This would seem to sustain the theory that the presentation of a claim could be waived, but the expression is inconsistent with the later ruling of the court as declared in the *Fairlamb* and other cases. Since those decisions the statute must be taken as it reads, and the presentation is a fact essential to the cause of action as much so as the instrument sued on. Our conclusion is, therefore, that that part of the decision in the case of *Nels v. Farquharson* hereinbefore quoted is not the law, and should be overruled with the rest of the opinion. See *Barto v. Stewart*, 21 Wash. 618, 59 Pac. 480. The *Fairlamb* and succeeding cases seem to be sustained by the better reason, considering, as we should, that the rule of the common law which passed the legal title to the administrator without restriction is greatly modified, if not entirely overcome, by the laws of this state; for, although retaining in a sense the theory that the title is in the administrator, it is more as a fiction than a reality. The administrator does not personate the deceased as he did at common law. Therefore he is bound to act as he would for a principal, moving in the same way, asserting the same rights, and pleading the same defenses. If he had the personal interest and title of a common-law administrator, he might waive a right or a defense, and the remedy of the heir would be against the administrator as for a devastavit; but, under modern conditions, he cannot waive that which a statute says shall be done, for the statute measures as well the limit of his power as the extent of the creditors' or strangers' right.

In writing this we have in mind the case of *Denney v. Parker*, 10 Wash. 218, 38 Pac. 1018, where the compromise of a claim by an administrator pending a lawsuit was affirmed. The case is not made to rest upon authority, unless it be the case of *Parker v. Providence*, etc., S. S. Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 44 L. R. A. 414, 33 Am. St. Rep. 869, and reference to that case will show that it was really bottomed upon a statute declaratory of the common law, giving an administrator power to arbitrate or compromise all doubtful claims independent of the order or direction of the court. "Executors and administrators may submit to arbitration or may adjust by compromise any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done." In some of the states the common-law powers of an administrator are recognized by the courts notwithstanding the statutes. They seem to have been unwilling to break away from the common law; whereas, it seems to us that the purpose of the statutes making an administrator amenable to the orders of the court was intended to avoid the uncertainty

and confusion of the resultant rule as announced in most all of the older cases. We quote it from the Rhode Island case: "If, in the exercise of this power, the executor or administrator by reason of negligence or any serious error in judgment obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a devastavit, and be required to make up the loss out of his own estate; but still the compromise, if made in good faith, would be binding upon the parties thereto. In *Rogers v. Hand*, 39 N. J. Eq. 270, 275, which was a case in which the executors compromised and settled a claim against the estate without suit, the court says: 'When they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority or contrary to law.' " There is now no reason for ignoring our statutes and allowing an administrator to waive a right, or admit by his action or inaction a claim against an estate. The reasons stated in the *Denney* Case are unsound. The case seems to have proceeded upon the theory that the probate court was something "over the hills and far away," whereas it was the same court in which the action was pending, and with full power in the same judge to discontinue the action at law until the probate record could be made up. *Sloan v. West*, 63 Wash. 623, 116 Pac. 272. The reasoning of the late Chief Justice Dunbar in his dissenting opinion to the decision under discussion seems to us to be unanswerable.

[5] Appellant further contends, and sought to put this contention into legal form by the proffer of an amended complaint alleging that, inasmuch as the special administrator did for eight or nine months administer the estate by acknowledging and paying claims, the executor should now be estopped to question his authority; especially so after stipulating to accept his answer as his own. It will be seen by reference to the authorities cited that the conduct of the special administrator was in excess of his duties as defined by statute, nor can the act of the administrator operate to deprive the estate of the benefit of the statutes of nonclaim. If we were to so hold, the estate would be put in a worse position by the appointment of an executor than it was before, for no action could be maintained against the special administrator (section 1424) and none against the executor (section 1479). Yet we are called upon to hold that an executor can ratify something that the statute expressly forbids. Appellant's remedy as a creditor was to ask for the appointment of some suitable person as administrator, so that he might present his claim in a formal way.

Affirmed.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

**KOLOFF v. CHICAGO, M. & P. S. RY. CO.**  
(Supreme Court of Washington. Jan. 18, 1913.)

**1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.**

Where decedent was killed by the fall of a brick while at work at the base of a 40-foot tower, and there was evidence that defendant's foreman was tossing the bricks from one position to another on top of the tower and that one of them fell, the evidence was sufficient to warrant a finding that the foreman's negligence caused the brick to fall.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**2. MASTER AND SERVANT (§ 190\*)—DEATH OF SERVANT—SAFE PLACE—NEGLIGENCE OF FELLOW SERVANT.**

Where defendant's foreman, while on the top of a tower, negligently tossed certain loose bricks from one position to another so that one of them fell and killed decedent, who was working below, the foreman's act was a violation of the master's duty to furnish decedent with a safe place to work and keep it reasonably safe, and was not the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

**3. MASTER AND SERVANT (§ 222\*)—DEATH OF SERVANT—DANGEROUS PLACE—ASSUMED RISK.**

Where decedent took his place at the base of a tower at the direction of his foreman, and was later killed by the fall of a brick negligently tossed from the top of the tower by the foreman without warning, decedent did not assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

**4. MARRIAGE (§ 50\*)—PROOF OF MARRIAGE—CHILDREN—EVIDENCE.**

In an action for death of a servant, evidence of decedent's brother that he was present at decedent's wedding in Bulgaria, that the ceremony was performed by a Christian priest according to the custom of the country, and that the parties lived together until decedent came to the United States, and that three children, a girl and two boys, were born to them, was sufficient prima facie proof to show that decedent left a widow and children.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 79-89; Dec. Dig. § 50.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 19\*)—RIGHT TO APPOINTMENT—WAIVER.**

The right of a decedent's surviving spouse and next of kin, in their order, to administer his estate, conferred by Rem. & Bal. Code, § 1389, is a personal right, which is waived by their failure to apply for letters within 40 days after decedent's death, after which the court has discretionary power to appoint any suitable person.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 78-82; Dec. Dig. § 19.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—COLLATERAL ATTACK.**

Where decedent's widow and children were nonresident aliens, whereupon the court appointed decedent's brother, a resident of the state, as his administrator before the expiration of 40 days, the brother being a suitable person and the 40 days having expired without any application on the part of the decedent's widow and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

children for letters, the appointment was valid as against collateral attack.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177-182, 1411; Dec. Dig. § 29.\*]

**7. DEATH (§ 11\*)—ACTION FOR WRONGFUL DEATH—CREATION.**

Since no right of action for wrongful death existed at common law, the right is entirely governed by statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.\*]

**8. DEATH (§ 32\*)—ACTION FOR DEATH—BENEFICIARIES.**

Under Rem. & Bal. Code, § 183, creating a right of action for wrongful death, the sole beneficiaries are the decedent's widow and children, and not the parents or collateral heirs.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. § 32.\*]

**9. DEATH (§§ 31, 42\*)—WRONGFUL DEATH—RIGHT TO SUE.**

Under Rem. & Bal. Code, § 183, creating a right of action for wrongful death, only a single action can be prosecuted, either by the widow and children for their joint benefit or by the decedent's personal representative with the consent of the widow and children for their benefit.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48, 58; Dec. Dig. §§ 31, 42.\*]

**10. EVIDENCE (§ 318\*)—HEARSAY—LETTERS.**

Where decedent died, leaving a wife and children in Bulgaria, a letter written in the Bulgarian language without signature, in the handwriting of decedent's sister, purporting to have been written for the widow, who could not write, to decedent's brother, begging him to send the widow money with which to support the children, was hearsay and incompetent to show the widow's authority to the brother to institute suit as administrator for decedent's wrongful death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.\*]

**11. EVIDENCE (§ 373\*)—ACTION—ADMINISTRATOR—RIGHT TO SUE—EVIDENCE.**

Where decedent died, leaving a widow and children in Bulgaria and complainant, a brother, in Washington, a certificate in the Bulgarian language of the mayor of the city where the widow lived, and his secretary certifying that complainant, who sued as administrator, was a brother of the decedent, and that the three children therein named were decedent's children, that she authorized and directed complainant to bring the action for her and the children, and bearing the impress of a rubber stamp as the official seal of the mayor, but not purporting to have been signed by the widow by mark or otherwise, was incompetent to confer authority from the widow on the complainant to maintain the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1581-1586, 1590, 1592, 1593, 1610, 1611; Dec. Dig. § 373.\*]

**12. ACKNOWLEDGMENT (§ 57\*)—WRONGFUL DEATH—ADMINISTRATOR—AUTHORITY TO SUE—EVIDENCE.**

Decedent was killed in Washington, and left a widow and certain children in Bulgaria. Complainant, a brother, instituted suit in Washington and, to show authority by the widow, offered a typewritten paper purporting to have been signed by the widow by mark and to authorize the bringing and prosecution of the action for her and minor children, naming them. There were no witnesses to the signature, but the paper purported to have been acknowledged in sufficient form before an officer, whose title was written in a foreign language, authenticat-

ed by the impress of a rubber stamp or seal, the legend of which was also in a foreign language. The venue was in the city of Kostel, kingdom of Bulgaria, and it was asserted that the certifying officer was the mayor of that place, and the impression his official seal. *Held* that, since such paper was not one entitled to record by reason of its being acknowledged, and it was not for that reason entitled by law to be acknowledged as provided by Rem. & Bal. Code, §§ 8758, 8760, the acknowledgment did not prove it, and it was therefore insufficient to show complainant's authority.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57.\*]

**13. EVIDENCE (§ 373\*)—WRONGFUL DEATH—AUTHORITY TO SUE—PROOF.**

Where decedent died leaving a widow and children in Bulgaria, and his brother was appointed as administrator in Washington, after which the widow executed an instrument authorizing the brother to institute a suit for decedent's wrongful death on behalf of herself and children, the execution of the instrument should have been proved by the testimony or deposition of some person who saw her sign it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1581-1586, 1590, 1592, 1593, 1610, 1611; Dec. Dig. § 373.\*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Nick Koloff, as administrator of the estate of Christ P. Koloff, deceased, against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Geo. W. Korte, of Seattle (F. M. Dudley, of Seattle, of counsel), for appellant. Walter L. Johnstone and S. A. Keenan, both of Seattle, for respondent.

ELLIS, J. This is an action by the administrator for the benefit of the widow and minor children of the decedent to recover damages from the defendant railway company for its alleged negligence resulting in the decedent's death. The evidence introduced by the plaintiff fairly established the following facts: The decedent was a common laborer, about 35 years of age, a native of Bulgaria, and had resided in this country but about 26 months. The defendant in September, 1911, was constructing an oil tank at Moneton, now Cedar Falls, Wash. The lower portion was of concrete, and above this of brick work upon which were to rest two 12 by 12 wooden beams for the support of a large steel oil tank. This and various other work was being done in that vicinity, and a number of men, including the deceased, were there employed under the direction of a foreman of the defendant. The concrete and brick work of this structure constituted a hollow, octagonal tower, about 40 feet high, which had been completed at the time of the accident. On September 19th the foreman called 8 or 10 men, among them the deceased, from other work to assist in hauling up, by means of a rope and tackle, the timbers to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

placed across the top of this tower. Near the bottom was a door, and the timbers were being hauled up from the inside. Two men were placed inside the tower to attach and guide the rope, while the deceased and five other men were directed by the foreman, who was in immediate charge of the work, to stand near the door on the outside and pull on the rope at his command. The foreman and another man were on top of the tower, at a point almost immediately above the six men. The first timber was hauled up without mishap. After the second timber was started, some difficulty was experienced, and it was lowered for readjustment of the rope by the men inside. While this was in progress, the foreman was engaged in shifting the position of certain loose bricks on the top of the tower, tossing them from one position to another immediately above the six men. He had been so engaged for three or four minutes when a brick fell, striking the deceased and killing him. At the time one of the two men on top of the tower—no witness could say which—called out, "Look out below," and immediately afterwards, "My God, I have killed a man." While no witness testified to seeing a brick leave the foreman's hands and hit the deceased, one man said he saw one of the bricks tossed by the foreman fall from the tower and strike the timbers of a narrow scaffold above the men below; that he could not see the man below, but immediately ran to the tank and saw the man lying down. There was no evidence tending to show that the deceased was ever on top of the tower, or had ever worked upon it or about it, or that he had any knowledge or warning of any kind that there were loose bricks upon it. The defendant offered no evidence.

The complaint charged as negligence (a) the throwing of, or causing the brick to fall, by the defendant's foreman in charge of the work; (b) the placing of deceased in a dangerous and extrahazardous position of which he had no knowledge or means of knowledge; (c) failure of the defendant to provide the deceased with a safe place of work; (d) failure to provide any means to protect the deceased from carelessness or negligence on the defendant's part. The cause was tried to a jury. Defendant's motion for a nonsuit was overruled. The jury returned a verdict for \$10,000. Defendant's motion for a new trial was overruled, and judgment was entered upon the verdict. The defendant appealed.

[1] The appellant first contends that there was no evidence to show, either directly or indirectly, what caused the brick to fall. As we have seen, there was direct evidence that the foreman was tossing the bricks from one position to another, and that one of them fell. There was no evidence that more than one brick fell, and the evidence was conclusive that a falling brick killed the deceased. The evidence was ample to war-

rant the jury in finding that the negligence of the foreman caused the brick to fall. The cases from this court cited by the appellant are not apposite. In *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 433, there was no evidence of any human agency in connection with the fall of the plank. In *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, there was no evidence, either direct or circumstantial, to show what caused the accident. In *Erengen v. Stone & Webster Eng. Corp.*, 66 Wash. 204, 119 Pac. 193, the facts were in no sense similar to those here presented.

[2] It is also contended that, if the cause of the fall of the brick was shown, it was something over which the appellant as master had no control, and was the result of an omission of fellow service. This is equally untenable. Without attempting to pursue the tenuous distinctions suggested by the appellant, it will be sufficient to say that the negligent act of the foreman infringed a duty which the appellant as master owed to the deceased, namely, the exercise of reasonable care to furnish a reasonably safe place of work and to keep it reasonably safe. There is no question of fellow service involved. *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 360. If the foreman did not represent the master, then there was a confessed lack of reasonable supervision looking to the safety of the servant's place of work. *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849; *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526. If he did represent the master, then his negligence in that capacity rendered the place of work unsafe. He should not have moved the bricks nor permitted them to be moved without warning the men below. The case is simple and typical. It falls directly within the principles announced by this court in the following decisions: *King v. Griffiths-Sprague Stevedoring Co.*, 45 Wash. 425, 88 Pac. 759; *McLeod v. Chicago, M. & P. S. Ry. Co.*, 65 Wash. 62, 117 Pac. 749; *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592.

[3] The deceased, when he took the position to which he was assigned by the foreman's command, had the right to assume that it was reasonably safe. He assumed no risk not reasonably a necessary incident to the actual work in hand. He was subjected to an unnecessary peril without warning. *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330; *Fueston v. Langan*, 67 Wash. 212, 121 Pac. 55; *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Howland v. Standard Milling & Logging Co.*, supra; *Hicks v. Jenkins*, supra; *Cook v. Ohehalls River Lumber Co.*, 48 Wash. 619, 94 Pac. 189.

[4] It is next contended that there was no

competent proof that the decedent left a widow and children. His brother testified that he was present at the wedding in Bulgaria 10 years ago; that the ceremony was performed by a Christian priest, as customary in that country; that the contracting parties lived together until decedent came to this country; that three children were born to them, a girl and two boys. This evidence was competent and ample to go to the jury upon these points. 8 Ency. Ev. 465; *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625; *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477. It is also contended that there was no evidence of a legal appointment of the respondent as administrator. It is argued that the appointment was invalid because it was made within 40 days after the decedent's death, and there was no showing of waiver of the right to act or of a request to appoint the respondent by the widow. Whatever might be said of this contention on a direct attack, it is unavailing here.

[5] The right of the surviving spouse and next of kin, in their order, accorded by statute (Rem. & Bal. Code, § 1389), is a personal right. It is waived by a failure to apply within 40 days after the death. Such failure confers upon the court discretionary power to appoint any suitable person. *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123.

[6] The petition for administration shows that the widow and children are nonresident aliens. None of them could act. The decedent's brother, a resident of this state, who was appointed, is, so far as the record shows, a suitable person. The 40 days have long since expired, and none of the persons entitled to priority have objected to the appointment. The appointment is valid as against collateral attack. 18 Cyc. p. 140; *Moreland v. Lawrence*, 23 Minn. 84; *Pick v. Strong*, Adm'r, 26 Minn. 303, 3 N. W. 697; *Larson v. Union Pac. R. Co.*, 70 Neb. 261, 97 N. W. 313. See, also, *Wiley v. Verhaest*, 52 Wash. 475, 100 Pac. 1008; *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16; *State v. Ayer*, 17 Wash. 127, 49 Pac. 226.

[7-9] It is next urged that there was no competent evidence that the widow and children authorized or sanctioned the bringing of this action by the administrator. This action was brought under section 183, Rem. & Bal. Code. This court has held that no right of recovery for wrongful death existed at common law, and that the right is therefore governed by the statute (*Manning v. Tacoma Ry. & P. Co.*, 34 Wash. 406, 75 Pac. 994); also that the sole beneficiaries of the right of action are the widow and children, and not the parents or collateral heirs (*Noble v. City of Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Manning v. Tacoma Ry. & P. Co.*, supra); that the statute grants but one cause of action to be prosecuted in a single suit by the heirs or personal representatives of the deceased (*Riggs*

*v. Northern Pacific Ry. Co.*, 60 Wash. 292, 111 Pac. 162); and that, where an action is prosecuted in the name of the personal representative, it is not for the benefit of the estate, but for the sole benefit of the widow and children who share jointly in the damages recovered (*Copeland v. City of Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333). Again this court has said that, while it is customary to prosecute such actions in the name of the widow and children, it may be prosecuted in the name of the personal representative for their benefit. *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831.

In the *Copeland Case*, 33 Wash. at page 421, 74 Pac. at page 584 (65 L. R. A. 333) it is said: "It is true the defendant cannot be subjected to two actions for the one cause, and, as the widow has the first right to sue, it must be made to appear, at some stage of the proceedings prior to the time the defendant is called on to put in his defense, that the widow has knowledge of and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name. The danger of a defendant's being subjected to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper times." We adhere to the rule so laid down as salutary and essential to the protection, not only of a defendant, but also of the rights of the widow and children. While it is there assumed that the widow has the first right to sue, this was said in relation to the facts there presented. In that case there were no children but only a widow, and that language was used in reference to the right as between the beneficiaries and the personal representative. The right of recovery being joint and enforceable only in a single action, it follows that the right to sue as to the widow and children is co-ordinate, neither having a prior right as to the other. It also follows that, if an authorization or sanction of the suit by the administrator is necessary on the part of the widow, it is also necessary on the part of the heirs. We have decided that nonresident aliens, widow and children, may maintain an action for wrongful death under this statute in their own names. *Anustasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, 130 Am. St. Rep. 1089. In another case it was held that a nonresident widow and minor children can maintain their joint action in this state; the widow procuring herself to be appointed guardian ad litem for the minors under section 187, Rem. & Bal. Code, for the purpose of bringing the action. *Shannon v. Consolidated, etc., Mining Co.*, 24 Wash. 119, 64 Pac. 169. In a more recent case we held that a minor may maintain the action by the widow as guardian ad

litem; the widow apparently having waived her right to join in the same action personally. *Riggs v. Northern Pacific Ry. Co.*, 60 Wash. 292, 111 Pac. 162.

From these holdings it is deducible that, there being but one right of action, joint in the widow and children, the widow may submit herself and the minor children (where under the age of 14) to the jurisdiction of the court by having herself appointed guardian ad litem for the purpose, or in the same way submit the children to the jurisdiction, waiving her own right to join. This is doubtless because of the fact that an infant, if under the age of 14 years, is incapable of initiating an action, and the mother is the nearest possible (to use the words of the statute, Rem. & Bal. Code, § 187) "relative or friend." But since the suit may also be maintained in the name of the personal representative, for the benefit of the widow and children, and since, as held in the *Copeland Case*, knowledge and sanction of the widow as to the bringing of the action must be shown, and by parity of reasoning the sanction also of the minor children, it would seem logically to follow that the widow may initiate the action by the personal representative by giving this consent or sanction for herself and for the children, and we so hold. The question is thus reduced to this: Was there competent and sufficient evidence that the widow, for herself and the minor children, authorized or sanctioned the bringing or prosecution of this action for their benefit?

[10-12] The evidence offered and admitted was as follows: (1) A letter in Bulgarian, without signature, with an offer to prove that it was in the handwriting of the decedent's sister. It was not translated, but the interpreter stated that it purported to be written for the widow, who could not write, to the decedent's brother, Nick Koloff, begging him to send her money with which to support the children and buy the things necessary therefor. This was, of course, incompetent for any purpose. It authorized no suit and was moreover hearsay. (2) A certificate, also in the Bulgarian language, with an offer to prove that the signature thereto purported to be that of the mayor and secretary of the city where the widow lived, and that the paper purported to certify that Nick Koloff, the administrator, is a brother of the decedent, and that the three children therein named are the decedent's children, and stating that she authorized and directed Nick Koloff to bring the action for her and the children. The paper bears the impression of a rubber stamp which may be assumed to be the official seal of the mayor. There is no tenable theory upon which this paper can be held admissible for any purpose. It did not purport to be signed by the widow, either by mark or otherwise. As a certificate, it is not such as to constitute evidence either at common law or under any statute, either federal or of this

state. (3) There was admitted in evidence, over objection that it was incompetent and that no foundation had been laid for its admission, a paper typewritten in the English language, purporting to be signed by Marie Koloff by mark, and purporting to authorize and sanction the bringing and prosecution of the action for her and the minor children, naming them. There were no witnesses to the signature. It purports to have been acknowledged in sufficient form before some officer whose title is written in a foreign language, presumably Bulgarian, authenticated by the impression of a rubber stamp or seal, the legend of which impression is also in a foreign language. None of the foreign words were translated by the interpreter. The venue is the city of Kostel, kingdom of Bulgaria, and it is asserted that the certifying officer was the mayor of that place and the impression that of his official seal. Assuming, without deciding, that we would take judicial notice of this seal as proving the official character of the certificate of acknowledgment in a proper case, still this paper, on such authentication, was not properly admitted without further proof of its execution. It is not such an instrument as is required by any law of this state to be acknowledged. Rem. & Bal. Code, § 8758. It would not be entitled to record by reason of being acknowledged. Rem. & Bal. Code, § 8760. The purpose of acknowledgment is authentication for record. The certificate of acknowledgment only proves the execution of an instrument entitled by law to record when acknowledged. Such a certificate would not prove the execution of a promissory note, a letter, or any other similar document. The instrument here in question lacks many of the elements of a power of attorney, either special or general. But, even if it might be held a power of attorney, it would not be authenticated by an acknowledgment. It is not a power to convey, or in any manner affecting, real estate, and is not entitled to record. Rem. & Bal. Code, § 8786. We know of no statute of this state, and have been cited to none, authorizing the authentication by acknowledgment and the recording of a power of attorney not affecting real estate, excepting certain powers relating to corporate agency and the like. Since the purpose of acknowledgment is authentication for record, and only as incidental thereto the certificate proves the execution of the instrument, it is only proof of the execution of an instrument entitled to be recorded. This is not such an instrument.

[13] The proof of the execution of the instrument should have been made by the testimony or deposition of some one who saw her sign it. Other assignments of error go to the instructions. It will not be necessary to review them, since what we have said of the evidence sufficiently disposes of them. Since this failure of proof does not go to

the actual right of recovery, and since the action was properly brought if actually authorized, we would not be warranted in directing a dismissal. If the trial court had not held the acknowledgment a sufficient proof of execution, other proof might have been furnished.

The judgment is therefore reversed, and the cause is remanded for a new trial or for a dismissal, without prejudice, at the respondent's option.

MOUNT, FULLERTON, MORRIS, and MAIN, JJ., concur.

**BENSON et al. v. ENGLISH LUMBER CO.**  
(Supreme Court of Washington. Jan. 22, 1913.)

**1. ACTION (§ 57\*)—CONSOLIDATION.**

Rem. & Bal. Code, § 183, permitting the "heirs or personal representatives" of one killed by wrongful act to maintain an action for damages, only creates one cause of action to be prosecuted in a single action by the heirs or personal representatives, so that separate actions brought by children for their father's negligent death were properly consolidated.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. § 57.\*]

**2. MASTER AND SERVANT (§ 103\*)—DELEGABLE DUTIES—SAFE APPLIANCE.**

The master's duty to exercise reasonable care to furnish a safe place of work and reasonably safe appliances is nondelegable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**3. MASTER AND SERVANT (§ 278\*)—INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE—UNSAFE APPLIANCE.**

In an action for death by the breaking of a hook used in hauling logs, evidence held to sustain a finding that the hook furnished was not reasonably suitable because made of inferior steel or by a defect in its casting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**4. MASTER AND SERVANT (§ 226\*)—MASTER'S DUTY—DELEGATION.**

If the master was negligent in furnishing reasonably safe appliances, he could not rely on any negligence of a fellow servant, with respect to that duty, to escape liability for resulting injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

**5. MASTER AND SERVANT (§ 217\*)—ASSUMED RISK—DEFECT IN APPLIANCE.**

An employé did not assume the risk of inherent defects in an appliance unless he knew of such defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**6. MASTER AND SERVANT (§ 185\*)—INSPECTION—DUTY.**

Since the master is bound to inspect appliances, the assurance to an employé, by another employé having charge of an appliance, that it was all right could be relied upon as the assurance of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

**7. NEGLIGENCE (§ 122\*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

The burden is on defendant to establish contributory negligence, but it may be established by plaintiff's evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.\*]

**8. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.**

To make the question of contributory negligence one of law, the facts must be so plain that reasonable men may not differ thereon, and where the evidence conflicts, or fair-minded men may draw different conclusions from the undisputed facts, the question is one for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**9. MASTER AND SERVANT (§ 247\*)—INJURIES—JURY QUESTION—PROXIMATE CAUSE.**

If a servant's contributory negligence was only a remote cause or condition of the accident, and the master's negligence was the proximate cause, he is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.\*]

**10. MASTER AND SERVANT (§ 289\*)—INJURIES—JURY QUESTION—PROXIMATE CAUSE.**

Whether decedent's negligence was the proximate cause of his death by the breaking of a hook while assisting in hauling logs held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**11. MASTER AND SERVANT (§ 289\*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.**

In an action for a servant's death by the breaking of a hook while hauling logs, the question of contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Consolidated actions by Helen Benson and another against the English Lumber Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded for new trial.

Ruck, Benson & McLane, of Seattle, for appellants. Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondent.

ELLIS, J. The plaintiffs, aged respectively five and seven years, children of Ole Benson, deceased, brought separate actions by their guardian ad litem to recover for the wrongful death of their father through the alleged negligence of the defendant. Upon motion of the defendant, the two actions were consolidated. The consolidated action came on for trial, and, when the plaintiffs had closed their evidence, the defendant challenged its sufficiency by a motion for nonsuit upon the grounds that the plaintiffs had failed to prove any negligence of the defendant as charged; that the evidence showed that the deceased was guilty of contributory negligence and had assumed the risk; and that, if any negligence was shown,



it was that of a fellow servant. The challenge was sustained, and the action was dismissed. The plaintiffs have appealed.

The material evidence may be condensed as follows: The respondent was engaged in the logging business and conducted it in the ordinary way. The logs were dragged out of the woods upon the ground by a donkey engine placed at the landing. This was done by means of a wire cable extending from the engine, through certain blocks and pulleys, back into the woods, where the cable was fastened to the logs by means of a "choker." The crew engaged in this work consisted of several men, among them a "hook tender," a "rigging slinger," and a "chaser." All of the crew were under the control and supervision of the hook tender, who acted as foreman. As such he had charge of and superintended the work. He had immediate charge of the logs, until they had been hauled out of the woods into the clearing about the landing, when the chaser took charge of them and directed their progress the rest of the way to the landing. The deceased was acting in the capacity of chaser. At the time of the accident, a log had been hauled out of the woods by means of the cable, blocks, pulleys, and swivel, under the direction and supervision of the hook tender, a distance of between 400 and 500 feet to a point about 150 feet from the landing. One witness said the log was large and heavy; another that it was not very large nor unusual in any way. At or near that point a part of this more complicated adjustment of the cable, referred to in evidence as the swivel, broke. The hook tender came out of the woods, and it was determined to drag the log the rest of the way by means of a stub line, operated by a direct pulley, without the intervention of blocks or pulleys. The hook tender himself superintended and, with the assistance of the rigging slinger, adjusted this line, attaching it to the choker about the end of the log by means of a steel hook. The deceased was present at the time and, one of the witnesses stated, assisted in the work. The hook tender testified that, when this operation was completed, he told the deceased that "everything was all right, to go ahead with the log." He also said that he told the deceased and the other man "to step back out of the way." The hook tender himself went back of the log and the rigging slinger, and the deceased went to a position 10 or 12 feet to one side and slightly forward of the log. The hook tender testified that, in case a hook broke, the piece might fly in any direction, back of the log as well as to the side, and that no one could tell which way it would fly. At that instant the engine was started with an even, steady pull, swinging the log around in line with the cable, when the log, becoming somewhat embedded in a small mound of earth, ceased to move, and the hook broke, the cable re-

coiling toward the engine, and the detached piece of hook flying in the direction of the deceased. Something—no witness testified what—struck the deceased in the forehead, crushing it and causing his death. It seems probable that it was the fragment of hook, as the piece was found at his side immediately after he fell. No one could say who gave the signal to start the engine, but it seems to be admitted that it was the chaser's duty at this stage of the work either to give the signal himself or to notify the signalman to give it. All of the evidence as to the actual accident was given by the hook tender and the rigging slinger, who seem to have been the only near eyewitnesses. They both testified that it was no uncommon thing for the hooks or other parts of the rigging to break in pulling a heavy log, and that the men knew that something was liable to break. The hook tender also testified that the deceased was inclined to be careless about getting out of the way, and had often been warned to be more careful. The hook tender immediately after the accident found the piece of broken hook at the side of the deceased and tossed it away; seeing which, another witness picked it up and positively identified it when it was produced at the trial. Two blacksmiths, of long experience in working with steel and in the making of hooks and other appliances for logging and other purposes, were qualified as experts and, on examination of this piece of hook, testified that it was made of a low grade of tool steel, and that the break showed a defect in the making known as "cold shut," caused by bending the steel at too low a temperature. They both testified that a hook made of low grade steel, such as this, was much more brittle and likely to snap, and will stand much less strain than one made of a high grade of steel, and has a less close grain and looks differently when broken. Both testified that a cold shut, such as shown on this fragment, greatly weakened the hook, and that any blacksmith, in making a hook, could detect at once whether there was a cold shut in it.

[1] As a preliminary contention, the appellants claim that the court erred in consolidating the two actions. The actions were brought under Rem. & Bal. Code, § 183, giving a right of action for wrongful death. We have construed this section as granting but one cause of action to be prosecuted in a single proceeding by the heirs or personal representatives of the deceased. *Koloff v. Chicago, etc., Ry. Co.*, 129 Pac. 398, just decided; *Riggs v. Northern Pac. Ry. Co.*, 60 Wash. 293, 111 Pac. 162; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333. The court committed no error in ordering the consolidation. Was the nonsuit properly granted? The respondent contends that no negligence or violation

of its duty to the deceased was established.

[2] The duty of the master to exercise reasonable care to furnish the servant with a reasonably safe place of work and reasonably safe appliances, so that the servant may not be exposed to unnecessary hazards, is positive and nondelegable. This has been so often held by this court as to require no citation of sustaining authority.

[3] That the jury might reasonably have found that the hook furnished by the master was not reasonably fit for its intended purpose, either because of the inferiority of the steel of which it was fashioned or because of the weakening effect of the cold shut, both of which defects could easily have been discovered in the making, and the latter, at least by subsequent inspection, seems under the evidence too plain for argument. Respondent suggests that, with so heavy a log partially embedded in earth, any hook would be likely to break. Sufficient inherent causes for the breaking having been shown, the jury would not be required to speculate, nor are we, as to what added strain a sound hook, made of good material, might have sustained. The contention that the negligence, if any, was that of a fellow servant is equally untenable.

[4] There being evidence from which the jury might have found a violation of the primary duty to furnish a reasonably safe hook, no question of fellow service was involved. *Koloff v. Chicago, etc., Ry. Co.*, just decided; *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369. The question of the respondent's negligence was for the jury.

[5] Since there was evidence from which the jury might have found that the hook broke because of inherent defects, the deceased did not assume the risk of that danger unless he knew of the defects. There is no evidence that he ever saw the hook, and the evidence that he had anything to do with the adjustment of the stub line was meager. As their titles would indicate, the hook tender and rigging slinger would be expected to perform that duty, and the evidence shows that they were mainly instrumental in performing it in this instance. We are not impressed by the hook tender's statement that, when he came out of the woods, he at once came under the chaser's orders. This was a mere conclusion, and his own actions at the time negative its soundness. He personally assisted in and superintended the adjustment of the stub line, assured the other men that it was all right, and told the deceased to go ahead with the log. There was no act or circumstance from which a relinquishment of his command can be inferred.

[6] The duty of inspection was upon the master. The assurance of the hook tender that the tackle was all right was the assurance of the master, upon which the deceased had the right to rely. "On the other hand, the servant does not accept the risks of un-

known, latent, unseen, or obscure defects or dangers, such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection, which the law puts upon him to the end of seeing that the premises, tools, and appliances, with respect to which the servant is required to labor, are in a reasonably safe condition, since the servant is not in general, except where he has agreed to do so by contract with his master, required to institute special inspections for the purpose of discovering hidden dangers." *Thompson on Negligence*, § 4641 (2d Ed.) p. 664.

A more difficult question is presented by the claim of contributory negligence. It is not pretended that there was any duty upon the deceased to inspect the hook, or that he had anything to do with its selection. The sole claim is that he was negligent in standing where he did.

[7] It is well established that in this state contributory negligence is an affirmative defense, and that the burden is upon the defendant to establish it. *Curran v. Seattle & S. F. R. & Nav. Co.*, 34 Wash. 312-522, 76 Pac. 87; *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659, 29 Pac. 346; *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111; *McLeod v. Chicago, M. & P. S. Ry. Co.*, 65 Wash. 62, 117 Pac. 749.

[8] While this defense may be established by the plaintiff's evidence, it is also well settled that, where there is uncertainty as to its existence, "whether the uncertainty arises from a conflict in the testimony or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them," the question is not one of law but one of fact to be determined by the jury. *Richmond & Danville R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Curran v. Seattle & S. F. R. & Nav. Co.*, supra; *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776; *Burlan v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214. The courts are therefore not at liberty to speculate as to the existence of any fact necessary to the establishment of the defense of contributory negligence. Every essential fact must be so plain that the minds of reasonable men may not differ thereon before the court will be justified in withdrawing the question from the jury. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582-592, 68 Pac. 191.

[9] Moreover, even assuming that the deceased was guilty of negligence, if the defendant's negligence was the proximate cause of the injury, while that of the deceased was only a remote cause or a mere condition of it, the defendant is still liable. *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419, 46 Pac. 650; *Atherton v. Tacoma Ry. & Power Co.*, 30 Wash. 395, 71 Pac. 39.

[10] What was the proximate cause of

the injury was a question for the jury under proper instructions. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360. Conceding that the deceased was guilty of contributory negligence in standing where he did, it is still manifest that, before the jury could have found that negligence the proximate or efficient cause of the injury, it must also have found that the hook would have broken had it been without defect and made of good material. To hold that, as a matter of law, the decedent's negligence was the proximate cause of the injury, as must be held to justify a nonsuit, is to hold without evidence to that effect, and on mere suspicion, that a sound hook, made of good material, must have broken in any event. We would also have to hold, as a matter of law, that a sound hook must have broken at the same instant that this did, since, if the hook had held for a longer time, the deceased might have changed his position or the log might have been dragged beyond him. Such speculation will not be indulged in order to grant a nonsuit.

[11] The question of contributory negligence in all of its phases was one for the jury.

The judgment is reversed, and the cause is remanded for a new trial.

MORRIS, MOUNT, FULLERTON, and MAIN, JJ., concur.

#### LEVOLD v. STIRRAT et al.

(Supreme Court of Washington. Jan. 31, 1913.)

#### APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO PROSECUTE.

Where appellant delays for more than 15 months after notice of appeal is given to file his briefs, prejudice from such delay will be presumed, and the appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by J. C. Levold against J. R. Stirrat and others. Judgment for defendants, and plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

John H. Perry, Hammond & Hammond, and Walter Schaffner, all of Seattle, for appellant.

PER CURIAM. This cause is before us upon the respondents' motion to dismiss the appeal. The final judgment was entered in the superior court on May 11, 1911. Notice of appeal was given on August 7, 1911, and the respondents' motion is based upon the failure of the appellant to file any briefs within the time required by law. The delay in filing the briefs, which is unexplained, has extended over a period of more than 15 months. The delay has been so great that

prejudice will be presumed, and we therefore conclude that the appeal should be dismissed. It is so ordered.

#### TAYLOR v. KIDD.

(Supreme Court of Washington. Jan. 29, 1913.)

#### 1. PHYSICIANS AND SURGEONS (§ 18\*)—ACTIONS FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

In an action against a surgeon for malpractice, evidence held to make a question for the jury as to whether defendant failed to treat plaintiff's injury with the ordinary diligence and skill which physicians and surgeons practicing in the same and similar communities ordinarily exercise in like cases.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

#### 2. EVIDENCE (§ 506\*)—EXPERT EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

Questions asked expert witnesses in a malpractice case after summarizing the facts shown by the evidence, concerning the treatment accorded plaintiff's injury by defendant, as to whether such treatment was such treatment as an ordinarily skillful physician practicing in the community in which defendant practiced would have used, were proper, even though that was the ultimate question for the jury to determine, since they involved matters not within the knowledge of persons of ordinary learning and experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.\*]

#### 3. TRIAL (§ 273\*)—INSTRUCTIONS—TIME FOR EXCEPTION.

The statutory provision that exceptions to the instructions may be taken at any time before the hearing of a motion for a new trial relates only to exceptions to their sufficiency as matter of law, and not to exceptions because given orally instead of in writing, and such exceptions must be taken at the time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680-682; Dec. Dig. § 273.\*]

#### 4. TRIAL (§ 284\*)—NECESSITY OF WRITTEN INSTRUCTIONS—WAIVER.

The statutory requirement that instructions shall be given in writing prior to the argument, and sent to the jury room with the pleadings and exhibits, may be waived, and is waived by failure to object at the time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 683-685; Dec. Dig. § 284.\*]

#### 5. PHYSICIANS AND SURGEONS (§ 18\*)—LIABILITY FOR MALPRACTICE.

A physician or surgeon is liable only for the injury and suffering caused by his unskillful or negligent treatment, and not for that caused by the original injury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by J. G. Taylor against A. B. Kidd. Judgment for plaintiff, and defendant appeals. Affirmed conditionally.

C. R. Hawkins and Peters & Powell, all of Seattle, for appellant. Douglas, Lane & Douglas, of Seattle, for respondent.

FULLERTON, J. On March 6, 1909, the respondent Taylor, while working on the roof of a house, fell therefrom to the ground, a distance of about 25 feet, and received severe and painful injuries. He employed the appellant, a physician and surgeon, to attend him. The physician found him suffering with two broken ribs, a severe strain of the left shoulder, and various contusions upon his body. The doctor immobilized the shoulder and ribs, accorded the contusions the usual treatment, and put the patient to bed, where he remained for some little time. Later on the patient was able to get up and move about, and seemingly gradually improved until the latter part of June, 1909. At this time his broken ribs had adhered, the contusions on his body had healed, and he had acquired some use of his injured shoulder. His shoulder, however, was not thought to be making satisfactory progress. The arm had very little motion, and attempts to manipulate it caused pain, and it had also become somewhat atrophied. The doctor diagnosed the trouble with the arm as an adhesion of the fibrous tissue surrounding the glenoid cavity of the scapula, in which the head of the humerus articulates. This he had endeavored to reduce by massage and manipulation, but without success. In the early part of July the appellant advised the respondent that a more rigorous manipulation of his arm than could be had without the use of an anæsthetic was necessary in order to break up the adhesions, and appointed a time for the patient to meet him at his office and receive such treatment. The respondent attended at the office at the time appointed, and received one such treatment which gave him some pain and caused considerable swelling in the arm and shoulder. Thereafter, on July 17, 1909, when the pain and swelling from the first treatment had somewhat subsided, the respondent went to the office a second time and his arm was subjected to a further and more rigorous manipulation by the appellant and his assistant, Dr. Mason. This last operation left the arm in an inflamed condition and much swelling and pain resulted, causing the patient to take to his bed, where he was confined for about 10 days. Between this date and August 5th following the appellant visited him almost daily, and such times as his arm would admit of it subjected it to movement and manipulation. On the last-named date the appellant discontinued the manipulation, prescribed treatment for reducing the swelling and inflammation, and told the patient to come to his office as soon as the swelling should be reduced, when he would examine his shoulder with an X-ray. The respondent, however, did not call again at the appellant's office, but on September 6, 1909, consulted with another surgeon in Seattle, a Dr. Bates, who subjected him to an X-ray examination. The plate disclosed a dislocation of the shoulder joint, the head

of the humerus projecting downward and inward. To correct the difficulty Dr. Bates advised a surgical operation on the shoulder, which he afterwards performed with the assistance of a Dr. Hanley. On cutting into the shoulder the doctor found the head of the humerus in a friable and porous condition, so much so that it was deemed necessary to cut away the end of the humerus for some two and one-half inches. After removing this portion of the humerus, the end remaining was set back into the shoulder cavity, and the wound inclosed and dressed. At the time of the trial the wound had entirely healed, the arm, while much shorter than it was originally, had recovered much of its lost motion and usefulness, having as the doctor stated, perhaps, 75 per centum of its original power and scope of motion. The respondent instituted this action on March 29, 1911, against the appellant for malpractice. In his complaint he alleged the fact of his injury, the employment of the appellant to treat the same, and the manner of appellant's treatment thereof, alleging as negligence that the appellant dislocated his arm on July 17, 1909, while attempting to break up the adhesions arising from the disuse of the arm following the original injury. Issue was taken on the complaint, and a trial had which resulted in a verdict against the appellant in the sum of \$5,500. From the judgment entered thereon this appeal is prosecuted.

[1] The appellant first assigns that the court erred in refusing to sustain his several challenges to the sufficiency of the evidence, arguing that the evidence fails to show that he did not treat the injury of the respondent with that ordinary diligence and skill which physicians and surgeons, practicing in the same and similar communities, ordinarily exercise in like cases. But we think there was on this question sufficient evidence to make a case for the jury. Aside from the general outline of the evidence which we have heretofore given, there was the positive evidence of a physician who examined the arm shortly prior to July 17, 1909, that there was then no evidence of dislocation, and it will be remembered that this was also the appellant's original diagnosis. There was therefore evidence from which the jury could well have found that the appellant dislocated the respondent's arm in his endeavor to remedy its ankylosed condition following the original injury; and the fact of such dislocation, and the further fact that he did not discover the dislocation at the times he subsequently manipulated the arm, was clearly evidence that he did not exercise the diligence and skill required of the ordinary physician and surgeon. For such injury as the respondent suffered because of such lack of diligence and skill he was, of course, entitled to recover from the appellant.

[2] The respondent was permitted, over the

objection of the appellant, to propound to his expert witnesses certain questions containing a summary of the facts the evidence on his part tended to establish concerning the treatment accorded the respondent by the appellant, and an inquiry whether the treatment thus accorded was such treatment as an ordinarily skillful physician, practicing in the community in which the appellant practiced, would bring to the care of such an injury. This is assigned as error, because, it is argued, it allows the witness to determine the very question the jury is impaneled to determine. But we think the questions not objectionable on the ground stated. The question whether the treatment accorded the respondent's injury by the appellant came up to the standard of ordinary care and skill was not a question within the knowledge of persons of ordinary learning and experience, and hence a jury selected from such persons could not know from the mere description of the treatment whether or not it was reasonably careful and skillful. It was therefore proper to call on persons, learned in the particular science and familiar with the proper practice in like cases, to state whether in their opinion the treatment met the prescribed standard, and this even though the question whether or not it does meet the required standard is the ultimate question for the jury to determine. This question was before us in *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626, concerning which we said: "The hypothetical question complained of was a fair summary of the facts which the respondent's evidence tended to prove. True the question embodied the very fact that was ultimately to be found by the jury, but this does not render it incompetent. To reach their final conclusion the jury were compelled to draw an inference from the facts proven which involved a question of medical science; that is to say, after all of the facts had been given in evidence, it was still a question whether the disease could be communicated in the manner recited, and, as that question involved a matter of medical science, it was proper to submit to the jury on the question the opinion of an expert versed in that science." The rule as thus stated is also the general rule. The question arose in *Quinn v. Higgins*, 63 Wis. 664, 24 Pac. 482, 53 Am. Rep. 305, passing upon which the court observed: "The question of negligence and carelessness on the part of the surgeon in the treatment he gave the plaintiff's leg, while it is one which the jury must necessarily determine upon the whole evidence in the case, is still a question which must be determined mainly upon expert evidence. Certainly the claimed misconduct of the surgeon is not so flagrant that a man entirely ignorant of surgery can form an intelligent judgment as to the propriety or impropriety of the treatment given by the defendant, unaided by evidence of men skilled in surgery

and having superior knowledge as to what treatment should have been given to the broken leg under all the circumstances. The defendant was therefore entitled to show, if he could, by witnesses having superior knowledge and skill in surgery, that the treatment he gave the plaintiff's leg was such as a surgeon of ordinary knowledge and skill in his profession would and ought to have given. The exclusion of any material evidence of the expert witnesses offered by the defendant which had a direct tendency to show that his treatment was proper, and such as a surgeon of ordinary learning and skill in his profession would have adopted in the case, must necessarily prejudice the defendant." So in *Jones v. Angell*, 95 Ind. 376, it is said: "The opinion of an expert in any art, science, trade, profession, or mystery may be given where it is proper for the decision of a question relating to the issues in the case." In *Challis v. Lake*, 71 N. H. 90, 51 Atl. 260, it is said: "The hypothetical question addressed to the expert, Dr. Galvin, was unobjectionable. Upon an assumed statement of facts, suggested by the evidence, he was asked, in substance, what in his opinion ought reasonably to have been done by the attending physician; that is, what treatment a reasonably skillful physician would have adopted in such a case. The competency of the question is so apparent as to admit of no serious discussion. *Spear v. Richardson*, 37 N. H. 23, 24; *Perkins v. Railroad*, 44 N. H. 223; *Wells v. Iron Co.*, 48 N. H. 491, 513, 540." And in *Northern Pacific Railroad v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977, it is said: "The first assignment avers error in permitting the medical witnesses, who testified in behalf of the plaintiff, to be asked whether the examinations made by them 'were made in a superficial or in a careful and thorough manner.' \* \* \* The second ground, that this question called for the opinion of the witnesses as to the manner in which the physical examinations were made, and thus supplanted the judgment of the jury in that particular, does not seem to us to be well founded. The obvious purpose of the question was to disclose whether the judgment of the physicians as to the plaintiff's condition was based on a superficial or on a thorough examination, and we think it was competent for the witnesses who were experts to characterize the manner of the examination." The two cases last cited, it is true, do not present the exact question at bar, but we think they are clearly analogous. If it be competent for an expert medical witness to state what treatment a reasonably skillful physician would have adopted in a given case, or to give his opinion whether his examination of a person's condition was superficial or thorough, clearly he may give it as his opinion whether a given treatment was or was not ordinarily careful and skillful. For other cases supporting

the rule, see *Olmsted v. Gere*, 100 Pa. 127; *Jones v. Angell*, 95 Ind. 376; *Wright v. Hardy*, 22 Wis. 348.

[3, 4] The trial judge reduced his charge to the jury in writing, and at the conclusion of the evidence read the same to the jury. After he had concluded the reading, the respondent's counsel suggested a question on which he thought further explanation necessary, whereupon the judge gave an oral instruction on the matter. The oral instruction was taken down by the stenographer who was present, but was not reduced to writing and given to the jury along with the general written instructions when they retired to consider of their verdict. Neither party at the time took exceptions either to the form or matter of the instruction, or requested that it be reduced to writing and given to the jury. The appellant, however, prior to the hearing on the motion for a new trial filed a written exception to this particular instruction on the ground that it was not reduced to writing and sent to the jury room along with the other instructions of the court. But we think the exception came too late. While it is true the statute provides that exceptions to the instructions of the court may be taken at any time before the hearing of a motion for a new trial, we think this must relate to exceptions to the sufficiency of the instructions as matter of law, and not to the manner in which they are given. The statute requiring instructions to be given in writing prior to the arguments of counsel to the jury, and requiring that they be sent to the jury room along with the pleadings and exhibits in the case, is not mandatory in the sense that the parties cannot waive the requirements. On the contrary, it is a common practice to waive some or all of them, and a party must be held to have waived them when he does not note his dissent at the time the breach of the rule is committed. This principle is not contrary to the rule in *Raynor v. Tacoma Railway & Power Co.*, 126 Pac. 91. There exceptions were timely taken to the action of the court, but the court refused to correct its mistake after the opportunity for it to do so had been afforded. Here no such opportunity was given, and we think the severe penalty of a retrial of the cause should not be visited upon the successful party because of a mistake the fault of which lay equally upon all the parties.

[6] Finally, it is said that the verdict is excessive. With this contention we are inclined to agree. The size of the verdict would indicate that the jury felt inclined to visit the entire loss suffered by the appellant upon the doctor, whereas he was only responsible for the injury and suffering caused by his own acts, not those caused by the original injury with which he had nothing

to do. It is not, however, necessary to award a new trial in the first instance.

If the respondent will within 30 days after the remittitur from the court reaches the lower court consent in writing to remit \$2,000 from the amount of the judgment, the judgment will stand affirmed for the sum remaining, namely \$3,500. Otherwise a new trial will be awarded.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

#### STATE v. BENNETT.

(Supreme Court of Washington. Jan. 25, 1913.)

##### 1. CRIMINAL LAW (§ 854\*) — MISCONDUCT — SEPARATION.

Under Rem. & Bal. Code, § 346, forbidding, except in felony cases, the jury to be kept together during trial, and section 2159 providing that the jurors in criminal cases shall not be allowed to separate except by consent of the accused and the prosecuting attorney, the separation of a juror in a felony case is reversible error, irrespective of any prejudice resulting to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.\*]

##### 2. CRIMINAL LAW (§ 868\*) — MISCONDUCT — WAIVER.

Since Rem. & Bal. Code, §§ 346, 2159, in effect prohibits the separation of jurors in a felony case, if the court knew that a juror had separated, accused could not waive his rights under the statute by failing to sufficiently object to the separation when he called the question to the court's attention.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2070; Dec. Dig. § 868.\*]

Department 1. Appeal from Superior Court, Ferry County; W. P. Bell, Judge.

Charles P. Bennett was convicted of embezzlement, and appeals. Reversed and remanded for new trial.

W. C. Stayt, of Colville, and James T. Johnson and Frank M. Allyn, both of Republic, for appellant. John W. Mathews, of Pullman, for the State.

CHADWICK, J. The appellant was convicted of the crime of embezzlement, and brings his case here on appeal.

Among the errors assigned, few are possessed of merit. During the progress of the trial, and while the jury was passing along the street in charge of two bailiffs, one of the jurors stopped and had some conversation with some bystanders. He then went into a lunch counter, which occupied a store-room with a cigar store; the two being separated by a partition seven feet high, with an open door or archway between the two places. The juror ordered and ate his supper and then went out. The remaining jurors were taken to a hotel and were there given their supper. The absence of the ju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ror was not immediately noticed. It would seem to us from the record that the juror finished his meal about the time his absence was noted. He was recovered by the bailiff, and from that time on the jury was kept together. He was away from 20 to 30 minutes and talked with several persons. On the next morning, the matter having come to the notice of the trial judge, the following colloquy ensued: "The Court: It was reported to the court last evening that one of the jurors in this case separated for a few minutes from the other jurors. I think the juror was Mr. Edberg. Mr. Edberg, did you separate from the other jurors? Mr. Edberg: I did. I didn't understand that the jury was to stay together. The Court: You say you did not understand that the jury was to be kept together? Mr. Edberg: No. The Court: Where did you go after you separated from the jury? Mr. Edberg: Just went into a restaurant and had my supper. The Court: Just went into a restaurant and had your supper? Mr. Edberg: Yes, sir. The Court: Did you talk to any one? Mr. Edberg: No. Mr. Stayt: If your honor please, we object to this proceeding. The Court: This is on the motion of the court. I shall take the privilege of questioning the juror. Did any one talk to you at that time? Mr. Edberg: No, sir. The Court: Did you speak to any one at all? Mr. Edberg: No, sir. The Court: What did you do; did you eat your supper at the restaurant? Mr. Edberg: Yes, sir. The Court: Then what did you do? Mr. Edberg: Stood out on the steps on the sidewalk and then went down the street to find the other jurors. The Court: Went down the sidewalk to find the other jurors? Mr. Edberg: Yes, sir. The Court: And didn't speak to any one from the time you left the jury until you again met them? Mr. Edberg: No. The Court: I want to instruct all the jurors that they are not to drop out or separate, even though the bailiffs should not see them. Every juror must understand that it is as much his duty to stay with the other jurors as it is the bailiffs' to see that he stays there, and each juror must consider it his duty, and it is your oath, as jurors, that you will remain together and not separate until the case is brought to an issue and you have brought in a verdict. The Court (to defendant's attorneys): If you wish to make any objections, you may do so. Mr. Stayt: We object to the whole procedure, your honor, and except to the action of the court. The Court: Exception allowed. Mr. Stayt: I guess we can proceed, your honor. Judge Neal will resume the stand." Several of the jurors made affidavit, saying that the juror did not refer to any one who had talked about the case in his presence during his absence, nor did he say that he talked with any one. The offending juror made affidavit exonerating himself from all intentional fault.

[1] It will be seen that the affidavits of the jurors are wholly insufficient to cure the

error if we adhere to the rule that the separation of a juror in a felony case from the body of the jury is reversible error. It is not denied that the case will have to be reversed if the rule laid down by this court in the case of *State v. Place*, 5 Wash. 773, 32 Pac. 736, and *State v. Strodemier*, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012, is followed; but it is contended (a) that these cases are opposed to the general rule and should be overruled; that the dissenting opinions filed in each of them state the true rule of practice; (b) that this court has declared a different and true rule in the case of *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; and (c) that defendant did not sufficiently reserve an exception to the misconduct of the juror. While it is true that our decisions, when read in the light of certain texts followed by the citation of adjudged cases, may seem to be out of harmony with that practice which requires a showing of actual prejudice, yet, when viewed in the light of the history of the law and our statute, it seems to us that the cases criticised were correctly decided. Anciently a separation of the jurors was fatal in all cases. This rule was relaxed so that a separation was allowed in all civil cases and latterly in cases of misdemeanors. These distinctions found their way into our statutes (sections 346, 2159, Rem. & Bal. Code). These statutes, when construed together, are quite as positive as the ancient rule, and the basis for the order of association of the jurors pending the trial is to be found in the statute and not in the order of the court. The *Place* and *Strodemier* Cases were put upon the statute. It may well be that, where the order to keep the jury together is based upon a discretionary order of the court, an appellate court should say in furtherance of justice that the case will not be reversed unless prejudice be shown; and, so far as we have looked into the authorities holding that an affirmative showing of prejudice must be made, the order was discretionary with the court and did not rest upon a statute. Whatever the rule may be elsewhere, the people of this state have seen fit to say, through the legislative body, that a defendant shall have not only a fair trial, but the semblance of a fair trial, for the reason, no doubt, that the danger of allowing a juror to pass upon his own delinquency would be quite as dangerous as the vice at which the statute is aimed. Any juror who would put himself in a situation where he might seek counsel or be subject to the approach of friends should not be heard to say that he did not intend a wrong or did not talk upon the subject of the case. If such construction be put upon our statute, it would be shorn of its vitality, for no defendant could ever rebut such a showing or prove a conversation against the will of the participants. It is not so much what may have been done as

what might be done. Our statute furnishes the rule of practice in this state, and it must be followed unless we have decided to the contrary in the later case of *State v. Pepon*, 62 Wash. 635, 114 Pac. 449. In that case we said: "But, the claim of error resting exclusively on the theory that some juror might possibly have been subjected to undue influence, the assignment, under the great weight of authority, cannot be sustained." It was upon the authority of this case, as we understand, that the lower court denied the motion for a new trial. While inclined to follow, in all proper cases, the logic, if not the rhetoric, of the case just cited, it must be remembered that the act here complained of was not violative of the statute but was within the bound of its permissive limitations. In the absence of a statute, prejudice will not be presumed. This is the holding in the *Pepon* Case; but, where the statute says thou shalt or thou shalt not, a presumption of prejudice follows, and such was the rule in the *Place*, *Strodemier*, and the cases hereinafter referred to.

[2] Finally it is contended that, conceding the act of the juror to have been error, appellant must be held to have waived his advantage. If it were a matter of practice only, we would not hesitate to hold that the error was waived; but, as we have seen, it was not a breach of a mere rule of practice or a discretionary order of the court, but a violation of the substantive law of our commonwealth. It was enough that the court knew of the misconduct of the juror and that the defendant objected thereto. Neither the burden nor the benefit of a statute depends upon the will of the individual. *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452; *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756. Statutes are the expression of the will of society, and to hold that an accused party should lose the benefit of a protective statute because his objection or protest is technically insufficient, or is not put in apt words or phrase, would be to deny its benefit in many cases. Moreover, the subject was introduced by the court and passed upon by him without suggestion or assistance of counsel. It is enough that the question was before the court at the time of the trial. It was then the duty of counsel to proceed as ordered by the court, for his right to urge the question upon motion for a new trial or upon appeal remained.

Other errors going to the instructions given and refused are urged. It will serve no purpose to review these assignments singly. The instructions as given generally state the law. In one or two it may seem that the court assumes disputed facts to have been proven, and in one or two instances we think the instructions do not have the sustaining grace of evidence to support them; but we will assume that, in the event of a new trial,

the court will prepare his instructions to meet the case as then presented. The instructions can be very materially simplified. There is but one issue. Defendant was the administrator of an estate. Upon the rendition and approval of the final account, the court found that he had in his possession moneys and properties belonging to the estate. He failed to pay over or distribute the trust funds upon demand. The only question of law, therefore, is whether he is guilty of embezzlement as that term is defined in our statutes.

The judgment of the lower court is reversed and the case remanded for a new trial.

CROW, MOUNT, GOSE, and PARKER, JJ., concur.

#### In re MARSH.

(Supreme Court of Utah. Jan. 4, 1913.)

#### ATTORNEY AND CLIENT (§ 39\*)—DISBARMENT—GROUNDS.

A colored attorney, who for several months kept a house of ill fame at which white girls consorted with negroes and smoked opium with his knowledge, and to which he took beer and served to the inmates and patrons, is morally unfit to be a member of the bar, and will be disbarred.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 52; Dec. Dig. § 39.\*]

In the matter of the disbarment of Lawrence Marsh, an attorney and counselor at law. Judgment of disbarment.

W. D. Riter, Bismark Snyder, and E. A. Walton, all of Salt Lake City, for petitioners. Willard Hanson, of Salt Lake City, for respondent.

PER CURIAM. On May 9, 1911, members of the committee on grievances of the State Bar Association of Utah presented an information, verified by their oaths, charging one Lawrence Marsh (a colored man), who was on July 1, 1909, admitted to practice before this court as an attorney and counselor at law, as being morally unfit to be a member of the bar of this court, and moved that the said Marsh be required to appear and show cause, if any he had, why he should not be permanently disbarred and his name stricken from the roll of attorneys of this court. It is alleged in the information, among other things, that "the said Lawrence Marsh \* \* \* during January, February, and the early part of March, 1911, was engaged in running and managing a house of ill fame \* \* \* in Salt Lake City, Utah; that he at the same time and place kept appliances for smoking opium and caused, permitted, and persuaded the inmates of said house, and others frequenting the same, to smoke or otherwise use opium thereat." A citation was issued requiring Marsh to ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pear before this court on May 11, 1911, and show cause why he should not be disbarred, his certificate of admission to practice law canceled, and his name stricken from the roll of attorneys of this court, and that he deposit forthwith his certificate with the clerk of this court. Marsh appeared and filed an answer in which he denied all the allegations of the information charging him with being morally unfit to practice in the courts of record of this state. He also deposited with the clerk of this court his certificate of admission. The matter was referred to Charles Baldwin, Esq., an attorney and counselor at law of this court, to take testimony and make findings of fact and conclusions of law thereon and to report the same to this court. A hearing was had before the referee, in which Marsh was represented by counsel and witnesses were sworn and examined.

After the evidence was taken and the cause submitted, the referee found the following facts, which are fully supported by the evidence: "(1) That Lawrence Marsh, for several months during the year 1911, kept a house of prostitution at No. 356 East Seventh South street, Salt Lake City; (2) that white girls resorted to his said house where they consorted with negroes brought there by him; (3) that opium was smoked there by the girls with his knowledge, and beer was taken there by him and served by him and the girls to colored men who resorted to the house." The referee also found and reported the following conclusions of law: "From the facts thus found, I conclude that said Lawrence Marsh is morally unfit to be a member of the bar of this court, and so report." The report of the referee, dated January 10, 1912, is hereby adopted and approved.

It is therefore ordered that Lawrence Marsh be, and he hereby is, permanently disbarred from practicing in the courts of record of this state. It is further ordered that his certificate of admission be, and the same is hereby, canceled, and the clerk of this court is directed to destroy his certificate of admission and to erase his name from the roll of attorneys of this court.

#### CHRISTENSEN et al. v. HAMILTON REALTY CO. et al.

(Supreme Court of Utah. Dec. 28, 1912.)

#### 1. PRINCIPAL AND SURETY (§ 10\*)—BUILDING CONTRACTOR'S BOND—VALIDITY.

A building contractor's bond was not unenforceable because it mentioned only the husband as obligee, though the building contract was signed by both husband and wife as owners, or because it incorrectly stated the contract price.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 23-27; Dec. Dig. § 10.\*]

#### 2. PRINCIPAL AND SURETY (§ 10\*)—BUILDING CONTRACTOR'S BOND—DESCRIPTION OF CONTRACT—SUFFICIENCY.

Nor was it necessary that such bond mention both husband and wife in order to identify the building contract, where the place where the house was to be erected was described in both contract and bond, and the date of the contract was given in both.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 23-27; Dec. Dig. § 10.\*]

#### 3. PRINCIPAL AND SURETY (§ 128\*)—BUILDING CONTRACTOR'S BOND—LIABILITY OF SURETY.

Where differences which arose between a building contractor and owner were submitted to an architect, who found that the building was not according to specifications, and it was thereupon, at his suggestion, agreed between the contractor and owner, with the consent of the trust company, which was surety on the contractor's bond, that the contractor should erect a retaining wall as compensation for the breach of his contract, the trust company was not by this supplementary agreement released from its suretyship obligation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356-365; Dec. Dig. § 128.\*]

#### 4. PRINCIPAL AND SURETY (§ 97\*)—ALTERATION OF CONTRACT—RELEASE OF SURETY.

The rule that any material alteration in the terms of the original contract releases the sureties applies only after the terms of the obligation are ascertained.<sup>1</sup>

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-154; Dec. Dig. § 97.\*]

#### 5. PRINCIPAL AND SURETY (§ 128\*)—ALTERATION OF CONTRACT—CONSENT OF SURETY.

The surety on a building contractor's bond may consent to a modification of the building contract, or may ratify the modification as in the case of other contracts.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356-365; Dec. Dig. § 128.\*]

#### 6. PRINCIPAL AND SURETY (§ 160\*)—ACTION ON BUILDING CONTRACTOR'S BOND—EVIDENCE.

In an action on a building contractor's bond, evidence of correspondence between the owner and his attorney on one side, and of the bonding company through its president on the other, and other material evidence, was admissible upon the issue of whether the bonding company had consented to an agreement in compromise of a breach of the building contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 436-438; Dec. Dig. § 160.\*]

#### 7. CONTRACTS (§ 246\*)—BUILDING CONTRACT—BREACH OF COMPROMISE AGREEMENT—LIABILITY OF CONTRACTOR.

Where a building contractor and the owner entered into a compromise agreement whereby the contractor was to build a retaining wall as compensation for breach of his original contract, and he subsequently refused to comply with such agreement, the owner could rescind the same and sue for a breach of the original contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131-1138; Dec. Dig. § 246.\*]

<sup>1</sup> Daly v. Old, 35 Utah, 82, 99 Pac. 460, 28 L. R. A. (N. S.) 463; Smith v. Bowman, 32 Utah, 38, 88 Pac. 887, 9 L. R. A. (N. S.) 889.

**8. PRINCIPAL AND SURETY (§ 128\*)—BUILDING CONTRACTOR'S BOND—BREACH OF COMPROMISE AGREEMENT—LIABILITY OF SURETY.**

Where the company which made such contractor's bond consented to the compromise agreement and subsequently approved its repudiation by the contractor, it could likewise be held for breach of the original contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356-365; Dec. Dig. § 128.\*]

**9. CORPORATIONS (§ 416\*)—OFFICERS—POWERS.**

Where the president of a surety company consented to a special compromise agreement whereby a contractor, for which it was surety, agreed to build a retaining wall as compensation for a breach of the building contract, the corporation was bound thereby; a corporation being bound by the acts of its agent within the corporate powers and the apparent scope of the agent's authority.<sup>2</sup>

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1623-1625; Dec. Dig. § 416.\*]

**10. CONTRACTS (§ 305\*)—BREACH OF BUILDING CONTRACT—WAIVER BY TAKING POSSESSION.**

Where an owner went into possession of his house, built on his own land, under protest that it was not completed by the contractor and in reliance upon a compromise agreement that a retaining wall should be constructed by the contractor in lieu of defects in the building, he did not thereby waive his right to claim damages for the defects upon the contractor's refusal to build the retaining wall, though the original contract provided that occupancy by the owner should be conclusive evidence of performance of the contract; there being no waiver by occupancy where the owner has no clear choice between accepting and rejecting the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1467-1475; Dec. Dig. § 305.\*]

**11. APPEAL AND ERROR (§ 1212\*)—PROCEEDINGS ON REMAND—NONSUIT.**

Where, in an action for breach of a building contract against the building contractor and the trust company which made his bond, the trust company files a separate answer in which it sets up its own defenses, both negative and affirmative, and judgment is rendered against the contractor, but the trust company's motion for nonsuit, interposed at the close of plaintiff's case, is improperly sustained, the trust company is entitled on remand of the case as against it to present its evidence upon the issue of facts presented by its answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by John A. Christensen and another against the Hamilton Realty Company, a corporation, and the Salt Lake Security & Trust Company, a corporation. From judgment for the Trust Company dismissing complaint against it, plaintiffs appeal. Reversed and remanded for new trial as against the Trust Company.

C. S. Patterson, of Salt Lake City, for appellants. Dey & Hoppage, Edwd. McGurkin, and W. E. Rydall, all of Salt Lake City, for respondents.

FRICK, C. J. This was an action to recover damages for an alleged breach of a building contract, and upon a surety bond. The contractor and surety are parties to the action. For convenience the respondent Hamilton Realty Company will hereafter be called the contractor, and the other respondent, Salt Lake Security & Trust Company, will be designated trust company. The appellants in their complaint, after alleging that they are husband and wife and the corporate existence of respondents, in substance alleged that they entered into a contract with the contractor aforesaid, which is dated on the 23d day of June, 1909, wherein said contractor covenanted and agreed to furnish all the materials and perform all the labor necessary to erect and complete a certain dwelling house (except the plumbing therein) in accordance with certain plans, specifications, and drawings, which were made a part of the contract aforesaid, and to do the work "in a good, substantial, and workmanlike manner"; that it was also agreed that all the materials used should "be fit, proper, and sufficient for the completion of said building"; that said dwelling and all work connected therewith should be furnished and completed, "provided that possession of the premises be given to the contractor on or before September 15, 1909"; that, in case the contractor should furnish the materials and perform the labor and should complete the said building as aforesaid, appellants agreed to pay it the sum of \$3,000 therefor; that it was further agreed that "the occupancy of said building by said party of the second part (appellants), his tenants, heirs, or assigns, shall be conclusive evidence of the performance of this contract against any claim of the owner and an acceptance of the same." It was also alleged that the trust company executed and delivered a surety bond, which is also set forth in the complaint, the material parts of which are, that the contractor, as principal, and the trust company, as surety, are "held and firmly bound unto John A. Christensen in the sum of \$1,500" upon the condition that said contractor "has entered into a contract with the said John A. Christensen for the building of a house \* \* \* according to plans and specifications agreed upon and signed by all of said parties for the sum of \$3,300; said agreement for building being dated June 23, 1909." It is further provided in said bond that, if said contractor "shall well and faithfully perform all of the covenants and agreements by it to be performed in said agreement, \* \* \* then this obligation to be void, otherwise to remain in full force and effect." The place where said dwelling should be erected is also specifically stated both in the contract and in the surety bond. Appellants further alleged that they had performed their part of the building contract,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

<sup>2</sup> Loftis v. Insurance Co., 88 Utah, 532, 114 Pac. 124.

but averred that the contractor had failed to do so, and then proceed to set forth in detail wherein the contractor had failed and refused to comply with the terms of the contract, and damages in that regard are fully specified. It was also alleged that the dwelling house was not completed within the time specified, and that, by reason thereof, appellants were damaged. Appellants demanded judgment against both the respondents for the amount claimed by them.

The contractor answered the complaint admitting the relationship of appellants and the capacity of respondents, admitted that it had entered into the agreement set forth in the complaint and that the trust company had executed the surety bond, and denied all other allegations of the complaint. As an affirmative defense, the condition contained in the contract with respect to the occupancy by appellants of the dwelling house and the effect thereof were pleaded, and it was averred that appellants, long before bringing the action, went into and remained in actual possession of said dwelling.

The trust company also filed an answer in which it made the same admissions that the contractor made in its answer, except that it had executed the bond, and denied all other allegations of the complaint. As an affirmative defense it also pleaded the condition in the contract respecting the effect of the occupancy of the dwelling by appellants, and that they for a long time had been and were in actual occupancy thereof. The trust company also averred that, pending the construction of said dwelling, the appellants and the contractor had entered into a "supplemental article of agreement" in which it was agreed that certain matters of difference had arisen and existed between appellants and the contractor with respect to whether the contractor was complying with the terms and conditions of his contract in the erection of said dwelling, and that said differences were submitted to one Fred. A. Hale, an architect, to pass upon and determine. It was further alleged on information and belief that said appellants and the contractor accepted the decision of said architect, and that said dwelling was thereafter completed "in accordance with the terms of said agreement and the decision of said Fred. A. Hale." The supplemental agreement aforesaid was set forth in full in its answer, but it was not averred that said agreement was not entered into with the consent of the trust company, or that by reason thereof the terms of the original agreement were materially changed or departed from. That matter was left to inference from an inspection of the agreements.

Appellants filed a reply in which they admitted that the supplemental agreement was entered into, and fully explained the reasons for the same, and averred that the same was entered into "with the consent and by

the procurement" of the trust company. Appellants in said reply further explained why and under what circumstances they went into possession of said dwelling; that both said contractor and said trust company, before bringing this action, had repudiated the compromise agreement and the terms and conditions imposed on them thereunder by said Fred. A. Hale, the architect mentioned therein. Appellants averred that, for the reasons aforesaid, they relied on the terms of the original agreement.

Upon the trial of the issues it was made to appear without dispute that the contractor had in many material matters failed and refused to comply with the terms of its contract, and had failed to comply with the plans and specifications both as to the furnishing of material and doing the work; that the appellant John A. Christensen, the owner of the building, protested against the further progress of the work unless the terms of the contract were complied with; that he notified the trust company through Mr. F. E. McGurrian, who signed the surety bond as its president; that, after the matter had been discussed, said supplemental agreement was drawn up, and pursuant thereto said McGurrian, Mr. Hamilton, representing the contractor, John A. Christensen, the owner, and Mr. Patterson, his attorney, and Mr. Fred. A. Hale, the architect mentioned in said supplemental agreement, went to the dwelling house then in process of construction to inspect it for the purpose of complying with the terms of said supplemental agreement. The architect then pointed out and discussed a number of defects in the building and departures from the plans and specifications. Such defects were found in the walls, in the setting of the window and door frames, and in other respects. No specific agreement with respect to what should be done was reached, however, at the time, but a short time thereafter Mr. Hale, the architect, suggested to the interested parties, including the trust company, that in view that the walls of the house were substantially completed, and for that reason to remedy some of the defects therein, they would have to be taken down at great expense, and, in view that it was necessary to construct a retaining wall along one side of the lot upon which the dwelling was erected in order to compensate the owner thereof for the defects pointed out in the erection of the house, the contractor should erect the retaining wall aforesaid, and the owner, Mr. Christensen, should furnish the material therefor. According to the evidence on the part of the appellants, this offer was accepted by all the parties, including the trust company, and the house was thereafter completed by the contractor. In doing so he was compelled to tear down and rebuild some of the flues in order to make them comply with the specifications. It was also made to appear

that, before entering into the building contract, John A. Christensen, one of the appellants, negotiated a loan of \$3,300 from the trust company, and to evidence the same he and his wife Selma executed and delivered their promissory notes for said sum, and to secure the payment thereof also executed and delivered a mortgage to said company, which was a first lien upon the property on which the dwelling was erected.

It seems that the dwelling house was to be erected at a cost of \$3,300, including the plumbing, but that the contractor agreed to construct the dwelling without the plumbing for the sum of \$3,000; the plumbing to be paid out of the remaining \$300 so far as that amount would pay for the same, and the balance, if any, should be paid personally by the owner. It seems that for this reason the sum of \$3,300 is mentioned in the bond, while in the contract the amount is stated to be \$3,000. It was further made to appear that the whole transactions relating to the loan, the building contract, and bond were all consummated in the office of the trust company, and that all the papers relating thereto were prepared and executed there. The trust company was thus mortgagee furnishing the money for the erection of the building, as well as surety for the contractor. It was also shown that the money loaned was not paid to Christensen, but was left with the trust company, and was by it paid for labor and materials as the work progressed upon orders issued by Mr. Christensen. In that way no money was paid except for work and materials which actually was performed on or entered into the building. In the manner aforesaid, the whole contract price was paid long before this action was commenced. Appellants also proved that the building was not completed until about 10 months after it should have been under the terms of the contract; that after paying out the money as aforesaid, and after notifying the trust company, they went into possession and made demand on both the contractor and the trust company that the retaining wall be constructed, which was refused. There was also produced in evidence the correspondence between the trust company and appellants with respect to the acts and conduct of the contractor and its failure to comply with the terms of the building contract, to which we shall again refer hereafter. After proving the damages by the architect and other witnesses, the appellants rested their case.

The trust company then interposed a motion for nonsuit upon substantially the following grounds: (1) That the contract sued on was not the contract for which the trust company became surety, as appears from an inspection of said contract and bond; (2) that the terms of the original contract were changed, modified, and rescinded by the supplemental agreement heretofore referred to;

(3) that the terms and conditions of the supplemental agreement materially changed and modified the original agreement, and that such changes and modifications were acted on by the parties, and therefore appellants cannot rescind the supplemental agreement; (4) that, if appellants may rescind the supplemental agreement as contended for by them, they nevertheless cannot recover on the original contract because they have taken possession of the dwelling house, and therefore have conclusively waived all right to sue the contractor for any defects that may exist in such dwelling; (5) that, in taking possession of said dwelling, appellants have waived all rights to compensation for any violations of the original agreement relating to defective work and materials, and that there is no evidence to support any claim for damages for delay in completing said house within the time specified in the original agreement; (6) that the supplemental agreement and the duties imposed thereunder upon the contractor created additional and increased liabilities upon both the contractor and the trust company, and that there is no evidence that the trust company or any of its officers authorized so to do consented to any change or modification of such original agreement. Wherefore it is contended the trust company is released from all liability upon the bond aforesaid. The district court sustained the motion for nonsuit, but upon what ground it is not made to appear, and entered judgment dismissing the case as against the trust company.

The case against the contractor was submitted to the jury upon the evidence, and they found a verdict in favor of appellants as follows: "For defective construction, \$217; for damages for delay in completion, \$224." Judgment was duly entered upon the verdict, and no one is here complaining of that judgment. The appellants, however, appeal from the judgment in favor of the trust company dismissing the action as against it. Appellants assign a large number of errors why the court erred in sustaining the motion for a nonsuit, but we think our decision will be understood better by referring to the reasons advanced by the respondent trust company why its motion for a nonsuit was properly sustained.

[1] It is asserted that the surety bond is not enforceable, because it appears from the recitals therein that it was not given as security for the faithful performance of the building contract introduced in evidence: (1) Because in the bond only John A. Christensen is named as obligee while the building contract is made with and is signed by both John A. and Selma Christensen; and (2) because in the bond the contract price for the erection of the dwelling is stated to be \$3,300, while in the contract it is stated to be \$3,000 only. These objections, in view of the whole transaction and the evidence, seem to

us wholly without merit. The only question raised by the objections we have set forth is one of identity and not, as counsel argue, one of different contracts or parties. It was not necessary to state the contract price in the bond, nor was it necessary to name all the beneficiaries for whose benefit the bond was given. In 1 Brandt on Suretyship and Guaranty, § 32, the author says: "A bond may be good as a common-law obligation, though no person be named therein as obligee. The naming of an obligee is the merest formality possible, so that, if the instrument failed to name one, the substance of the undertaking would remain." It is quite true that an obligee is necessary—that is, some person must be designated, either expressly or by necessary implication, who may enforce the bond for the benefit of those for whom it is made—but it is not true that it is necessary to name all the beneficiaries for whose benefit a bond is given in order to make it valid and enforceable. Leach v. Flemming, 85 N. C. 447. That this is so is very frequently illustrated in bonds to secure the faithful performance of building contracts where, in such bonds, a particular obligee is named, yet the bond is given for the benefit of all who may furnish materials or perform labor upon the building. Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050. In the case at bar Selma Christensen signed the building contract as the wife of John A. Christensen, and in that way became merely a nominal party thereto. But she nevertheless was interested in the home as the wife of Mr. Christensen, and as such was a beneficiary under the contract, and, since she is made a party to the action, no one can complain.

[2] We cannot see, however, why it was necessary to name her in the bond except as identifying the bond as the one which was given to secure the faithful performance of the contract. The bond was, however, abundantly identified by other means. For example, the precise place where the house was to be erected is described in both the contract and the bond, and the date of the contract is given in both. Indeed, the courts hold that the contract and the bond must be treated as one instrument, whether they refer to each other or not. The cases cited by counsel have not the remotest bearing upon the question involved here. The cases cited all relate either to the question that an obligee is necessary or to a change of principals in the original contract and who are named in the bond after the same had been executed and delivered. The question in this case is one purely of identity; that is, whether the bond introduced in evidence is the bond that was in fact given to secure the performance of the contract which was sued on. We think the question is one that does not even admit of a possible doubt, to say nothing of a reasonable doubt. If, therefore, the

court sustained the motion for nonsuit upon this ground, it was error.

[3] It is further argued that, by entering into what is called the supplemental agreement with respect to the differences that had arisen between Mr. Christensen, the owner of the dwelling, and the contractor, the terms of the original contract were "modified, abrogated, and rescinded," and for that reason the bond was released. So far as the so-called supplemental agreement is concerned, there is absolutely nothing in its terms or provisions which in any way modifies, abrogates, or rescinds any matter or thing contained in the original contract or in the plans and specifications. All that was sought by the owner of the dwelling in entering into the supplemental agreement was to have the contractor comply with, rather than to alter, change, or depart from, any of the provisions of the original contract or the plans or specifications. Indeed, what was sought by the owner of the dwelling was to have the contractor observe and comply with the terms of the building contract and not to modify, abrogate, or rescind them. But it is contended that by subsequently adopting the suggestions of the architect, who was appointed in the supplemental agreement to determine whether the terms of the contract and the plans and specifications were being followed or not, as a compromise and settlement of the damages to which the owner of the dwelling was entitled by reason of the failure of the contractor to follow the plans and specifications and to comply with the terms of the contract, it should erect a certain retaining wall for the owner; that additional burdens were cast upon the bond, by reason of which it was released.

[4] In this connection the doctrine is invoked that sureties are favorites of the law, and that they have the right to insist that they be bound only in accordance with the strict letter of their contract, and that, in case the parties to the contract make any material change, alteration, or any material departure from the terms of the original contract in executing it, the sureties are released from their obligations. The rule is well stated by Mr. Justice Straup in Smith v. Bowman, 32 Utah, 38, 88 Pac. 687, 9 L. R. A. (N. S.) 889, and is approved in Daly v. Old, 35 Utah, 82, 99 Pac. 460, 28 L. R. A. (N. S.) 463. It is, however, also pointed out in Daly v. Old, supra, that the doctrine applies only after the terms and conditions of the obligation are ascertained, and that, in ascertaining the obligations assumed by the surety in his contract, the same rules of construction are applied as in the construction of other contracts. See, also, 1 Brandt on Suretyship and Guaranty, § 103, and *Henricus v. Englert*, 17 N. Y. Supp. 235, 237.\*

[5] Again the surety may consent to any

\* Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 625.

change or modification of the original contract after the execution of both the contract and bond, or may ratify such change or modification when made under precisely the same circumstances and conditions that changes or modifications of other contracts may be consented to or ratified by those who are bound by the provisions thereof, and such consent or ratification may be proved in the same manner as consent and ratification may ordinarily be proved. All this is elementary.

[6] By considering the correspondence that passed between the owner of the dwelling and his attorney on one side and the trust company through its president upon the other, in connection with the other evidence adduced at the trial, all of which was proper (*Wills v. Ross*, 77 Ind. 1-13, 40 Am. Rep. 279) upon the subject of consent, we think the evidence is quite sufficient to withstand a motion for nonsuit, to say the least. The correspondence aforesaid discloses that, as soon as the owner of the dwelling, in his own mind at least, became satisfied that the contractor was not complying with the plans and specifications either in furnishing the quality of materials or in performing the work as specified, he at once wrote to the trust company setting forth in detail in what particulars the contractor failed to comply with the terms of his contract and the plans and specifications. The trust company, through its president, responded, and he expressed a willingness to go with the attorney, the architect, and the owner to make an inspection of the building for the express purpose of determining whether the complaints of the owner were well founded or not. The president of the trust company, the contractor, the owner and his attorney, and the architect then went to the building, and the architect there and then pointed out specifically wherein and to what extent the contractor had failed to comply with the plans and specifications and with the terms of his contract. Neither the president of the trust company nor the contractor, so far as the evidence discloses, at any time dissented from or questioned the correctness of the decision of the architect. Many of the defects, however, could be remedied only by tearing down the entire walls of the building, which were then almost completed. It was for this reason that nothing specific was done or agreed to at the meeting held at the building. The architect, however, afterwards thought out the plan of permitting the work to proceed; but, in order to compensate the owner of the building, to some extent at least, for the depreciation in value of his building because of its defective construction, the architect suggested that the contractor construct the retaining wall referred to. The architect says he submitted the proposition to both the contractor and the president of the trust company, and, after they had consented, he then submitted it to the owner

of the building, and he likewise consented to the proposition. The contractor was thus permitted to proceed with the building, and all that the owner insisted upon thereafter was that the plans and specifications be complied with in completing the building. The building was accordingly completed, but not at the time agreed upon but nearly 10 months thereafter. The owner ordered the trust company to pay the contractor as the building progressed. This no doubt was done in reliance upon its promise to erect the retaining wall. In that way the whole contract price for the building was paid, and, when the building was completed, the owner notified the trust company that the retaining wall was not constructed, that the building was not completed within the time specified, that he insisted that the wall be completed, and that he be paid damages for the time that he was deprived of the use of the building. Upon this question the president of the trust company seems to have been the only one with whom the whole correspondence was carried on. He was fully apprised of all the facts and he, as appears from the correspondence, even took the matter up with the contractor, and, when the contractor repudiated the compromise agreement with respect to the retaining wall and refused to construct the same, the president, as appears from his last letter, ended the controversy in the following words: "As bondsman for the contractor, this company does not feel like taking any further part in the matter." It was after the foregoing transactions that the appellants brought this action, which is based on the breaches of the building contract.

[7, 8] The trust company vigorously contends that the appellants may not rescind the compromise agreement with regard to the erection of the retaining wall, but must rely upon that agreement if they have any remedy at all. It further insists that, by entering into that agreement, the parties to the building contract added new terms and conditions thereto, by reason of which it is released from liability upon the surety bond. As we have seen, however, the trust company consented to whatever change was made, and hence is bound thereby. Moreover, the trust company also clearly approved the repudiation by the contractor of the compromise agreement to construct the retaining wall. From all this it follows that, if the appellants may sue the contractor upon the original contract for the alleged breaches thereof, they may likewise sue the trust company upon the surety bond. We think the facts of this case bring it clearly within the doctrine that where a compromise agreement is entered into between parties to an existing contract whereby one of the parties agrees to do or to perform certain things as compensation for some breach of said contract, and the party so agreeing subsequently refuses to comply with the compro-

mise agreement or abandons the same, the other may at his option either sue on the compromise agreement or may rescind the same and sue for the breaches of the original contract. The doctrine is tersely stated in 8 Cyc. 535, in the following words: "Upon a breach of the terms of a compromise agreement or abandonment by one party thereto, the other party may treat the agreement as a nullity and be remitted to his original claim or cause of action." Upon the question that appellants could have based an action upon the compromise agreement, it is said: "The right to be remitted to his original cause of action is for the benefit of the other party to the compromise, and he may, if he so desire, waive the breach and proceed upon the compromise." See, also, *Clews v. Rielly*, 6 N. Y. Supp. 640,<sup>4</sup> and *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425. It is further said in Cyc. that, before a party can rely and insist upon the compromise agreement, he must show either a performance of the condition imposed by such agreement or show some valid excuse for nonperformance of the imposed condition. In the case at bar the compromise agreement, to which the trust company was in effect a party, is relied on by it after it had expressly approved its repudiation by the contractor. The wisdom and justice of the foregoing rule is well illustrated by the facts in this case.

As the evidence now stands, the undisputed facts are that the contractor was permitted to proceed with the completion of his contract upon the express agreement that the retaining wall should be erected as part compensation, at least to the owner of the building for defective construction; that the contract price was paid to the contractor in reliance upon that agreement; and that the owner finally entered into possession of the dwelling, and in doing so apparently waived all claim for damages except for delay in completing the building, and that the wall be constructed. After the contract price was paid, however, the contractor repudiated the compromise agreement, refused to comply with the terms thereof, and the trust company in effect approved its repudiation. Under such circumstances the owner of the building may well say, "I now elect to stand upon the terms of the original agreement and shall insist upon my rights thereunder, whatever they may be." If the contractor and the trust company may now say that appellants are not bound by the compromise agreement, then, as we view it, they may take advantage of their own wrong. We are clearly of the opinion that, under the evidence as it now stands, the trust company must be held to have consented to both the terms of the compromise agreement and the abandonment or repudiation thereof by the contractor. It

therefore cannot take advantage of any change of the original contract that might have been effected by the compromise agreement, and it is also bound by the election of appellants to sue upon the original contract.

[9] The contention that no authority is shown in the president to consent to the changes aforesaid is not tenable. Corporations, like individuals, are bound by the acts of their agents which are within the powers of the corporation and within the apparent scope of the agent's authority. In the case at bar it may be assumed that the principal officer of the corporation, *prima facie* at least, had the power to waive or to consent to a change or modification of certain provisions in a contract which related to matters coming within the corporate powers and which he had the authority to enter into, and with respect to which he, in all stages of the business, apparently represented and acted for the corporation. Moreover, the question of the president's authority is, we think, settled against respondents' contention by what is said by this court in *Loftis v. Insurance Co.*, 38 Utah, 532, 114 Pac. 134. See, also, *Thompson on Corporations* (2d Ed.) § 1690.

[10] It is also stated in the motion for nonsuit that, under the terms of the original agreement, appellants have waived all their rights to claim damages for defective construction by reason of their going into occupancy of the building. As heretofore stated, the letter of the contract is to that effect. The contract must, however, receive a reasonable construction, and the terms thereof should be applied to normal, and not to abnormal, conditions. The appellant John A. Christensen constantly protested that the contract was being violated. He finally went into possession of his own house under protest that it was not completed and in reliance upon the compromise agreement that the retaining wall would be constructed in lieu of correcting the defects in the building itself. This is made to appear from the correspondence and from his conduct, as the same is disclosed from the evidence. If the owner, by taking possession and protecting his own property, under the circumstances disclosed by this record, loses all rights against a contractor for failure to comply with his contract, a new method has been discovered by which a building contractor may escape liability for contractual breaches. Moreover, the provisions in the contract referred to, in our judgment, were not placed therein for the purpose of having them apply to cases where there is an actual dispute between the contractor and the owner of the building when possession is taken by the owner while protesting that the building has not been completed in accordance with the contract. To so rule would be to hold that it was intended by the parties that the owner could remain out of possession indefinitely and could recover from the contractor damages for the loss of rent or use

<sup>4</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 636.

of the dwelling while he remained out of possession. A provision in a building contract which, under all the circumstances, would make the taking of possession by the owner of his own property conclusive evidence that he had waived all defects in cases where the contractor insists that the building is completed according to the terms of the contract, and the owner contends to the contrary, would, in our judgment, be void as being wholly unreasonable. Before it can be held that an owner waives his rights by going into possession of his own house, he must have a clear choice between accepting and rejecting the work as done. The owners of buildings have no such choice where the building is erected on their own ground. Hence the mere act of going into possession cannot be made conclusive evidence of waiver. 3 Page on Contracts, § 1497.

The question of whether appellants may or may not recover damages from the trust company for delay in completing the building for the full period of time that it remained uncompleted, when it should have been completed as provided in the contract, is a question that we cannot determine at this time. All we can say is that, as the evidence now stands, a finding of liability for the whole period of time would be justified.

[11] In conclusion, counsel for appellants insists that we should reverse the judgment in favor of the trust company and remand the case to the district court, with directions to that court to enter judgment against said company for the amount of damages found against the contractor, as hereinbefore stated. This contention is no doubt based upon the theory that, where the surety is made a party with the contractor in an action for a breach of the original contract, the surety is bound by any judgment that may be obtained in such action for damages for a breach of such contract. Ordinarily the law is to that effect. In the case at bar, however, the surety filed a separate answer in which it set up its own defenses, negative as well as affirmative. When the case was tried, the whole case, as against the trust company, was determined upon questions of law arising upon the motion for nonsuit. That company, therefore, never had an opportunity to present its evidence upon the issues of fact presented by its answer. While that company may not again insist that the questions of law raised by the motion aforesaid and herein determined adversely to its contention are legal defenses to the action, it may nevertheless show, if it can, that the facts upon which our conclusions of law are based are not as, for the purposes of the motion for nonsuit, it concedes them to be, and as we of necessity have assumed them to be. The trust company is also entitled to be heard upon all questions of fact and to have either the court

or the jury pass upon the effect to be given to its evidence upon any material or relevant issue. So far as the judgment against the contractor is concerned, it must stand affirmed.

The judgment of dismissal entered in favor of the trust company is reversed, and as to said company the cause is remanded to the district court, with directions to grant appellants a new trial and to proceed with the case in accordance with the views herein expressed. Appellants to recover costs on appeal.

McCARTY and STRAUP, JJ., concur.

#### MATHEWS v. BERRETT et al.

(Supreme Court of Utah. Dec. 30, 1912. Rehearing Denied Jan. 23, 1913.)

#### 1. ASSIGNMENTS (§ 37\*)—IRRIGATION WATER—CONTRACT TO EXCHANGE—TRANSFER BY DELIVERY.

Where plaintiff's grantor on conveying the land to her also delivered a contract with defendant B. for an exchange of irrigation water to be used in connection with the land conveyed, the delivery of such contract without formal assignment constituted a sufficient transfer of the interest of plaintiff's grantor in the contract, and entitled complainant to sue to enforce the same.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 74; Dec. Dig. § 37.\*]

#### 2. SPECIFIC PERFORMANCE (§ 121\*) — EXCHANGE OF PROPERTY—IRRIGATION WATER—FINDINGS.

In a suit for specific performance of a contract for the exchange of certain irrigation water, evidence held to require findings that complainant had legal title to the water which she contracted to deliver to defendant, and that she was ready, able, and willing to perform all the conditions of the exchange contract to be performed on her part.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

#### 3. SPECIFIC PERFORMANCE (§ 28\*)—EXCHANGE OF PROPERTY—IRRIGATION WATER—NECESSITY OF EXCHANGE—IMPROVEMENT TO PROPERTY.

Where a water right attached to complainant's land could not be used thereon, whereupon complainant's grantor contracted with defendant B. for an exchange of such water right for the right to take water from another stream appurtenant to B.'s land, and complainant and her predecessors had been using the water pursuant to the exchange since 1870 or 1872, and a written contract therefor was made in 1892, but which failed to specify any length of time the contract was to run, and the complainant made valuable and lasting improvements on her land in reliance on the exchange having no other source from which to obtain water, the contract would be construed as continuing until terminated by consent of both parties, and complainant was therefore entitled to enforce specific performance on B.'s repudiation thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.\*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Suit by Ruth P. Mathews against Richard T. Berrett and the Rice Creek Irrigation Company. Decree for defendants, and complainant appeals. Reversed and remanded, with directions.

The facts of the case, in substance, are as follows: Appellant, Ruth P. Mathews, is the owner of about 45 acres of land situated in Weber county, this state. A portion of this land, about three acres, is irrigated with water from a spring situated thereon, and for more than 40 years next preceding the commencement of this action a portion of the land has been irrigated with water from a stream known as Rice creek. An orchard has been grown on the land, and during each and every season of the 40 years mentioned appellant and her predecessors in interest have planted and grown grain and other valuable crops thereon. Respondent Richard T. Berrett is, and for more than 40 years has been, the owner of farming lands under what is known as the Cold Water canal. These lands are so situated that it has been and is impracticable to supply them with water from Rice creek, and appellant cannot be supplied with water from the Cold Water canal. Appellant's predecessors in interest were owners of a water right in the Cold Water canal, and Berrett was the owner and entitled to the use of water for irrigating purposes from Rice creek. These parties, Berrett and appellant's predecessors in interest, in 1872, or prior thereto, exchanged with each other the water represented by their respective interests in the streams mentioned. Under this arrangement, appellant's predecessors in interest were, for many years, supplied with water to irrigate the land now owned by appellant, and Berrett received water with which to irrigate his land from the Cold Water canal. In 1892 the Rice Creek Irrigation Company, for the purpose of regulating and distributing the waters of Rice creek and improving its system, became incorporated. When incorporated, the company issued to Berrett a certificate of stock for the interest represented by the water which he had exchanged with appellant's predecessors in interest for water in the Cold Water canal. In the same year the following written agreement was entered into between Elijah Shaw, Sr., one of appellant's predecessors in interest and Berrett: "The contract, made the 7th day of June, A. D. 1892, between Richard T. Berrett of North Ogden, in the county of Weber and territory of Utah, the party of the first part, and Elijah Shaw, Sr., of Pleasant View, in said county of Weber and territory of Utah, the party of the second part, witnesseth: That the said Richard T. Berrett, in consideration of the covenants on the part of the party of the second part, hereinafter contained, doth covenant and agree to and with the said party of the second part that he will let him, Elijah Shaw, have and use a ten and three-

fourths hours water right in and to the waters flowing in what is known as Rice creek every five and a half days according to the regulation of the Rice Creek Irrigation Company. Said Richard T. Berrett owning 28 shares in said company, giving him the right to 14 hours and 30 minutes for field use every  $5\frac{1}{2}$  days and reserving from said second party 3 hours and 45 minutes. And the said Elijah Shaw, Sr., in consideration of the covenants on the part of the party of the first part, doth covenant and agree to and with the said Richard T. Berrett that he, Elijah Shaw, Sr., will furnish fifteen hours per week in and of North Ogden Irrigation Company's canal water to go to Harrisville in exchange for Cold Water Company water and securing eleven and three-fourths ( $11\frac{3}{4}$ ) hours of Cold Water creek water as distributed by said Cold Water Irrigation Company every five and one-half ( $5\frac{1}{2}$ ) days to be delivered or turned into the South Rice creek ditch, and further agrees to keep the Cold Water ditch in repair and if said Cold Water streams shall fail to be as large as Rice creek the shortage to be made up from said Rice creek if from no other source. In witness whereof, we have hereunto set out hands and seals the day and year first above written. Richard T. Berrett. Elijah Shaw, Sr. Signed and delivered in presence of: Geo. S. Dean. John Hall. (Duly acknowledged by both.)" In June, 1904, appellant purchased the land upon which the Rice creek water in question has been used, and at the time of the execution of the deed to the land her grantor delivered to her the contract above set forth. Upon the execution of the deed and the delivery to her of the contract for the exchange of water, appellant went into possession of the land, about 21 acres of which had been, and was being, cultivated. About eight acres of the land was in orchard. This appellant improved by removing therefrom old fruit trees, and planting young ones in their stead. She cleaned off and brought into cultivation about 15 acres of the new land; that is, land that had not theretofore been irrigated or farmed. She also made other valuable and permanent improvements on the land. The evidence without conflict shows that the improvements made and erected on the land by appellant's predecessors in interest were of the value of about \$2,000, and that appellant during the first five years of her ownership of the premises has made improvements thereon of the value of \$3,000, and that during these five years she has used the Rice creek water in question to irrigate the orchard and crops grown thereon. No one during this time disputed or even questioned her right to the use of Rice creek water. The evidence shows and the court found that appellant's "lands are arid in character and require the application of water for irrigation for the purpose of producing crops

consisting of orchards, grains, grasses, and other farm products growing upon the same," and the evidence also shows that without irrigation this land would be unproductive and practically valueless. At the opening of the irrigation season of 1909 Berrett for the first time denied appellant's right to the use of the Rice creek water in question, and refused to longer abide by the terms of the contract, and demanded of the Rice Creek Irrigation Company that it distribute to him the water which had theretofore for more than 40 years been distributed to appellant and her predecessors in interest. Whereupon appellant commenced this action to compel the Rice Creek Irrigation Company to distribute to her the water in question in accordance with the rules and regulations of the company for the distribution of its waters, and to compel Berrett "to specifically perform his agreement to deliver and permit to be delivered (to appellant) such water at all times and so long as the conditions of said agreement shall or may be performed by plaintiff."

The court found, among other things, and the findings are supported by the evidence (No. 5), "that since the execution of said contract (Exhibit A) the said water has been used according to the terms of said agreement, and the Rice Creek Irrigation Company has distributed the water belonging to the defendant Berrett upon the land described in the complaint and to the parties in possession thereof; and said defendant Berrett has received and used from the Cold Water Creek during all of said times water which was used upon the land described as belonging to him in the complaint on file herein.

\* \* \* No. 6. That the plaintiff and her predecessors in interest have since the execution of Exhibit A not exercised any ownership nor paid any assessments upon the stock of the Rice Creek Irrigation Company, and have only paid the expenses of cleaning ditches and water master, and that all the other assessments upon the said stock have been paid during all of said time by the defendant Berrett, and the defendant Berrett during all of the said times has not paid the taxes or assessments upon the Cold Water Irrigation Company's stock mentioned in said contract (Exhibit A), but same were paid by the plaintiff and her predecessors in interest." The court also found (No. 4) "that said contract (Exhibit A) has never been assigned or transferred to this plaintiff, and that she is not the owner of the Rice Creek waters mentioned and described in said contract; and there is no evidence in this case to show that the plaintiff is the owner of the North Ogden Irrigation Company waters mentioned in the said Exhibit A, and that she is not able, ready, or willing to perform or comply with all of the conditions of said contract (Exhibit A)."

Richards & Boyd, of Ogden, for appellant.  
A. G. Horn, of Ogden, for appellees.

McCARTY, J. (after stating the facts as above). The contention first made by appellant on this appeal is that the court's fourth finding of fact is not only unsupported by, but is contrary to, the evidence. This assignment of error involves the following propositions: (1) Was the contract in question assigned or transferred to appellant? (2) Has appellant the legal title to a sufficient amount of water in North Ogden Irrigation Company to enable her to perform and comply with the terms and conditions of the contract? (3) Is she able, ready, and willing to perform all of the conditions of the contract to be performed on her part? We think that all of these propositions must be answered in the affirmative. N. P. Mathews testified, and his evidence is not disputed, that at the time of the conveyance to appellant of the land on which the Rice creek water in question has been used the contract was delivered to him as agent for appellant by her grantors; that during the intervening five years between the time of the conveyance of the land and the commencement of this action he was in charge of, farmed, and improved the premises for appellant; and that during this time the land was supplied with "exchange water" covered by the contract.

[1] The law is well settled that the delivery of an instrument such as the contract in question when supported by a valuable consideration is sufficient to pass whatever interest the transferor may have in or to the instrument. In 4 Cyc. 44, the rule as declared by practically all of the authorities is stated as follows: "When supported by a valuable consideration, no writing is necessary to the assignment of written instruments, and the delivery of the chose in action, or the written evidence of the right, debt, or title, will be sufficient to pass the beneficial interest therein"—citing many cases.

[2] Regarding the second and third propositions, the evidence shows conclusively that she has the legal title to the Cold Water creek water which Berrett for 17 years has used, under the contract, in exchange for the Rice creek water used by appellant and her predecessors in interest; that she has the legal title to a sufficient amount of the capital stock of the North Ogden Irrigation Company to enable her to continue to furnish to Berrett the Cold Water creek water as provided in the contract, and that she is not only able and willing, but anxious, to perform all of the conditions of the contract required of her by its terms. Findings of fact No. 4 are, therefore, not only unsupported by evidence, but are contrary to evidence of the most positive and conclusive character.

[3] In its seventh finding of fact the court found: "That, while the plaintiff has continued to improve the real estate of which she was in the possession and described in the complaint, such improvements or ex-

penditures were not made or incurred by reason of any act or conduct or any kind on the part of the defendant Berrett." The court also found (No. 8): "That there is no evidence in this case that the plaintiff cannot secure other Rice creek water or water from other sources to properly irrigate the lands in question and described in the complaint." These findings are assailed on the ground that they are not sustained by the evidence. The testimony of N. P. Mathews, who was the agent of the appellant, and who for five years next preceding the commencement of this action, as such agent, was in charge of the premises and land upon which the Rice creek water in dispute has been used, shows that he made improvements on the land of the value of \$3,000, and that these improvements were made in reliance upon the right of appellant to use the so-called "exchange water" on the lands. And the undisputed evidence shows that Berrett acquiesced in the use of the water by appellant and her predecessors in interest for 17 years under the contract, including the 5 years during which the improvements last mentioned were made. And the evidence also shows that there is no water available for the irrigation of appellant's land other than the "exchange water" from Rice creek heretofore used thereon. N. Montgomery, on this point, testified as follows: "The only water source this property has known during all these years (35 or 40) has been the waters of Rice creek. \* \* \* These lands have no other source than Rice creek after the flood waters." These flood waters disappear from the 1st to the 15th of July each and every year. N. P. Mathews testified, in part, as follows: "There has been no other source for irrigating the land than Rice creek. \* \* \* I have no other water that can be diverted for that purpose; and it is necessary to irrigate these lands during the months of July and August and late in the season of each year." E. R. Shaw, another witness for appellant, testified that: "The Mathews (appellant) land would be worthless so far as the orchard or anything like that is concerned, if the water of Rice creek were shut off." We think this evidence, which is not denied, precludes any inference that there is any water available for the irrigation of appellant's land other than the Rice creek water. And we think that the evidence shows that during the irrigation season there is no surplus or unclaimed water in Rice creek. In fact, the record shows that occasionally there is a "shortage" of water in Rice creek. In the face of this evidence which is not disputed, the court's findings of fact Nos. 7 and 8 cannot be upheld.

Counsel for respondent Berrett contends that the contract on its face shows "It was only contemplated between the parties to be a temporary affair, or, in other words, it was not to be permanent, and was to exist only during the pleasure of the parties." In

his discussion of this question counsel says: "The very language of this contract wherein Berrett agrees to let Shaw have water precludes the idea of a permanent trade. It is true no limit of time is stated in the contract, and it is equally true that the certificates of stock representing the water in question were never transferred by Berrett, who always paid the taxes levied against the stock." Of course, this contract can be terminated by the mutual consent of all the parties who have a beneficial interest therein, but that is not the question here involved. The question here presented is, May Berrett, under the undisputed facts of this case which show that appellant has performed every duty required of her by the terms of the contract, and who is ready, able, and willing to continue to discharge every obligation imposed upon her by the instrument, terminate it against the wishes of appellant and without her consent, and thereby cause her great and irreparable damage? In construing contracts, the rule is elementary that, where the meaning of the parties is not clear regarding some essential part or feature of it, courts will, in determining what the intention of the parties was, consider not only the nature of the instrument, but will take into consideration the circumstances and conditions surrounding the parties executing it and the objects they had in view and which prompted them to make the contract, as shown by the evidence.

In 2 Page on Contracts, § 1123, the author says: "It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract as nearly as can be done by admitting evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties to the contract, and the objects sought to be accomplished by the contract." See, also, 9 Cyc. 587. Applying this rule of construction to the contract in question, we find that the exchange of the Rice creek water in controversy was made by Berrett with appellant's predecessors in interest for Cold Water creek water about 1870 or 1872, and this exchange continued without interruption until just before the commencement of this action. As hereinbefore stated, the written contract was executed in 1892. In the meantime valuable and permanent improvements were made on the land upon which this Rice creek water was being used. Not only these improvements, but the land itself, would be rendered practically valueless without this Rice creek water.

The evidence shows that Berrett, when he entered into the written contract, could not use the water of Rice creek on his lands. On this point J. B. Bailey, a witness for appellant, testified as follows: "I have been acquainted with the cultivation of the Mathews (appellant's) lands for the past 21

years. During that time these lands have never used any water from what is known as Cold Water creek. They cannot do so." The witness further testified, and his testimony is not denied: "I know Mr. Berrett, and where his lands are. They are below what is known as the Cold Water ditch." Taking into consideration the valuable property interests of Berrett and of plaintiff's predecessors in interest that had been acquired and created by them through this exchange of water, in connection with all the other facts and circumstances leading up to and surrounding the execution of the contract, we think it may be fairly inferred that the parties to the contract executed the same for the purpose of protecting and perpetuating these property interests, and that it was their intention that the contract should continue in force until terminated by the mutual consent of all parties owning a beneficial interest therein. The contract was executed June 7, 1892. Now let us suppose, for the sake of illustration, that in July or August of that same year, when the use of the Rice creek water was indispensable to the saving of the orchard and the growing of the crops on the lands mentioned, Berrett had refused to further comply with the terms of the contract, and had attempted to take the Rice creek water from the land and terminate the contract, is it not plain that appellant's predecessor in interest, Elijah Shaw, could have gone into a court of equity and compelled Berrett to specifically perform his part of the contract? Undoubtedly he, Shaw, under such circumstances, would have been entitled to equitable relief. Berrett having acquiesced in the use of the Rice creek water on the land referred to for 17 years, during which time valuable and permanent improvements have been placed upon the land in reliance on the use of the water in dispute, all of which improvements as well as the land would be practically valueless without the water, we think a much stronger reason exists for equitable relief than in the hypothetical case above stated.

We are clearly of the opinion that appellant is entitled to the relief prayed for in her complaint. This case differs materially from the case of *Montgomery v. Berrett*, 121 Pac. 569, recently decided by this court. In that case there was a sharp conflict in the evidence regarding the terms of the alleged parol agreement for the exchange of water, and the court there found, among other things, "that the proofs in the case are not clear and satisfactory or sufficient to warrant the court to order a specific performance of the said alleged contract." Whereas, in the case at bar, there is no substantial conflict in the evidence on any material issue in the case.

The cause is remanded, with directions to

the lower court to set aside its findings Nos. 4, 7, and 8, heretofore made and filed in the case, and to vacate the judgment rendered thereon, and to make findings and render judgment in accordance with the views expressed herein, appellant to recover her taxable costs in this and in the lower court.

FRICK, C. J. I concur. Under the contract in question, the exchange of the water was made for a special purpose. Such exchange was without limit and unconditional. Neither party to the agreement reserved the right to terminate the agreement without the consent of the other, although it must have been contemplated by both that the use of the water when used as contemplated would result in valuable improvements which would be materially affected, if not destroyed, in case the agreement should be terminated, as is now attempted by respondent. We must assume that it was for this reason that the right to terminate the agreement by one without the consent of the other was withheld. I think the agreement, in view of the subject-matter, is of that character which a court of equity should specifically enforce, especially when it is made to appear, as in this case, that one of the parties would suffer irreparable injury if it were terminated, and the other can suffer no injury in case of its enforcement.

STRAUP, J., concurs in both.

#### STANFORD v. GRAY et al

(Supreme Court of Utah. Dec. 31, 1912. Rehearing Denied Jan. 23, 1913.)

##### 1. HABEAS CORPUS (§ 99\*)—SURRENDER OF CUSTODY—VALIDITY OF CONTRACT.

A contract by a parent, fairly made, surrendering the custody of a child, as to a children's home, is valid as between the parties, but is unenforceable if contrary to the child's interest.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.\*]

##### 2. EVIDENCE (§ 80\*)—PRESUMPTIONS—FOREIGN STATUTES.

In absence of contrary evidence, it is presumed that the law of California relating to the forfeiture of the custody of minor children is the same as the law of Utah.<sup>1</sup>

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80;\* *Common Law*, Cent. Dig. §§ 14-16.]

##### 3. HABEAS CORPUS (§ 85\*)—CUSTODY OF CHILD—CONTRACTS—DURESS—EVIDENCE.

Evidence, in habeas corpus to obtain custody of plaintiff's child which she surrendered to another, held not to sustain a finding that the contract surrendering custody was executed by plaintiff through fraud or coercion.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

<sup>1</sup> *Oak Leather Co. v. Union Bank*, 9 Utah, 87, 33 Pac. 246; *Dignan et al. v. Nelson et al.*, 26 Utah, 186, 72 Pac. 936.

**4. HABEAS CORPUS (§ 85\*)—CUSTODY OF CHILD—SURRENDER—RECOVERY—BURDEN OF PROOF.**

The burden is on a parent, who has contracted away the custody of a minor and seeks to recover it, to show that it is not receiving proper care or proper physical, moral, and intellectual training.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

Straup, J., dissenting.

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by Selma Stanford, attorney in fact for Belle Hansen, on behalf of Robert Schroyler, against B. B. Gray and another. From a judgment for plaintiff, defendants appeal. Reversed, with directions to vacate decree and enter decree as directed.

This is a habeas corpus proceeding involving the right to the control and custody of a child born to respondent, Belle Hansen, out of lawful wedlock. The facts regarding the paternity of the child and the circumstances under which it was born, as found by the trial court, are as follows: "That the said Belle Hansen is, and has been for the period of 24 years immediately preceding the filing of this complaint, a resident of the city and county of San Francisco, state of California; that Robert Schroyler, an infant male child, two years and ten months of age, is the child of the said Belle Hansen by birth, having been born out of lawful wedlock on the 14th day of December, 1908, at the city of Seattle, state of Washington; that the father of said child is Clarence Buzzini, who at all times referred to in the petition of the plaintiff was and is a resident of the city and county of San Francisco, state of California; that the said Clarence Buzzini had been for some years prior to the birth of said child plaintiff's sweetheart; that he had betrayed her." The court further found, and the finding is supported by the evidence: "That said child by reason of its birth, under the circumstances aforesaid, took the name of Robert Schroyler, the maiden name of the said Belle Hansen prior to her present marriage; that the said Belle Hansen, on the 24th day of June, 1910, was lawfully married to William Hansen at the city and county of San Francisco, state of California, and ever since said date they have been and now are husband and wife residing in said city and state, where they have at all times since their said marriage maintained a home and residence; that prior to the 24th day of June, 1910, the said William Hansen then desiring to marry the said Belle Schroyler, requested of her father, J. B. Schroyler, his consent to such marriage; \* \* \* that said consent was given with the express agreement and understanding on the part of the said William Hansen as made with the said J. B. Schroyler that the said William Hansen would maintain, edu-

cate, and support the said minor child, Robert Schroyler."

Mrs. Hansen returned from Seattle to San Francisco about February, 1909, bringing with her the child. On arriving in San Francisco Mrs. Hansen went with the child to the home of her sister, Mrs. Perkins, at which place she and the infant remained for about two weeks. From her sister's place she went to the home of her parents, J. B. and Elizabeth Schroyler. Soon after returning to the home of her parents, she obtained employment in San Francisco at which she earned from \$10 to \$15 per week. On obtaining employment Mrs. Hansen placed the child in the home of a Mrs. Hess, where it was taken care of by Mrs. Levens, a daughter of Mrs. Hess. The expense of keeping and maintaining the child at this private home was \$3.50 per week, which was paid by Mrs. Hansen from the money earned by her daily labor. The child remained with and was cared for by Mrs. Levens until September 12, 1910, a period of about 18 months, when it was put in the Children's Home Society of California by Mrs. Hansen. While the child was with Mrs. Levens, Mrs. Hansen called to see it quite often and occasionally would take it with her to the home of her parents and sometimes keep it there for "a day or two." About June, 1909, Mrs. Hansen met her husband, William Hansen, to whom she was married June 24, 1910. These parties, during their courtship, which lasted about one year, together called quite often at Mrs. Levens' to see the child. Mr. Hansen was by profession a dentist, but had for more than a year prior to his marriage practically abandoned his profession and had devoted nearly all his time to inventing a device for starting gasoline automobiles. At the time of his marriage, and for several months thereafter, Hansen, so he says, was "practically stranded" financially. The Hansens, being without means to provide and furnish a home for themselves, made arrangements with the Schroylers, Mrs. Hansen's parents, to board with them until Hansen should realize an income from his invention. His finances, however, at the time of the trial, had very much improved, and he was receiving an income from his invention of from \$100 to \$300 per month.

After her marriage Mrs. Hansen continued to have Mrs. Levens keep the child and care for it. Desiring to assist her husband in defraying the expense of patenting his invention, she decided to take the child from the private home of Mrs. Levens and put it where she would be relieved of the burden of paying \$3.50 per week for its maintenance. On September 8, 1910, she wrote to M. J. White, who was secretary of the California Society for the Prevention of Cruelty to Children, asking his assistance to get Buzzini to support the child and to find a cheap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er lodging and boarding place for it, promising on her part to try and get some one to adopt it. In her letter to Mr. White, among other things, she says: "He (Buzzini) promised my sister and myself that he would do the right thing by the baby if he got a steady position in the fire department. He has passed the examination and has not done anything, and failed to do what he promised. I was just married again and now my husband has learned of the baby having no name. He has threat to leave me. I am married two months to him. He will not give me a cent. So I am working every day to support the baby and myself. But I cannot give the child the proper care it should have, and I am doing wrong by raising it up without a name. \* \* \* Please see if you could do something for me or help me to get him in some home. I will give a little money each month to try and get some one to adopt him, to give him a name and father. As it is now he is without both." In reply to this letter, Mr. White invited Mrs. Hansen to call and see him at his office, which she did September 12, 1910. The result of this conference, as found by the court, was that: "On September 12, 1910, at San Francisco, Cal., Belle Hansen, the mother of said child, being the sole and only person entitled to his guardianship, custody, and control, delivered and surrendered the same to the Children's Home Society, a corporation of California, and, at the time of delivering the child as aforesaid, signed and delivered to said society a written instrument as follows: 'County of San Francisco, State of California--ss.: Know all men by these presents, that I am the mother and only legal guardian of a minor child known as Robert Schroyer and born December 14, 1908; and that, because of my inability to properly provide for and bring up said child, do hereby fully, freely and forever relinquish and abandon to the Children's Home Society of California, all my right of custody, services and earnings of said minor child to the end that a home may be procured for him. That I do hereby authorize and request said Children's Home Society to place said child in a home at its discretion, and I hereby waive right to notice of any proceedings for his adoption, and consent to the same in any case approved by said society, its superintendent or president, or, if requested by the society, I hereby agree to appear and consent. That I will not seek to know with whom, or where, the said child is placed, but intrusting his well-being to said Children's Home Society, will in no way disturb or interfere with the provision made for him. Witness my hand and seal at San Francisco, California, this 12th day of September, 1910. Mrs. Belle Hansen. Witnesses to signature: Mrs. K. M. White, J. H. Fairweather.'" The foregoing instrument was duly acknowledged by Mrs. Hansen before a notary public.

The court further found: "That she was

driven to her said act by the necessity and distress of her situation; that she was greatly annoyed and distressed mentally by reason of her circumstances and surroundings and by reason of the differences between herself and her husband and the threatened estrangement between them and by reason of her family relations; \* \* \* that by reason of her said mental condition, caused by the surroundings aforesaid, for many days prior to the signing of said instrument, her mind was excited and disordered; \* \* \* and that while being in said mental condition, and acting under sudden impulse and without knowing the full contents of said instrument or its effect and purport, she signed the same on the advice and solicitation of the said Mr. White, in whose integrity, at that time, she had utmost confidence." The court also found that: "Thereafter, about the latter part of October, 1910, the said Children's Home Society, acting under and in accordance with said written instrument, at San Francisco, Cal., placed said child in the custody of the defendants, to the end that he might be nursed, supported, educated, and adopted by the defendants; that the defendants took said child into their possession and have ever since kept, maintained, nursed, and supported him with the utmost care and tenderness and have formed a deep attachment and affection for him, and are desirous of continuing to support and educate him, and are willing and ready and intend to adopt him under and in accordance with the laws of Utah, and have kept and detained and are keeping and detaining him for the purpose aforesaid and not otherwise. The defendants are amply able to maintain, educate, and support said child and are in all respects fit and suitable persons to adopt him and to have his custody and control."

The evidence shows, and the court found: "That, immediately after receiving possession of said child, the defendants removed it from the city and county of San Francisco, state of California, to the city of Salt Lake, state of Utah, and that ever since on or about the 18th day of October, 1910, the said defendants have resided in the city of Salt Lake, state of Utah, and have had in their possession the said infant child, \* \* \* and that the plaintiff herein did not know where said child was from and after the date when she delivered possession of said child to the said society in the city of San Francisco, state of California; that on or about the 21st day of July, 1911, she learned for the first time that said child was in the possession, custody, and control of the said defendants."

As conclusions of law the court found: "(1) That the plaintiff, Belle Hansen, is a fit and proper person to have control and custody of said minor child, Robert Schroyer, and is entitled to possession and custody of said minor child. (2) It is and would be for the best interest of said child to deliver him

to its mother, Belle Hansen. (3) That the purported relinquishment signed by the plaintiff is no bar to plaintiff's rights to recover said child. (4) That plaintiff is entitled to a judgment and decree against said defendants as prayed for in her complaint, and that said child, Robert Schroyer, is illegally restrained and detained by said defendants."

A decree was entered giving to the plaintiff, Belle Hansen, the custody and control of the child. To reverse the decree defendants prosecute this appeal.

W. D. Riter and R. A. McBroom, all of Salt Lake City, for appellants. W. R. Hutchinson and Cheney & Jensen, all of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). The first question presented by this appeal is: Did the court err in deciding that the relinquishment executed by Belle Hansen September 12, 1910, which is set forth in the foregoing statement of facts, was not a bar to her right to recover the child?

Respondents contend: (1) That contracts by which a parent seeks to transfer and surrender the custody of his infant child to another are void as against public policy; and (2) that, assuming, for the purposes of this case, contracts of this kind, when fairly and voluntarily entered into, are binding between the parties, the facts and circumstances surrounding the execution of the contract in question render it invalid.

[1] There are some authorities which hold that a contract made by a parent in which he surrenders the care, control, and custody of his minor child to another is void as against public policy. The great weight of authority, however, sustains the position of appellants that a parent may by contract legally transfer and surrender his infant child into the custody of another where the interest of the child is not prejudiced by the transaction, and in all controversies arising respecting the custody of the child after such transfer and surrender have been made, the paramount consideration—the question of controlling importance—is the interest, welfare, and happiness of the child. In other words, while contracts of this kind, fairly and voluntarily entered into, are valid as between the parties, they will not be enforced to the detriment of the child. The earliest case on this question to which our attention has been called is *Matter of McDowell*, 8 Johns. (N. Y.) 328. In that case an indenture of apprenticeship was executed by the parent, but not in compliance with the statute. The parent, claiming that the indenture was therefore void, sued out a writ of habeas corpus to regain the custody of the infant. The court said: "There is nothing before the court to show any improper treatment of the infant, nor that the party to whom the father intended to bind

him has not hitherto faithfully performed the stipulations of the indenture. This is not a case then in which the father has any equity, or any right to complain. He may be bound still by the covenants in the indenture, though the infant is not."

In the case of *Curtis v. Curtis*, 5 Gray (Mass.) 537, the court said: "We are relieved from the necessity of going into the question, how far the indenture is valid and binding upon the minor under the laws of Connecticut. The only question is, how far it affects the mother's rights. And the court are all of the opinion that, so far as the rights of the mother are concerned, she has relinquished them by this instrument, which operates either as a contract or an estoppel—and it is immaterial which—to prevent her from now setting up her rights. If the child should object, we should be obliged to regard the provisions of the indenture with greater care, and ascertain its legal force and effect in Connecticut, where it was made, and in which state apparently the parties had their domicile."

In the case of *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, the court, in the course of a well-considered opinion, says: "The right of the parent or the state to surround the child with proper influences is of a governmental nature; while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived. Ordinarily the law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another. Where, however, a parent, by writing or otherwise, has voluntarily transferred and delivered his minor child into the custody and under the control of another, as in the case at bar, and then seeks to recover possession of the child by writ of habeas corpus, such parent is invoking the exercise of the equitable discretion of the court to disrupt private domestic relations which he has voluntarily brought about, and the court will not grant the relief, unless upon a hearing of all the facts it is of the opinion that the best interests of the child would be promoted thereby. It is sometimes said that such a voluntary transfer is 'void,' or that it is 'contrary to public policy'; but the cases using such language show that it is not used in an absolute sense, but in the sense that such transfer is no impediment to the action of the court in determining what is best for the interest of the child. The law does not prohibit such a transfer, but, on the contrary, allows the child to reap the benefit thereof when it is to its interest so to do."

To the same effect are the following cases: *Hohenadel v. Steele*, 237 Ill. 229, 86 N. E. 719; *Dumain et ux. v. Gwynne*, 10 Allen (Mass.) 270; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810; *Carpenter v. Carpenter*, 119 Mich. 167, 77 N. W. 703; *Miller v. Miller*, 123 Iowa, 165, 98 N. W. 631; *Anderson v. Young*, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277; *Lamar v. Harris*, 117 Ga. 993, 44 S. E. 866; *Carter v. Brett*, 116 Ga. 114, 42 S. E. 348; *Fletcher v. Hickman*, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896, 88 Am. St. Rep. 862; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593.

Moreover, we have a statute which recognizes the validity of contracts of this character. Comp. Laws 1907, § 720x27 provides: "No parent or guardian or other person who, by instrument in writing, surrenders or has surrendered heretofore, the custody of a child to any children's aid society or institution, shall thereafter, contrary to the terms of such instruments, be entitled to the custody or control or authority over, or any right to interfere with, any such child, and these same conditions shall prevail where the child is or has been delivered to the children's aid society or institution by the action of any proper court." The second paragraph, or subdivision, of section 720x23 of the same act, is as follows: "Institutions' shall mean any building, or buildings, public or private, under the control of a competent board of managers, and used as a home or place of detention, correction, or punishment for delinquent or dependent children."

The trial court found, and the finding is supported by the evidence, that: "Said Children's Home Society \* \* \* was a corporation duly organized under the laws of the state of California, for the purpose of taking possession of and finding homes for abandoned children, and was an institution holding and possessing private buildings at various places in California under the control of a competent board of managers, used as a home or place of detention, correction, or punishment for delinquent or dependent children."

Under the foregoing provisions of the statute a parent may, in this state, in pursuance of an instrument in writing such as the one under consideration, duly executed by him, surrender and forfeit his right to the custody of his infant child.

[2] There being no evidence to the contrary, it will be presumed that the law of the state of California relating to the forfeiture of the custody of minor children is the same as the law of this state. *Oak Leather Co. v. Union Bank*, 9 Utah, 87, 33 Pac. 246; *Dignan et al. v. Nelson et al.*, 26 Utah, 186, 72 Pac. 936. It therefore necessarily follows that contracts of this kind, fairly and voluntarily entered into, being binding in this state, are presumed to be valid when executed in the

state of California. Counsel for respondent, however, vigorously contend that, under the peculiar facts of this case, the presumption that the law of California with respect to "the forfeiture of the right of custody and control of minor children" is the same as the laws of the state of Utah, cannot be indulged in. Appellants, "for the purpose of showing the state of the law in \* \* \* California in regard to instruments," such as the one under consideration, introduced in evidence a portion of the decision in the case of *Campbell v. Wright*, 130 Cal. 380, 62 Pac. 613, which is as follows: "By the former section the power of the court to appoint guardians is limited to the case of 'minors who have no guardian legally appointed by will or deed,' and the same limitation is prescribed by section 243 of the Civil Code, and section 241 therein cited. In the latter section the power of the parent to dispose of the custody of the child by will or deed is expressly recognized, and this must be taken as a recognition of the general right of the parent to dispose of the custody of the child, of which it is but a special example; for it would be unreasonable to suppose that the Legislature intended to limit or restrict a right universally recognized in our own and in all systems of law to the single case provided for, which must therefore be regarded simply as an application of the recognized principle."

It is insisted that, appellants having introduced evidence to show that the state of the law in California is the same as the law of this state, it must be presumed that they introduced all of the law of that state relating to this particular subject. The portion of the decision in the case of *Campbell v. Wright*, supra, introduced in evidence, does not purport to contain either in detail or in substance the statute of California on this matter. Certain sections of the statute are referred to in the opinion and in a measure construed; but, as stated, no part of the statute is incorporated therein. The portion of the decision referred to, no doubt, was put in evidence for the purpose of showing the "state of the law of California" on the question here in controversy as construed by the Supreme Court of that state, and the decision seems to recognize the validity of contracts of the character of the one under consideration.

[3] Mrs. Hansen seeks to avoid the contract on the grounds: First, that she executed it under irresistible pressure of circumstances, and that her mind at the time she signed the document was, and for several weeks prior thereto had been, as found by the court, "excited and disordered"; and, second, that when she executed the relinquishment and delivered the child to the Children's Home Society of California, she understood and believed that she was placing it in that institution temporarily, "for a little while" only, and that she intended



after the child had remained there "for a few weeks" to return for it, take it to the home of her parents where she and her husband were lodging and boarding, and have her husband adopt it. There is absolutely no evidence whatever tending to show that Mrs. Hansen's mind was either "excited" or "disordered" at or immediately prior to the time she executed the relinquishment. The only inference of which the evidence is susceptible is that she was in good health and in possession of her faculties when she signed the document; and the evidence is all but conclusive that she knew and understood the terms of the relinquishment and intended when she signed it to transfer and permanently surrender the right to the care and control and custody of the child to the Children's Home Society of California. In her letter to M. J. White (excerpts from which appear in the foregoing statement of facts), written four days before she executed the relinquishment, she expressed a desire to have some one adopt the child "to give him a name and a father." Eight days after she executed the relinquishment, she again wrote to Mr. White, and, among other things, said: "I told Mrs. Levens I had a home for good for the baby. \* \* \* I think I have done what is right by the baby by adopting him out as I am sure he will have a name and a home." In another letter that she wrote to Mr. White September 20, 1911, more than four months after she executed the relinquishment, she said, referring to the child, "You took him to adopt." M. J. White testified that, before Mrs. Hansen executed the relinquishment, he explained the terms of the document to her. On this point he testified, in part, as follows: "On September 12, 1910, she called at my office. \* \* \* She said \* \* \* she wanted to place the child for adoption. I had a long talk with her, calling to her mind and trying to impress on her the seriousness and importance of giving away her child. \* \* \* I handed it (the relinquishment) to her to read, and she held it in her hand. I discussed the provisions of it with her, and the importance of the step she was taking. It is our purpose to prevent a parent from giving away a child if there is any way which it can be kept by the parents, and for that reason I dwelt particularly upon the act she was about to do."

The evidence of Mr. White on this point is corroborated by the testimony of the subscribing witnesses to the relinquishment, both of whom were present and heard what was said on that occasion by White and Mrs. Hansen. While some parts of Mrs. Hansen's testimony is to the effect that she was ignorant of the terms and conditions contained in the relinquishment when she signed it, yet the statements made by her in her correspondence with Mr. White, above referred to, we think, is all but conclusive that she did know and understand the terms and conditions of the instrument. The findings

of fact made by the court that Mrs. Hansen signed the relinquishment "while acting under sudden impulse and without knowing the full contents of said instrument or its purport and effect," and that she signed it under an "irresistible pressure of circumstances," are not supported by the evidence.

[4] We now come to the question of whether, under all of the facts and circumstances as disclosed by the record, the social and intellectual training, as well as the future happiness, of the child, would be better promoted by restoring it to the custody of Mrs. Hansen than by leaving it in the care, control and custody of appellants. As we have pointed out, the weight of authority, which of course includes the better reasoned cases, holds that, where a parent in writing voluntarily relinquishes and surrenders the custody of his infant child to the custody of another, he cannot recover the custody of the child in his own right; and, where the parent in such case comes before the court seeking to recover the custody of the child the burden is on him to show, not on his own behalf, but on behalf of the child, that it is not receiving the proper care, or that its physical, moral, and intellectual training is not what it should be. The right, therefore, of a parent in such case to the custody of the child, does not depend altogether on the question of whether he is a suitable person to have the care and custody of the child as counsel for respondent seem to contend. Tested by the foregoing rule, which we think is a wholesome one, do the facts in the case support the decree of the court? We think not. The court found, and the finding is supported by the evidence, that appellants, ever since the child was given into their custody, have "kept, maintained, nursed, and supported him with the utmost care and tenderness and have formed a deep attachment and affection for him and are desirous of continuing to support and educate him, \* \* \* and are amply able to maintain, educate, and support said child, and are in all respects fit and suitable persons to adopt him and to have his custody and control." We do not wish to be understood as holding, or even intimating, that the Hansens are unsuitable persons to have the care and custody of the child in question. What we do hold is that, Mrs. Hansen having voluntarily relinquished and surrendered her right to the care and custody of the child, the burden is on her to show that the parties who acquired the custody of the child by virtue and in pursuance of the relinquishment have in some way been derelict in their duty to the child, and that it would be better for the best interests of the child to take it out of their custody and return it to her. This she has wholly failed to do.

We have examined the record in this case with more than ordinary care and are of the opinion that the only reasonable infer-

ence which can be drawn from the evidence—in fact, the only inference permissible—is that the interest and welfare of the child would be best promoted by leaving it in the care and custody of appellants.

The judgment is reversed, with directions to the trial court to modify the findings heretofore made and filed in the cause, vacate the decree, and to make findings and enter a decree in accordance with the views herein expressed. Appellants to recover costs.

FRICK, C. J. I concur. The case belongs to that class which involves questions that cannot be too carefully considered by the courts, and which, because of its character, should be determined in accordance with the facts and circumstances surrounding the individuals whose rights and interests are affected, and, when the interests are fully and fairly considered, those which affect the welfare of the child should ordinarily control in the final determination of the action. No hard and fast rule can therefore be laid down which shall control all cases. I am convinced that the mother of the child in question here intentionally and without adequate cause surrendered it to the custody and care of others, and, further, that she did so to further her own personal ends and aims in life. A careful reading of the record prevents me from arriving at any other conclusion. I say this without any feeling against the mother. While I am in sympathy with her motherly instincts which prompt her to regain custody and control of her child, I nevertheless cannot overlook the best interests and rights of the child and of those who have freely, voluntarily, and in the most generous manner provided and cared for its wants and welfare. The affections of the child have now become entwined in those of its foster parents. To now permit the mother to take the child could only result in opening up wounds that better remain closed. It must also result in disturbing the peace of mind of the foster parents, and, in view of the past disposition of the mother's present husband, subject the child to new and untried influences that I am not at all convinced are as certainly beneficial to its best interests and welfare as are those which surround it now, and which, so far as can be ascertained from the record, will, through all the years of the child's minority at least, continue to surround it. Suppose the mother should again meet with misfortune such as in her judgment would be sufficient to justify her to abandon the child, would she not again abandon it precisely as she did to further her own welfare? Under such circumstances, the sympathy that we naturally entertain for the mother should not be permitted to sway our judgment. In view therefore that the mother has surrendered her natural or legal right to the exclusive custody and control of

the child, this court has but one duty to perform, and that is to protect the best interests and welfare of the child. This, in my judgment, can only be accomplished by rendering the judgment outlined by my Associate, Mr. Justice McCARTY.

STRAUP, J. I dissent. I think the findings of the lower court: (1) That the pleaded relinquishment was not the free and voluntary act of the mother; (2) that she is a fit and proper person to have the custody of the child, and is able to maintain, support, and educate it; (3) and that it is to the best interest of the child to permit the mother to have the custody of it—are all supported by sufficient evidence. And it being clearly shown, and substantially without conflict, that the mother is in all respects a fit and proper person to have the custody of her child, and is able to care for it, I think all doubts, if any, with respect to all other questions involved, should be resolved in her favor.

#### GIAUQUE v. SALT LAKE CITY et al.

(Supreme Court of Utah. Dec. 30, 1912.)

#### 1. TRIAL (§ 396\*)—FINDINGS—CONFORMITY TO ISSUES.

Where, in an action to enjoin a city from cutting shade trees on a lot surrounded by a picket fence, the actual location of the south boundary line of the block in which the lot was situated was in issue, a finding that the south boundary line of the lot was marked by plaintiff's picket fence did not conform to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.\*]

#### 2. BOUNDARIES (§ 42\*)—CONTROL.

While, where the calls in a deed give an initial point and then run to some other point, as a fence, etc., stated to be a given number of feet distant from the first point, the calls for distance yield to the monument, a finding merely that a lot five by ten rods is bounded by a picket fence does not refer to the fence as a monument, and hence cannot extend the lot beyond the five by ten rods called for.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 208; Dec. Dig. § 42.\*]

#### 3. EMINENT DOMAIN (§ 274\*)—STREETS—SHADE TREES.

A property owner is entitled to enjoin a city from cutting shade trees from a part of his lot, irrespective of whether his damage be large or small.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. 274.\*]

#### 4. EMINENT DOMAIN (§ 82\*)—STREETS.

If the land on which shade trees adjacent to a sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land upon paying a just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 215-219; Dec. Dig. § 82.\*]

#### 5. APPEAL AND ERROR (§ 1122\*)—FINDINGS—DUTY TO MAKE.

The Supreme Court should not be required to make findings of fact upon the material is-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sues, either affirmatively or negatively; that being the trial court's duty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4420; Dec. Dig. § 1122.\*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Arnold G. Giauque against Salt Lake City and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

H. J. Dininny, Aaron Myers, and P. J. Daly, all of Salt Lake City, for appellants. Young & Moyle, of Salt Lake City, for respondent.

FRICK, C. J. Respondent brought this action to enjoin the appellants from removing a certain fence and from cutting down certain shade trees which, it is alleged, are on respondent's property, and which appellants will remove and cut down unless restrained. For the purposes of this decision we shall not refer to the appellant the James Kennedy Construction Company, since that company claims no rights as against respondent.

Respondent, in his complaint, in substance alleged that he is, and for many years immediately preceding the commencement of the action was, the owner of five by ten rods in lot 2, block 29, plat A, Salt Lake City survey; that said property abuts on Sixth South street, and the south boundary line thereof is marked by a substantial picket fence which has been "in its present location \* \* \* for more than thirty years last past"; that about 1½ feet north of said fence there is a row of six shade trees which greatly add to the value of said property, all of which is used for residential purposes; that, unless restrained, appellant will remove said picket fence and cut down said trees, and will construct a permanent cement sidewalk along the south side of said property where said fence and trees now stand; that, by removing said fence and cutting down said trees, respondent will sustain irreparable injury and damage; that appellant claims "some right, title, or interest in or to said property or some part thereof," which claim, it is alleged, is "unlawful and void."

Upon the foregoing allegations, respondent prayed judgment that appellant be required to set forth the nature of its claim and that it be "enjoined from cutting down or interfering with said trees and said fence, \* \* \* and that plaintiff (respondent) be adjudged to be the owner of said premises, and that such other and further order in the premises as is just be made." Appellant, in answer to the complaint, set up various defenses. It denied respondent's ownership of the property described in the complaint, and denied that the south side thereof was marked by a picket fence; admitted that certain trees were standing on the south of respondent's property, but denied that the same were

on his property; admitted that it intended to cut down the trees and remove the fence mentioned in the complaint, and that it intended to construct a permanent cement sidewalk in front of the property described in the complaint, but averred that the trees and fence aforesaid were standing in the street, and that no part of said sidewalk, when laid as contemplated, would overlap or be laid on the property described in the complaint. Appellant further averred that respondent had erected said fence and planted said trees in said Sixth South street, and that he had trespassed on said street to the extent of 6.47 feet on the east line of his property, and to the extent of 7.15 feet on the west line thereof, and that said strip was part of Sixth South street, and that the title thereof was in appellant. Appellant further denied each and every other allegation contained in said complaint. Appellant further averred in its answer that Salt Lake City, including said Sixth South street, was located and platted on the public lands of the United States; that said street was platted 132 feet wide, which plat was made long before a patent was obtained for the land on which the same was platted; that in June, 1872, a patent was duly issued by the United States to the mayor of Salt Lake City for the lands platted as aforesaid, including said Sixth South street, which patent was issued under and by virtue of an act of Congress entitled, "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867 (Act March 2, 1867, c. 177, 14 Stat. 541), and that respondent and his predecessors in title obtained title to the premises in question through the mayor aforesaid, subject to the provisions of the act aforesaid, and subject to the rights of appellant as the same appear from the plat made as aforesaid. Appellant further averred that, by reason of what was contained in said act and the acts amendatory thereof, respondent was estopped from claiming any portion of said Sixth South street. It was further averred that respondent was wrongfully claiming the strip of land hereinbefore referred to, and that the same was in excess of his five by ten rods. Appellant also averred that the action was barred by virtue of certain sections, naming them, of the Compiled Laws of 1876, of the Compiled Laws of 1888, of the Revised Statutes of 1898, and of the Compiled Laws of 1907.

Upon substantially the foregoing averments, appellant prayed judgment that the title to the strip of ground to which reference has been made as being within Sixth South street be adjudged to be in appellant, and that respondent's complaint be dismissed. Respondent filed a reply to the foregoing answer in which he set up facts which he claimed constitute an estoppel, and also pleaded the statute of limitations, and claimed title to the strip of ground aforesaid by adverse possession.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon the foregoing issues, a preliminary hearing was had to determine whether a temporary injunction should issue pending the hearing upon the merits. After the preliminary hearing, the district court issued a temporary injunction pending the action. Some time thereafter, by consent of the parties, the case was submitted to the court upon the evidence adduced at the preliminary hearing, and the court, upon such evidence, made findings of fact; the material portions of which are as follows: "(2) That plaintiff is the owner of and in possession of the following real property located in Salt Lake City, Utah: Commencing at a point  $2\frac{1}{2}$  rods west of the southeast corner of lot 2, block 29, plat A, Salt Lake City survey; thence west 5 rods; thence north 10 rods; thence east 5 rods; thence south 10 rods to beginning. \* \* \* (3) That the south side of said property where said property adjoins said Sixth South street is marked by a substantial picket fence, and said fence has been in its present location and has marked the south boundary of said property for more than 30 years last past, and located on the north side of said fence on said land owned by plaintiff, and about  $1\frac{1}{2}$  feet from said fence, is a row of poplar trees, about six in number, planted and used for shade trees, and valuable to plaintiff and to said premises and to said residence located thereon. (4) That said defendants have marked said trees to be cut down, and are intending to cut them down, and also are intending to cut down said fence, and will cut down said trees and said fence at once unless restrained by order of court, and are intending to, and will, unless restrained, lay a cement sidewalk across the south five or six feet of the entire south side of said premises. (5) That the value of said trees or the damage done by the destruction of said fence and the taking of said property for said sidewalk, in case it is so taken, cannot be estimated or determined, and damages will not compensate, and plaintiff has no adequate remedy at law. (6) The court further finds that no part of said property above described or referred to is a part of the public streets of Salt Lake City, and that defendants, and neither of them, have any right, title, or interest therein, or to any part thereof." Upon these findings the court also made conclusions of law declaring the respondent to be the owner of the property described in the findings aforesaid; that appellant had no interest therein, and had no right to enter upon the same, and that a decree should be entered enjoining appellant from entering upon said property and from removing said fence and from cutting down said trees, and from interfering in any way with said premises. A decree enjoining appellant as aforesaid was accordingly entered, from which this appeal is prosecuted.

By referring to the issues presented by the pleadings and the findings as the same appear in the foregoing statement, it is apparent that

the findings do not respond to the issues. All that the court in effect found is that the title to the five by ten rods described in his complaint is in respondent; that the south side of the tract is marked by a picket fence which has been there for more than 30 years; that a little to the north of said fence are certain shade trees which, with said fence, appellant threatens and intends to cut down and remove; and that no part of the property described "is a part of the public streets of Salt Lake City." Appellant's counsel insist that the court erred in making all of said findings, and that they are not supported by the evidence. It is further urged by them that the conclusions of law and judgment are not supported by the findings.

[1] The difficulty with the findings is that they respond to neither the issues nor the evidence adduced at the hearing, all of which is preserved in a bill of exceptions filed in this court. In appellant's answer the source of respondent's title was fully set forth, and it was there averred that the title to the property in question was obtained, subject to the provisions of an act of Congress. In the act referred to, it was provided as follows: "That, when the title to said lands shall be held by the corporate authorities of any town or city, all lands designated for public use by such corporate authorities as streets, lanes, avenues, alleys, parks, common public grounds, shall vest in, and be held by, the corporate authorities, and *shall not be claimed adversely by any person or persons whatsoever.*" (Italics ours.) Comp. Laws 1876, p. 383. The title to all the public streets and grounds is therefore in Salt Lake City, the appellant. Nor is it disputed that the street in question was in fact platted before the land in question was patented to the mayor of Salt Lake City in trust and for the use of those who occupied or claimed particular parts of the platted portions of said city. The act, therefore, by its terms prohibited any person from claiming any portion of any platted street by reason of any fact or condition that arose or existed prior to or at the time the patent to the land was issued. Any right, therefore, if any there be, to any portion of any street, must rest upon some claim or right which was initiated after the patent was issued as aforesaid. Now, under the evidence in this case, it seems to us several matters are established beyond all question. For example, the evidence is undisputed that the blocks as originally surveyed and platted were intended to be 660 feet square, and that the streets were to be 132 feet wide, measured between the block lines. It is also clearly shown by the evidence that there are no field notes of the original survey and plat of Salt Lake City; that subsequent surveys were made by authority of the city council, which very frequently disagreed with fences and other improvements made on the surface of the ground. By reason of that fact, the original locations of both street and

lot boundaries in many instances are left in doubt.

In the case at bar appellant proved that in establishing the boundaries of block 29, in which the property in question is located, the city engineer attempted to do so partly from monuments which were taken as some of the monuments of the original survey, and which were found in the intersections of streets some distance from the block in question, and partly from the fences and improvements found on the surface of the ground in said block; that in doing so it was established that in allotting the block in question its full 660 feet, and in giving respondent his full five by ten rods and allowing 132 feet for Sixth South street, respondent's fence was something over six feet in the street on the east, and something over seven feet therein on the west line of his property, and that the strip in question is in excess of the ten rods to which respondent is entitled under the calls in his title papers. While respondent's counsel in their brief and argument dispute appellant's claims in this regard, yet appellant's evidence, as already stated, is clearly to that effect, and is not met by any positive evidence to the contrary. The actual location of the south boundary line of the block in question was therefore one of the principal issues in the case. If the boundary line is at the point where respondent's fence is standing, then there can be no question concerning respondent's right to an injunction. If, however, the boundary line is where it is claimed to be by appellant, namely, about seven feet north of respondent's fence, then respondent must establish his right to the strip of ground which would then be in Sixth South street upon other grounds. The court made no findings with respect to where the south boundary line of block 29 is in fact located. All it found is that the south boundary line of respondent's five by ten rods is marked by his fence, and, in view of this, the title to said five by ten rods is quieted in him. Appellant at no time claimed any right, title, or interest in the five by ten rods deeded to respondent. It, however, claimed that his five by ten rods did not extend southward to the fence in question, but that he claimed a strip of ground in excess of ten rods in length. At the hearing we think appellant established its contention in that regard. Respondent, however, disputes appellant's contention. The court, therefore, should have specifically found where the south boundary line of block 29 is located, and whether such boundary is as far south as respondent's fence. If the court had found the south boundary line of said block to be at the point where respondent's south fence is located, then the real issue between the parties would have been settled by a proper finding. The court, however, did not so find. Nor did it find that respondent's south line is coterminous with the south boundary of

block 29. What the court found, in effect, is that the south boundary line of appellant's five by ten rods is marked by a picket fence. This finding, as appellant's counsel contend, is not supported by the evidence, in this: That the undisputed evidence is to the effect that respondent's ten rods do not extend to the fence line by over six feet on the east line and by over seven feet on the west line thereof. According to this evidence, respondent therefore has a strip of ground five rods long by about seven feet wide in excess of his ten rods, the whole of which appears to be within the 132 feet originally allotted to Sixth South Street.

[2] It must not be assumed that the finding in question is like the calls in a deed which give the initial point and then go to some other point, such as a post, a fence, or a tree, which is stated to be a given number of feet, yards, or rods distant from the initial point. Under such circumstances, the distance must yield to the monument called for. In the finding in this case, however, it is said that the five by ten rods are bounded by a picket fence, and this fence is not used as a call or a monument, but merely as indicating that respondent's ten rods are inclosed by the fence. In other words, the finding does not and cannot extend respondent's five by ten rods beyond the exact number of rods called for, as might be done if the fence were treated as a call or monument. In view of the evidence, therefore, there is a strip of ground in addition to the five by ten rods which is claimed by respondent. As we said before, if respondent is entitled to this strip, it must be for reasons other than those disclosed by the findings.

From anything that is said above, we do not wish to be understood as holding that, as a matter of fact, the original south boundary line of block 29 may not be where respondent's fence line is located, but what we hold is that the court has not so found. It may also be that, if the boundary is not so far south as the fence, the city may nevertheless have regarded and treated said fence as marking the boundary line between respondent's property and the north boundary of Sixth South street for such a length of time or under such circumstances as will prevent it from disputing said boundary line at this late date. As the findings now stand, however, a legal conclusion to the effect just stated cannot be based thereon. It may also be that, if it be found that the original or true south boundary line of block 29 is not as far south as respondent's fence now is, he nevertheless may be entitled to the strip of ground for other reasons, as, for example, under his pleas of adverse possession or estoppel. But whether respondent may be entitled thereto for the reasons last stated or not is not before us, and upon that phase of the case we express no opinion. All that we now hold is that, as the findings now

stand, they do not respond to the issues, nor, for the reasons stated, do they support the judgment entered in this case. Nor is the finding that, in case said fence is removed and said trees cut down, the damages resulting to respondent's property cannot be estimated, supported by any evidence.

[3] True, that finding may not be very material, since if the strip of ground in question belongs to respondent for any reason he is entitled to an injunction regardless of whether his damages are great or small.

[4] The only remedy appellant would have in such event would be to condemn the strip and yield to respondent just compensation therefor. We therefore mention that finding for the sole reason that the claim may not hereafter be made that we deemed it a proper or material finding or one necessary to authorize an injunction, or as preventing appellant from proceeding to condemn the strip in case it be found that the same belongs to respondent, and it is the desire of appellant to condemn it for the purposes set forth in its answer.

In conclusion we desire to state that in view that this case was finally decided upon the evidence adduced at the preliminary hearing for a temporary injunction, and that the issues were apparently not fully tried out, and because of the very incomplete state of the findings when compared with the issues presented by the pleadings, it might be unfair to both parties if we either attempted to make findings or directed what they should be.

[5] Moreover, this court should not be called upon to make the findings of fact. That is the duty of the trial courts, and they should see to it that, in the preparation of findings, they respond to the issues, and that upon all material questions either affirmative or, in case there is no evidence, negative findings be made.

In furtherance of justice, therefore, and in fairness to the parties and to the trial court, we have concluded to reverse the judgment and to remand the cause for a new trial. Such is the order. Appellant to recover costs on appeal.

McCARTY and STRAUP, JJ., concur.

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COLLETT et al. v. MORGAN.

(Supreme Court of Wyoming. Jan. 29, 1913.)

On petition for rehearing. Opinion modified, and rehearing denied.

For former opinion, see 128 Pac. 626.

BEARD, J. The defendant in error has filed a petition for a rehearing in this case, in which it is urged that the court erred

in reversing the judgment of the district court in toto, and that the effect of our decision is to deprive him of a water right. Such was not our intention; but we confess the language used in the opinion is subject to that construction.

Counsel for plaintiffs in error did not contend, either in his brief or oral argument, that defendant in error was not entitled to an appropriation of water, but that the board of control and the district court erred in refusing certificates of appropriation of water to plaintiffs in error for their respective portions of the Nina V. White tract of land, and in determining that defendant in error was entitled to the use of the ditch in question. We were of the opinion that on the record presented the plaintiffs in error were entitled to certificates of appropriation for sufficient water to irrigate their lands, with date of priority as stated in the opinion, and that the board of control was without authority to determine the ownership or right to the use of the ditch between the parties, and that on those questions—the only ones urged in this court—the board erred, and the district court erred in affirming the decision of the board, and to that extent the judgment should be reversed.

The writer of that opinion, and of this, inadvertently failed to clearly state the conclusions reached by the court. The last paragraph of the opinion is withdrawn, and the following substituted therefor:

The judgment of the district court is reversed, in so far as it attempts to determine the ownership or right to the use of the ditch in question, and in so far as it denies to plaintiffs in error appropriations of water, and the cause is remanded to the district court, with instructions to vacate and set aside to that extent the judgment heretofore entered, and to enter judgment establishing the respective rights of Sylvester Collett, T. K. Collett, and Fred Roberts to the use of sufficient water to irrigate their respective parts of the Nina V. White tract of land, not exceeding one cubic foot of water per second of time for 70 acres. Said rights to have priority as of date July 18, 1888, the date of the filing of the Nina V. White claim therefor. The rights of the parties in the ditch in question, whether as owners or otherwise, being a question which the board of control could not settle in this proceeding, is not determined, but is left to be settled by the agreement of the parties, or in a proper proceeding in a court of competent jurisdiction. Plaintiffs in error will recover their costs in this court.

The opinion being thus modified, a rehearing is denied.

Former opinion modified, and rehearing denied.

SCOTT, C. J., and POTTER, J., concur.

**CHAPMAN v. CARROTHERS.**

(Supreme Court of Wyoming. Jan. 29, 1913.)

**1. PAYMENT (§ 65\*)—BURDEN OF PROOF.**

Defendant, in an action upon a written contract of sale by which defendant, the buyer, agreed to pay plaintiff's indebtedness to a certain creditor, defendant admitting by his answer that plaintiff was indebted to that creditor and alleging payment, has the burden of proving payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162-175, 196, 197, 199-201; Dec. Dig. § 65.\*]

**2. PAYMENT (§ 73\*)—SUFFICIENCY OF EVIDENCE.**

Evidence in an action by a seller of goods for a breach of a contract by the buyer to pay and discharge certain liabilities of the plaintiff to third parties, defended on the ground of payment, held sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 220-225, 232-238; Dec. Dig. § 73.\*]

Error to District Court, Big Horn County; Carroll H. Parmelee, Judge.

Action by T. A. Carrothers against W. J. Chapman. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. West, of Basin, and H. S. Ridgely, of Cheyenne, for plaintiff in error. John P. Arnott, of Basin, E. E. Lonabaugh, of Sheridan, and Burke & Riner, of Cheyenne, for defendant in error.

BEARD, J. The defendant in error, T. A. Carrothers, brought this action against the plaintiff in error, W. J. Chapman, in the district court of Big Horn county to recover the amount alleged to be due on a certain written contract. A jury was waived, and the cause tried to the court. The court found in favor of Carrothers in the sum of \$829.55, and rendered judgment against Chapman for that amount and costs. Chapman brings the case here on error.

The contract sued on bears date September 9, 1902, and recites that Carrothers had on that date sold and delivered to Chapman his stock of wines, liquors, and cigars, and the saloon furnishings and fixtures, together with the good will of the saloon business conducted by him in the town of Cody; and as a part of the consideration of such sale, Chapman assumed and agreed to pay all of the debts and liabilities of Carrothers to E. C. Enderly and Stein, Block & Co. on account of said saloon business, amounting in all to the sum of \$500, more or less.

The petition is separated into paragraphs which are numbered. In the first paragraph, the sale and delivery of the property is alleged. The second alleges that, at the date of the sale and prior thereto, Carrothers was justly indebted to E. C. Enderly on account of said saloon business in the sum of \$523.25. The third alleges that Chapman had failed and refused to pay any part of said indebtedness except \$62 paid to Carroth-

ers April 27, 1905, and that on the last mentioned date Carrothers was compelled to pay, and did pay, said Enderly said indebtedness, with interest, amounting in all to the sum of \$629.25. The fourth pleads the contract. The fifth alleges the failure of Chapman to pay to Carrothers any part of said sum except the \$62. The prayer is for judgment for \$567.35, with interest from April 27, 1905. The answer admits the allegations of paragraphs 1, 2, and 4 of the petition, denies the allegations of the third paragraph, and alleges "that on or about April 26, 1905, defendant had a full and complete settlement with plaintiff and fully paid him all of the consideration of the contract sued upon, and that he does not owe the plaintiff the sum of \$567.35, or any sum whatever," and denies the allegations of the fifth paragraph of the petition. The reply denies the new matter pleaded in the answer. The only ground for a reversal of the judgment urged by counsel for plaintiff in error is that the finding and judgment of the district court are not supported by the evidence.

[1] It being admitted by the answer that on September 9, 1902, the date of the contract sued on, Carrothers was justly indebted to said Enderly in the sum of \$523.25, counsel for plaintiff in error very properly concede that the burden rested upon the defendant below to prove settlement and payment, as alleged in the answer.

[2] The evidence is very unsatisfactory. The defendant below testified, in substance, that a settlement was made between himself and Carrothers in Mr. Zaring's law office (in Basin, the county seat of Big Horn county), and that he signed a check, leaving the amount blank, and delivered it to his attorney, Mr. Walls; that they did not know the amount, and for that reason the check was so made; that Walls was to fill in the amount and pay it to Carrothers; that the check was paid and the amount was \$300 or \$350; that it had been mislaid, and that he did not know whether it was indorsed by Carrothers or not; that the check was given to settle his contract between Carrothers and himself; that he signed the check and left it with Walls, telling him he did not know exactly what it was, but about \$300; that he signed the check and Walls filed it out; that at the time of the settlement there were present, in Mr. Zaring's office, Mr. Zaring, Carrothers, a fellow they called "Frenchy," and himself. Mr. Walls testified, in substance, that he was acting as attorney for Chapman in his absence; that Chapman and Carrothers arranged between themselves that one Fenton was to receive certain moneys in behalf of Carrothers from him; that at the time they did not know what the amount would be; that Chapman made a check payable to his (Walls) order, leaving the amount to be filled in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by him; that he ascertained the amount, wrote it in the check, got it cashed and paid the money over to Fenton and took his receipt therefor, and afterwards delivered the receipt to Chapman; that it ran in his mind that the amount was around \$111, but he would not undertake to testify to the exact amount; that the money paid by him to Fenton was in full settlement of all the difficulties between Carrothers and Chapman. The receipt was not produced or offered in evidence, and Chapman testified that he did not have it, as he supposed the matter was settled, and he never paid any attention to it. Mr. Arnott testified that in the early part of 1903 he had for collection an account in favor of E. C. Enderly and against T. A. Carrothers for \$523.25 for cigars and liquors sold by Enderly to Carrothers for the saloon purchased by Chapman; that on April 16, 1903, he took a note for that amount in favor of Enderly, signed by Carrothers and wife and secured by mortgage, and sent the note and mortgage to Enderly. Mr. Zaring testified to remembering Carrothers and Chapman being in his office in April, 1905, and it was his understanding that they were making a settlement of some differences, and he understood a settlement was made, but knew nothing of the details; that he then had for collection the note mentioned by Mr. Arnott and collected the amount, including interest, \$629.35, from Carrothers the next day. The note was put in evidence and is marked, "Paid in full Apr. 27—05. C. A. Zaring." Neither Carrothers nor Fenton testified in the case, and the foregoing is substantially all of the evidence in the case. Carrothers having paid that amount, he was entitled to recover the same from Chapman, with legal interest from the date of payment, unless Chapman sustained his plea of settlement and payment.

We think it is clear that the parties did not agree upon the amount to be paid; the undisputed evidence being that they did not then know the amount. There is no evidence tending to prove any authority of Fenton to make any agreement for Carrothers with Walls, or that he did do so in fact. How Walls ascertained the amount he inserted in the check does not appear. There is no evidence showing it to have been by any agreement between him and Carrothers or any one else having authority to do so. There is also a substantial conflict in the testimony between Chapman and his attorney as to the amount of the check; neither of them states the amount definitely; and they vary widely in their recollections or impressions on this important matter in the case, and which could have been learned by referring to the books of the bank on which the check was drawn and where it was paid; especially is this the case when the record discloses that a part of

the evidence was taken October 13, 1909, at which Chapman testified the check had been mislaid, and the cause was then continued over the term and the remaining evidence taken September 28, 1910.

On the evidence presented, we think the district court was correct in its conclusion that the evidence was insufficient to sustain the defense of settlement and payment pleaded in the answer, and that the record presents no error entitling the plaintiff in error to a reversal of the judgment.

The judgment of the district court is affirmed.

Affirmed.

SCOTT, O. J., and POTTER, J., concur.

CALKINS v. BLACKWELL LUMBER CO.  
(Supreme Court of Idaho. Dec. 17, 1912.)

*(Syllabus by the Court.)*

1. TRIAL (§ 359\*)—VERDICT—SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.

Under the provisions of section 4397, Rev. Codes, in an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict, and, where a special finding of fact is inconsistent with the general verdict, the special finding controls the general verdict, and judgment must be entered in accordance with the special finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860, 875, 877, 878; Dec. Dig. § 359.\*]

2. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

The evidence in this case examined, and held that, while there is a conflict in the evidence, we find that there is sufficient evidence in the record to support the findings of the jury and the judgment of the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

3. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

It is a recognized rule of law in this state that in a civil suit, where negligence is the issue for the jury to determine, it is sufficient if the evidence, whether direct or circumstantial, creates a preponderance of the proof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

4. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Circumstantial evidence is legal evidence, and if the facts are shown by circumstantial evidence, and are such that reasonable men may fairly differ upon the question whether there was negligence or not, and the jury concludes that there was negligence, the verdict of the jury should not be set aside or reversed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

5. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.

In an action to recover damages resulting from alleged negligence, if the facts are such that more than one reasonable conclusion or



inference can be drawn from the circumstantial facts in evidence—one that negligence has been shown and the other that negligence has not been shown—and if the jury decide and determine that negligence has been shown, the action of the jury should not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 6. OTHER QUESTIONS IMMATERIAL.

Other questions immaterial and not prejudicial examined, and held not to be grounds for reversal.

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by E. W. Calkins against the Blackwell Lumber Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

John P. Gray, of Coeur d'Alene, and Chas. L. Heitman, of Spirit Lake, for appellant. McFarland & McFarland, of Coeur d'Alene, and Franklin Pfirman, of Wallace, for respondent.

STEWART, C. J. This action was brought by the respondent for the purpose of recovering damages alleged to have been sustained by the respondent and ten other persons, who assigned their claims to respondent. The damages were the result of a fire which consumed timber upon land owned by the respondent and his assignors. In the complaint it is alleged that damages resulted by reason of the negligence of the appellant.

The complaint, after alleging ownership of the lands of respondent and the other parties interested and damaged, and the ownership and control of timber lands by the appellant, alleges:

(1) That the said defendant during the period from June 1, 1910, up to the time of plaintiff's grievances herein complained of, and during the closed season of 1910, willfully, unlawfully, negligently, and carelessly failed and neglected to provide its said portable engines, jammers, and logging locomotives with good, sufficient, or proper spark arresters, or other sufficient or proper appliances to prevent the escape of fire therefrom.

(2) That the said defendant negligently and carelessly permitted the spark arresters in said portable engines, jammers, and logging locomotives, and said engines, jammers, and locomotives, to operate in a defective, inefficient, and insufficient manner, and willfully, unlawfully, negligently, and carelessly permitted sparks to escape from said portable engines, jammers, and logging locomotives, whereby numerous fires were started along and adjacent to said railroad of defendant.

(3) That during the said period the defendant willfully, unlawfully, negligently, and carelessly set out, and caused to be set out, fires in slashings and down timber on its said timber lands and its said timber holdings along and near its said railroad for the pur-

pose of clearing said lands, and the lands on which it owned the said timber or brush and other inflammable material, without first obtaining permits or any permit in writing or print, or at all, from the fire warden of the fire district then duly established and in which said lands and timber were situated, and without sufficient or any help present to control the same, and without guarding or watching the same.

(4) That during said period the defendant willfully, unlawfully, negligently, and carelessly failed and neglected to keep the ground for 50 feet on each side of the track of said logging railroad so operated by defendant, or such portion thereof owned or controlled by defendant, free or clear from combustible and inflammable materials, but allowed the said right of way to be and remain covered with dry grass, sticks, old logs, and other inflammable materials, and negligently and carelessly permitted said materials to be set on fire by its said locomotives, jammers, and portable engines, and to continue on fire and to burn without making sufficient or any efforts to extinguish such fires after the same were started.

(5) That at numerous times during said period the defendant willfully, unlawfully, negligently, and carelessly suffered and permitted its employees to leave deposits of fire, live coals, and ashes along said railroad and on said railroad's right of way and in the immediate vicinity of woodlands adjoining said railroad and right of way, which were liable to be overrun by fire, and whereby numerous fires were communicated to the said woodlands.

(6) That on or about the 28th of July the defendant willfully, unlawfully, negligently, and carelessly suffered and permitted said fires to escape from its right of way and its lands and timber and to spread over the plaintiff's premises.

The defendant put in issue the material allegations of the complaint, and alleged affirmatively that the injuries sustained by the appellant "were brought about and caused by the act of God, to wit, by an exceedingly high wind, or winds, of unprecedented violence and velocity, which on or about the 28th day of July, 1910, and for days before and after said date prevailed in, around, and upon and across all of said lands described and set forth in said complaint, and in each and every of said 11 causes of action, which said violent wind, or winds, could not be controlled by the defendant, its servants, and agents, or by any human agency or agencies, and over which defendant and its servants and agents had absolutely no control, and that the injury to or destruction of said property described in said complaint, if injured or destroyed at all, was proximately caused by said unprecedented and violent wind or winds, and that the injury to, or destruction

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of said property, if injured or destroyed at all, would not have occurred, had there not been such violent and unprecedented wind or winds, and that the injury, or destruction complained of, if caused at all, was caused by the act of God, through said unprecedented wind or winds, and not in any manner, or at all, by the alleged negligence of the defendant, its servants or agents." A jury was selected to try the case, and evidence was introduced on behalf of plaintiff and defendant, and the cause was submitted to the jury. The jury were directed to return a general verdict, and likewise answer certain interrogatories submitted to them, which will be hereafter referred to. The jury returned a general verdict for the respondent in the sum of \$11,516.65, and specifically answered the interrogatories submitted.

The following are the special interrogatories and the answers:

"Interrogatory No. 1. Were the donkey engines of the defendant during the period from June 1, 1910, up to the time of plaintiff's alleged grievances, equipped with good and sufficient spark arresters? A. Yes. \* \* \*

"Interrogatory No. 3. Was any fire kindled by the donkey engines which extended to the lands of the plaintiff and his assignors? A. No. \* \* \*

"Interrogatory No. 5. Were the jammers of the defendant during the period from June 1, 1910, up to the time of plaintiff's alleged grievances, equipped with good and sufficient spark arresters? A. No. \* \* \*

"Interrogatory No. 7. Was any fire kindled by the jammers which extended to the lands of the plaintiff and his assignors? A. No. \* \* \*

"Interrogatory No. 9. Did the defendant set out, or cause to be set out, any fires in slashings or down timber on its timber lands or timber holdings near its railroad for the purpose of clearing said lands, or the lands on which it owned the timber, or brush or other inflammable material at any time subsequent to the 1st day of June, 1910? A. Yes.

"Interrogatory No. 10. If so, where, and when? A. By the spark alleged to have been set out on camp 7 branch.

"Interrogatory No. 11. Did the defendant burn any brush or other inflammable material or set out or cause to be set out any fires in slashings on any of its lands subsequent to the 1st day of June, 1910, and up to the time of plaintiff's alleged grievances, without first obtaining permits in writing or print from the fire warden of the fire district then established in which the lands and timber were situated, or without sufficient or any help present to control the same, or without guarding the same? A. Yes.

"Interrogatory No. 12. If so, where, and when? A. At camp 5 in July.

"Interrogatory No. 13. Was the fire set at camp 5 to protect the camp and backfire put out by the defendant, without extending

to the lands of the plaintiff or any of his assignors? A. No. \* \* \*

"Interrogatory No. 15. Did any fire set along the right of way of camp 5 branch extend to the lines of the plaintiff and his assignors? A. Yes.

"Interrogatory No. 16. If you answer the above question, 'Yes', how did the fire start, where, and when? A. By burning slashing at camp 5 in July.

"Interrogatory No. 17. Was the defendant company guilty of any negligence in failing to put forth efforts to control and put out fires in the vicinity of its operations? A. Yes. \* \* \*

"Interrogatory No. 22. Were the lands of the plaintiff burned over by reason of any negligence of the defendant? If so, of what did it consist? A. Yes; by not sufficiently extinguishing and guarding against fires mentioned in Nos. 10 and 16.

"Interrogatory No. 23. Did the defendant use reasonable and ordinary care to prevent any fires from reaching the woodlands? A. We believe not.

"Interrogatory No. 24. Were the locomotive engines of the defendant during the period from June 1, 1910, up to the time of plaintiff's alleged grievances, equipped with good and sufficient spark arresters? A. No. \* \* \*

"Interrogatory No. 26. Was any fire kindled by the locomotive engines which extended to the lands of the plaintiff and his assignors? A. No."

It will be observed from the answers to the special interrogatories the jury found for the appellant as to negligence upon the questions submitted, except interrogatories Nos. 9, 10, 13, 15, and 16, and in answer to such latter interrogatories the jury found negligence against the appellant in the burning of slashings at camp 5 in the month of July, and setting of a spark on camp 7 branch, by the special verdict for the defendant and appellant upon all questions except these embraced in interrogatories Nos. 9, 10, 13, 15, and 16, which are found in favor of the respondent, and upon which the general verdict is in accord.

A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

[1] The first contention presented in this court by counsel for the appellant is that the special verdict controls the general verdict. This contention is correct. Section 4397, Rev. Codes, provides: "In an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. \* \* \* Where a special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." The rule thus announced is approved and followed by this court in the fol-

lowing cases: *Bradbury v. Idaho, etc., L. L. Co.*, 2 Idaho, 239, 10 Pac. 620; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Menasha W. Wl. Co. v. Spokane, etc., Ry. Co.*, 19 Idaho, 586, 115 Pac. 22.

[2] The next question presented, and the controlling question in this case, is: Does the evidence support the verdict of the jury? The evidence is very voluminous. It covers 1,700 pages of typewritten matter. It is conflicting upon the question of negligence of the defendant and the cause of the fire which burned over the lands of plaintiff and his assignors and destroyed the timber upon the lands of the plaintiff and his assignors, which resulted in the injury complained of in this action. In the scope of a judicial opinion it is impossible to detail and point out the evidence which tends to support the theory of the appellant or the respondent. To detail this evidence would make an opinion very lengthy and cumbersome. We shall therefore refer in a general way to the evidence and what the evidence tends to show, and upon which the jury based its verdict. The evidence is to the effect that in the summer of 1910 there were many disastrous forest fires in the section of country involved, and that a long dry season was followed by intensely hot and sultry weather, and that high winds raged. The Blackwell Lumber Company was the owner and in control of a large area of timber land lying west and north and south of the lands of the respondent and his assignors. The company owned and operated a railroad extending from Mica Bay, which railroad passes around within a mile or so of the lands of the respondents upon the south and west, and encircles the land of respondent and his assignors upon the east, south and west. The railroad is located west of the lands of the appellant, and the nearest point to the lands of the respondent and his assignors is about a mile from the closest tract of land. Upon this railroad the railroad company established what is generally designated as camp 5, from which branch lines radiate to the places where most of the logging was carried on. Camp 5 was headquarters for all this work, and was the western or northern terminus of the main railroad from which branch lines extended. The closest tract of land of the plaintiff and his assignors to the railroad near camp 5 was that of Pfirman, one of the assignors of plaintiff, and was within a distance of less than a mile east of the railroad. The appellant was the owner of all the timber between camp 5 and the Pfirman place. The other assignors owned the timber upon the lands to the east and north of the Pfirman tract, and the plaintiff owned all the timber immediately adjoining the lands of the settlers on the west. Camp 7 was on the land of the railroad which runs past camp 5, and is located northeast of camp 5 about a mile in a northeasterly direction, and is about

three-fourths of a mile from the Pfirman tract. Camp 8 is north of camp 5 about a mile and a half. These various camps were located in draws, which were lower than the lands to the east in the direction of plaintiff's lands; the latter being higher than the different camps. The lumber company was cutting timber during the summer of 1910 up to August, in section 29 and section 32. Camp 8 was located at the northeast corner of section 29 and camps 5 and 7 were located upon section 32, and these two sections joined sections 28 and 33 on the north, and are joined on the east by sections 33 and 27, and section 28 is east of section 27, in which the lands of the respondents were located. After June 1, 1910, the tree tops were not burned and covered the ground intervening between camp 5 and the branch lines radiating from that point and the timber lands of the plaintiff.

The evidence shows that a fire was started by the appellants on camp 7 branch, and that this was about a mile from camp 5 along the camp 7 branch. The direction of the winds at the time this fire was started was from the southwest, and was driving the fire northerly and easterly from camp 7 in the direction of the lands of the plaintiff. This fire was noticed on August 2d, and later the fire was noticed on the different claims of the settlers. There was also seen a fire at camp 5 running east, and there was no fire west and south of the Blackwell works at that time. These two fires, the evidence shows, were burning from the west in an easterly direction in the direction of the appellant's lands, and there were no fires on the Blackwell land before that time, and the fires were traveling from the direction of the Blackwell operations and works in the direction of the respondent's lands. The lands of the plaintiff were burned over about the 3d or 4th of August. These various fires were traced by different witnesses from camp 5 and from camps 7 and 8, and the fire was shown to have been set just east of camp 8, and was traced north and east from that camp. It also appears from the evidence that the slashings that were burned in camp 5 were east and north of the camp. There was no fire west of it. The lands were clean on the west side of the railroad. This fire was traced to a point a mile north of camp 8 and also in the direction of camp 5. The general tendency of the evidence and upon which the jury seems to have based the judgment was that the fires set out at camps 7 and 5 were in fact set out by the Blackwell Company for the purpose of backfiring. This meant the burning of the timber around the camp so that fire coming from other directions could not approach the lands of the plaintiff west and east of the railroad. The evidence also shows that these fires which were set out by the company were not controlled by the company, and that they continued to burn and

travel north and east from where they were set out, and that they traversed the section lying between the railroad and the lands of the plaintiff and reached the plaintiff's lands where the timber was burned.

Because of the general character of the territory, the draws and mountains covered by the fires and the scarcity of persons in the community, and the fact that no witness saw the actual start of any fire or its exact course, and no witness saw the fire all the time in its course of traveling, the cause and course of the fire in the present case can only be determined from all the circumstances shown upon the trial, and the direct evidence upon conditions and surroundings no doubt were taken into consideration by the jury, which points to satisfactory and convincing conclusions. The appellant introduced considerable testimony to show that the fire which caused the injury to plaintiff's land came from a point near what is known as camp 6, an old abandoned camp of the appellant which was located in section 25 in the state of Washington, and across the said land and about  $1\frac{1}{2}$  miles northeast from camp 7, and about the same distance southeast from camp 8, and that said fire from the place of starting traveled north into section 24 and then east, north of camp 8 through sections 20 and 21, and then south between sections 21 and 22 down to the south lines of said sections near the lands owned by some of the assignors of plaintiff in sections 28 and 27. The course of this fire is shown fairly by the evidence from the point where it was started to a point between sections 28 and 27 where the lands of Carlson and Huber, assignors of the plaintiff, were located. There is, however, no evidence or anything to indicate that it ever reached the lands of the respondent or his assignors, but it was near there, and it is barely possible that the fire may have reached the lands and destroyed the timber for which this action is brought. The jury, however, took the view that said fire was not the one that caused the damages, but that the damages resulted from the fires that were set out by the appellant near camps 5, 7, and 8. From a careful consideration of all the evidence in the case we are of the opinion that it is sufficient to support the findings of the jury.

In finding No. 9 the jury found that the appellant set out fires in slashings and down timber on its timber lands and holdings near its railroad for the purpose of clearing said lands and the lands which it owned, and that this fire was set out in brush and inflammable materials subsequent to June 1, 1910. The jury also found that the company burned brush and other inflammable material, and set out and caused to be set out fires in slashings on its lands subsequent to the 1st day of June, 1910, without obtaining permits in writing, and without sufficient help to control it and without guarding the

same. In finding No. 13 the jury found that the fire was set out at camp 5 to protect the camp and backfire and that such fire was not put out by the defendant, and that such fire extended to the lines of the plaintiff and his assignors, and that this fire was caused by burning slashings at camp 5, and the jury found further that these fires were the result of negligence on the part of the appellant in failing to put forth efforts to control and put out such fires, and that by reason of such negligence the plaintiff's lands were burned. We think these findings are also sustained by sufficient evidence.

[3-5] Counsel for appellant very strenuously contend that there is no direct evidence in this case which proves negligence on the part of appellant in putting out the fires in the first instance and in an effort to control such fires after being set out, and in the prevention of such fires reaching the lands of the plaintiff and his assignors, and that, in this case, as there is nothing but circumstantial evidence to prove such negligence, it was the duty of the respondent in resting upon such evidence that such evidence should show clearly, satisfactorily and convincingly the negligence and the fact that the negligence is the proximate cause, that every link in the chain must be there just the same as if a man's life depended upon it in a criminal case. While this rule is sustained by some authorities, it has never been recognized by the courts of this state. In the case of *Adams v. Bunker Hill, etc., Min. Co.*, 12 Idaho, 643, 89 Pac. 624, 11 L. R. A. (N. S.) 844, in discussing this question, this court said: "There are very few things in human affairs, and especially in litigation involving damages, that can be established to such an absolute certainty as to exclude the possibility or even some probability that another cause or reason may have been the true cause or reason for the damages rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause." In that case this court quoted and approved the case of *Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, as follows: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. \* \* \* It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." In that same case the court quoted from the syllabus in the case of *Sioux City & Pac. Ry. Co. v. Stout*, 17 Wall. (84 U. S.) 657, 21 L. Ed. 745, in which the Supreme

Court of the United States said: "If upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, the conclusion of negligence can be justified, the defendant is not entitled to a nonsuit, but the question of negligence must be left to the jury." In the case of *Adams v. Bunker Hill, etc.*, Min. Co., supra, this court also said: "While, perhaps, no single fact or circumstance standing alone that has been shown by the plaintiff would justify the jury in saying that it alone established negligence on the part of the defendant, still, when all the facts and circumstances that were shown are taken and considered together, they are sufficient to go to the jury. \* \* \* The court may properly, and in fact should, say when no facts have been established to support the plaintiff's case, but the court cannot say what facts and circumstances shall be believed and what may not be believed, nor can the court determine as to what conclusions a jury might reach from a certain state of facts and train of circumstances from which different conclusions might be reasonably reached by different minds." It is a recognized rule of law in this state in a civil suit, where negligence is the issue for the jury to determine, that it is sufficient if the evidence, whether direct or circumstantial, creates a preponderance of the proof. *Adams v. Bunker Hill, etc.*, Min. Co., supra.

Circumstantial evidence is legal evidence, and if the facts are shown by circumstantial evidence, and are such that reasonable men may reasonably differ upon the question whether there was negligence or not, and the jury conclude that there was negligence, the verdict of the jury should not be set aside or reversed. *Meler v. Nor. Pac. Ry. Co.*, 51 Or. 69, 93 Pac. 691; *C. & P. Ry. Co. v. Wood*, 66 Kan. 613, 72 Pac. 215. So in the present case, if the facts are such that more than one reasonable conclusion or inference can be drawn from the circumstantial facts in evidence, one that negligence has been shown, and the other that negligence has not been shown, and the jury decide and determine that negligence has been shown, the action of the jury should not be disturbed.

A number of questions have been argued relating to the action of the trial court in admitting and refusing evidence. We have examined all these objections, and we find no substantial error which would justify a reversal of the judgment upon the court's ruling thereon. As observed above, the evidence was mostly circumstantial, and many questions were asked which would at first glance appear to be immaterial, but, when considered with other circumstances, might become material by reason of their relation or connection with some other material fact. We therefore find no error in the trial court in

overruling objections made to evidence offered, or in admitting evidence against objections made to such evidence.

Exceptions were taken to instructions given and also to instructions requested by appellant and refused by the trial court, and exceptions were also taken to certain instructions requested and modified by the trial court. From an examination of the instructions given by the trial court we think the trial court correctly instructed the jury, when the instructions are all taken and considered as the law of the entire case. The instructions requested by the defendant and refused by the trial court were practically covered by the instructions given by the trial court, where such instructions stated the law, and, where they did not, the court rightly refused to give such instructions. We find no error in the instructions.

The next contention made by appellant is that the damages are excessive. We have gone carefully over the evidence which relates to the value of the property destroyed, and there is sufficient evidence to sustain the verdict to the extent of the amount found by the jury. We think the weight of the evidence is in favor of the verdict.

The judgment in this case is therefore affirmed, costs awarded to respondent.

SULLIVAN, J., concurs.

#### STATE v. HUNTER.

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 101\*)—JURISDICTION OF COURTS—COUNTY COURT.

Under a plea to its jurisdiction, a county court is unauthorized to set aside and hold for naught an indictment of a lawful grand jury charging an offense within the jurisdiction of such court and transferred thereto by an order of the district court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 198-205; Dec. Dig. § 101.\*]

#### 2. CRIMINAL LAW (§ 1088\*)—WRIT OF ERROR—RECORD—SCOPE AND CONTENTS.

The original indictment and its indorsements constitute a necessary part of the record, and whatever is properly shown by them is considered as shown by the record.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2746-2751, 2757, 2766, 2782-2802, 2899; Dec. Dig. § 1088.\*]

#### 3. CRIMINAL LAW (§ 101\*)—SETTING ASIDE—GROUNDS.

No indictment should be set aside by an inferior court on the grounds of technical errors, informalities, or irregularities in the proceedings had in the district court returning said indictment and transferring the same to the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 198-205; Dec. Dig. § 101.\*]

Error from Coal County Court; R. H. Wells, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mose Hunter was indicted for a violation of the prohibitory law, and from an order of the county court, setting aside the indictment, the state brings error. Reversed and remanded.

Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jas. R. Wood, of Coalgate, Co. Atty., for the State. Charles T. Gibson, of Oklahoma City, for defendant in error.

DOYLE, J. This is an appeal by transcript of the record on the part of the state from a judgment of the county court of Coal county setting aside and holding for naught an indictment returned into the district court of Coal county, and by that court transferred to said county court, charging the defendant in error with a misdemeanor, to wit, the unlawful sale of whisky. The defendant in error has filed a motion to dismiss the appeal upon 14 separate grounds, none of which have merit, as a reason for dismissing the appeal. Section 6947, Procedure Criminal, provides: "Appeals to the Criminal Court of Appeals may be taken by the state in the following cases, and no other: (1) Upon judgment for the defendant on quashing or setting aside an indictment or information. (2) Upon an order of the court arresting the judgment. (3) Upon a question reserved by the state." This court has repeatedly held, and the statutes so provide, that an appeal may be taken to this court on a transcript of the record. The county attorney fully complied with all the requirements necessary to confer jurisdiction on this court. Notices of appeal were seasonably served, and the appeal perfected within the time allowed by law, and the certificate of the clerk to the transcript is sufficient. The motion to dismiss the appeal is therefore overruled.

[1] On the question presented, it is the contention of the state that the plea of the defendant to the jurisdiction of the county court was insufficient to authorize the said court to set aside such indictment. The record discloses that upon arraignment the defendant filed the following plea: "The State of Oklahoma v. Mose Hunter, Defendant. No. 1,230. Plea: Comes now the defendant, Mose Hunter, and respectfully shows to the court that this court is without jurisdiction to put this defendant upon trial under the indictment filed herein, and as grounds for such plea says: First, that said indictment was found and returned into the district court of Coal county, Oklahoma, by a grand jury of said Coal county; second, that said indictment was not triable in said district court; third, that said indictment has not been transferred from said court to this honorable court in the manner provided by law; fourth, that the purported order transferring said indictment from said district court to this honorable court is not

a true and correct copy of any order of said district court made in relation to said indictment; fifth, that the said attempted transfer and the purported order by and of the said district court is insufficient in law to confer jurisdiction upon this honorable court to try this defendant for the offense charged in said indictment; sixth, that said purported transfer and the purported order transferring said indictment, and the certificate thereto attached, is not under the seal of said district court, and is not signed by the judge of the said district court, the honorable Robert M. Rainey; seventh, that the said proceedings had in relation to said indictment, the said indictment, and any and all papers coming from the said district court in this cause, do not bear the seal of the said district court and cannot be considered by this honorable court as coming from a court of record. Wherefore, premises considered, the defendant prays that said indictment may be set aside. [Signed] Jahn & Gibson, Attorneys for Defendant."

It will be observed that none of the statutory grounds for setting aside an indictment as prescribed by section 6738, Procedure Criminal, are set forth, nor is it verified, alleging under oath that he (the defendant) is acting in good faith. In support of the plea, the following testimony was offered: "C. L. Cardwell, clerk of the district court, being duly sworn, testified as follows: By Geo. E. Jahn: Q. State your name? A. C. L. Cardwell. Q. Are you a resident of Coal county? A. Yes, sir. Q. Do you hold any official position in Coal county? A. Yes, sir. Q. What is it? A. Clerk of the district court. Q. As such clerk, are you the custodian of the records? A. I am. Q. Were you the district clerk of the district court of Coal county during the August, 1911, term of the district court of Coal county? A. I was. Q. As such clerk, did you keep the records? A. I did. Q. State whether you have a record of an order by the district judge of that court directing the transfer of the misdemeanor indictments returned into that court at that term. A. I have. Q. Where is that record to found? A. In the criminal journal, volume 1. Q. What page? A. There are several. The order of transfer is pages 313, 314, 315, 316, and 317, Criminal Journal, No. 1. Q. At that time, Mr. Cardwell, was it your business to transfer this indictment among others to the county court? A. Yes, sir. Q. Did you do it? A. I did. Q. Did you attach to that indictment the court's order. A. I consider that I did. Q. Mr. Cardwell, read from your record the order? A. 'Order Transferring Causes. Now on this the 5th day of September, 1911, it appearing to the court that indictment No. 451, entitled the State of Oklahoma v. James Webster, charges the said James Webster with the offense of selling liquor. Indictment No. 452, entitled the State of Oklahoma v. Martin Masoner, charges the

said Martin Masoner with the offense of selling liquor. Indictment No. 453, entitled the State of Oklahoma v. W. S. Eyeman, charges the said W. S. Eyeman with the offense of selling liquor. Indictment No. 454, entitled the State of Oklahoma v. Ed Cook, charges the said Ed Cook with the offense of selling liquor. Indictment No. 455, entitled the State of Oklahoma v. Ed Cook, charges the said Ed Cook with the offense of selling liquor. Indictment No. 456, entitled the state of Oklahoma v. Art Williamson, charges said Art Williamson with the offense of selling liquor. Indictment No. 457, entitled the State of Oklahoma v. Mark Chapman, charges the said Mark Chapman with the offense of selling liquor. Indictment No. 458, entitled the State of Oklahoma v. Joe King, charges the said Joe King with the offense of selling liquor. Indictment No. 459, entitled the State of Oklahoma v. Claud Stevens, charges the said Claud Stevens with the offense of selling liquor. Indictment No. 460, entitled the State of Oklahoma v. Barney Cescolini, charges the said Barney Cescolini with the offense of selling liquor. Indictment No. 461, entitled the State of Oklahoma v. Barney Cescolini, charges the said Barney Cescolini with the offense of selling liquor. Indictment No. 462, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 463, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 464, entitled the State of Oklahoma v. Mark Chapman, charges the said Mark Chapman with the offense of selling liquor. Indictment No. 465, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 466, entitled the State of Oklahoma v. Wilton Droke, charges the said Wilton Droke with the offense of selling liquor. Indictment No. 467, entitled the State of Oklahoma v. Joe Brooks, charges the said Joe Brooks with the offense of selling liquor. Indictment No. 468, entitled the State of Oklahoma v. Bud Taylor, charges the said Bud Taylor with the offense of selling liquor. Indictment No. 469, entitled the State of Oklahoma v. Mrs. C. J. Diamond, charges the said Mrs. C. J. Diamond with the offense of selling liquor. Indictment No. 470, entitled the State of Oklahoma v. James Barker, charges the said James Barker with the offense of selling liquor. Indictment No. 471, entitled the State of Oklahoma v. Lit Bays, charges the said Lit Bays with the offense of assault and battery. Indictment No. 472, entitled the State of Oklahoma v. Joe Brooks, charges the said Joe Brooks with the offense of gambling. Indictment No. 473, entitled the State of Oklahoma v. Isaac Boyd, charges the said Isaac Boyd with the offense of selling liquor. Indictment No. 474, entitled the State of Oklahoma v. Barney Cescolini, charg-

es the said Barney Cescolini with the offense of selling liquor. Indictment No. 475, entitled the State of Oklahoma v. George Sharron, charges the said George Sharron with the offense of selling liquor. Indictment No. 476, entitled the State of Oklahoma v. George Sharron, charges the said George Sharron with the offense of selling liquor. Indictment No. 477, entitled the State of Oklahoma v. Ben Summers, charges the said Ben Summers with the offense of selling liquor. Indictment No. 478, entitled the State of Oklahoma v. George Sharron, charges the said George Sharron with the offense of selling liquor. Indictment No. 479, entitled the State of Oklahoma v. Wallace Wolf, charges the said Wallace Wolf with the offense of selling liquor. Indictment No. 480, entitled the State of Oklahoma v. Mose Hunter, charges the said Mose Hunter with the offense of selling liquor. Indictment No. 481, entitled the State of Oklahoma v. Bob Arnold, charges the said Bob Arnold with the offense of carrying weapons. Indictment No. 482, entitled the State of Oklahoma v. Tom Guyens, charges the said Tom Guyens with the offense of gambling. Indictment No. 483, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 484, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 485, entitled the State of Oklahoma v. Bill Carroll, charges the said Bill Carroll with the offense of selling liquor. Indictment No. 486, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 487, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 488, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 489, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 490, entitled the State of Oklahoma v. Mark Chapman, charges the said Mark Chapman with the offense of selling liquor. Indictment No. 491, entitled the State of Oklahoma v. Mark Chapman, charges the said Mark Chapman with the offense of selling liquor. Indictment No. 492, entitled the State of Oklahoma v. Mark Chapman, charges the said Mark Chapman with the offense of selling liquor. Indictment No. 493, entitled the State of Oklahoma v. Isaac Boyd, charges the said Isaac Boyd with the offense of selling liquor. Indictment No. 494, entitled the State of Oklahoma v. Tony Antone, charges the said Tony Antone, with the offense of selling liquor. Indictment No. 495, entitled the State of Oklahoma v. Adam Zingle, charges the said Adam Zingle with the offense of selling liquor. Indictment No. 496, entitled the State of

Oklahoma v. Grover Garr, charges the said Grover Garr with the offense of selling liquor. Indictment No. 497, entitled the State of Oklahoma v. W. S. Partain, charges the said W. S. Partain with the offense of selling liquor. Indictment No. 498, entitled the State of Oklahoma v. Ed Cook, charges the said Ed Cook with the offense of gambling. Indictment No. 499, entitled the State of Oklahoma v. Tuck Love, charges the said Tuck Love with the offense of gambling. Indictment No. 500, entitled the State of Oklahoma v. Tom Tiner, charges the said Tom Tiner with the offense of gambling. Indictment No. 501, entitled the State of Oklahoma v. G. H. Evans, charges the said C. H. Evans with the offense of gambling. Indictment No. 502, entitled the State of Oklahoma v. John Allen, charges the said John Allen with the offense of gambling. Indictment No. 503, entitled the State of Oklahoma v. Charles Covington, charges the said Charles Covington with the offense of selling liquor. Indictment No. 504, entitled the State of Oklahoma v. Charles Covington, charges the said Charles Covington with the offense of selling liquor. Indictment No. 505, entitled the State of Oklahoma v. Silva Otrero, charges the said Silva Otrero with the offense of selling liquor. Indictment No. 506, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 507, entitled the State of Oklahoma v. James Clark, charges the said James Clark with the offense of selling liquor. Indictment No. 508, entitled the State of Oklahoma v. Ed Cook, charges the said Ed Cook with the offense of selling liquor. Indictment No. 509, entitled the State of Oklahoma v. W. S. Partain, charges the said W. S. Partain with the offense of selling liquor. Indictment No. 510, entitled the State of Oklahoma v. William Alcorn, charges the said William Alcorn with the offense of selling liquor. Indictment No. 511, entitled the State of Oklahoma v. Lee Garr, charges the said Lee Garr with the offense of selling liquor. Indictment No. 512, entitled the State of Oklahoma v. Lee Garr, charges the said Lee Garr with the offense of selling liquor. Indictment No. 513, entitled the State of Oklahoma v. Mrs. Adam Zingle, charges the said Mrs. Adam Zingle with the offense of selling liquor. Indictment No. 514, entitled the State of Oklahoma v. Barney Cescolini, charges the said Barney Cescolini with the offense of selling liquor. Indictment No. 515, entitled the State of Oklahoma v. Adam Zingle, charges the said Adam Zingle with the offense of selling liquor. Indictment No. 516, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 517, entitled the State of Oklahoma v. William Alcorn, charges the said William Alcorn with the offense of selling liquor. Indictment No. 519, entitled the

State of Oklahoma v. Tony Antone, charges the said Tony Antone with the offense of selling liquor. Indictment No. 520, entitled the State of Oklahoma v. W. S. Partain, charges the said W. S. Partain with the offense of selling liquor. Indictment No. 521, entitled the State of Oklahoma v. Art Williamson, charges the said Art Williamson with the offense of selling liquor. Indictment No. 522, entitled the State of Oklahoma v. Dick Dye, charges the said Dick Dye with the offense of selling liquor. Indictment No. 523, entitled the State of Oklahoma v. Earl Chapman, charges the said Earl Chapman with the offense of selling liquor. Indictment No. 524, entitled the State of Oklahoma v. Mrs. Joe Ellene, charges the said Mrs. Joe Ellene with the offense of selling liquor. Indictment No. 525, entitled the State of Oklahoma v. James Webster, charges the said James Webster with the offense of selling liquor. Indictment No. 526, entitled the State of Oklahoma v. Mrs. Joe Ellene, charges the said Mrs. Joe Ellene with the offense of selling liquor. Indictment No. 527, entitled the State of Oklahoma v. Mrs. Corrupts, charges the said Mrs. Corrupts with the offense of selling liquor. Indictment No. 528, entitled the State of Oklahoma v. Joe King, charges the said Joe King with the offense of selling liquor. Indictment No. 529, entitled the State of Oklahoma v. Fred Reggi, charges the said Fred Reggi with the offense of selling liquor. Indictment No. 530, entitled the State of Oklahoma v. Will Sandy, charges the said Will Sandy with the offense of selling liquor. Indictment No. 531, entitled the State of Oklahoma v. Martin Masoner and Mrs. Martin Masoner, charges the said Martin Masoner and Mrs. Martin Masoner with the offense of liquor nuisance. That said offenses are misdemeanors, and that the district court of Coal county, Oklahoma, has no jurisdiction to try said causes. It is therefore ordered that the above and foregoing numbered and styled causes be, and the same are hereby, transferred to the county court of Coal county, Oklahoma, there to be docketed, held and proceeded with in the manner provided by law. Robert M. Rainey, District Judge.' Q. Is that the order of the court on which this indictment was transferred? A. Yes, sir. Q. Is that signed by Judge Rainey in person? A. Yes, sir. Q. Is that order attached to indictment 480 asserted to be a true copy? A. Yes, sir. Q. The order attached to indictment No. 480, was that signed by Judge Rainey? A. No, sir; it is a certified copy of his signature."

The record further shows the following clerk's certificate to the order transferring said cause:

"State of Oklahoma, Coal County—ss.:

"I, C. L. Cardwell, clerk of the district court of Coal county, Oklahoma, do hereby certify that the above and foregoing is a



true and correct copy of all the records and orders of the district court, of Coal county, Oklahoma, made in the case of the State of Oklahoma v. Mose Hunter, indictment No. 480, charging the said Mose Hunter with the crime of selling liquor, as the same appears of record in my office in the journal of said court; that the indictment following this certificate, being indictment No. 480, State of Oklahoma v. Mose Hunter, is the original and identical indictment in said cause returned into the district court of Coal county, Oklahoma, by the grand jury on the 5th day of September, 1911; and that the bill of costs hereto attached is a true and correct bill of all the costs that have accrued in said cause in the district court of Coal county, Oklahoma.

Docket .....	\$2.00
Entering order to file indictment.....	.10
Filing indictment .....	.10
Recording indictment in indictment record .....	.60
Jurat and seal to indictment record.....	.25
Entering order to transfer to county court .....	.10
Certifying to district court proceedings..	1.25
<b>Total .....</b>	<b>\$4.40</b>

"In witness whereof, I have hereunto set my hand and the seal of said court at Coalgate, in said county and state, on this, the 5th day of September, 1911.

"[Signed] C. L. Cardwell,

"Clerk of District Court. [Seal.]"

The judgment of the county court is as follows: "The court, being fully advised in the premises, finds as follows, to wit: First. That this cause comes to this court from the district court of Coal county, Oklahoma. Second. That the said cause comes into this court upon a purported transcript of the clerk of the district court. Third. That from the purported record accompanying said cause the court finds that the district court of Coal county, Oklahoma, convened in regular session on the 21st day of August, 1911, and that there was no transcript showing that court convened on the first Monday in August, 1911. Fourth. That there was no order issued by the said district court calling a grand jury for said term of said district court. Fifth. That there is no record of the issuance of a venire for said grand jury from said district court. Sixth. That there is no record bearing the signature of the judge of the said district court, nor is there any record bearing the seal of said district court attached to the purported separate order that the district judge made transferring this cause to the county court of Coal county, Oklahoma, and that such purported order of the district judge is not such an order that would give the county court of Coal county, Oklahoma, jurisdiction of this cause. Seventh. That the purported order accompanying the indictment herein is not a true copy of any

order made by the district court in relation to this cause. Eighth. That this cause comes into this court without a certified copy of the record of the proceedings had in said cause in the said district court of Coal county, Oklahoma. Ninth. That none of the record, proceedings, or papers coming to this court from the said district court are certified or signed by the judge of said district court, nor do they or either of them bear the attestation of the clerk of said district court, nor are any of the proceedings had in said district court in this cause certified to this court as true and correct copies as the same appears of record in said district court. Tenth. That the said purported transfer herein is not accompanied by an attached certified bill of costs. Eleventh. That the record as disclosed by the record coming to this court herein, as afore mentioned, is insufficient in law to confer jurisdiction upon this court to hear and determine the said cause. Twelfth. That this court is without jurisdiction in the premises. It is therefore ordered, adjudged, and decreed by the court that the plea of the defendant to the jurisdiction of this court be, and the same is hereby, sustained, and the indictment filed in this court be, and the same is hereby, set aside and held for naught. To the ruling of the court the state excepts, and is granted forty (40) days to make transcript to the Criminal Court of Appeals of the State of Oklahoma."

After a careful examination of the record, the conclusion of the court is that this judgment of the county court cannot be permitted to stand. There was no question properly raised by this so-called plea to the jurisdiction of the county court that said indictment was not found, indorsed, presented, or filed as prescribed by law, or that the grand jury was not drawn or impaneled as provided by law.

[2] The original indictment, with all its indorsements, becomes a part of the record of the case, and whatever is properly shown by the caption and the indorsement is considered as shown by the record. *John Jolly v. State*, 5 Okl. Cr. 301, 115 Pac. 124. The indictment recites that it was returned "at the August, 1911, term of the district court of Coal county, state of Oklahoma, begun and held at the city of Coalgate in said county on the 7th day of August, nineteen hundred and eleven, the grand jury of said county, good and lawful men, legally drawn and summoned according to law, and then and there examined, impaneled, sworn and charged according to law," etc. It is signed by the county attorney of that county, and indorsed by the foreman of the grand jury as a true bill. The record therefore shows that this indictment was found and returned in the manner and by the means prescribed by law.

In addition thereto, the record shows a

sufficient order transferring the indictment to the county court, with a certified copy of such order, and also with a bill of costs that have accrued therein in the district court. This is all that is necessary under the requirement of the statute (section 551, Snyder's Sts.). The trial court should have summarily overruled the so-called plea for the reason that it was insufficient as a motion to set aside on statutory grounds, and was not verified; and, as a plea in abatement, it is bad in so far as it contradicts the record. The absolute verity which a regular judicial record imports cannot be questioned by a proceeding of this kind in an inferior court. If an indictment, apparently legal and formal, had not in fact the sanctions which the law and the Constitution require, a motion to set aside, or a plea in abatement, must be specific as to that fact, and, when properly raised, the question must be tried by an inspection of the record.

[3] Here, under the findings and judgment of the county court, 70 odd indictments transferred from the district court thereto are held to be illegal. There is absolutely no warranty of law, technical or otherwise, to sustain the judgment of the county court. Courts are established to preserve the pure administration of justice, and to secure substantial, and not mere technical, rights. Yet it would seem that there is a tendency, manifest in a few of the courts of inferior jurisdiction in this state, to set aside and hold for naught indictments transferred to them from district courts on motions and pleas that do not set forth any statutory ground for setting aside an indictment. No indictment should be set aside by an inferior court on the grounds of technical errors, informalities, or irregularities in the proceedings had in the district court returning said indictment and in transferring the same to the trial court.

The judgment of the county court of Coal county is reversed, and the cause remanded thereto to be proceeded with in accordance with the views herein expressed.

FURMAN, P. J., and ARMSTRONG, J.,  
concur.

#### SMITH v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 25, 1913.)

*(Syllabus by the Court.)*

#### CRIMINAL LAW (§ 1070\*)—PARTIES—DEATH—ABATEMENT OF CAUSE.

Where it is made to appear to the court that an appellant has died pending an appeal, the cause will be abated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2700, 2701; Dec. Dig. § 1070.\*]

Appeal from Superior Court, Pittsburg County; P. D. Brewer, Judge.

Myrtle Smith was convicted of manslaughter, and appeals. Cause abated.

J. H. Wilkins, of McAlester, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant was convicted in the superior court of Pittsburg county for the crime of manslaughter, and prosecuted an appeal. Pending a consideration of the appeal, application was made to this court to release appellant upon her own recognizance, on account of the physical condition of appellant, which application was granted. See *Myrtle Smith v. State*, 6 Okl. Cr. 364, 118 Pac. 676. It has been made to appear to this court that shortly after her release from prison appellant died.

It is therefore ordered that the prosecution in this case be abated, and the cause stricken from the docket.

ARMSTRONG, P. J., and DOYLE, J., concur.

#### ODOM v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 17, 1912. On Petition for Rehearing, Jan. 22, 1913.)

*(Syllabus by the Court.)*

#### 1. CRIMINAL LAW (§ 93\*)—JURISDICTION—ALLEGATIONS OF INFORMATION.

The jurisdiction of a district court over a felonious assault is not defeated because the information charging the offense may be duplicitous, nor on the theory that county courts under Const. art. 7, § 12, have exclusive jurisdiction of an offense, the commission of which is necessarily included in that charged in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137-166; Dec. Dig. § 93.\*]

On Petition for Rehearing.

#### 2. CRIMINAL LAW (§ 1131\*)—APPEAL AND ERROR—WAIVER OF RIGHT TO APPEAL—ACCEPTANCE OF PAROLE.

Where a plaintiff in error accepts a parole pending the determination of his appeal, he thereby waives the right to have his appeal determined, and, when the attention of the court shall be called judicially to the fact that a parole has been granted and accepted, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.\*]

Appeal from District Court, McIntosh County; Preslie B. Cole, Judge.

George Odom was convicted of aggravated assault, and appeals. Dismissed.

J. B. Lucas and Niles & Burford, all of Checotah, and Moman Pruett, of Oklahoma City, for plaintiff in error. The Attorney General, for the State.

DOYLE, J. The plaintiff in error was convicted of the crime of assault with intent to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

do bodily harm, and was sentenced in accordance with the verdict of the jury to imprisonment for one year in the penitentiary. The judgment and sentence were entered on October 6, 1911. The indictment charged that on December 3, 1910, "George Odom did unlawfully, feloniously, and of his malice aforethought, and without authority of law, and without justifiable or excusable cause, make an assault upon the person of one Tom Stout, with the felonious intent to do bodily harm to him, the said Tom Stout, with and by means of a certain gun or revolving pistol, the said gun or revolving pistol being then and there a dangerous and deadly weapon, by attempting to shoot at the said Tom Stout, and by striking the said Tom Stout with the said gun or revolving pistol, thereby inflicting a serious, painful, and dangerous wound or wounds in and upon the head of him, the said Tom Stout, contrary," etc. On arraignment the defendant entered a plea of not guilty.

The proof on the part of the prosecution tended to show the following facts: Thomas Stout testified that on December 3, 1910, he was city marshal of the city of Checotah; that about 9 p. m. of that day he was walking from the depot to town with Jimmie Gaskell and Billy Rhyneheart, and "just as we passed the express office, click, click went a gun," and the defendant held a gun in his face; that he threw his left hand up and pushed the gun away, and said, "What is the matter, Mr. Odom"; the defendant said, "Don't talk to me, you G— d— cowardly son of a b—, I would rather kill you as a dog, I would rather kill you as to look at you"; and "hit me on the top of the head and knocked me down and pointed the gun in my breast, and said if I didn't go home he would kill me"; that he was bleeding from a wound on his head and went to a doctor; that the gash in his head was not very large, but bled freely. Jimmie Gaskell testified that the gun held by defendant looked like a 45-caliber pistol; that the defendant cocked it before he struck Stout; that the defendant hit Stout twice with a gun over the head. William Rhyneheart, Ruben Self, and Sam Self testified substantially to the same state of facts. Defendant, testifying on his own behalf, denied that he had a pistol; that he either struck Stout with his fist or with a whisky bottle. On cross-examination he admitted that he was convicted in the police court of Checotah for having a pistol on that occasion.

[1] The only question presented by this appeal is the question of jurisdiction. The learned counsel in their brief say: "If it is true that the indictment in this case charges both a felony and a misdemeanor in the same count that under such indictment the defendant can rightfully be convicted of only the lesser offense, in this case a misdemeanor, then

under our law the district court had no jurisdiction to try the cause and in case of conviction pass sentence upon the accused." We think that the contention is wholly without merit. The indictment charges a felony. The guilt of the defendant was clearly established, and there is no error in the record. It is our opinion that the appeal in this case is wholly without merit.

The judgment of the district court of McIntosh county is therefore affirmed.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### On Petition for Rehearing.

DOYLE, J. This cause, submitted at the November term and on December 17th, was affirmed. A petition for rehearing was granted, and the case was assigned for the January term.

[2] It has now been called to the attention of the court that plaintiff in error has been granted a parole by the Governor, which has been duly accepted by him. The provisions of our act of Criminal Procedure, which allows appeals by defendants, as a matter of right, from any judgment of conviction against them, does not give the right to a paroled plaintiff in error to still maintain and prosecute his appeal. It is our opinion that the right of appeal does not exist when the defendant is not actually or constructively in custody, so that the judgment and sentence of the trial court can be enforced if affirmed by the appellate court. It would be a farce to proceed to determine the merits of the appeal unless the courts had control over the plaintiff in error so that their judgments might be made effective. A plaintiff in error, by accepting a parole, abandons his appeal and waives the right to have it determined.

Therefore it is considered that this appeal be, and the same is hereby, dismissed, and the cause remanded to the district court of McIntosh county.

ARMSTRONG, P. J., and FURMAN, J., concur.

#### JONES v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 25, 1913.)

#### (Syllabus by the Court.)

1. CRIMINAL LAW (§§ 586, 593, 596, 1151\*)—APPEAL—REFUSAL OF CONTINUANCE.

(a) An application for a continuance is addressed to the sound discretion of the trial court, and a conviction will not be reversed upon the ground that the continuance should have been granted, unless it clearly appears from the record that the court abused its discretion in this respect.

(b) A defendant is not entitled to a continuance, as a matter of right, to secure cumula-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tive testimony. If special reasons exist why a continuance should be granted to obtain this class of evidence, these reasons must clearly be set out in the application for a continuance.

(c) For an application for a continuance, which was insufficient on account of the absence of witnesses and the sickness of one of the counsel for appellant, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1811, 1320, 1328-1330, 3045-3049; Dec. Dig. §§ 586, 593, 596, 1151.\*]

## 2. JURY (§ 103\*)—CRIMINAL LAW (§ 1166½\*)—DISQUALIFICATION—OPINION.

(a) Before a juror is disqualified on account of an opinion, it must appear that the opinion is fixed and is such as will combat the evidence and resist its force. A mere impression as to the guilt or innocence of a defendant, where it appears to the court that a juror can and will disregard such impression and be governed entirely in arriving at a verdict by the testimony of the witnesses and the instructions of the court, will not disqualify such juror.

(b) Where there is nothing in the record to show that an incompetent, disqualified, or otherwise objectionable juror was forced upon the defendant, this court will not consider an assignment of error based upon the ruling of the trial court on a challenge for cause.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461-470, 497; Dec. Dig. § 103; \* Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

## 3. INDICTMENT AND INFORMATION (§ 189\*)—HOMICIDE (§ 21\*)—MURDER—CONVICTION OF MANSLAUGHTER.

(a) Where an indictment or information charges that a murder was committed with a premeditated design to effect the death of the person killed, or of some other person, a conviction can be had for manslaughter in the second degree.

(b) The various classifications made in our statutes on the subject of felonious homicide were never intended to, and do not, establish so many different rules of pleading. Their purpose is to mitigate the hardships of the common law and to furnish rules to guide the trial judge in the admission of evidence and in his instructions to the jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189; \* Homicide, Cent. Dig. §§ 35-41; Dec. Dig. § 21.\*]

## 4. CRIMINAL LAW (§§ 1159, 1175\*)—APPEAL—CONVICTION OF LESSER OFFENSE.

(a) When a defendant is on trial for murder, and the jury, under proper instructions, find him guilty of manslaughter in the second degree, this court will not grant a new trial upon the ground that the defendant should have been either convicted of murder or manslaughter in the first degree or acquitted.

(b) The jury have the absolute right to fix the degree of a crime of which a defendant is convicted when the court submits to them the different degrees, and this court will not disturb their verdict upon the ground that they have found the defendant guilty of a less degree of offense than that which the evidence establishes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083, 3179-3182; Dec. Dig. §§ 1159, 1175.\*]

Appeal from District Court, Beckham County; G. A. Brown, Judge.

E. E. Jones was convicted of manslaughter in the second degree, and appeals. Affirmed.

J. C. Baker, a practicing physician at Sayre, examined the wounds of John Thur-

mond, the deceased, shortly after he died on April 23, 1910. The examination disclosed three gunshot wounds, one on the right arm just above the elbow, and two through the body, one about a half inch to the right of the breast bone, between the fourth and fifth ribs, and the other just to the right of that, about an inch or so. The bullets were lodged just beneath the skin in the back, and witness cut them out. They were pistol bullets. They went straight through the body, about on a level, and did not range much to the left or right. The wounds caused his death. The body was warm when the examination was made.

R. B. Brittain was present at Thurmond's barn at the time when the homicide occurred. Witness was standing on the sidewalk in front of the barn when Jones and Shorty Myers became involved in a difficulty. The latter cursed defendant, and Jones hit him, knocking him down. Myers then ran around the barn and entered it again, saying to Jones, "Now I will get you, you son of a bitch," and Jones grabbed him by the collar and the seat of his pants and butted him against the wall. Thurmond came in then and told them to stop and to get out of his place of business. Jones then rushed for his gun and fired. Witness saw Thurmond enter the barn, but did not notice any pistol or gun on him. He did not appear angry when he demanded that Jones and Myers get out of his barn.

J. B. Carson was with defendant on the Sunday of the killing, from 9 o'clock to near 12 o'clock, which was about the time the homicide occurred. Defendant then had a pistol.

John A. Stitzler was present at Thurmond's barn at the time of the difficulty—about 12 o'clock. About 30 minutes before the shooting, defendant called to Thurmond to come into the office of the barn, that he had some business with him. Thurmond, Moon, and witness went in. Defendant then held out a bottle of whisky in one hand and pointed a gun at Thurmond with the other and asked him which he wanted. They all took a drink, except Thurmond. Shortly afterwards the difficulty between defendant Jones and Shorty Myers occurred. Witness caught Shorty in his arms to separate them, and Jones hit at him again, missing him, but hitting witness. Witness told him to stop; that he would make Shorty quit bothering him. Defendant then told witness that if he had anything to say they could settle it pretty quick. About then Thurmond came up and told Jones to get out of the barn, that he wanted to raise nothing but trouble there, and he wanted him to get out. Jones then pulled his gun and told Thurmond, "It is your next move, God damn you, get in the road." Thurmond tried then to draw his gun from his pants pocket, but had only the handle of it out, when Jones

fired. Jones shifted his position then to the office door, but Thurmond remained where he was. Both of them, meanwhile, were shooting. Jones' gun snapped twice. Jones threw up his hands saying, "I am hit," and staggered as though he were about to fall. Thurmond dropped his hands and said, "Well, I guess I have got him too." Jones staggered through the door and threw his hand against the door and pulled himself around, then, seeing Thurmond, he quickly raised his gun and shot again and shot through a crack in the office door and hit Thurmond. Witness saw the death look in Thurmond's face, and saw him staggering, and he turned away. When he looked again, he was lying upon the sidewalk.

W. J. Moon testified to practically the same facts sworn to by Stitzler as occurring up to the time when the shooting commenced. He left the barn at that time.

C. H. Cope was near the barn when he heard shots. He went over there and found deceased lying at the front door. Defendant was standing a few feet from the door, with a gun in his hand, which witness took from him. There were two cartridges in it and three empty hulls. The cartridges had been snapped on, but they failed to fire.

Alex. Watson testified in behalf of appellant that he was in a restaurant just across the street from Thurmond's barn when the shooting commenced. He went to where he could see the difficulty. Thurmond was a little south and west of the door, about six feet from the office door. Just after he saw a man go into the office, Thurmond shot into the office door. Then two shots came out of the door. After Thurmond fell he saw Jones standing near him with his gun in his hand.

William Poindexter testified in behalf of appellant. His testimony is substantially the same as that of Watson.

Roy Dunbar testified in behalf of appellant that he was near the barn when the shooting began; heard about seven shots. The second shot was louder than the first.

C. H. Bogard testified in behalf of appellant that he was in the restaurant; heard about seven shots; the second was louder than the first; saw Jones come out of the office door; just as Jones started into the office, Thurmond shot twice, then Jones shot twice at him.

T. S. Combs testified in behalf of appellant that he ran a shop east of the stable and also of Jones' place of business. Jones had pawned his pistol with him, and on the morning of the homicide redeemed it. It was not loaded when he redeemed it. Did not keep his place of business open on Sunday. Jones came there and wanted to redeem his pistol, so witness let him have it.

E. E. Jones, the appellant, testified in his own behalf that he ran a restaurant in Sayre, knew deceased, was friendly with him, never had any previous difficulty with him. About

9 o'clock of the day of the difficulty, defendant went to Thurmond's stable and while there took a drink with deceased and Shorty Myers. Did not then have his pistol. Went by the second-hand store and got his pistol and tried to sell it to Mr. Carson. He passed Thurmond's barn about noon. When Shorty Myers accosted him in insulting language, a difficulty between them ensued, in which defendant shoved Shorty to the ground. Thurmond came over and caught Shorty and threw him out of the barn; after a few minutes Shorty returned and began cursing defendant. The latter caught hold of him and they both fell to the floor. Thurmond had returned and was standing there watching them. John Stitzler then placed his hand on defendant's shoulder and said, "John, don't do that"; and just about then Thurmond said, "You God damned son of a bitch, cut that out"; and as he said that he drew an automatic gun from his pocket and fired at defendant from his hip. Defendant jumped to the south and fired, then fell. Thurmond then shot at him a second time, and, as defendant jumped up and started for the office door, he fired again. Defendant went into the office and closed the door, and Thurmond shot at him through a crack in it. Then defendant shot Thurmond twice. He fell, and his gun fired as he fell.

Defendant was charged twice before with an assault to murder, and, upon its being reduced to assault, he pleaded guilty to the charge. Was also charged with robbery and pleaded guilty to a misdemeanor. He pleaded guilty also to aggravated assault once in Sherman, Tex.

Horace Gaither testified in rebuttal for the state to contradictory statements made by defendant's witness Alex. Watson.

John C. Hendrix, county judge, testified in rebuttal for the state that Poindexter, defendant's witness, told him at the time of the inquest that he knew nothing whatever of the facts of this case.

Gene Steele testified in rebuttal for the state to having heard Poindexter make this statement.

Ed Lewis, another member of the coroner's jury, testified in rebuttal for the state that he heard Poindexter make such statement.

Charles E. McPherran and Charles B. Cochran, both of Durant, for appellant. Smith C. Matson and Joseph L. Hull, Asst. Attys. Gen., for the State.

FURMAN, J. (after stating the facts as above). First. At the August, 1911, term of the district court of Beckham county, an information was filed against appellant charging him with the crime of murder. On the 23d day of November thereafter, the case was reached for trial, and appellant filed a motion for a continuance on account of the absence of Vic Vorhees, Frank Morgan, T.

M. Beavers, and S. Slater, who were alleged to be material witnesses for the defendant, and also upon the ground of the sickness of one of his local attorneys. Attached to the motion for a continuance, and made a part thereof, were the subpoenas which were issued by appellant for the absent witnesses. The subpoena for Vic Vorhees was issued on the 20th day of November; the subpoena for Frank Morgan was issued on the 15th day of November; and the subpoenas for Beavers and S. Slater were issued on the 10th day of November, 1911. The subpoenas for Vic Vorhees, Beavers, and Slater were returned, "Not found." The subpoena for Frank Morgan was returned, "Served on the 15th day of November, 1911." It is nowhere alleged in the application for a continuance that the testimony of the absent witnesses was not cumulative and could not be obtained from any other source.

[1] This court has repeatedly held that a continuance will not be granted to allow a defendant to obtain merely cumulative testimony, unless some special reason exists therefor. See *Bethel v. State*, 8 Okl. Cr. —, 126 Pac. 698; *Litchfield v. State*, 8 Okl. Cr. —, 126 Pac. 707. When this case was tried, it appeared from the testimony introduced that, if the absent witnesses had been present, their testimony would have been only cumulative. We think the showing is also insufficient upon the question of diligence.

In the case of *Musgraves v. State*, 3 Okl. Cr. 423, 106 Pac. 545, this court said: "No reason is given why process was not procured for the witness at an earlier date. The law requires diligence in these matters. A defendant cannot sit still and wait until just before his trial before he begins to get ready for trial. He must be diligent; and if special reasons exist upon which a reasonably prudent man would rely, which would cause him to fail to exercise the utmost diligence, he must state these reasons in his motion for a continuance as an excuse for not having exercised the utmost diligence. No such reasons are stated in the motion in this case. Continuances are not granted as matters of favor or convenience. Defendants must learn that it is a very serious matter to violate the laws of Oklahoma, and that, when they are charged with such conduct, they must be diligent in preparing their defense."

So far as the sickness of one of appellant's local attorneys is concerned, the record shows that appellant had the benefit of the services of one of the ablest criminal lawyers in the state as leading counsel, and that he also had the assistance of local counsel. The record nowhere shows that appellant suffered any injury on account of the overruling of the motion for a continuance. An application for a continuance is addressed to the sound discretion of the trial court, and a conviction will not be reversed upon

appeal unless an abuse of this discretion is shown.

[2] Second. Appellant complains in his brief that the court erred as to the qualifications of two of the jurors in holding them to be competent, and that thereby appellant was forced to exhaust two of his peremptory challenges on said jurors. An examination of the record does not show any error in the ruling of the trial court upon this question. Two of the jurors, when examined on their voir dire, did state that they had received impressions about the case from what they had heard, but that they had not talked to any witnesses in the case; that what they had heard was a mere matter or rumor and would not in any manner influence them in considering the evidence; and that they could and would, if taken on the jury, disregard all such impressions and be governed alone by the testimony of the witnesses and the charge of the court in making up their verdict. Before a juror is disqualified on account of impressions he may have with reference to a case, it must appear that he has such an opinion as will combat the evidence and resist its force. See *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300; *Scribner v. State*, 3 Okl. Cr. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985. In the case of *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988, this court expressly held, in an opinion by Judge Doyle, that an opinion to disqualify a juror must be a fixed one and not a mere impression. This is the law as we understand it. Otherwise it would be impossible to obtain intelligent jurors in the trial of criminal cases. We therefore think that the court did not err in the ruling on this question. But, even if it be conceded that the court was in error on this question, we could not grant a new trial on this account, because there is nothing in this record to show that appellant suffered any injury therefrom.

In the case of *Colbert v. State*, 4 Okl. Cr. 500, 113 Pac. 558, Judge Doyle, speaking for this court said: "Where there is nothing in the record to show that an incompetent, disqualified, or otherwise objectionable juror was forced upon the defendant, this court will not consider assignments of error based upon the rulings of the court upon a challenge for cause."

[3] Third. A number of questions presented in the brief of counsel for appellant may be considered under the general objection that, where a defendant is charged with homicide committed with a premeditated design to effect the death of the person killed, or of some other person, a conviction cannot be had for manslaughter in the second degree. Under these various assignments of error, counsel for appellant has discussed at great length and with signal ability all of our statutes upon the subject of felonious homicide, and also the statutes of many other states of the Union. If

the views contended for by counsel for appellant were recognized by this court, indictments and informations for murder would become almost as complicated and confusing as a Chinese puzzle, and the very objects for which our statutes were enacted would be defeated. Where an indictment or information charges a defendant with murder committed with a premeditated design to effect death, and alleges the means with which the homicide was committed, and identifies the transaction which resulted in the killing, this sufficiently informs the defendant of the accusation against him and enables him to prepare for his defense. As murder committed with a premeditated design to effect death constitutes the highest character of felonious homicide, and as the greater necessarily includes all of its several parts, the charge that the homicide was so committed includes all of the lesser degrees of this offense, and a conviction may be had for any of said lesser degrees. The various classifications included in our statute upon the subject of felonious homicide were never intended to, and do not, establish so many different rules of pleading. Their purpose was to mitigate the hardships of the common law and to furnish rules to guide the trial judge in the admission of evidence and in his instructions to the jury. If this was an open question, we would discuss it at length, but the views expressed by counsel for appellant have already been fully discussed by this court, and these previous decisions will be treated as final upon these questions. See *Rhea v. Territory*, 3 Okl. Cr. 230, 105 Pac. 314; *Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300; *Byars v. State*, 7 Okl. Cr. 650, 126 Pac. 252; *Turner v. State*, 8 Okl. Cr. —, 126 Pac. 452; *Fritz v. State*, 8 Okl. Cr. —, 128 Pac. 170.

[4] Fourth. It is contended by counsel for appellant that, under the evidence in this case, appellant should either have been convicted of murder or manslaughter in the first degree, or that he should have been acquitted. We cannot recognize this as a ground for setting aside this verdict. Mr. Bishop's New Criminal Procedure, § 596, is as follows: "The jury have the absolute power to fix the degree, as, if in the opinion of the court, which it should state for their guidance, the evidence proves, however conclusively, the first degree, they can still return a verdict for the second. The defendant has no ground of complaint. Of course the proofs must establish murder of one sort or the other." For a full discussion of this question, see *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812, 34 L. R. A. (N. S.) 1121.

We are of the opinion that the testimony in this case would sustain a verdict of either murder or manslaughter in the first degree, but as the jury in charity for the weakness and faults of human nature, or through sympathy for the prisoner or for some other

mistaken reason, have seen fit to convict him of manslaughter in the second degree, we cannot disturb the verdict on this account, although we are of the opinion that he should have been convicted of a higher degree. The error was in favor of appellant, and it is one of which he cannot in justice be heard to complain.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

#### VIAN v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1133\*)—APPEAL—REHEARING.

When counsel for an appellant has notice of a motion to dismiss an appeal and makes no reply thereto, it is too late after the case has been decided to attempt to correct the record in a motion for rehearing.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. § 2984; Dec. Dig. § 1133.\*]

On rehearing. Denied and judgment reformed.

For former opinion, see 128 Pac. 1103.

FURMAN, J. The following motion for a rehearing has been filed in behalf of appellant: "Comes now the above-named appellant, by his attorney, H. Jennings, and moves the court that a rehearing may be had in this matter, and for grounds for such motion says: First, that in the first paragraph of the findings of this court, made herein, there is set out the fact, as a reason for the dismissal of the appeal, 'that the case-made was not served upon counsel for the state until more than sixty days after the date of sentence.' Whereas, at the time of the overruling of the motion, duly filed in the district court of Rogers county, the defendant was given ninety (90) days in which to file such case-made, ten (10) days were allowed for amendments, and five (5) days for settling the pleadings, as is evidenced by a certified copy of the judge's trial docket, attached hereto, marked 'Exhibit A,' and made a part hereof, and that such case-made was filed and settled within the time so prescribed. Wherefore, appellant prays that he may be granted a rehearing in this matter. H. Jennings, Attorney for Appellant."

Attached to this motion, and made a part thereof, is a certified copy of the judge's trial docket referred to in the motion, which is as follows: "We the Jury find the Deft Guilty—7-3-12 Deft filed mo for new trial, 7-10-12 overruled & Deft ex—Sentenced to Pen for 5 years at hard labor, sentence to commence July 2 1912 Bond fixed \$3000—Deft given 3 Days to make Bond. 90—10&5."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We are at an utter loss to know why counsel filed such a motion as this, for the very record upon which he relies and which he attached to the motion contradicts the statement made in the motion. Counsel for appellant had more than 15 days notice of the motion to dismiss this appeal, and made no reply to it. Even if there was an error in the transcript of the record, it is too late now for counsel to make a correction and be heard to complain.

The motion for a rehearing is therefore denied, with directions to the trial court to reform the judgment, and require the confinement of appellant in the penitentiary for the period of five years from date of his reception therein. Mandate will issue at once.

ARMSTRONG, P. J., and DOYLE, J., concur.

### JOHNS v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS.

Instructions to juries should be considered in the light of the testimony of the case in which they are given, and, where it appears from an inspection of the entire record that the guilt of the accused is conclusively established, errors in the instructions given, which could not have injured the appellant, will not be ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

#### 2. HOMICIDE (§ 114\*)—SELF-DEFENSE—MUTUAL COMBAT.

If a person armed with a deadly weapon voluntarily and unnecessarily enters into a mutual combat for the purpose of getting a pretext to slay his adversary, or if such person has reason to believe that such combat will or may result in death or serious bodily injury to one or the other of the persons engaged therein, then the right of self-defense will not arise in favor of such person, no matter to what extremity he may be reduced during such combat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 153, 154; Dec. Dig. § 114.\*]

#### 3. CRIMINAL LAW (§ 1130\*)—BRIEFS—CITATION OF AUTHORITIES.

In their briefs, counsel should cite the volume and page of the Oklahoma reports of all decisions of this state upon which they rely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.\*]

Appeal from District Court, Hughes County; John Caruthers, Judge.

Dellia Johns was convicted of manslaughter, and appeals. Affirmed.

Walker & Fancher, of Holdenville, for appellant. Chas. West, Atty. Gen., for the State.

FURMAN, J. So far as the material questions in this case are concerned, there is no

substantial conflict in the testimony. Appellant was the wife of deceased. By a prior marriage she had become the mother of five children, three girls and two boys. Without going into details, it is sufficient to say that the testimony discloses a wretched state of feeling existing between appellant and the deceased some time prior to the homicide. The eldest daughter of appellant had left home. Appellant brought her back. It appears that the deceased had charged this girl with a want of chastity. Appellant stated to several witnesses the day before the homicide that deceased had said to her that, if she did not whip the girl, he would whip her, and appellant further stated that she then informed the deceased that if he did this would be the last whipping he would ever give her; that she (appellant) would kill him. It appears from the testimony that on the morning of the homicide a violent quarrel arose between appellant and deceased in which a great deal of improper language was used by both parties. It also appears that deceased was not armed during this controversy, but that appellant had a gun in her hands, and that during this controversy appellant shot the deceased and killed him. After the shooting she was asked why she had killed the deceased, and she said, "She had been in hell for seven years, her and her children, and she couldn't get along any longer."

[2] On account of the doctrine of mutual combat, armed with a deadly weapon, and previous threats of appellant to kill the deceased, and the statement made by appellant just after the killing, the evidence in this case does not present the issue of self-defense. The law is that when a person is armed with a deadly weapon and voluntarily and unnecessarily enters into a mutual combat for the purpose of getting a pretext to kill his adversary, or knowing that such combat will or may result in death or serious bodily injury to one or the other of the persons engaged therein, then in such case the right of self-defense will not arise in favor of such person, no matter to what extremity he may be reduced in such combat. See *Koozer v. State*, 7 Okl. Cr. 336, 123 Pac. 554.

[1] We also think that the court might well have omitted the charge upon manslaughter. It is therefore not necessary to discuss a number of questions raised by counsel for appellant with reference to the instructions of the court, for objections to instructions must always be considered in the light of the testimony in the case. We think that the instructions complained of, while not entirely correct, were beneficial to appellant in that their effect was that they reduced a verdict which should have been for murder to manslaughter.

[3] In the brief of counsel for appellant, numerous decisions of this court are cited,



giving the page and volume of the Pacific Reporter upon which they can be found. We have no objection to counsel citing cases in the Pacific Reporter, but when they cite decisions of their own state they should give the volume and page of the state report upon which the cases can be found. We trust that the lawyers of Oklahoma will heed this request in the future. We find no prejudicial error in the record.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

STATE ex rel. SPRINGMEYER v. BAKER.

STATE ex rel. LEGATE v. JOSEPHS.  
(Nos. 1,949, 1,950.)

(Supreme Court of Nevada. Jan. 4, 1913.)

1. QUO WARRANTO (§ 34\*)—ELECTION CONTESTS—JURISDICTION.

The court has jurisdiction to allow a writ of quo warranto on the relation of a defeated candidate for a state office to contest the election.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 41; Dec. Dig. § 34.\*]

2. QUO WARRANTO (§ 57\*)—CONTESTS—APPOINTMENT OF COMMISSIONER—JURISDICTION OF COURT.

Under Comp. Laws, §§ 3279, 3280, authorizing the court to direct a reference when necessary for the information of the court, etc., the court, in quo warranto to contest an election to a state office, has jurisdiction to appoint a commissioner to count the undisputed ballots and report to the court for its information the actual ballots in dispute as well as the fact and number of undisputed ballots.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 68; Dec. Dig. § 57.\*]

3. ELECTIONS (§ 307\*) — COMPENSATION OF COMMISSIONER APPOINTED BY COURT.

The compensation due the commissioner, appointed by the Supreme Court in an election contest to count the ballots which are undisputed and report the actual ballots in dispute, may be taxed as costs against the defeated party; but the court may not order relator to pay the costs in advance, thought the commissioner may withhold his report until payment is made by the party calling for it, and any compensation advanced by either party to receive and use the report will be recovered as other costs from the losing party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333; Dec. Dig. § 307.\*]

4. COSTS (§ 3\*)—RECOVERY—STATUTORY PROVISIONS.

Costs are recoverable only by express statutory provisions.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.\*]

5. CLERKS OF COURTS (§ 11\*)—COSTS IN SUPREME COURT—STATUTORY PROVISIONS.

The fees of the clerk of the Supreme Court prescribed by Comp. Laws, § 2469, allowing a fee for entering any motion, rule, or order, and a fee for filing each paper, are limited to orders and motions defined by section 3586, providing that every direction of the court made or entered in writing and not included in the judgment is an order, and an application for an order is a motion, and an offer of or objec-

tion to evidence, or a ruling admitting or rejecting evidence, or the routine adjournment of the trial, is not a motion and order, and the clerk may not recover fees therefor.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 33, 38, 41, 50, 52, 57, 60, 63; Dec. Dig. § 11.\*]

6. COSTS (§ 240\*)—LIABILITY—PRIMARY LIABILITY.

Each party to an appeal or proceeding in the Supreme Court is primarily liable for the costs made by him, and there is no statutory authority for the charging to relator or appellant, or requiring the payment by them before judgment, of fees incurred by respondent.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 922-926; Dec. Dig. § 240.\*]

7. COSTS (§ 240\*)—COSTS IN SUPREME COURT.

Where costs are incurred on both sides on appeal or original proceeding, the clerk must collect his costs in advance from the respective parties incurring them.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 922-926; Dec. Dig. § 240.\*]

8. CLERKS OF COURTS (§ 14\*)—COSTS IN SUPREME COURT—FEES OF CLERK.

The clerk of the Supreme Court in an original proceeding must on request issue subpoenas, and fees therefor will be disallowed unless the party against whom the charge is made applied for and obtained a written order for the subpoenas.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 42; Dec. Dig. § 14.\*]

9. ELECTIONS (§ 293\*)—CONTESTS—BALLOTS AS EXHIBITS.

A party to an election contest may attach all ballots in the same precinct to which he objects and have them filed as one exhibit, but the ballots of each precinct should be kept separate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 288-296; Dec. Dig. § 293.\*]

10. ELECTIONS (§ 186\*)—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, § 1858, providing that when a voter marks more names than there are persons to be elected to office, or where it is impossible to determine his choice for any office, his vote for the office shall not be counted, a ballot containing a cross after the names of the candidates for the same office cannot be counted for either.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. § 186.\*]

11. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, § 1852, providing that the voter shall prepare his ballot by stamping a cross in the square, and in no other place, after the name of the person for whom he intends to vote, the cross must be in the square after the name of the candidate, and a ballot with a cross after the name of the candidate and before the square is invalid.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

12. ELECTIONS (§ 180\*)—BALLOTS—MARKING BALLOTS.

Under Rev. Laws, § 1852, providing that in case of a constitutional amendment submitted the cross shall be placed after the answer which the voter desires to give, the cross in voting for or against a constitutional amendment need not be placed in the square, and a ballot with a cross before the square and after the word "Yes" or "No" in voting on a constitutional amendment is valid, as is also a ballot in which a single cross is placed in the square.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**13. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.**

A ballot containing a cross placed in the square and another cross placed before the square and after the word "Yes" or "No" in voting on a constitutional amendment must be rejected because of the extra cross.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

**14. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.**

Under Rev. Laws, § 1858, providing that any ballot on which appears names or marks excepting as provided for shall not be counted, a ballot containing a cross in the square following a blank space left for filling in the name of a candidate for an office for which no candidate has been nominated, or containing the name of a candidate written by the voter, must be rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

**15. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.**

Ballots containing crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, must be rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

**16. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.**

A ballot containing an erasure destroying the texture of the paper, or containing holes rubbed or torn through the paper by the voter, must be rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

**17. ELECTIONS (§ 194\*)—BALLOTS—MARKING BALLOTS.**

A ballot containing marks other than those required for voting, apparently designed for identification, or which may be readily used for that purpose, will not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

**18. ELECTIONS (§ 166\*)—BALLOTS—FAILURE TO TEAR OFF NUMBER.**

A ballot from which the number has not been torn by the election officers is valid.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 166.\*]

Quo warranto by the State, on the relation of George Springmeyer, against Cleveland H. Baker, and by the State, on the relation of J. W. Legate, against Joe Josephs, to contest elections to the office of Attorney General and Clerk of the Supreme Court. Proceeding on relation of George Springmeyer dismissed, and judgment for respondent Joe Josephs.

See, also, 126 Pac. 345.

George Springmeyer, of Goldfield, for relators. Wm. Woodburn, James R. Judge, and C. H. Baker, all of Carson City, for respondents.

PER CURIAM. Relator J. W. Legate and Joe Josephs, respondent, were opposing candidates for the office of clerk of the Supreme Court at the general election in 1910. On the face of the returns respondent had a majority of 11 votes. This contest was brought on the 3d day of January, 1911. At the same time a contest for the office of

Attorney General of the state was instituted on the relation of George Springmeyer against Cleveland H. Baker, who on the face of the returns had a majority of 65 votes over the relator Springmeyer. Both relators were represented by the same counsel as were both respondents, and stipulated that their causes should be consolidated and treated jointly, in so far as the interposition of objections and the rulings of the court and other matters pertaining to the conduct of the trial might be concerned.

[1] The respondents first appeared protesting against the information filed by relator and interposed a demurrer questioning the authority of the court to allowing the writ of quo warranto asserting that "the court has no jurisdiction over the subject-matter of said proceeding, in that such proceeding can only be instituted in the name of the state on relation of and by the Attorney General of the state, and cannot be instituted in the name of the state on the relation of a private individual without the intervention of the Attorney General."

The court after due consideration of the contention of relator found it to be without merit. *McMillan v. Sadler*, 25 Nev. 165, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573. And on January 5, 1911, made an order allowing the proceeding in quo warranto.

[2, 3] On the 31st day of May, 1911, a commissioner was appointed to assist the court in opening, examining, and classifying the ballots. Counsel for respondents questioned the authority of the court to make the appointment of a commissioner, which was overruled by the court in the following opinion delivered from the bench:

"At the beginning of the contest in the above-entitled cause, after a demurrer and other motions and objections were overruled, and it appeared that in this contest an examination of some 25,000 ballots would probably be necessary, and it further appearing that in all probability approximately 75 per cent. of said ballots would be free from objection of either of the parties to this contest, and the court being occupied with a heavy calendar of causes and other important official work, the court, in order to save several months of its time, believing it to be in the interest of the state that the time of the court should be consumed in other matters before them rather than in the examination of and passing upon ballots undisputed, under its authority made the following order appointing a commissioner: 'The court heretofore having signified their intention of appointing a commissioner, to take charge of the counting of the ballots and report to the court any and all irregularity appertaining to the same, and report to the court any and all objections during the trial of the above-entitled cases, it is ordered by the court that George L. Sanford

be, and is hereby, appointed commissioner in the above-entitled cases. As such commissioner, he is empowered to count all the ballots offered in evidence, to number in indelible pencil, and lay aside for each precinct, all ballots not clearly regular to which objection is interposed; to report to the court the number of ballots for each party to each proceeding to which there is no objection; to present to the court all the ballots to which objection is made; and to carefully preserve in the custody of the court, without change, otherwise than as marked for identification, all ballots which are offered in evidence.'

"The authority of the court to make this appointment is questioned by the respondents herein. We have no question whatever of our authority to make such appointment. It is contended by the relators that we have the inherent power to make such appointment; but, be that as it may, it is unnecessary for us to pass upon this question for the reason that we find express statutory authority to have made this appointment under sections 3279 and 3280 of the Compiled Laws of Nevada, which read:

"A reference may be ordered upon the agreement of the parties, filed with the clerk, entered in the minutes: First, to try any or all of the issues in an action or proceeding whether of fact or law, and to report a judgment thereon. Second, to ascertain a fact necessary to enable the court to proceed and determine the case.

"When the parties do not consent, the court may upon the application of either, or of its own motion, direct a reference in the following cases: First, when the trial of an issue of facts requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. Second, when the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect. Third, when a question of fact, other than upon the pleadings, arises upon motion or otherwise in any stage of the action; or, fourth, when it is necessary for the information of the court in a special proceeding.'

"Under the authority of the above provisions the court has the unquestioned authority, without consuming its time, to appoint a commissioner to take a count of the ballots which are undisputed and to have him report to the court for its information the actual ballots in dispute as well as the fact and number of undisputed ballots.

"As to how and by whom the commissioner appointed is to be paid, we are of the opinion that such compensation as may be due him for his services rendered is to be taxed as costs against the losing party to the contest.

"As to the authority of this court to order relators to pay in advance such costs, as is

suggested by counsel for respondents, we find no such authority. As we have held, *supra*, that costs were not recoverable at common law, and a party is liable for them only when their payment is required by express statutory provision, it follows that, in the imposition of costs on either party, the court must find some authority, and as there is no authority to be found warranting the court, in a proceeding of this character, to impose costs in advance of a hearing of the cause, or to tax them against one party, or the other, until a judgment carrying costs is awarded, we are of the opinion that the costs are to be taxed against the losing party. The commissioner or referee appointed by the court is, however, privileged, and it is his lawful right to withhold his report until such payment, as he may be entitled to and awarded by the court, is paid by the party calling for his report, to be introduced as evidence or used in the trial of the cause before the court, and the court will not order the referee to deliver said report to the parties demanding it, or file the same, before his compensation is paid by the party desiring it, for the reason it would have no such authority.

"The Court of Appeals of New York, in the case of *Geib v. Topping*, passed upon the point adversely to the contentions of respondents that relators could be compelled to pay the fees of the referee in advance, but also held that the referee was not bound to part with his report without the payment of his legal fees. *Geib v. Topping*, 83 N. Y. 46. The Supreme Court of Wisconsin, in the case of *King v. Whiton*, also held adversely to respondents' contention that the court had the authority to order relators to pay the fees of the referee in advance, but sustained the position that the referee was entitled to hold his report and demand his fees in advance before the same could be filed or used as evidence on the trial of the cause. *King v. Whiton*, 15 Wis. 690. For other cases in point, see *Cummins v. Robinson* [2 Okl. 494] 37 Pac. 1064; *Fisher v. Raab et al.*, 81 N. Y. 235. In support of the authority of this court to impose the costs upon the losing party, see *Schwacker v. McLaughlin* [139 Mo. 333] 40 S. W. 935; *In re City of New Orleans*, 19 La. [Ann.] 382; *Lobdell v. Bushnell*, 27 La. [Ann.] 395; 34 Cyc. 893, and cases therein cited.

"Such compensation as may be allowed for the services rendered by the commissioner will therefore be taxed finally against the losing party. Should, however, any fees or compensation, which the commissioner might be entitled to, be advanced by either party for the purpose of receiving and using the report of the commissioner in the trial of the cause, such party so advancing the same, if he prevail in the action, will be entitled to recover the same as other costs from the losing party."

During the proceedings there was present-

ed for consideration of the court the legality of certain clerk's fees charged against relators which were passed upon in the following opinion delivered from the bench:

"There is presented for our determination the legality of the clerk's fees charged against relators for numerous motions, orders, and filings. A number of these which were made for the respondents have been charged to the relators. The fee of \$1.25 for a motion and \$1.25 for an order have been charged for the admission of testimony and for the overruling of objections to the introduction of evidence.

[4] "Costs were not recoverable at common law, and a party is liable for them only when their payment is required by express statutory provisions. *McKenzie v. Coslett*, 28 Nev. 220 [80 Pac. 1070]; 11 Cyc. 24; *In re Green, Clerk*, 40 Mo. App. 491. In *State ex rel. Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649, the court said: 'The overcharges and abuses in making out bills of cost have become, and justly, a matter of public complaint. Yet there is this excuse, that, bills of costs having rarely been before the courts, clerks, no matter how conscientious, have had no authoritative construction to follow. Hence there has been very little uniformity; each clerk being, like the Gentiles of old, a law unto himself.'

[5] "As held in *Shed v. Railroad Co.*, 67 Mo. 687, statutes in reference to costs must be strictly construed, and an officer cannot legally claim fees unless the statute has expressly conferred the right to collect them. Section 474 of the Practice Act provides that 'there shall be allowed to the prevailing party in any action in the Supreme and district courts, his costs and necessary disbursements, in the action or special proceeding in the nature of an action.' The following sections provide for the allowance of costs in judgments, and section 478 for their apportionment between the parties in the discretion of the court upon the rendition of judgment. The statute (Comp. Laws, § 2469) allows the clerk of the Supreme Court, in addition to other fees, \$1.25 'for entering any motion, rule, or order,' and 30 cents 'for filing each paper.' Rule 27 [73 Pac. xv] of this court provides that 'no transcript or original record shall be filed or cause registered, docketed, or entered until an advance fee of twenty-five dollars is paid into the clerk's office, to pay accruing costs of suit.' In compliance with this rule, \$50 were paid to the clerk by relators. Section 491 of the Practice Act (Comp. Laws, § 3586) was as follows: 'Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.' The following sections provide that motions shall be made in the county in which the action is brought, or in an adjoining county in the same district, and the time within which

written notice of motion, when written notice is necessary, must be given and the manner in which it must be served. In *State ex rel. Blount*, supra, the court said: 'The charge—motion for judgment, 25 cents—is often made by clerks, but is illegal. The motion for which 25 cents is allowable is a motion in the cause made in writing and required to be recorded, not the mere verbal application for a judgment.'

[6] "We conclude that the fee of \$1.25 for entering every motion or order, which the clerk is authorized to charge under section 2469 of the Compiled Laws, is limited to orders and motions defined by section 491 of the Practice Act (Comp. Laws, § 3586), and to directions of a court or judge required to be made or entered in writing, and to applications for the same. We do not understand that every offer of, or objection to, evidence is a motion, nor that every ruling of the court admitting or rejecting answers or questions, testimony, or evidence is an order within the definition of motion and order for which the clerk is authorized to charge under the fee bill. Nor do we think that the routine adjournment by the court of the trial or hearing, which may last several months, until the next day, or for a few days to accommodate pressing engagements of the court or counsel, is of the magnitude of a motion and order for continuance as generally understood, or warrants the charging of the fee for motion and order, except in cases where objection is made to the continuance and the court is required to rule upon the merits of the motion and objection; it being well understood when the proceeding commenced that such adjournments would be necessary because of the necessities of the court as well as counsel. But there is no statute or authority providing for the charging to relators or appellants, or requiring the payment by them before judgment, of fees incurred by respondents. Each party to an appeal or proceeding is primarily liable for the costs made by them respectively.

[7] "Since the adoption of Rule 27, supra, it has been the practice of the clerk to collect all costs of both parties out of the advance fee of \$25 deposited by the appellant or relator. While this course is not strictly in accordance with the law, it in most cases results in a convenience to both parties as well as to the clerk of the court. In most cases this advance fee is sufficient to cover the costs of both parties, and no injury to either party can ordinarily result therefrom, for the prevailing party is entitled to recover his costs. In a case, however, where costs are incurred on both sides upon an appeal or original proceeding, the clerk should collect his costs in advance from the respective parties incurring such costs. If respondents, by making objections, bringing

witnesses, and in other ways, 'could create costs at will and without limit, which relators would be compelled to pay in advance in order to maintain the proceedings they have instituted, this exaction would result in a denial to poor relators of the right to contest and cause great and undue expense for wealthy ones.

[8] "As it is the duty of the clerk to issue subpoenas on request, the charge, 'Order to issue subpoenas on request, \$1.25,' will be disallowed unless the party against whom the charge is made applied for and obtained a written order that the subpoenas issue on request. As courts are open for the introduction of testimony and the reception of evidence, and as it is their duty to proceed with trials at the time they are set, the following charges are disallowed: 'Order overruling respondents' objection to appointment of commissioner, \$1.25. Motion and order to introduce testimony, \$2.50. Motion and order to examine ballot boxes, \$2.50. 24 orders overruling objections to examine ballot boxes, \$30. Motion and order to introduce in evidence, \$2.50. Order that counting the ballots be from 10 to 12, and 1:30 to 4, \$1.25. Motion and order for Mr. Hamilton to be sworn, \$2.50. Respondents' objection and ruling of court to proceed with cross-examination, \$1.25. Motion and order to open trunk containing packages, \$2.50. Order that commissioner mark packages of unknown precincts as exhibits, \$1.25. Motion and order to return all packages to trunk in charge of George L. Sanford, \$2.50. Motion and order to examine each precinct package, \$2.50.' Orders extending the time for filing demurrer, answer, and briefs are properly chargeable as motions and orders; and these, and items not heretofore mentioned as disallowed, will stand as charges against the party making the motion and obtaining the order, filing the paper or incurring the fee. Properly these orders would be in writing and filed or entered in the minutes of the court, and the prevailing parties would be entitled to recover judgment for their costs expended.

[9] "A request has been made that the ballots in each county to which objections are entered be attached together and filed as one exhibit and with a charge of one filing fee. As objections may be made to the admission of ballots in one precinct different from the objections made to ballots in another precinct in the same county, and as it is desirable to have the ballots of each precinct considered and kept separate so that they may be returned to the ballot box of that precinct without becoming intermingled with the ballots of other precincts, this request is not granted; but the relators may attach all ballots in the same precinct to which they object and have them filed as one exhibit, and the respondents may do the same."

Questions which arose regarding whether the ballots were public documents and whether they could be certified in by the clerks by express without being personally accompanied were passed upon and determined adversely to relators' contentions. *State v. Baker*, 35 Nev. —, 126 Pac. 345.

The further objection to ballots was first withdrawn by the contestants for the office of clerk of the Supreme Court, and on November 11, 1912, after the examination of about 18,000 ballots, the contest for the office of Attorney General was dismissed. The contest for the office of clerk of the Supreme Court was finally submitted, with briefs, November 29, 1912, and we need consider further only the ballots relating to that contest.

Doubtful ballots were laid aside and carefully considered a second time by all the members of the court. Nearly all the questions involved regarding the validity of the ballots have been determined in the cases of *Dennis v. Caughlin*, 22 Nev. 452, 41 Pac. 768, 29 L. R. A. 731, 58 Am. St. Rep. 761; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; *State v. Sadler*, 25 Nev. 163, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; *Lemaire v. Walsh*, 27 Nev. 258, 74 Pac. 801; *Strosnider v. Turner*, 29 Nev. 347, 90 Pac. 581; and *Strosnider v. Turner*, 30 Nev. 155, 93 Pac. 502, 133 Am. St. Rep. 710.

In accordance with these decisions and the pertinent sections of the statutes relating to elections, we have held as good ballots on which there was an apparent attempt to retrace a cross or an effort to make it more certain, and in doing so employing more lines than were necessary to properly make a cross, or on which there was a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose; or when the ballot paper was defective in manufacture; or when over a faint cross a second cross was placed, apparently for the purpose of making it more distinct; or when there was a slight blur connected with a cross, resulting from a defective stamp or too much ink on the pad; or when there was a slight pencil mark, or faint finger mark, or slight tobacco stain, clearly made by accident and not design, and ballots from which a strip has been torn along the edge by the election officers.

[10] As heretofore held, ballots were considered good on which more candidates were voted for than there were officers to be elected; but such ballots, when containing a cross after the names of both relator and respondent, could not be counted for either. Section 1858, Revised Laws, provides that when a voter "marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted."

[11] Objection was made to a considerable number of the ballots because in voting for a constitutional amendment the cross was placed after the word "Yes" or "No" and before the square. These ballots are held to be valid. For a time after the adoption of the Australian ballot system in this state, the statute provided that a candidate should be voted for by marking an X after his name, and it was held that the placing of the X after the name before the square did not invalidate the ballot. As amended in 1901 (Laws 1901, c. 100), the statute, Revised Laws, § 1852, provides that the voter "shall prepare his ballot by stamping a cross or X in the square, and in no other place, after the name of the person for whom he intends to vote for each office." Since that time it has been necessary to place the X in the square after the name of the candidate in order to comply with the statute, and ballots with the cross after the name of the candidate, and before the square, which were formerly good, are now held to be invalid. *Strosnider v. Turner*, 30 Nev. 155, 93 Pac. 502, 133 Am. St. Rep. 710.

[12] The same section provides that "in case of a constitutional amendment, or other question submitted to the voters, the cross or X should be placed after the answer which he desires to give"; but the statute does not require that the cross in voting for or against a constitutional amendment be placed in a square, as is required in voting for a candidate. Consequently, under these two provisions of the statute, ballots with a cross before the square and after the name of a candidate are void, but when with a cross before the square and after the word "Yes" or "No" in voting on a constitutional amendment are valid, as are also ballots in which a single cross voting on the constitutional amendment is placed in the square.

[13] Some of the ballots under objection had a cross placed in the square and another cross placed before the square and after the word "Yes" or "No" in voting on the constitutional amendment, thus:

Yes	X	X
No		

These ballots were rejected because they have the extra cross, while all ballots with only one cross after the word "Yes" or "No" following the constitutional amendment, whether the cross be before or in the square, are counted.

[14] Section 1858 provides that "any ballot upon which appears names, words or marks, written or printed except as in this act provided, shall not be counted." Many of the ballots which have been rejected were invalidated because stamped with a cross in the square, following a blank space left for filling in the name of a candidate for public ad-

ministrator when the name of no person appeared upon the ballot as a candidate for that office, evidently because no nomination for the place was made, thus:

For Public Administrator	Vote for One
	X

By the words "Vote for One," the voters using these ballots may have been misled into placing the stamp in the square following the vacant line, but the voter is required to know the law and that the statute is plain and inexorable in its language which invalidates the ballot if crosses or marks other than crosses in the square following the names of candidates, or crosses after the word "Yes" or "No" following a constitutional amendment, are placed on the ballot. On a few of such ballots the voter had written in with lead pencil the name of the person for whom he wished to vote for public administrator. The ballots are also rejected. This blank space could be used only for printing or inserting by the clerk on the ballot the name of some one nominated for the office after the ballot had been printed.

[15-17] Ballots having the following defects are also rejected: Crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, as with a pen or brush; erasures not slight and destroying the texture of the paper; crosses on the back of the ballot, or on the front of the ballot excepting when in the squares opposite the names of the candidates, except when the vote is on constitutional amendment; any other marks, not slight or apparently accidental, which might have been designed for the identification of the ballot, or which might be readily used for that purpose; two or more crosses deliberately made within the square, not for the purpose of retracing; and ballots with holes rubbed or torn through the paper by the voter.

[18] The question of the validity of some of the ballots has not been easy to determine, but the number of these it not sufficient to change the result in any event. One ballot from which the number had not been torn by the election officers is held to be valid as not being caused by the fault of the voter, under former decisions of this court.

Under these precedents and rules, out of 963 ballots objected to by respondent we have sustained the objection to 264, and out of 755 ballots objected to by relator we have sustained the objection to 234. As relator Legate has consequently lost 30 ballots more than respondent Josephs, this number, added to the 11 majority which Josephs had upon the face of the election returns, makes his majority 41.

The certificate of election as originally issued to Joe Josephs, respondent, will stand, and it is ordered and adjudged that he was elected to the office of clerk of the Supreme

Court at the general election held in 1910 for the term of four years, and that he is entitled to the office accordingly.

**STONE v. BELL, County Auditor.**  
(No. 2,015.)

(Supreme Court of Nevada. Jan. 4, 1918.)

**1. MANDAMUS (§ 19\*)—ABATEMENT.**

A proceeding in mandamus against a county officer does not abate upon the expiration of his term of office; but, the duty being a public one, his successor may be substituted.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 51, 52; Dec. Dig. § 19.\*]

**2. GRAND JURY (§ 27\*)—POWERS OF GRAND JURY.**

Rev. Laws, §§ 7028, 7029, respectively, require the grand jury to inquire into the willful and corrupt misconduct of public officers, and provide that they may examine all public records, while section 1508 imposes on the board of county commissioners the duty of auditing the accounts of all officers. Sections 4148 and 4153 provide for the appointment of a State Auditor who shall at the direction of the Governor examine the books and accounts of all county officials. *Held* that, there being a presumption that public officers performed the duties required of them by law, the grand jury cannot hire an accountant to examine the books of county officials; it being their duty, in case there is reason to believe that the books of the county should be audited, to request either the board of county commissioners or the Governor to provide for such audit.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. § 66; Dec. Dig. § 27.\*]

**3. GRAND JURY (§ 27\*)—POWERS OF JUDGE—PRIVATE ACCOUNTANT.**

The grand jury being without statutory authority to hire an accountant to audit the books of county officers, the district judge, though required by Rev. Laws, § 4924, to charge grand juries as to their duties, part of which section 7028 provides shall be an inquiry into the willful and corrupt misconduct of public officers, has no inherent authority to engage a private accountant to examine and audit the books of all county officers; it not appearing that there was any reasonable ground to believe that such officers were guilty of misconduct.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. § 66; Dec. Dig. § 27.\*]

Appeal from District Court, Esmeralda County; Peter J. Somers, Judge.

Mandamus by W. C. Stone against M. J. Bell, as County Auditor of the County of Esmeralda. From a judgment granting a peremptory writ, respondent appeals. Reversed, and proceedings ordered dismissed.

This is an appeal from a judgment granting a peremptory writ of mandamus commanding the appellant to issue his warrant on the county treasurer of Esmeralda county in favor of the respondent for the sum of \$602.45. The proceeding was submitted to the court below upon an agreed statement of facts which were adopted by the court, and which are as follows:

"(1) That on February 15, 1908, a grand jury was duly impaneled according to law,

and immediately thereupon began to perform the duties imposed upon that body by law.

"(2) That in the course of its business the said grand jury requested the judge of the court, of which it was a part, to authorize it to employ auditors to audit the books of the county of Esmeralda, and in accordance with the said request Hon. Frank P. Langan, then judge of the district court of the First judicial district of the state of Nevada, in and for the county of Esmeralda, made an order authorizing the said grand jury to employ auditors to audit the books of Esmeralda county.

"(3) That in the course of its business the said grand jury, through its foreman, by virtue of said order, entered into a contract with McLaren-Goode & Co., certified accountants of the city and county of San Francisco, state of California, by which the said McLaren-Goode & Co. were employed to audit the books of the county of Esmeralda, at a fixed rate of compensation.

"(4) That the said McLaren-Goode & Co., in accordance with the aforesaid contract, began the work of auditing the books of Esmeralda county on the 10th day of April, A. D. 1908, and that the said work was completed to the satisfaction of the court and grand jury on the 9th day of May, A. D. 1908.

"(5) That the amount due McLaren-Goode & Co. for said work amounted, according to the rate of compensation fixed by said contract, to the sum of \$1,227.45.

"(6) That the bill for the amount due McLaren-Goode & Co., amounting to \$1,227.45, was duly presented to the court, Judge Langan presiding, and, meeting with the approval of the court, the said bill was allowed by Judge Langan and thereupon presented to George Brodigan, the then auditor of the county of Esmeralda, for payment.

"(7) That the said bill, as allowed by Judge Langan, was presented to George Brodigan, auditor of Esmeralda county, for payment. That the said George Brodigan thereupon paid to McLaren-Goode & Co., on a peremptory writ, the sum of \$625, after mandamus proceedings had been had, but that he has at all times failed and refused to pay the balance of \$602.45, since the same fell due.

"(8) That the said George Brodigan has ceased to be auditor of Esmeralda county, and that M. J. Bell is, at this time, the duly elected and qualified auditor of Esmeralda county. That the said M. J. Bell, as successor in office to George Brodigan, has been duly substituted in his place as defendant in this action, which substitution was and has been made over and against the objection of M. J. Bell.

"(9) That said claim of \$602.45 was, for a valuable consideration, sold and assigned by McLaren-Goode & Co. to Walter C. Stone,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that he, the said Walter C. Stone, is at this time the bona fide owner of said claim.

"(10) That the said claim for the sum of \$602.45 of the plaintiff was never presented to the county commissioners of Esmeralda county, and has never been acted upon by the board of county commissioners of Esmeralda county, and has never either been allowed or rejected by said board of county commissioners. That no copy of any order of the board of county commissioners allowing the said claim or demand and authorizing the payment thereof, together with the claim, has ever been submitted to the defendant George Brodigan, as county auditor, or to the substituted defendant, M. J. Bell, the successor of said George Brodigan.

"(11) That demand for the said sum of \$602.45 was duly made upon said M. J. Bell prior to the application for his substitution as defendant in this action, and payment was refused by him."

John F. Kunz, of Goldfield, for appellant.  
Henry M. Hoyt, of Goldfield, and Benjamin J. Henley, of Goldfield, for respondent.

NORCROSS, J. (after stating the facts as above). [1] It is the contention of counsel for appellant that the court below erred in allowing the motion of the plaintiff to substitute M. J. Bell as respondent in the proceeding after the expiration of the term of office of George Brodigan, against whom the proceeding was originally instituted. Counsel contends that the proceeding abated upon the expiration of the term of office of the original respondent, and that it was improper to substitute his successor in office, and a number of cases are cited to support this view. The question is one of original impression in this court, and we see no good reason not to adopt the view that the successor in office in a case of this character may be substituted in place of the officer whose term has expired. Here an official duty is sought to be enforced, one which continues until performed, regardless of who may, for the time being, be the incumbent of the office. To hold that a proceeding of this character abates, simply because there is a change in the person occupying the office, is to impose needless expense and delay upon a litigant seeking to enforce what he deems to be a legal right. If the successor in office sees fit to adopt the course of his predecessor in refusing to perform what is alleged to be an official duty, no good reason appears why a new proceeding should of necessity be instituted.

[2, 3] There is no statutory authority for a district judge to enter an order authorizing a grand jury to employ an accountant to audit the books of county officers. It is the contention of counsel for respondent on appeal that the district court had the inherent authority to make the order in question. Our attention has not been called to,

nor have we been able to find, an authority directly in point.

By section 311 of the old criminal practice act, which is the same as section 178 of the act now in force (Rev. Laws, § 7028), it is provided: "The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; into the condition and management of the public prisons within the county; and into the willful and corrupt misconduct in office of public officers of every description within the county." The following section of the old and new acts is substantially the same in both, and reads: "The grand jury shall be entitled to free access, at all reasonable times, to all public prisons, and to the examination without charge of all public records within its district." Rev. Laws, § 7029. By an act approved February 12, 1879 (Rev. Laws, § 4924), it is provided: "It shall be and it is hereby made the special duty of all district judges in this state to give in charge to the grand juries, at the commencement of each term of their respective courts the full text of the statutes of this state, in reference to the duties, conduct, responsibilities, and penalties of military, civil, and peace officers in this state."

It is contended by counsel for respondent that "the court had the power to authorize the grand jury to employ auditors to audit the county books by universal and immemorial custom," and further that the power is also given the court "by necessary implication" by the provisions of section 7028, Rev. Laws, supra.

We are not aware of the existence of any such custom, nor have we been able to find mention of the same in authorities or text-writers. There is a legal presumption that public officers perform the duties required of them by law, and, while grand juries are commanded to inquire into "willful and corrupt misconduct of public officers," such duty is to be performed in the light of such presumption. To perform the ordinary and usual duties of a grand jury does not require the employment by them of an expert accountant.

There are two specific provisions of statute providing for the auditing of the books of county officers. The board of county commissioners are given power "to examine and audit the accounts of all officers, having the care, management, collection, or disbursement of any money belonging to the county or appropriated by law, or otherwise, for its use and benefit." Rev. Laws, § 1508. The Legislature by an act approved March 26, 1907, provided for the appointment by the Governor of a State Auditor, who "shall be thoroughly versed in the science of book-keeping and accounts," and whose duty it shall be at the direction of the Governor "to examine the books and accounts of all county officials," etc. Rev. Laws, §§ 4148-4153.



If the grand jury had reason to believe that the county books of Esmeralda county should be audited, it could have requested either the board of county commissioners or the Governor to provide for such an audit.

That courts have certain inherent powers, which neither the Legislature nor the executive branch of government can take from them, is beyond question. We do not think, however, that a district court has the inherent power to make an order authorizing the grand jury to audit the county books. That is not a duty imposed upon the grand jury or the court, but is a duty by statute lodged elsewhere.

The case of *State v. Davis*, 26 Nev. 373, 68 Pac. 689, and other cases cited by counsel for respondent, do not, we think, warrant a holding that the district court has an inherent power to bind a county by a contract authorized to be entered into by a grand jury for the purposes of auditing the books of the various county officers. All the authorities recognize that the inherent powers of courts have limitations. The case of *Board of Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402, is instructive in this regard.

This proceeding does not present a question whether, in the case of an investigation of a charge of malfeasance in office of a public officer, a district court might not, under certain circumstances, be warranted in authorizing the grand jury to employ an expert and to order the payment of the amount of his services. The order in this case was general and comprehensive in character, authorizing the grand jury to enter into a contract with a firm of accountants to audit all the county books. This, we think, was an invasion of the executive branch of government and in excess of the power of the court.

The judgment is reversed, and the proceedings ordered dismissed.

**OLLAINE v. McGRAW et al.** (Sac. 1909.)  
(Supreme Court of California. Jan. 2, 1913.)

**1. MINES AND MINERALS (§ 38\*)—TRESPASS—FINDINGS—EVIDENCE.**

In an action to recover damages for and an injunction to restrain a trespass on plaintiff's quartz mining claim, evidence held to sustain findings that plaintiff's claim overlapped a portion of a conflicting placer claim, that the ore taken by defendant was taken from the overlap, and that plaintiff made no discovery at the time of the location of his alleged claim.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**2. HIGHWAYS (§ 80\*)—LOCATION ON MINING CLAIM—EFFECT.**

Location of a highway by a board of supervisors over a located mining claim does not affect the claim further than to establish an easement over the same to the extent necessary for public use as a highway.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 288, 290; Dec. Dig. § 80.\*]

**3. NEW TRIAL (§ 150\*)—APPLICATION—NEWLY DISCOVERED EVIDENCE.**

An application for a new trial for newly discovered evidence is ineffective where it is not sustained by showing that the proposed evidence was not known to the applicant at the time of the trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

**Department 1. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.**

Action by Charles Ollaine against Charles McGraw and another. From an order denying plaintiff's motion for new trial, he appeals. Affirmed.

B. K. Collier and Jas. D. Fairchild, both of Yreka, for appellant. Taylor & Tebbe, of Yreka, for respondents.

**ANGELLOTTI, J.** This is an action for damages and for an injunction. Plaintiff alleged that ever since June 15, 1909, he has been entitled to the exclusive possession of certain described territory known as the Eastern Star Quartz Mining Claim, the same constituting a quartz mining location chiefly valuable for the gold-bearing rock and earth contained therein; that defendants on or about October 3, 1910, wrongfully entered thereon, took and appropriated to their own use large quantities of such rock and earth, and are continuing so to do, to his damage in the sum of \$100; that defendants threaten to continue to do so; and that the consequent injury to plaintiff will be irreparable. Defendants by their answer denied the allegations of the complaint, and further alleged that defendant Charles McGraw, Jr., is, and ever since October 3, 1910, has been, the owner in the possession of, and entitled to, the exclusive possession of that certain quartz mining claim known as Leroy Fraction, which includes a portion of the land claimed by plaintiff to be within the limits of his alleged Eastern Star location. The case was tried by the court without a jury, and the findings were in favor of defendants. Judgment was given that plaintiff take nothing by his action. This is an appeal only from an order denying plaintiff's motion for a new trial. We are therefore here concerned with such points only as are available on motion for a new trial.

[1] Plaintiff's attempted location of a quartz mining claim was made June 15, 1909. The land described in the notice was a piece of land triangular in shape, running northwest and southeast, 600 feet wide on the northwest and running to a point at the southeast end. The plaintiff claimed that, prior to making his location, he made a sufficient discovery of gold-bearing quartz in place in the northwesterly portion of this triangular piece. The trial court found that plaintiff's claim overlapped a portion of a certain placer mine which had been, since the year 1888, owned and continuously worked

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by Charles McGraw and his predecessor in interest, and that the contact between the said claims comprised a piece of land on the west border of said placer mine about 1,500 feet in length and about 66 feet in width. It is stated generally in appellant's brief that this finding is not supported by the evidence, but it is not pointed out wherein it lacks such support. An examination of the record discloses that there was ample evidence to sustain a conclusion that plaintiff's alleged claim overlapped, to the extent stated, a portion of the Ashantee Placer Mining Claim, located by James McGraw on May 16, 1888, and transferred by said James McGraw to Charles McGraw on February 6, 1903, and that said claim had been continuously worked by Charles McGraw and his predecessors ever since the year 1888.

It was found that, at the time said quartz claim was located by plaintiff, there was no discovery made by plaintiff of gold-bearing rock or mineral in place. This finding is earnestly attacked as being without sufficient support in the evidence. We have carefully read so much of the record as bears upon this point, and, while it may be that a contrary finding would have been amply supported, we are satisfied that it cannot be held that there is not sufficient support in the evidence for the conclusion reached by the trial court. It must be borne in mind that the alleged discovery was purely a surface discovery; plaintiff not opening up the ground at all, but basing his conclusions almost entirely upon the appearance of the surface. The testimony of witnesses for defendants, who subsequently examined the claim, was squarely opposed to that of plaintiff and his witnesses as to "croppings, iron, quartz, or anything that would indicate mineral." The situation was such that we cannot say that the court was not warranted in failing to give any particular weight to plaintiff's testimony that he "found gold in rock" that he took from the surface at his alleged point of discovery. As to this finding, we have at best simply the usual situation of conflicting evidence, upon which a finding either way would be held by an appellate court to be sufficiently sustained by evidence.

The fourth and fifth findings, which are also attacked as being without support in the evidence, are, so far as material, substantially as follows: Plaintiff never performed any work upon his claim except as hereinafter stated. During 1909 and 1910 he authorized one Butler to work thereon, on his (Butler's) own account, with the understanding that he (plaintiff) could claim Butler's work as his assessment work on said Eastern Star claim. Butler associated Charles McGraw, Jr., with him in the work, and they made a great number of small excavations upon the land described in plaintiff's complaint, most of which were made upon the McGraw placer claim. All the work done upon such placer

claim by Butler and McGraw, Jr., was done under an agreement with McGraw, Sr., by which the latter was to receive 20 per cent. royalty upon all gold or precious minerals extracted therefrom. They discovered "upon said placer mine stringers of quartz, and extracted therefrom the sum of \$2,600, 20 per cent. of which was paid to defendant Charles McGraw." This work and labor was performed at a point about 600 feet from said "alleged discovery." As to these findings, the evidence was clearly sufficient to support the conclusion that the work and labor of Butler and McGraw, Jr., was done more than 300 feet from plaintiff's "alleged discovery." The testimony was such that we cannot hold that it does not sufficiently support the conclusion that most of their work was on the land covered by McGraw's placer claim, and that the discovery made by them was made on such land. In no other material respect does plaintiff claim these findings to be unsupported by the evidence:

The sixth finding is to the effect that on or about October 10, 1910, with the consent of McGraw, Sr., McGraw, Jr., located a quartz mine, known as the Leroy Fraction, based on the discovery referred to in the fourth and fifth findings, and that such Leroy Fraction was properly marked on the ground, etc. We are unable to see wherein this finding is without sufficient support in the evidence given by Charles McGraw, Jr., and in the recorded copy of the notice of location. There was no error in permitting defendants to show the facts as to the ownership and occupancy by McGraw of the Ashantee placer mine, although they had not specifically set up the same as a defense in their answer. They had denied plaintiff's allegation of ownership, as well as all the other allegations of his complaint, and evidence of McGraw's ownership and occupancy of the land embraced in the Ashantee placer claim was clearly relevant and material evidence in support of such denials.

[2] We are unable to perceive the materiality of certain proposed evidence to the effect that on January 5, 1909, the board of supervisors of Siskiyou county declared 12 feet of the bed of Ash creek, included in McGraw's placer mining claim, to be a public highway. Such action by the board of supervisors could not affect the claim further than to establish an easement over the same, to the extent stated, for public use as a highway. The trial court did not err in excluding the proffered evidence.

[3] Various affidavits were presented on the motion for a new trial in support of the claim that the motion should be granted on the ground of newly discovered evidence. There is absolutely no pretense of a showing that any of the proposed evidence set forth in the affidavits was not known to plaintiff at the time of the trial except the proposed evidence of Mr. H. N. Bean as to a conversation with one of defendants' witnesses after

the trial, or, if not then known, could not with reasonable diligence have been discovered and produced at the trial. It is, of course, well settled that such a showing is essential to warrant the granting of a new trial on the ground of newly discovered evidence. The provision of the Code of Civil Procedure on the subject is that a new trial may be granted on account of "newly" discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Code Civ. Proc. § 657, subd. 4. It cannot reasonably be claimed that the proposed evidence of Mr. Bean was of such a nature as to require the trial court to grant a new trial on this ground.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

GOLDMAN v. MURRAY et al. (S. F. 5,891.)  
(Supreme Court of California. Dec. 30, 1912.  
Rehearing Denied Jan. 29, 1913.)

1. ASSIGNMENTS (§ 79\*)—ACTS CONSTITUTING.

Where a bona fide creditor of a corporation took from it promissory notes evidencing its debt to him, and he believed that the notes were valid, while in fact they were invalid as corporate obligations, and he transferred them by indorsement in due course to a third person, who received them in payment of a debt due him, the assignments as between the creditor and the third person carried with them the original indebtedness of the corporation.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 146; Dec. Dig. § 79.\*]

2. ASSIGNMENTS (§ 48\*)—ACTS CONSTITUTING.

No precise form of words or writing is necessary to the establishment of an equitable assignment of an indebtedness due the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. § 48.\*]

3. ASSIGNMENTS (§ 58\*)—ACTS CONSTITUTING—ACCEPTANCE.

Where a bona fide creditor of a corporation took from it notes evidencing its debt to him, and he, believing that the notes were valid, while in fact they were invalid as corporate obligations, indorsed them in due course to a third person in payment of a debt due him, an acknowledgment and acceptance by the corporation of the assignment of its indebtedness were not essential to the validity of the assignment created by the indorsement.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121-123; Dec. Dig. § 58.\*]

4. ASSIGNMENTS (§ 49\*)—ASSIGNMENTS OF PART OF FUND OR DEBT—OPERATION.

A nonnegotiable order for part of a fund or debt operates as an equitable assignment pro tanto as between the drawer and payee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2434-2437; vol. 8, p. 7652.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joseph H. Goldman against

James A. Murray and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Garber, Creswell & Garber and Hillyer, Stringham & O'Brien, all of San Francisco, for appellant. C. H. Wilson, of San Francisco, for respondent.

HENSHAW, J. This is an action to enforce a stockholder's liability for his proportion of certain debts of the corporation. The complaint charged in separate causes of action upon different items of indebtedness. One will serve as a type of all. After the allegations of the corporate existence and capacity of the corporation, the number of outstanding shares, and the number of those shares owned by defendant Murray, it is alleged that the corporation became indebted to Alfred D. Bowen "for cash loaned and advanced for its use and benefit in the sum of \$20,000"; that the corporation then made its promissory note as evidence of the indebtedness, and promised to repay Alfred D. Bowen the sum of \$20,000 on demand; "that Alfred D. Bowen thereafter, and before the maturity of said note, for value received, indorsed the same to this plaintiff, and duly assigned to this plaintiff the aforesaid indebtedness of said corporation." The other causes of action charge in similar language upon like indebtednesses, also evidenced by promissory notes. Upon the trial, the existence and validity of the indebtedness from the corporation to Bowen stood unchallenged. Defendant Murray, however, attacked the validity of the promissory notes. The trial court found in favor of the plaintiff on all the issues, saving that it found that the promissory notes were not duly or at all authorized by the corporation or the board of directors thereof. But still further the court found that the corporation was indebted to Bowen for moneys loaned to it in the amount sued for, and that Bowen duly assigned to the plaintiff this indebtedness. It found defendant Murray liable as a stockholder, and gave judgment accordingly.

Appellant's attack is directed against the finding of the assignment by Bowen of the debt due the latter from the corporation. If this finding is supported, there is an end to the controversy. Preliminary to the consideration of the question, it should be noted that the invalidity of the corporation's notes arose from the fact that Bowen, creditor of the corporation and payee of the notes, was also a director; that as a director he voted for the issuance of the notes; and that without his vote the issuance would not have been ordered. A second fact is that the amounts mentioned in the notes were not, at the times when they were drawn, the full amounts of the indebtednesses due from the corporation to Bowen, or, phrasing it differently, they were in the nature of orders for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a part of the indebtedness or fund due to the creditor at the time they were drawn.

[1] The evidence, and all of the evidence, touching the equitable assignment by Bowen to plaintiff is that the notes were intended to cover the advancements made by Bowen to the corporation; that Bowen was indebted to plaintiff in the amounts evidenced by the promissory notes; and that he indorsed them to plaintiff and delivered them to plaintiff "for payment of advances." Appellant's contention is that "a bill of exchange or draft payable generally, and not out of any particular fund or debt, will not, before acceptance, operate as an assignment to the holder of the bill or draft of a debt due from the drawee to the drawer." *Lewis v. Traders' Bank*, 30 Minn. 134, 14 N. W. 587; 4 Cyc. pp. 47, 49. "That an order drawn on a fund for a part only does not amount to an assignment." *Moore v. Gravelot*, 3 Ill. App. 442. That "a bill itself, before acceptance, has no tendency to prove the assignment, but the contrary." *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283. In argument it is said that a general indorsement, such as these promissory notes bore, affords no evidence of an assignment of any fund or indebtedness, and that the oral testimony failed utterly to show any such assignment. Finally appellant argues, placing much reliance on *Cashman v. Harrison*, supra, that a deliberate and established effort to assign would have been inefficacious without the acceptance of the debtor, which acceptance, in this case, admittedly was not established. But while *Cashman v. Harrison* does support this view, its declarations are at variance with the earlier decisions of this court. *Whentley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522; *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403. In *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 43, 38 Pac. 518, there was under consideration an inland bill of exchange or draft which had not been accepted. This court said: "An equitable assignment of a specific remand or particular indebtedness may be effected by means of an instrument having the form of an order or bill of exchange drawn by the creditor upon the debtor for its full amount, when such is the intention of the drawer and payee, and it is not essential that the intention to make such assignment should appear on the face of the order or bill of exchange (*Bank of Commerce v. Bogy*, 44 Mo. 13, 100 Am. Dec. 247; 1 *Daniel on Negotiable Instruments* [4th Ed.] § 20; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522), and it was not the intention of this court to overrule the latter case by anything said in the course of the opinion in *Cashman v. Harrison*, 90 Cal. 297 [27 Pac. 283]." Touching the evidence establishing such an equitable assignment, it is said in *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary.

If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." We have before us, then, a case where the bona fide creditor of a corporation takes from it promissory notes evidencing its debt to him, in the belief of the validity of the notes, and passes them on in due course of business to his creditor; the notes being given to, and received by the indorsee in payment of the indorser's indebtedness to the indorsee. The assignments of the notes, so far as Bowen and the plaintiff were concerned, carried with them the original indebtednesses. *Redington v. Cornwell*, 90 Cal. 63, 27 Pac. 40; *Knowles v. Sandercock*, 107 Cal. 640, 40 Pac. 1047; 7 Cyc. 816. The intent of the parties—of Bowen on the one hand to assign and of the plaintiff, on the other to accept the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment.

[2-4] First, since no precise form of words or writing is necessary to the establishment of an equitable assignment, it mattered not whether the notes were or were not the valid obligations of the corporation. They still afforded evidence of what, as between themselves, the plaintiff and the witness Bowen proposed to do and did with the indebtednesses owed to the latter by the corporation. Second, as we have seen, the acknowledgment and acceptance by the corporation of the assignment of the debt of Bowen to plaintiff was not essential to the validity of the assignment. And, third, while authority is divided upon the question of the equitable assignability of a portion of a debt or fund before acceptance, the sounder view we take it is that expressed in 1 *Daniel on Negotiable Instruments*, § 23, and upon this point we cannot do better than to quote the learned author at length: "This doctrine is clearly correct in so far as it applies to legal assignments. The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action and leave a balance due the creditor. He cannot sue in the creditor's name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that a nonnegotiable order for part of a fund operates as an equitable assignment pro tanto. Clearly this is the case when it has been accepted or assented to by the drawee. And when it has not been accepted, our own view is this: That a nonnegotiable order for part of a fund does

operate as an equitable assignment pro tanto as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And, if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer or by legal process served upon the drawee. Mr. Justice Story has stated the principle, as we conceive it, more correctly in his treatise on Equity Jurisprudence than in the cases hitherto cited, and he there declares that, while a draft for part of a fund operates no assignment at law, the same principle applies in equity to a draft for part of a fund that applies to a draft for the whole, and that 'in each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it.' We can perceive no sufficient reason for excluding a bill for a part of a fund, whether it be negotiable or not, from operating as an equitable assignment within the limitations of the text. It would only carry out to its legitimate sequence the theory of the bill."

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

**GJURICH v. FIEG.** (Sac. 1965.)  
(Supreme Court of California. Jan. 3, 1913.  
Rehearing Denied Jan. 31, 1913.)

**1. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT.**

A verdict attacked for insufficiency of evidence cannot be interfered with on appeal, where there is substantial evidence in its support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**2. WORK AND LABOR (§ 7\*)—IMPLIED CONTRACT.**

While ordinarily the law implies a promise to pay from the rendition and acceptance of services, the presumption may be rebutted by the existence of meretricious relations between the parties, which raises a presumption to the contrary.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.\*]

**3. WORK AND LABOR (§ 28\*)—ACTIONS—EVIDENCE—SUFFICIENCY.**

In an action for work and services, evidence held sufficient to support a finding for defendant on the ground that no agreement to pay had ever been made.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 55; Dec. Dig. § 28.\*]

**4. WITNESSES (§ 275\*)—EXAMINATION—CROSS-EXAMINATION.**

In an action for compensation for services rendered, where plaintiff on direct examination testified that he had worked for defendant under circumstances from which an obligation on her part to pay for such services could be implied, cross-examination as to his sexual relations with her was proper, tending to rebut this implication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 928, 967-975; Dec. Dig. § 275.\*]

**5. WORK AND LABOR (§ 27\*)—ACTIONS—EVIDENCE.**

In an action for work and labor, evidence of the sexual relations between defendant and plaintiff, while meretricious, is admissible to rebut the presumption that compensation was intended, arising from the rendition of services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

**6. APPEAL AND ERROR (§ 882\*)—ESTOPPEL TO ALLEGE ERROR.**

An unsuccessful party cannot complain on appeal of the improper admission of evidence offered by himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**7. APPEAL AND ERROR (§ 1046\*)—REVIEW—HARMLESS ERROR.**

Statements by the court as to findings in a former action between the parties are harmless, where the findings subsequently admitted showed the statements to be correct in fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.\*]

**8. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL—SCOPE OF ARGUMENT.**

Where the findings in a former action between the parties are admitted in evidence, counsel may refer to the matters covered by them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

**9. WORK AND LABOR (§ 30\*)—ACTIONS—INSTRUCTIONS.**

In an action for work and labor, where defendant contended that the relations of the parties was such that no inference that the services had been performed for pay could be drawn, instructions might properly state other relations from which an inference that the services were to be performed gratuitously could be drawn.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**10. WORK AND LABOR (§ 30\*)—ACTIONS—INSTRUCTIONS.**

In an action for services, where defendant denied indebtedness and employment, instructions referring to the sexual relations of the parties were proper; such relations being material to that issue.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**11. WORK AND LABOR (§ 30\*)—TRIAL—INSTRUCTIONS.**

In an action for work and labor, where defendant contended that her sexual relations with plaintiff should be considered only in determining whether a claim for wages existed, instructions that sexual favors would not constitute a payment for services were properly refused.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**12. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR.**

In an action for services, improper instructions on the statute of limitations are harmless,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

where the jury found there was no liability whatever on the part of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Department 1. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Emanuel Gjulich against Fanny Fleg. From a judgment for defendant, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Webster, Webster & Blewett, of Stockton, for respondent.

SLOSS, J. The action was brought to recover a balance of \$5,000 claimed to be due to plaintiff from defendant "upon an open book account and an open, mutual, and current account" for work and services rendered by plaintiff at defendant's request, "for which said services the defendant promised and agreed to pay plaintiff the said balance of said account and the amount so alleged to be due thereon." The answer denied the indebtedness. A trial before a jury resulted in a verdict in favor of the defendant. The plaintiff appeals from the judgment, bringing up the evidence under the method provided in section 953a of the Code of Civil Procedure.

[1-3] 1. There is no merit in the contention that the verdict is not sustained by the evidence. There was testimony tending to show that in 1897 the defendant, pursuant to plaintiff's advice, purchased a small tract of land a few miles from Stockton, and established a roadhouse and saloon there. Thereupon she and the plaintiff took up their residence upon the premises and lived there for some 10 years. During this time the plaintiff was engaged in working on the place, devoting his time to the care of the grounds, planting of trees and vines, construction of arbors, building additions to the house, and other things. The defendant tended bar and took care of the saloon. From the outset of their residence on the premises, and for a number of years thereafter, the parties occupied the same bedroom, living together as husband and wife. An offer of marriage had been made by plaintiff to defendant and accepted by her. No marriage was ever solemnized, however. These relations commenced and continued without any specific agreement for the payment of wages by defendant to plaintiff. Gjulich was given money, from time to time, for the purpose of purchasing articles and supplies required on the place, and out of this money he retained what he desired for his own use.

The foregoing statement is based, in large part, upon the testimony of the defendant. In many particulars, the evidence offered by plaintiff was in conflict with that of the defendant. But where the verdict is attacked for insufficiency of evidence, our power

begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which, in and of itself, would support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. For this reason we attach no importance to an alleged written agreement by the defendant to pay plaintiff \$3 per day. The defendant denied the execution of the writing, and her denial was enough to authorize the jury to find, as it impliedly did, that the agreement relied upon had never been made. The same observation may be applied to the claim of an antecedent oral agreement to pay wages.

The facts, as hereinabove stated, clearly justified the verdict. Ordinarily, no doubt, the law will imply a promise to pay for services rendered and accepted. But this rule is founded "upon a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby." *Moulin v. Columbet*, 22 Cal. 508. Thus, where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services. *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *Murdock v. Murdock*, 7 Cal. 513; *Frier-muth v. Frier-muth*, 46 Cal. 42; *Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31. "The question is one that must be determined on the circumstances of the particular case; the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered." *Crane v. Derrick*, *supra*. These principles were embodied in the instructions to the jury. The general verdict in favor of the defendant carried with it implied findings that there had been no express agreement, oral or written, for compensation, and that, in view of the circumstances under which the parties had gone to the land and lived and labored together there, the plaintiff had rendered services without any expectation of pecuniary payment therefor. These were legitimate conclusions from the evidence. The testimony of the defendant was direct to the point that there had been no express agreement for compensation. And, if that were so, the fact that the parties had gone to the premises to live together, and had lived together as husband and wife, afforded a sufficient basis for the inference that compensa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—30.

tion in money for any services rendered was not contemplated. The relation existing, although meretricious, may be considered as illustrating the purpose and expectation with which work was done by each.

[4] 2. The court did not err in permitting the defendant, on cross-examination of the plaintiff, to inquire concerning his cohabitation with the defendant. The plaintiff, on direct examination, had testified that he had worked for defendant under circumstances from which an obligation to pay for his services would be implied. The relations between the parties had a tendency to rebut this implication, and formed, therefore, a proper subject for cross-examination. The questions, then, did not relate to collateral matters, and the defendant was not, as is claimed, bound by plaintiff's answers, and thus precluded from asking further questions for the purpose of impeachment.

[5] The same reasoning on which the cross-examination of plaintiff is held to be proper justifies the rulings of the court permitting the defendant to testify concerning her relations with plaintiff.

[6] 3. In 1907 the defendant conveyed the premises to plaintiff. Thereafter she brought an action to set aside the conveyance, alleging that she had been induced to execute it by means of fraud practiced by the plaintiff. The value of the property was estimated to be \$2,000. The plaintiff, in order to account for his failure to credit the defendant with this transfer as a payment of \$2,000 on his claim, offered in evidence the judgment rendered in the action brought by defendant against him, and setting aside the said conveyance. The judgment was not then final, although it has since been affirmed in this court. *Fieg v. Gjurich*, 127 Pac. 49. It is now argued that the judgment was not admissible because the cause in which it was rendered was still pending on appeal. But of course the appellant, having offered the evidence himself, cannot complain of its admission.

It is also claimed that the court erred in admitting the findings upon which the judgment in *Fieg v. Gjurich* was based. But this evidence, too, was offered by the plaintiff. He first offered the judgment alone. The defendant insisted that the entire judgment roll should go in. The court expressed the view that all should be offered. Thereupon the plaintiff, acting, as his counsel said, "under the advice of the court," offered the findings and the decree. If the findings were not admissible, the plaintiff waived his right to object by offering them himself. He might have preserved his point by insisting upon his offer of the judgment alone and taking an exception to a ruling excluding it. But, instead of so doing, he offered the findings himself.

[7] In the course of a prior colloquy, in which counsel were seeking to agree on a

stipulation concerning the former judgment, the court stated its recollection to be that the findings had been that the deed was obtained by fraud. Inasmuch as the findings themselves, showing the court's recollection to be accurate, were subsequently admitted, the plaintiff could have suffered no prejudice from this remark.

[8] It was not misconduct for defendant's counsel, in arguing to the jury, to refer to the matters covered by the findings which were before the jury.

[9] 4. We see no error in the instructions. As we have already intimated, they covered with fullness and accuracy the propositions of law governing the principal issue in the case. It was not improper for the court to refer to the case of a son working for a father, or a woman for a supposed husband. These were mere illustrations of some of the circumstances which would justify an inference that services had been rendered gratuitously, and were appropriate as aids to the jury in determining whether compensation was expected in the case at bar, which was in some degree parallel to those suggested.

[10] It is argued that instructions referring to the alleged cohabitation of the parties were erroneous because they dealt with matters that had not been pleaded. But the mere denial of indebtedness and employment raised an issue on which, in the absence of an express agreement, the relations of the parties became material.

[11] The court refused to charge, as requested by plaintiff, that sexual intercourse would not constitute payment of plaintiff's claim for wages. This instruction had no application to any issue in the case. The defendant did not rely upon the cohabitation as payment. Her contention was merely that her relations with plaintiff were to be considered in determining whether a claim for wages had ever existed. The offered instruction could only have served to confuse the jury.

[12] Certain instructions relative to the statute of limitations are criticised by plaintiff. Their effect was to limit any recovery to the amount earned in the statutory period next preceding the commencement of the action. We think the instructions were correct, but the verdict found makes it unnecessary to discuss the particular objections urged. The jury found, in effect, that there never had been any liability on defendant's part to pay wages to plaintiff. It is therefore immaterial whether the court was right or wrong in directing them that, if they found a liability, they could award wages for only a given time. There are no other points of sufficient consequence to require notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

**RUSSELL v. RUSSELL. (Civ. 1,009.)**

(District Court of Appeal, Third District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 24, 1913.)

**1. DIVORCE (§ 303\*)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE—ABUSE OF DISCRETION.**

Where the wife obtained a divorce for extreme cruelty, and the parties agreed that each should have the custody of their son for six months in each year, which interfered with his school attendance, there was no abuse of discretion in a modification of the decree so as to award the custody of the child, then 10 years old, to the father, the child to visit and be visited by his mother at reasonable times, to be set by the court, and to be with her during all vacations.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

**2. DIVORCE (§ 303\*)—CUSTODY OF CHILD—MODIFICATION OF DECREE—CONTRACTS BETWEEN PARTIES.**

Where a divorce decree is entered, and the custody of a child is given to each parent for six months out of the year, in accordance with an agreement between such parents, such decree does not render such agreement final and binding, but the decree is still subject to modification, since the power of the court to look after the interest of the child cannot be abridged.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

**3. PARENT AND CHILD (§ 2\*)—CUSTODY OF CHILD—"TENDER YEARS."**

It does not follow from Civ. Code, § 246, subd. 2, providing as between parents that, if a child is of tender years, the mother should have its custody, and, if of the age to require education and preparation for labor, the father should have it, and Code Civ. Proc. § 1750, providing that a child could not choose its guardian until it was 14 years of age, that a child is of "tender years" within Civ. Code, § 246, until it is 14 years of age, but sex and physical development are to be considered, and it cannot be said that as a matter of law a child 10 years old is a child of tender years.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6911.]

**4. DIVORCE (§ 289\*) — CUSTODY OF MINOR CHILD—POWER OF COURT—STATUTORY PROVISIONS.**

Provisions of the Civil Code relating to guardians and wards do not control the power given the court under Civ. Code, § 138, in actions for divorce, to make such order for the custody, etc., of minor children as may seem proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. § 289.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Divorce action by Zelia B. Russell against Philip N. Russell. From an order modifying the final decree, affecting the custody of a child, the plaintiff appeals. Affirmed.

Raleigh E. Rhodes, of Madera, for appellant. M. K. Harris, of Fresno, for respondent.

CHIPMAN, P. J. This is an appeal from an order made after final judgment in a

divorce proceeding modifying the final decree affecting the custody of a minor child.

An interlocutory decree of divorce was duly made and entered July 1, 1909, in favor of plaintiff on the ground of extreme cruelty, which was made final on July 2, 1910. Pending the trial of the cause the parties entered into an agreement concerning their property rights, in which they also agreed that each should have the "care, custody, and maintenance of" their minor child, Dewitt Russell, six months of each year, during his minority. The agreement did not designate the months during which each was to care for the child. In the final decree the court adjudged as follows: "That the plaintiff is to have, and she is hereby awarded, the care, custody, and maintenance of said minor child (then eight years old) six months in each year of his minority; and that the defendant is to have the care, custody, and maintenance of said minor child for a like period of six months in each year." It appears that thereafter, to wit, about July 5, 1910, plaintiff married Charles Rogers, and now resides with him in the city and county of San Francisco; that since said interlocutory decree said minor child has resided with plaintiff during the months of July, August, September, October, November, and December, and the balance of the year with defendant in the city of Fresno.

Defendant gave notice to plaintiff that on June 5, 1911, he would move the court to modify the decree in said action "so that the custody, maintenance, and education of the minor child of said parties \* \* \* be awarded to defendant, with the right of said minor child to visit and be visited by plaintiff at such reasonable times as the court may determine, upon the ground that it is to the best interests of said minor child that he be placed in the care and custody of said defendant." The motion was heard on affidavits submitted by the parties, and the court made the following order: "It is hereby ordered and adjudged that said motion of defendant be granted; and it is ordered that the said decree in said action heretofore filed herein be and the same is so modified that the custody, maintenance, and education of said minor child be awarded to defendant, with the right of said minor to visit and be visited by plaintiff at such reasonable times as the court may determine, and the court does further order and adjudge that said minor child shall visit with and be with said plaintiff during all vacations, from the end of all school terms to the beginning of the succeeding school term of the school where said minor shall attend, and during such other time or times as may be reasonable, provided, however, that the actual attendance of said minor at school shall not be unnecessarily interfered with by such visits."

[1] There was no evidence that either

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



party was an unfit person to have the care and custody of the child, and, as to the question whether it would be to the best interest of the child to be chiefly cared for by the defendant, the evidence was such as to leave it to the sound discretion of the court which we cannot say was abused. It appeared that, under the existing arrangement, the child was shifted from San Francisco to Fresno during the school term which caused a change of teachers and course of study, to the disadvantage of the pupil. There was some evidence submitted by plaintiff that while in the care of the defendant the child had been neglected in some respects, and had not received the personal attention or discipline which his health and mental and moral welfare demanded. But this was successfully met by a countershowning made by the depositions of persons familiar with the treatment the child had received from defendant while in his custody. It was urged by plaintiff that the ground of divorce was such as to have called for a refusal to make the order. We do not know what facts were adduced at the trial which justified the court in finding the defendant guilty of extreme cruelty; nor can it be assumed that they were of such a character as to show defendant to be an improper guardian of the child. The parties agreed that each should share equally, during the minority of the child, in his care, custody and maintenance. It is not likely that plaintiff would have voluntarily agreed to the arrangement if she had thought the defendant's treatment of her in any way disqualified him to have the care and custody of their child. Nor is the child of such tender age (he is now past ten years of age) as to imperatively require the attention of a mother, or that his father, as the evidence shows his household to be constituted, may not give the child needed attention. In short, there was evidence such as justified the decision of the court that it is for the best interests of the child that he should remain with his father and under his direction during the school year.

[2] But plaintiff makes certain contentions independent of the questions of fact above described. It is claimed that the decree as to the custody of the child, having confirmed the agreement of the parties in respect of the custody of the child, is final and cannot be modified or changed, and also that the agreement is a binding contract irrespective of the decree. The precise question here involved arose, under somewhat similar conditions, in the case of *Black v. Black*, 149 Cal. 224, 86 Pac. 505. In that case the child was seven years old, and its custody was awarded to the mother. But this does not change the principle enunciated in the decision. The court said: "A decree based upon such an agreement as to custody is simply provisional. The court is not required to award the custody of the children in conformity to it. It does so only because the parents, in view

of a judicial separation and solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them in the future, and an agreement prompted by these considerations is generally approved by the court and made part of the decree. The decree, however, made in pursuance of the agreement, is subject to the power of modification authorized by the statute. The children are not parties to the action for divorce and the jurisdiction which the statute confers on the court to be exercised from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties made pending the divorce litigation which the decree follows, or by the action of the court in originally approving and adopting it."

[3] Upon the question of the power of the court under section 138, Civil Code, see *Crater v. Crater*, 135 Cal. 633, 87 Pac. 1049; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. Appellant insists that subdivision 2 of section 246 of the Civil Code should govern the action of the court. It provides as follows: "(2) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as matter of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." The next step in the argument is that a child under the age of 14 is a child of tender years because section 1750 of the Code of Civil Procedure provides that, if the child is under that age, the court may appoint his guardian, and, if of the age of 14 years, "he may nominate his own guardian, who, if approved by the court, must be appointed accordingly." The conclusion contended for by no means follows from the sections referred to. The Legislature has not declared that a child under the age of 14 years is to be treated by the courts as a child of tender years within the meaning of those terms as used in section 246 of the Civil Code. The sex is to be considered as is also the physical development. There cannot be any fixed and certain age of minority which, in all cases and for all purposes, can be said to constitute a child of "tender years."

It is not claimed that the child here requires "preparation for labor and business," and hence appellant's picture of the horrors of child labor, too often seen, is inapt. The claim here of both parents is that the child "is of an age to require education" and to better promote this object seems to be their chief concern.

[4] We do not think the sections found in the provisions of the Civil Code relating to guardians and wards in any wise control the power given the court under section 138, Civil Code, in actions for divorce, to "make

such order for the custody, care, education, maintenance and support of such minor children as may seem necessary and proper."

The order is affirmed.

We concur: HART, J.; BURNETT, J.

**MYERS v. CHITTINA EXPLORATION CO. et al. (Civ. 1,068.)**

(District Court of Appeal, First District, California. Nov. 27, 1912.)

**TROVER AND CONVERSION (§ 49\*)—CORPORATE STOCK—DAMAGES—ESTOPPEL.**

In an action for conversion of corporate stock, the measure of damages is the market value of the stock, with interest and incidental damages incurred in the pursuit of the property, and the defendant is not estopped to deny that the shares were not worth their par value.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 264; Dec. Dig. § 49.\*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by C. B. Myers against the Chittyna Exploration Company and others. Judgment for plaintiff, and part of the defendants appeal. Reversed.

W. C. Graves and J. S. Spilman, both of San Francisco, for appellants. Booth & Bartnett and W. J. Bartnett, all of San Francisco, for respondent.

**KERRIGAN, J.** This is an action brought by the plaintiff against the defendants to recover the value of 10 shares of the capital stock of the Chittyna Exploration Company, a corporation, sold to the defendant Jennie G. MacKinley under an assessment alleged in the complaint to be invalid.

The plaintiff recovered judgment for \$1,000, found by the court to be the value of said shares, and the appeal is by the defendant corporation and defendant MacKinley (the two of the defendants against whom the judgment was rendered), and is from the judgment and order denying their motion for a new trial.

Appellants have filed a brief in support of their appeal, but no answer thereto has been made by the respondent. From the record it appears that in the month of May, 1899, one Allis was the owner and holder of 10 shares of the capital stock of the corporation defendant, represented by a certificate; that while he was thus the owner he pledged the same to plaintiff to secure an indebtedness of \$4,500; that thereafter this stock was sold to pay an assessment which had been levied thereon by a resolution of the board of directors of the corporation.

The complaint is in two counts, the first of which proceeds upon the theory that the levying of the assessment and sale of the stock were void, and the second merely al-

leged that the defendants converted the shares to their own use.

The case was tried upon the theory that there had been a conversion of the stock by the defendants, for which the plaintiff was entitled to recover its reasonable value, which he alleged to be \$3,000. Testimony was admitted on behalf of the plaintiff tending to show that the 10 shares of stock in controversy were worth between \$2,000 and \$3,000. But when the defendants attempted to rebut this testimony, and show that the stock was worth in fact not more than the amount of the assessment, to wit, \$10 per share, the court refused to permit them to do so, holding that they were estopped to denying that the shares were worth their par value, and on this theory the court found the stock to be worth \$1,000, and rendered judgment for that sum against the appellants.

The refusal of the court to receive the proffered testimony was error. There is no principle of estoppel applicable to any phase of this case, and the law we think is plain that, in an action for conversion, the measure of damages is the value of the property at the time of the conversion, with interest, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in the pursuit of the property. Civ. Code, § 3336.

The judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

**PEOPLE v. MEASOR. (Cr. 262.)**

(District Court of Appeal, Second District, California. Nov. 23, 1912.)

**CRIMINAL LAW (§ 1087\*)—APPEAL—RECORD.**

The record on appeal must show that notice of appeal has been given as provided by Pen. Code, § 1247.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Kate Measor was convicted of crime, and she appeals. Affirmed.

Henry W. Nisbet, of San Bernardino, and Dick Foye Harding, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

**ALLEN, P. J.** At the calling of the calendar for the October term, upon which calendar this cause appeared, attention of counsel for appellant was called to the fact that the record failed to disclose that notice had been given as required by section 1247 of the Penal Code, without which notice, by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the provisions of said section, an appeal was ineffectual. It was then stated by counsel that such notice had been given, and a diminution of the record was suggested and permission given to the defendant to supplement her record with a copy of such notice. No oral argument was made, but counsel for defendant obtained 10 days' time within which to file points and authorities in support of the appeal. No points and authorities have been filed; the defect in the record has not been cured; and in addition, in order that injustice might not be done the defendant by reason of the neglect of her counsel, we have taken the trouble to examine the record and we find no prejudicial error therein.

The judgment is therefore ordered affirmed.

We concur: JAMES, J.; SHAW, J.

**MENTRY et al. v. BROADWAY BANK & TRUST CO. et al.** (Civ. 1,166.)

(District Court of Appeal, Second District, California. Nov. 22, 1912. Rehearing Denied by Supreme Court Jan. 20, 1913.)

**1. QUIETING TITLE (§ 21\*)—"ADVERSE CLAIM"—WHAT CONSTITUTES.**

Under Code Civ. Proc. § 738, authorizing an action by any person against another claiming an estate or interest in real property adverse to him for the purpose of determining such adverse claim, a mortgage is a claim adverse to the interest of the owner, and the owner may bring an action to determine the amount and extent of the mortgage lien.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 51-53; Dec. Dig. § 21.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 223; vol. 8, p. 7567.]

**2. QUIETING TITLE (§ 19\*)—CONDITIONS PRECEDENT.**

A tender of the amount due on the mortgage is not a condition precedent to an action by the mortgagor against the mortgagee to determine the amount and extent of the lien under Code Civ. Proc. § 738, authorizing actions to determine adverse claims.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 48; Dec. Dig. § 19.\*]

**3. MORTGAGES (§ 256\*)—ASSIGNMENT—EQUITIES—AVAILABILITY.**

Where a mortgagee, who had not advanced to the mortgagor the full face value of the mortgage, assigned it for its face value to a person, who made no inquiry of the mortgagor, the assignee had a lien on the premises only for the amount actually advanced by the original mortgagee, since an assignee failing to inquire of the mortgagor as to the validity of the mortgage, the amount due, and defenses thereto takes subject to all infirmities or objections which could have been set up against the original mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 678-681, 688; Dec. Dig. § 256.\*]

**4. ESTOPPEL (§ 110\*)—PLEADING AS DEFENSE—NECESSITY.**

An assignee of a mortgage, who, when sued by the mortgagor for a determination of the amount and extent of the mortgage lien, knew the facts which she claimed estopped the mortgagor from denying that the original mortgagee advanced the full face value of the mort-

gage, but failed to plead such facts in her answer, could not rely on estoppel as a defense or introduce evidence tending to establish an estoppel.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 300; Dec. Dig. § 110.\*]

**5. ESTOPPEL (§ 55\*)—RELIANCE ON ACTS—NECESSITY.**

Where a mortgagee at the time of an assignment of the mortgage had not advanced the face value of the mortgage, but thereafter promised to do so, and the mortgagor then promised to notify the assignee if the mortgagee failed to advance the balance, the mortgagor's promise did not create an estoppel in favor of the assignee, unless she not only changed her position, but was injured by reliance on such promise.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 136-141; Dec. Dig. § 55.\*]

**6. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.**

Where a mortgagee, who had not advanced to the mortgagor the face value of the mortgage, assigned it, and the mortgagor subsequently brought an action against the assignee to determine the amount of the lien, the admission of the mortgagor's testimony that, because of the mortgagee's failure to advance the agreed amount, he was compelled to borrow money elsewhere, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.\*]

**7. TRIAL (§ 397\*)—FINDINGS—CONFORMITY TO ISSUES.**

Where there was no issue relative to estoppel raised by the pleadings, a finding relative thereto was unnecessary.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by May Mentry and others against the Broadway Bank & Trust Company and others. From the judgment and an order denying a new trial, defendants appeal. Affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellants. Hutton & Williams, of Los Angeles, for respondents.

ALLEN, P. J. The action was one instituted by plaintiffs to determine adverse claims to real property described in the complaint the ownership and seisin of which was alleged to be in plaintiffs. Defendants and appellants answered, each alleging that on October 16, 1908, plaintiffs executed to one L. E. Jones their promissory note for the sum of \$5,500, copy of which is set out and made a part of the answer, and as a part of the same transaction, to secure the payment of such note, executed a mortgage in writing upon the property described; that thereafter, on October 24, 1908, said Jones assigned and transferred said note and mortgage to the Broadway Bank & Trust Company, after which date, to wit, on November 19, 1908, defendant Fiske, through defendant Forrester, her agent, purchased said note, paying the face value thereof, and the same was assigned and transferred to said Fiske. It is further averred that said Fiske

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is the owner and holder of the note and mortgage, and that no portion of the mortgage indebtedness has been paid, except the sum of \$220 interest paid thereon April 18, 1909, and defendants asked that the mortgage be declared a first lien upon the property, and that plaintiffs be decreed to hold the title subject thereto. The defense is thus seen to have been founded upon a written instrument, copy whereof is contained in the answer, and, plaintiffs not denying its genuineness and due execution under oath, such genuineness and due execution of the instrument set out is thereby admitted. Under this admission of plaintiffs, and under the issues presented, the trial court proceeded to a hearing of the cause and found the ownership and seisin in plaintiffs, the execution of the note and mortgage as in the answers alleged, and the ownership thereof in said Fiske. The court further found that the only adverse interest held by defendants and appellants was that of an incumbrance upon the property created and established by the said note and mortgage, the amount of which incumbrance the court found to be the sum of \$2,500, with interest thereon, and by its judgment decreed plaintiffs to be the owners and seised of the premises subject to the lien of defendants for \$2,500, with interest from October 16, 1908, less a credit of \$220 paid on account of interest, which interest was to be computed according to the terms and provisions of the note and mortgage. Defendants and appellants moved for a new trial, which was denied, and they appeal from the judgment and order upon a statement of the case.

[1, 2] It is appellants' first contention that the action authorized by section 738 of the Code of Civil Procedure, being one in the nature of an action to quiet title, cannot be maintained by an owner as against a mortgagee without first, and as a condition precedent, tendering a return of the amount received and due upon the mortgage. We are of opinion that the conditions precedent necessary in order to entitle a party to rescind a contract in toto are not required in an action of the character here sought to be maintained. One owning or being possessed of real property may have a court determine the amount and extent of a lien actually existing under the provisions of section 738 without any tender or offer to pay the amount admitted to be due. Section 738 authorizes an action to be brought by any person against another who claims an interest in real property adverse to him for the purpose of determining such adverse claim. "It is settled by the decisions that the owner of any estate or interest in land of which the law takes cognizance is entitled under this statute to have any claim adverse to his interest, such as it is, determined." *German-American Sav. Bank v. Gollmer*, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (N. S.) 1066. An

incumbrance by way of mortgage is a claim adverse to the interest of the owner, and we think may be determined under the statute above cited. The facts of the case as presented by the record are as follows: Plaintiffs applied to Jones for a loan of \$5,500, which he agreed to make when good title was ascertained. The note and mortgage were signed and left with a notary. Jones obtained possession of the note and mortgage, and, procuring a certificate of title showing an incumbrance of the mortgage only, hypothecated the note and mortgage with the Broadway Bank & Trust Company as security for a loan of \$4,900. At that time Jones had only advanced to the mortgagors about \$1,250 of the amount of the mortgage. The bank within a few days thereafter sold the note and mortgage to defendant Fiske, and of the proceeds discharged the Jones note, for which said note and mortgage were held as collateral. Thereafter, from time to time, Jones advanced to the mortgagors an additional sum of \$1,250, and no more, and in February, 1909, Jones absconded, and has ever since been a fugitive from justice. Plaintiffs had no knowledge of the transfer of the note and mortgage until shortly after the 2d of December, 1908, and thereafter, on the 24th of December, one of the plaintiffs called upon Forrester, the agent of Fiske, and made known to him the fact of Jones' failure to advance the full amount of the mortgage. The agent and Mentry then visited Jones, and Jones promised to advance the balance called for by the mortgage before 2 o'clock that day. The agent told Mentry that, if Jones did not pay it, to let him know. Mentry gave the agent no further notice of Jones' default, and afterwards in April paid the interest due upon the entire amount of the mortgage. Subsequently, in June, 1909, the attorneys for all three of the plaintiffs notified the agent Forrester and defendant Fiske that the mortgage was obtained criminally and possession improperly secured, and they demanded the return of the note and mortgage, which was refused and this action was brought in October following. The record shows that after the 24th of December, the date of the interview between Jones, Mentry, and Forrester, Jones had on deposit with the bank in February, 1909, the sum of \$1,212.53, which he subsequently at various times drew out, and his account was balanced.

[3] It is appellants' further contention that, under the facts presented, the plaintiffs are estopped to claim that the note and mortgage are for less than the full amount. It is settled law in this state that "one about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or

set-offs to interpose against it. If he neglects to do this, he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed." *Briggs v. Crawford*, 162 Cal. 124, 121 Pac. 381. This rule insures to the plaintiffs in this case the right, notwithstanding the assignment of the note and mortgage, to every defense which they might have made had Jones retained the mortgage. It goes without saying that, if Jones had sought to foreclose the mortgage, they could have defended against it to the extent of his default in the advancements, and that the only lien which he could have had under a decree of foreclosure would have been as to the actual amount of money advanced by him, which was the sum the court in this case decreed to be a lien in favor of Mrs. Fiske, the purchaser.

[4] Mrs. Fiske had knowledge and notice long before this suit was instituted of the actual condition of affairs. She knew that Jones had not advanced the amount of money requisite, and that plaintiffs would claim a defense thereto because of such failure. Having such knowledge, she did not plead in her answer, nor did the bank, any facts by way of an estoppel. "That a party who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so, is the recognized rule in this state." *Fritz v. Mills et al.*, 12 Cal. App. 117, 106 Pac. 726, and authorities there cited. This rule suffers an exception only in instances where under our system of pleading no opportunity is afforded for a pleading wherein an estoppel may properly be pleaded. *Ahlens v. Smiley*, 11 Cal. App. 343, 104 Pac. 997. The defendants having cognizance, then, of the character of the defense which plaintiffs claimed to the mortgage, it was their duty, had they desired to avail themselves of any facts constituting an estoppel, to have pleaded the same. The opportunity so to do was afforded and their neglect precludes them from the introduction of evidence tending to establish an estoppel, or from the court's consideration of evidence in that direction. This we say is the rule were it even assumed that the facts of the case are such as would have estopped the plaintiffs from asserting their claim of a failure of consideration in part.

[5] It will be observed that Mrs. Fiske did no act or thing based upon any promise made by Mentry to her agent. That such a promise should operate as an estoppel, it must be made to appear, not only that she changed her position, but that relying upon such promise an injury resulted by reason thereof. There is no averment in the answer, nor in fact is there any evidence in the record tending to show a reliance upon Men-

try's promise, or that by reason of such reliance she was prevented from taking any steps necessary for her indemnification, or that any steps which she might have taken could have so resulted. There can be no inference from the facts that the appellants changed their position by reason of the neglect of Mentry to give the notice, or of any delay in instituting the action, unless it be assumed that such notice if given would have afforded them an opportunity to have recouped by an action against Jones, or the bank as a guarantor, the amount of the loss suffered. But, as we have said before, there was no plea of any estoppel, or of any facts supporting the same, and hence it was not proper for the court to consider them.

Appellants' citation of authorities to the effect that the acknowledgment of a deed is a public declaration of a fact upon which all persons may in good faith act and which the grantor is estopped from attacking can have no application in this state, where the question involved relates to a mortgage which is but a lien and incumbrance upon the property, and, were its force even conceded in that direction, our Supreme Court has by the decisions hereinbefore cited declined to observe the rule.

[6] We see no prejudicial error in the action of the court permitting the plaintiffs to show that they had been compelled to borrow money elsewhere by reason of Jones' failure to advance the amount agreed. Assuming the incompetency of such evidence, it could not in any view of the case have prejudiced the defendants.

[7] Appellants' final contention is that the court failed to find upon a material issue relative to an estoppel. As we have before attempted to show, there was no issue with relation to an estoppel and no finding was necessary.

We see no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

NELLIS v. JUSTICES' COURT OF LOS ANGELES TP. et al. (Civ. 1,218.)

(District Court of Appeal, Second District, California. Nov. 22, 1912.)

1. JUSTICES OF THE PEACE (§ 80\*)—PROCESS—FORM AND REQUISITES—"ORDER."

Under Code Civ. Proc. § 102, as added by St. 1911, p. 442, providing that all legal processes in actions or proceedings in the justices' court of Los Angeles township shall be issued by the clerk on the order of the presiding justice, the clerk cannot issue the summons in an action unless, after the commencement of the action, the presiding justice makes an order in writing directing him to do so, and a general order to the clerk to sign all legal process that is necessary to be issued is insufficient, since an "order" in a legal sense means a decision given in an action pending during the progress thereof, and is defined by Code

Civ. Proc. § 1003, as every direction of a court or judge made or entered in writing, other than a judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 251-257; Dec. Dig. § 80.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5017-5023; vol. 8, p. 7739.]

## 2. JUSTICES OF THE PEACE (§ 80\*)—PROCESS—FORM AND REQUISITES.

Under Code Civ. Proc. § 100, as added by St. 1911, p. 442, providing that the original process in all actions or proceedings begun in the justices' court of Los Angeles township shall be returnable and the party summoned required to appear before the presiding justice or one of the other justices to be designated by the presiding justice, the name of the justice in whose department the process is returnable, and before whom defendant is required to appear, should be designated in the summons, and a summons commanding defendant to appear and answer before the "justices' court" is insufficient to give jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 251-257; Dec. Dig. § 80.\*]

## 3. PROCESS (§ 1\*)—"SUMMONS"—NATURE.

A summons is the process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6787-6788; vol. 8, p. 7810.]

## 4. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN DEFAULT JUDGMENT.

A substantial compliance with statutory provisions as to the form of the summons is mandatory, and without such compliance the court does not acquire jurisdiction to render a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Petition by T. E. Nellis for a writ of review directed to the Justices' Court of Los Angeles Township and another. From a judgment in favor of respondents, the petitioner appeals. Reversed, with directions.

Edward Judson Brown, of Los Angeles, for appellant. Robert C. Fairall, of Los Angeles, for respondents.

SHAW, J. Petitioner obtained a writ of review from the superior court, the purpose of which was to annul the action of the justices' court of Los Angeles township (created by act of the Legislature in adding to the Code of Civil Procedure six new sections numbered 99 to 102b, inclusive, approved March 23, 1911, Stats. 1911, p. 442) in rendering judgment by default against him in a certain action brought in said justices' court, wherein the Pico Heights Lumber Company was plaintiff and petitioner defendant. Upon the return to the writ and after a hearing thereon, the court denied the relief prayed for and rendered judgment in favor of respondents herein. From this judgment, petitioner has appealed.

[1] Appellant contends that the summons

issued and served upon him as defendant in said action was insufficient to give the court jurisdiction. The summons is silent with reference to anything showing that the same was issued upon an order of the presiding justice, as required by section 102 of the Code of Civil Procedure, which provides that "all legal processes of every kind in actions or proceedings in said justices' court shall be issued by the said justices' clerk upon the order of the presiding justice." While the record of the justices' court contains nothing showing that the presiding justice at any time made an order directing the clerk to issue the process, an affidavit was presented at the hearing wherein it is stated that, some 10 months prior to the commencement of the action, the presiding justice ordered the clerk to sign all legal process that was necessary to be issued in and about the business of said justices' court. Respondents contend that this affidavit shows that such order was duly made. We cannot assent to this proposition. Section 1003 of the Code of Civil Procedure defines an order as being "every direction of a court or judge, made or entered in writing," other than a judgment. It is not shown that the alleged order was in writing, nor that any record thereof was made. Moreover, an order in a legal sense means a decision given in an action pending, and during the progress thereof. Had the Legislature intended that the clerk should of his own motion issue all process, it would have so stated. Since it has provided that he can only issue it upon the order of the presiding justice, the statute cannot be annulled by the making of a general order as a substitute therefor.

[2] Appellant further contends that the summons so issued was insufficient to give the court jurisdiction of defendant, for the reason that it wholly fails to comply with section 100 of the Code of Civil Procedure, which provides that "the original process in all actions or proceedings begun in said justices' court shall be returnable, and the parties summoned required to appear before the presiding justice, or before one of the other justices of the peace to be designated by the presiding justice." Reference to the summons shows that defendant was commanded to appear in the justices' court of Los Angeles township, "and to answer before the said justices' court in Los Angeles city in said township." It is clear from a reading of section 100 that the Legislature intended that the parties summoned in said justices' court should by the summons be required to appear either before the presiding justice or before one of the other justices of the peace designated and named therein. The summons issued to defendant should inform him of such fact. There is no statutory authority for requiring the defendant to appear in the justices' court of Los Angeles township.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3, 4] The summons is the process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons. Where the Legislature, as here, creates a justices' court with four justices, one of whom is presiding justice, and by express provisions of law provides that the summons in actions therein shall be issued by the clerk only upon order of the presiding justice, and that such process shall designate the justice before whom the defendant named therein shall be required to appear, a substantial compliance with such provisions must be deemed mandatory. *Lyman v. Milton*, 44 Cal. 630; *Ames v. Sankey*, 128 Ill. 526, 21 N. E. 579. In the absence of a compliance therewith, the court is without jurisdiction to render a judgment by default. In the case at bar no attempt was made to follow the statutory provisions. In *Helms v. Dunne*, 107 Cal. 117, 40 Pac. 100, involving a proceeding in the justices' court of the city and county of San Francisco, the summons issued purported to be pursuant to an order made by Charles A. Low as presiding justice, when in fact Low was not presiding justice. It being made to appear in the trial court, however, that a written order had been duly signed by J. E. Barry, who was presiding justice, directing the issuance of the summons, it was held sufficient; the recital therein of Low's official character being deemed surplusage. In our opinion, the clerk of the justices' court of Los Angeles township is without authority to issue summons in an action therein unless, after the commencement thereof, the presiding justice of such court makes an order in writing directing him so to do, and, furthermore, the name of the justice in whose department the process is returnable, and before whom the defendant is required to appear, should be designated in the summons.

For the reasons given, the judgment herein is reversed and the court directed to render judgment in favor of petitioner annulling the judgment of the justices' court.

We concur: ALLEN, P. J.; JAMES, J.

#### LUNDEEN v. NOWLIN. (Civ. 1,185.)

(District Court of Appeal, Second District, California. Nov. 27, 1912. Rehearing Denied Dec. 27, 1912. Denied by Supreme Court Jan. 22, 1913.)

#### 1. CONTRACTS (§ 187\*)—BENEFIT OF THIRD PERSON—RIGHT OF ACTION.

A contract for the exchange of land recited that a broker was the agent of both parties, and provided that each party agreed to pay a specified sum to such broker. The exchange was consummated, but one of the parties refused to pay the broker the stipulated price. *Held* that, the contract not having been rescinded, the broker was entitled to sue for the stipulated compensation under Civ. Code, § 1559, providing that a contract, made expressly for the benefit of a third person, may

be enforced by him at any time before the parties rescind it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

#### 2. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.

Where there was some evidence to sustain the trial court's findings, an appellate court cannot weigh the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by K. Lundeen against George Nowlin. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

El W. Freeman, of Los Angeles, for appellant. El B. Drake, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff and from an order denying defendant's motion for a new trial.

[1] On the 17th day of May, 1911, one George Nowlin and K. B. Norswing entered into an agreement for the exchange of certain real property which they severally owned. Plaintiff herein was a real estate broker who, through his agents, performed some services in connection with the exchanges of properties, and, when the parties above mentioned reduced the terms upon which the exchange was to be made to writing, there was incorporated in it the following condition: "It is further understood, as part and parcel hereof, that K. Lundeen is agent for both the parties of the first part and second part, and for his services herein the party of the first part agrees to pay said K. Lundeen the sum of \$1,375, and the party of the second part likewise agrees to pay said K. Lundeen \$1,250. Both of said sums from the first party and second party are due the said K. Lundeen upon the signing of this contract by both parties hereto, and the said K. Lundeen is to perform no further services for either party hereto after this contract is signed." The exchange of properties was finally consummated, and, upon defendant's refusal to pay his portion of the amount agreed to be paid to Lundeen as agent, this action was brought. In the answer of defendant it was alleged that plaintiff had misrepresented the dimensions of the property which defendant received in exchange for that which he transferred to Norswing, and that, by reason of the alleged misrepresentations, defendant was damaged in a large sum of money. The trial court found on the issues in favor of plaintiff and against defendant.

On this appeal it is urged, first, that the contract imposed no liability on the part of Nowlin to pay plaintiff commissions, as plaintiff was not a party to the exchange and therefore not entitled to enforce any claim

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against defendant. It appears from the face of the writing, as it is there expressly stated, that the parties agreed to pay to Lundeen, the plaintiff, the respective amounts mentioned, and an acceptance of this agreement, or offer of agreement, if we may choose so to term it, was indorsed upon the writing under date of the day following the execution thereof. It is provided by section 1559, Civil Code, that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." This contract was not rescinded, and undoubtedly, upon default being made by either of the parties contracting in that regard, a cause of action arose in favor of plaintiff. *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654; *Stanton v. Carnahan*, 15 Cal. App. 527, 115 Pac. 339. Page on Contracts, vol. 3, § 1308.

[2] We have examined the statement used on the motion for a new trial, and also the specifications in which error is assigned on the alleged ground that the findings made by the court are not supported by the evidence. On the question of misrepresentations alleged to have been made by plaintiff as to the dimensions of the ground which defendant received in the exchange of properties, it must be said that there was some evidence to sustain the findings of the court, and that, under the familiar rule that a state of conflict in the evidence presents a condition not subject to review by an appellate court, we have no function to perform in determining upon which side the weight of evidence rested. In our opinion, there is presented by the record no error entitling defendant to have the judgment or order denying his motion for a new trial reversed.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

### PEOPLE v. HILL (Cr. 259.)

(District Court of Appeal, Second District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 22, 1913.)

#### 1. CRIMINAL LAW (§ 1159\*)—APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—VERDICT.

The weight of evidence is for the jury, and, where the record shows some affirmative evidence establishing all of the elements necessary to prove a criminal charge against defendant, this court cannot review the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 2. CRIMINAL LAW (§ 1144\*)—REVIEW—PRESUMPTIONS—TIME WHEN CRIME CHARGED.

It cannot be presumed that an indictment filed May 25, 1912, for an offense against the local option law, effective November, 1911, alleging its commission "on or about the 19th day of May, 1912," was intended to charge the

commission of an offense at a time when the act described was no offense under the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

#### 3. INTOXICATING LIQUORS (§ 223\*)—REQUISITES—TIME OF OFFENSE—CODE PROVISIONS—"A MATERIAL INGREDIENT IN THE OFFENSE."

Under Penal Code, § 955, which provides that the precise time at which an offense was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense, the time when an offense against the local option law, effective November, 1911, was committed was not "a material ingredient of the offense," and under an indictment filed May 25, 1912, alleging its commission "on or about May 19, 1912," the prosecution might show its commission at any time within the one-year period of limitations subsequent to the day when the law became effective.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 268-274; Dec. Dig. § 223.\*]

#### 4. JURY (§ 131\*)—CHALLENGES—EXAMINATION.

Where defendant in the examination of jurors was permitted to ascertain their condition of mind as to their bias or prejudice, the court was not bound to permit an unduly protracted examination to enable defendant to decide whether he would peremptorily challenge any of the jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 131.\*]

#### 5. JURY (§ 103\*)—CHALLENGE FOR CAUSE—DISCRETION OF COURT.

Where the answers of jurors upon examination disclosed a state of mind closely bordering on prejudice against defendant, yet all asserted that they could try him fairly, the denial of his challenges for cause was within the discretion of the trial judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461-479, 497; Dec. Dig. § 103.\*]

#### 6. INTOXICATING LIQUORS (§ 239\*)—PROSECUTION—INSTRUCTIONS—APPLICATION TO ISSUES AND EVIDENCE—"FURNISHING" LIQUOR.

In a prosecution under an indictment for selling and furnishing liquor, an instruction that it was unlawful to sell, furnish, or "give away" any liquor was within the pleadings and issues, since, under the charge of "furnishing," a giving away might be proved.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. § 239.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3010-3013.]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Harry Hill was convicted of an offense against the local option law, and he appeals. Affirmed.

Wm. J. Clark, of Independence, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted upon an indictment returned by the grand jury of Inyo county for the offense of selling and furnishing alcoholic liquor to another within the boundaries of certain "no license" ter-



ritory. This offense is a misdemeanor of which the superior court had jurisdiction. He appeals from the judgment and from an order denying a motion for a new trial.

[1] The first point made by appellant is that the evidence was insufficient to sustain the verdict of the jury. In view of the fact that there is shown by the record to have been some affirmative evidence establishing all of the elements necessary to prove the charge as made against defendant, this court is not permitted to enter upon a review of the testimony for the purpose of forming any conclusion as to which side the weight of evidence might lean. As to all questions of fact, it was the province of the jury to make conclusions upon them, and with the determination so made we cannot here interfere.

[2, 3] The indictment, in fixing the time of the commission of the offense, contained the allegation that the crime charged had been committed "on or about the 19th day of May, A. D. 1912." The law under which defendant was prosecuted became operative, as to that portion of Inyo county in which the offense was alleged to have been committed, on November 6, 1911. The indictment was filed on the 25th day of May, 1912. It is the contention of defendant that the prosecution under an allegation phrased in the words "on or about" might address the proof to any date prior to the filing of the indictment and within the one-year period of the statute of limitations, and that, as to a portion of this period there was no offense known to the law of the kind charged against defendant, the indictment should have contained a more definite statement as to the time of the commission of the alleged offense. In order to sustain this argument, we would be required to presume that, under the allegation contained in the indictment, the offense may have been committed prior to the time that the prohibitive measure affecting the sale and furnishing of liquors went into effect. Section 955 of the Penal Code, in treating of the statement to be contained in an indictment or information respecting the time of the commission of the alleged offense, provides as follows: "The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." We do not think that the matter of the time when the offense was committed was in this case a material ingredient of that offense, as that term is used in the statute. The prosecution might have introduced evidence showing the commission of the offense at any time within the period subsequent to the date when the law creating the offense became effective. We cannot presume that the pleader in drawing his indictment intended to charge the crime as having been committed at a time when the acts described constituted no offense under the law,

The case of *People v. Miller*, 137 Cal. 642, 70 Pac. 735, referred to by counsel for appellant, contains no intimation contrary to this view, but rather is an authority in point with the conclusion we have just expressed. The decisions of other states, where the statutes do not contain the provision which we have quoted from our Penal Code, are not valuable to establish the contention of appellant in this regard under our practice.

[4] It is next contended that the defendant was unduly restricted in his examination of certain jurors while interrogating them as to their state of mind. Many of the questions asked of these jurors, and which the trial judge declined to permit answers to be made to, might well have been allowed as proper questions, but sufficient appears by the record to show that the defendant was allowed ample latitude by other questions which he was permitted to ask of them, and to which answers were made to have illustrated the condition of mind of such jurors as to their bias and prejudice; and it was not incumbent upon the court to permit the examination to be unduly protracted for the sole purpose of enabling defendant to decide as to whether he might desire to challenge peremptorily any of the jurors offered.

[5] We find no error in the rulings of the court denying the challenges for cause interposed by the defendant to several of the proposed jurors. While the answers of these men in some instances disclosed a state of mind closely bordering upon prejudice, yet they each asserted that they could try the defendant fairly, and we think it was for the trial judge to determine that question, and that, under such a state of facts, his rulings ought not to be disturbed. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

[6] Defendant complains of certain instructions given to the jury by the trial judge. One of these instructions was to the effect that, under the law then being considered, it was unlawful within the "no license" territory to "sell, furnish, distribute, or give away any alcoholic liquors." The point of the objection is directed to the use of the words "give away," and it is contended that, as the indictment charged only the selling and furnishing of liquor, it was improper to instruct the jury that a person who gave alcoholic liquors away would be guilty. In this contention we do not concur, as, under the charge made, a person described as "furnishing" liquor might be proved to be one who had given it away. All of the instructions complained of, with this exception, are admitted to correctly state propositions of law in an abstract way, and we believe further that the charge, as embodied therein, was correct and pertinent to the case then on trial. The instructions as given were numerous, and, as we read them, they covered sufficiently and fairly all of the matters pertinent to the issues being considered, and no prejudicial error appears in the giving of

any of them, or in the refusal to give certain additional charges offered by defendant.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

# PEOPLE v. ROSELLE. (Cr. 194.)

(District Court of Appeal, Third District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 22, 1913.)

## 1. CRIMINAL LAW (§ 554\*) — EVIDENCE — WEIGHT — TESTIMONY OF DEFENDANT — ACCEPTANCE AS A WHOLE.

Where there was circumstantial evidence that defendant killed the deceased, testimony by defendant that he killed deceased, but did so in self-defense, need not be accepted as a whole by the jury, but they could credit or disbelieve any of the narrated circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.\*]

## 2. HOMICIDE (§ 340\*) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

A defendant cannot complain that the court instructed on manslaughter when he was charged with murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

## 3. JURY (§ 31\*)—RIGHT TO TRIAL BY JURY—IMPAIRMENT—MISCONDUCT OF JUROR.

An affidavit by defendant's attorney that he saw a juror asleep during the taking of testimony, and before he could inform the court a recess was ordered, and that he did not know how long the juror was asleep, was not sufficient to show that the juror's condition was such that he failed to hear any question or answer, so as to deprive defendant of his right to trial by jury; the juror's name not being given, nor was he asked whether he heard the testimony, or given an opportunity to explain.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Phillip Roselle was convicted of manslaughter, and he appeals. Affirmed.

W. D. L. Held and T. J. Weldon, both of Yukia, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

CHIPMAN, P. J. Upon an information charging defendant with murder for the killing of one Erick Nilsen, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of manslaughter, and we strongly recommend him to the mercy of the court." Before judgment, defendant made application for a new trial, which, being denied, judgment was pronounced and an appeal taken from both the order and judgment.

We quote from appellant's brief: "Three propositions are advanced by appellant, demanding a reversal herein: First, we contend that there is no evidence in the record

to sustain the verdict and judgment; second, the trial court erred in giving to the jury an instruction on the question of manslaughter; and, third, the defendant was deprived of his constitutional right to a trial by jury by reason of misconduct of one of the jurors in that, during a portion of defendant's cross-examination of one of the witnesses for the people, such juror was asleep."

[1] 1. There was evidence, in its nature circumstantial, that defendant killed the deceased. In addition to this evidence, defendant testified in his own behalf, admitting that he shot and killed deceased, claiming that it was in self-defense. The point made is that "the evidence for the defense was a connected whole, no portion of it could stand unless it all stood; to adopt a part demanded that credence be given to all, and to discredit one circumstance detailed forbade credit to any other," and hence the verdict cannot stand—that is to say, the jury having believed defendant's testimony that he killed the deceased, they were also bound to believe him that it was done in self-defense. The jury were under no such constraint. They had the right to judge from all the narrated circumstances what part of defendant's story should be credited and what part disbelieved. They had the right to say whether, on his own statement of the facts and under the instructions of the court on that subject, the defendant was justified, in self-defense, to go to the extremity of killing the deceased.

In *People v. Sherman*, 103 Cal. 409, 37 Pac. 388, it was held that the defendant, who was accused of murder and was convicted of manslaughter, was entitled to a new trial where the evidence, without conflict, showed that the killing was justifiable. Defendant relies on this case on the assumption that the justification in the case cited, shown by the witnesses who were present and saw the killing, also appeared in the present case. This is on the further erroneous assumption that the jury were bound to give credit to all of defendant's testimony. The jury, as we have seen, was not so required to do.

[2] 2. Upon the second point, it is stated in his brief: "Defendant has either justified the killing or he has not, for no mitigating circumstances were shown. This being so, defendant is either guilty of murder or he is not guilty, and the court was not warranted in instructing the jury that a verdict of manslaughter might be rendered." It has been held that, where the defendant requested such an instruction, it was not error to refuse it. *People v. Lee Gam*, 69 Cal. 553, 555, 11 Pac. 183; *People v. Chavez*, 103 Cal. 407, 37 Pac. 389; and other cases. But such ruling was based on the fact that the evidence was all one way and pointed to no other conclusion than of guilt as charged.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The converse does not follow, as claimed, for the all-sufficient reason that, by giving the instruction, the defendant was not prejudiced. On the contrary, the jury were given latitude which resulted in defendant's advantage. There was evidence that defendant and deceased were not on friendly terms; that both of them had been drinking the early part of the night of the homicide, which occurred about half past nine o'clock, when both were on their way home; there was also evidence that the reputation of defendant for peace and quiet in the neighborhood was good. An examination of the entire record discloses some ground for the conclusion reached by the jury. There was no witness to the homicide except the defendant and the deceased. The jury were at full liberty to acquit the defendant if they believed that he was justified in taking the life of deceased. The instruction cannot be said to have been an invitation to render a compromise verdict. The jury may have decided that, while the deceased was, in some degree, the aggressor, the defendant was not justified in killing him.

[§] 3. The only support given to the claim of misconduct by a juror is found in the affidavit of W. D. L. Held, one of defendant's attorneys, which is as follows: "That on the 18th day of June, 1912, and while testimony was being taken in said case, affiant observed that one of the jurors was asleep in the jury box; that Clarence Ylitalo, a witness on behalf of the prosecution, was at said time under cross-examination; that affiant has no knowledge of the duration of the time during which said juror was asleep; that the judge of this court, presiding at said trial, before affiant had an opportunity to call his attention to the condition of said juror, admonished the jury that all of them should remain awake, and thereupon declared a recess of said court." Without doubt the defendant was entitled to the undivided attention of every juror while evidence was being taken in the trial. But we do not think the facts appearing in the affidavit of Mr. Held are sufficient to show that the juror's condition was other than momentary, or that he failed to hear any question and answer of material importance. The juror's name is not given, nor was he asked whether he heard the testimony. He was not given an opportunity to explain, what may have been the fact, that his eyes were closed but that he was not asleep. The affidavit shows that the duration of the juror's condition was not known, and we cannot presume that it was of such length of time as to have prevented his understanding the testimony being given.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

# DOUDELL v. SHOO et al. (Civ. 1,001.)

(District Court of Appeal, Third District, California. Nov. 27, 1912. On Petition for Rehearing, Dec. 27, 1912. Rehearing Denied by Supreme Court Jan. 24, 1913.)

## 1. PARTNERSHIP (§ 20\*)—CREATION—CONSTRUCTION OF AGREEMENT.

Where D. and S. enter into a parol contract of partnership to associate themselves together for certain purposes, including the obtaining of an option in the name of S. to purchase certain real property for the business in which they are to engage, and a certain sum is paid the vendor from money borrowed by S., and they agree that the unpaid principal and interest shall be paid from the proceeds of the business and property, and, when fully paid, D. shall pay S. one-half of the sum borrowed and advanced by him, with interest, and that such real property shall be and become part of the co-partnership assets, the relation between them is that of partners within Civ. Code, § 2395, defining a partnership, and is not a mere contract of employment of D. by S.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

## 2. PARTNERSHIP (§ 327\*)—ACTION FOR ACCOUNTING—COMPLAINT—CONSTRUCTION—"SHOULD BE AND BECOME."

An averment of the complaint in an action for a partnership accounting that, under the partnership agreement, real estate purchased "should be and become partnership assets," meant that it should become such upon its acquisition, and not that it should become such only when fully paid for.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769-778; Dec. Dig. § 827.\*]

## 3. PARTNERSHIP (§ 11\*)—ESSENTIALS OF AGREEMENT—LIABILITY FOR DEBTS.

In view of Civ. Code, § 2404, providing that an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses unless otherwise stipulated, a contract may be a partnership agreement, though it makes express provision merely for a division of the profits, and not of the losses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. § 11.\*]

## 4. PLEADING (§ 8\*)—COMPLAINT—CONCLUSION.

A statement in a complaint in an action for a partnership accounting that the parties "entered into a parol contract of copartnership" was not objectionable as a statement of a mere legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

## 5. PARTNERSHIP (§ 1\*)—NATURE.

An agreement whereby persons associate themselves together for the purpose of conducting and maintaining a certain business is a contract of partnership within Civ. Code, § 2395, defining partnerships.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 1.\*]

## 6. EVIDENCE (§ 471\*)—ADMISSIBILITY—CONCLUSIONS.

Witnesses must state the very facts from which the facts pleaded are drawn, and not mere conclusions from such facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471; Witnesses, Cent. Dig. §§ 833-836, 988.]

**7. PARTNERSHIP (§ 327\*)—ACTION FOR ACCOUNTING—COMPLAINT.**

A complaint in an action for a partnership accounting, which alleged that real property, stock in trade, fixtures, and paraphernalia used in the partnership business were to be paid for out of the profits of the business and rents from the real property, and that certain payments on the principal of the purchase price and interest had been so made, sufficiently alleged that plaintiff was to have an interest in the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769-778; Dec. Dig. § 327.\*]

**8. PARTNERSHIP (§ 3\*)—NATURE.**

To constitute a partnership, it was not necessary that there be a joint ownership of the property used in carrying on the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 13, 14; Dec. Dig. § 8.\*]

**9. FRAUDS, STATUTE OF (§ 129\*)—CREATION OF PARTNERSHIP—DURATION.**

A partnership formed under a partly executed oral agreement that it shall continue for not less than three years exists until dissolved, notwithstanding the statute of frauds; Civ. Code, § 1624, subd. 1, making void an oral agreement not to be performed within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

**10. FRAUDS, STATUTE OF (§ 56\*)—PARTNERSHIP—PURCHASE OF REAL ESTATE.**

A partnership formed under an oral agreement to carry on a certain business was not invalid under Civ. Code, § 1624, making void an oral agreement for the sale of real property, though it provided for the purchase of certain real property to be used in the partnership business.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

**11. PARTNERSHIP (§ 322\*)—ACTION FOR ACCOUNTING—TRANSFER OF PARTNERSHIP PROPERTY.**

A person to whom it was alleged by supplemental complaint that certain real property belonging to a partnership had been conveyed by the defendant partner after the filing of the original complaint was properly joined as defendant in an action for a partnership accounting.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 746-752; Dec. Dig. § 322.\*]

**12. ACTION (§ 38\*)—MISJOINDER—PARTNERSHIP ACCOUNTING—RELIEF SOUGHT.**

Where the main relief sought was the establishment of a partnership and an accounting, a prayer for an injunction and the appointment of a receiver in aid of the main relief did not cause a misjoinder of causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.\*]

**13. WITNESSES (§ 275\*)—CROSS-EXAMINATION—ACTION FOR PARTNERSHIP ACCOUNTING.**

Where, in an action for a partnership accounting, the plaintiff testifies on the controverted issue whether certain real property belonged to the partnership that he paid the option money for same, the defendant should be permitted to cross-examine him on such matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**14. WITNESSES (§ 388\*)—IMPEACHMENT—LAYING FOUNDATION.**

Under the express provisions of Code Civ. Proc. § 2062, it could not be shown on cross-examination of a witness for impeachment purposes that he made statements in his testimony at a former trial at variance with his present

testimony until the former statements had been related to him with the circumstances and he had been asked whether he made same, or, if such statements were in writing, until they had been shown to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

**15. APPEAL AND ERROR (§ 220\*)—OBJECTION BELOW—ADOPTION OF REFEREE'S REPORT.**

Defendants' objection to the adoption of a referee's report because they had no notice of the times and places at which testimony before the referee was to be taken could not be reviewed where they had ample notice of the filing of the referee's report, and did not make such objection before the report was approved and adopted by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.\*]

**16. REFERENCE (§ 55\*)—TAKING OF TESTIMONY—NOTICE.**

Where defendants were in court when a referee was appointed and directed, and thus had actual notice that he must take certain testimony, notice to them of the time and place at which such testimony would be taken was not essential, when, by the exercise of a little diligence, they could have ascertained such time and place.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 83; Dec. Dig. § 55.\*]

**17. APPEAL AND ERROR (§ 1011\*)—CONFLICTING EVIDENCE.**

The decision of the trial court upon the weight and preponderance of conflicting evidence will not be disturbed on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**On Petition for Rehearing.****18. WITNESSES (§ 245\*)—CROSS-EXAMINATION—REPETITION OF QUESTION.**

Where a question was asked and answered in a manner which indicated that no different answer could probably be given to the same question, it was not error to sustain an objection to a repetition of the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.\*]

**19. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for a partnership accounting, the exclusion of defendant's testimony as to the total amount paid to plaintiff for his services, if error, was harmless, where such total could be easily determined by mathematical calculation from payments to which defendant was permitted to testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

**20. WITNESSES (§ 236\*)—EXAMINATION—QUESTION.**

Where the defendant testified that some things testified to by plaintiff occurred and some did not, his counsel should not have asked him, "What part did and what part didn't?" but should have called defendant's attention separately to, and asked him as to the correctness of, each of the plaintiff's incorrect statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. § 236.\*]

**21. REFERENCE (§ 61\*)—HEARING—FAILURE OF PARTY TO ATTEND.**

Where the failure of defendant or his attorneys in an action for a partnership accounting to attend the hearing before the referee was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

due to their own negligence, they could not complain that the hearing was held in their absence.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 93, 101; Dec. Dig. § 61.\*]

**22. PARTNERSHIP (§ 342\*)—ACTION FOR ACCOUNTING—MATERIAL ISSUES—DURATION OF PARTNERSHIP.**

Where, in an action for a partnership accounting, the principal issue was whether there was a copartnership agreement, and, if there was, whether the partners had entered upon the execution of its terms, the question of the duration of the partnership was immaterial; and hence it was immaterial whether a finding by the court thereon was within the issues.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. § 342.\*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by John Doudell against John J. Shoo and others. From a judgment for plaintiff and denial of new trial, defendants appeal. Affirmed and petition for rehearing denied.

Royle A. Carter, of Fresno, Carl F. Wood, of Oakland, and Frank Kauke, of Fresno, for appellants. C. K. Bonestell, of Fresno, for respondent.

**HART, J.** This action was brought for an accounting of the partnership property and business of the plaintiff and the defendant John J. Shoo.

The complaint alleges that in the month of July, 1909, the plaintiff and the defendant John J. Shoo entered into a parol contract of copartnership, "whereby they agreed to associate themselves together for the purpose of conducting and maintaining a billiard and pool hall and saloon and cigar business in the city of Coalinga, county of Fresno, state of California, and dividing the profits thereof equally between them"; that by the terms of said contract the plaintiff was to have the sole and entire management of said business; that, at the time that said contract was entered into, it was further agreed by and between said parties that they would obtain an option to purchase, in the name of the defendant John J. Shoo, four certain lots, with the improvements thereon, situated in said city of Coalinga; that the improvements on said lots consisted of buildings suitable to the purposes of the business which, as before indicated, they had agreed to engage in; that in pursuance of said agreement the plaintiff and defendant John J. Shoo on the 21st day of July, 1909, obtained an option in writing and in the name of said John J. Shoo from the owners of said real property to purchase the same for the total sum of \$65,000, on the following terms: Twenty thousand dollars to be paid on the 1st day of August, 1909, and \$15,000 on the 1st day of every succeeding August until the full purchase price was paid, together with interest at the rate of 6 per cent. per annum on the deferred payments; that neither plain-

tiff nor John J. Shoo had ready money with which to make the first payment as aforesaid, and it was, therefore, agreed between them that said Shoo should borrow the sum requisite to make such payment; that the balance remaining unpaid on the purchase price should be paid as the installments thereof and interest became due out of the profits of the copartnership business and the rents to be derived from said property; that, when the entire purchase price should have been so paid, the plaintiff should pay to said Shoo one-half of the said sum of \$20,000 borrowed by him for the purpose of making the first payment on the purchase price and one-half of the interest which said Shoo might have paid on said sum of \$20,000; that said real property "should be and become part of the copartnership assets."

The complaint then proceeds to allege that all the terms of the said agreement were carried out as above averred, and that on the 1st day of August, 1909, the "plaintiff and said defendant, as partners, entered into and took possession of said premises and proceeded to conduct, and ever since have conducted therein as partners, a saloon and cigar business in conjunction with pool and billiard tables, and have ever since let out other portions of said premises and received rent therefor; that plaintiff has from said 1st day of August continuously up to the time he was expelled from participation in the affairs of said copartnership, as herein-after set forth, had the sole and entire charge of said business; that on the 8th day of February, 1910, said defendant Shoo against the will of plaintiff forcibly excluded him from said premises and from any participation in any of the affairs of said copartnership, and has ever since kept him excluded from all thereof, and has ever since refused, and still refuses, to permit plaintiff to participate in any thereof, or to account to him for anything belonging to said copartnership; that said defendant has ever since claimed, and now claims, to be the sole owner of everything belonging to said copartnership, whether real or personal property." The complaint (supplemental) further avers that Shoo, after the commencement of this action, caused to be executed and delivered to him by the vendors thereof a deed to all the real property purchased as aforesaid as copartnership property, and that on the same day such deed was so executed and delivered (February 28, 1910) said Shoo and the defendant, Josephine J. Shoo, his wife, executed and delivered a deed to said property to the defendant Herrick; that said copartnership has made large profits and rents out of the business conducted and the property owned by it, amounting to the sum of \$25,000, which has been expended in the extinguishment of the debts of the copartnership; that the defendant has received and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

retained for his own use from the profits of said business the sum of \$4,000, while the plaintiff has likewise received and retained for his own use the sum of \$900 only; that at the time of the commencement of this action there was on deposit in two banks in Coalinga in the name of the defendant Shoo a sum exceeding \$3,000, which belongs to said partnership.

It is then alleged that prior to the commencement of this action the defendant John J. Shoo conveyed and assigned to the defendant Josephine J. Shoo all of his property "for the purpose of evading pecuniary responsibility for any of the acts hereinabove set forth." Ancillary to the principal relief sought for as above stated, the prayer is for a decree enjoining the defendants, their agents, etc., from interfering with the plaintiff in participating in the management of said business and the partnership property, etc., and for the appointment of a receiver, *pendente lite*, to take possession of all the partnership property and business, etc. Each of the defendants filed demurrers, both general and special, to the complaint. Among the grounds specially urged against the complaint are those of misjoinder of parties defendant and misjoinder of causes of action and that it is ambiguous and uncertain. The demurrers having been overruled, each of the defendants answered the complaint, specifically denying the averments thereof, and charging, as do the special demurrers, a misjoinder of parties defendant, misjoinder of causes of action and that the averments of the complaint are ambiguous and uncertain.

The court found that a copartnership agreement was entered into by and between the plaintiff and the defendant John J. Shoo at the time and for the purposes set out in the complaint; that, in pursuance of said agreement, they, as equal partners, entered into and took possession of the premises described in the complaint, and proceeded to conduct and maintain thereon as equal partners the saloon and cigar business and billiard hall, and have ever since conducted and maintained thereon such business and billiard hall; that in the name of the said defendant Shoo they acquired, as equal partners, and for partnership uses, the real and personal property described in the complaint; that at the time mentioned in the complaint the defendant John J. Shoo, "against the will of plaintiff, wholly excluded him from said partnership property and business and from any participation in any of the affairs of said partnership, and has ever since kept him wholly excluded therefrom, and has ever since refused to account to him for or concerning anything relative to said partnership"; that profits from said business and rents from portions of the real property purchased by them as described have been derived and received, and that a portion of the profits and rents so derived and received

have been expended in remodeling and repairing buildings standing on said real property and in making payments on the interest on the unpaid purchase price and on the principal thereof; that the plaintiff and said Shoo have each received and retained a share of the profits of said business, "but unequal in amount"; that there are debts outstanding against said partnership, and "that since the exclusion of plaintiff from said business the defendant John J. Shoo has had the management and control of the partnership business and property, and has received and paid out sums of money in connection therewith."

As to the interest of the defendant Herrick in this controversy, the court finds that money had been loaned by him and applied on account of the purchase price of the partnership real property "and the legal title to said property has been transferred to said Herrick as security for the payment of said loan."

The court as a conclusion of law from said findings determines "that an accounting is necessary between plaintiff and the defendant John J. Shoo covering all of the property and business found to exist between them from the commencement thereof."

The decree, which is characterized in the transcript as an "Interlocutory Decree," followed the findings and the conclusion of law, but required and provided for the appointment of and named a referee, to whom was committed the power and the duty of taking a full accounting of all of the copartnership dealings and transactions between the plaintiff and the said defendant John J. Shoo, as described in the complaint, and postponed the making of further findings and of a final decree "until the coming in and settlement of the referee's report." After the filing of the report of the referee, the court adopted the same, and made it a part of the findings theretofore made, and upon the findings so made, and the conclusions of law deduced therefrom, made and entered its final decree adjudging the plaintiff and the defendant John J. Shoo to be partners, as set forth in the complaint, and adjusting the matter of the accounting of their partnership business and property in conformity with the findings and report of the referee.

The defendant appealed from the "interlocutory decree" and from an order denying a motion for a new trial after the entry of said decree. After the rendition and entry of the final decree, the defendants moved for a new trial, which motion was denied, and they then noticed and took an appeal from the order denying said motion.

The defendants contend that the complaint does not state facts sufficient to constitute a cause of action for the following reasons, viz: (1) That it is not therein or thereby

shown that the plaintiff and the defendant John J. Shoo entered into or formed a partnership, and in this connection it is contended that the mere allegation that they "entered into a parol contract" involves nothing more than the statement of a legal conclusion, and that the facts pleaded disclose a contract of employment only whereby the plaintiff was to render the services alleged in consideration of one-half of the profits of the business referred to in the complaint. (2) That the contract pleaded in the complaint is void under the statute of frauds, in that it involves "an agreement that by its terms is not to be performed within a year from the making thereof." Section 1624, Civ. Code; section 1973, Code Civ. Proc. (3) That as to the real property which it is alleged the parties agreed to purchase as partnership property the contract is void under the terms of section 1624 of the Civil Code, supra.

In addition to the general objections thus urged against the complaint, the points, arising under the special demurrer, that there is a misjoinder of parties defendant, a misjoinder of causes of action, and that the complaint is ambiguous and uncertain are also pressed by the defendant John J. Shoo, and discussed in the briefs.

The further complaint is made of certain rulings of the court in the allowance and rejection of certain testimony.

[1] 1. A partnership is defined by section 2395 of our Civil Code as follows: "The association of two or more persons for the purpose of carrying on business together, and dividing the profits between them." The complaint in our opinion clearly discloses a contract by which the plaintiff and John J. Shoo associated themselves together for the purpose of carrying on and conducting the business therein mentioned as partners. The complaint, as has already been shown, reads: "That the plaintiff and said John J. Shoo entered into a parol contract of copartnership whereby they agreed to *associate themselves together* for the purpose," etc. Again, in the second paragraph, it is alleged that said contract also involved a covenant whereby they agreed to obtain an option, in the name of the defendant Shoo to purchase in the city of Coalinga certain real property, on which were located buildings appropriate "for the business which plaintiff and defendant had agreed, as hereinabove stated, to carry on." In the same paragraph it is averred that, the sum of \$20,000 having been paid to the vendor upon the acceptance of the option from money borrowed by the said defendant, it was agreed that the unpaid principal and interest should be paid from the profits and the rents derived from said business and said property, and that, when the same was fully paid, then the plaintiff should pay to the defendant one-half of the said \$20,000 used in making the first payment

as aforesaid and one-half of any interest which said defendant might have paid thereon, and that said real property "should be and become part of the copartnership assets." These averments obviously go much further than the statement of the mere conclusion that the parties formed themselves into a copartnership. They show, as we have declared, that they agreed to and did associate themselves together as partners; that they jointly purchased certain real and personal property for carrying on the business which they had associated themselves together as partners to carry on; that, as partners, they jointly entered into and took possession of said property; that they agreed to share equally the profits of said business.

[2] But counsel appear to assume that the averment that the real property "should be and become partnership assets" means that such property should not become such until it was fully paid for. We cannot agree with that construction. Interpreted by the light of the complaint as a whole, that averment clearly and unmistakably means that the real property upon its acquisition by the plaintiff and Shoo under the circumstances indicated by the complaint should then "be and become partnership assets." In this view of the complaint, and particularly of the averment just referred to, there can be no difficulty in distinguishing from the present case the cases cited by appellants, and in which it was held that the complaints disclosed by their averments not a contract of copartnership (the theory upon which they were drafted), but a mere contract of employment, whereby the plaintiff was employed by the defendant to perform services in consideration of an equal share with his employer in the profits of the business upon which such services were to be bestowed. We will examine some of the cases referred to. In *Stone v. Bancroft*, 112 Cal. 652, 44 Pac. 1069, the plaintiff was employed at a monthly salary to manage the business of the defendant, and, in addition thereto, the defendant agreed to give the plaintiff a one-tenth interest in said business upon the condition that the plaintiff would devote his whole time and best energies, for a period of not less than 10 years from the date of the agreement, to the carrying on of said business. The plaintiff quit his connection with and management of the business before the expiration of the time during which he was to manage the same as a condition precedent to the vesting in him of the one-tenth interest therein. The Supreme Court very properly held that the plaintiff never acquired a vested interest in the business because of the failure of the contingency upon which his title was to vest.

In *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147, the complaint alleged that the defendant agreed with the plaintiff to purchase with his own funds real estate, and that the plain-

tiff, for selling the same in subdivided tracts, should receive one-half the profits of all sales so made. It was held, as very clearly the complaint revealed, that the agreement pleaded was one whereby the defendant employed the plaintiff to perform the stipulated services for certain specified compensation. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236, was where the plaintiff and the defendant entered into a contract whereby the former hired his services to the latter in carrying on and conducting for the defendant the canned salmon business, and for which services it was agreed that the plaintiff should receive a salary of \$200 per month, and, additionally, one-half the net profits of said business. The company had the right to reject sales and to determine the matter of the credit of parties to whom sales were made. The agreement was to continue for six months from its date, "and was to continue thereafter, in consecutive periods of six months each, for three years from its date, if at the end of the first six months and each successive six months, respectively, there should be no net loss to the company." It was further agreed that, if either party failed to carry out any portion of the agreement, the same should for that reason become null and void at the option of either party. The Supreme Court held, as it could not justly otherwise be held under the facts as stated, that the contract did not make the plaintiff a partner in the business, and said: "He was to have no title to any of the property, and was not liable for any of the debts. His entire interest in the business consisted in his right to receive one-half of the profits as his compensation." In the case at bar, as will be noted, there is no language in the agreement as pleaded, as we construe and understand it, which provides, as do the agreements involved in two of the cases above referred to, any condition or contingency upon the performance or happening of which only the interest of the plaintiff as a partner in the business and property mentioned in the complaint was to vest. The allegation is not, as before declared, that the plaintiff's title was not to vest until some future time or only in the event that the purchase price was in fact fully paid and the defendant Shoo repaid by the plaintiff one-half of the \$20,000 advanced by said Shoo as the first payment. The only reasonable interpretation of the language of the complaint is, as we have shown, that the parties agreed to jointly purchase the property for partnership purposes; that they did so and jointly entered into and took possession of said property; that they were to jointly carry on the business, to carry on which they had associated themselves together, and to jointly enjoy in equal shares the profits thereof.

[3] But it is insisted that the complaint fails to disclose a partnership because it is

not therein made to appear that the plaintiff agreed to be liable for the debts contracted in carrying on the business. This contention is not sound. Manifestly, as counsel for the plaintiff suggests, liability for debts can mean nothing else but liability for losses, and, where a contract of copartnership contains a stipulation or agreement for the division of profits and none as to the division of losses, the law will imply a joint responsibility for the latter by the partners. Section 2404 of the Civil Code provides that "an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated." In *Coward v. Clanton*, supra, it is said that it is "not true that our Code makes-profit-sharing a test of partnership," and in the same case it is said: "It would not lack much of a good definition of a partnership if the clause (in section 2395, Civ. Code, supra) in regard to the division of profits were omitted. It would read that 'a partnership is the association of two or more persons for the purpose of carrying on business together.'" Thus it will be observed that the effect of an agreement whereby two or more parties associate themselves together for the purpose of carrying on business, without any reference or covenant therein as to the division of profits, would be to establish them as partners, unless there was some other express stipulation therein that such was not intended to be their legal relation. But where, as here, the agreement goes further, and stipulates that there shall be a division of profits without a stipulation of any character as to the division of losses, the latter liability is implied from the provision for the division of profits. See *Quinn v. Quinn*, 81 Cal. 15, 22 Pac. 264; *Whitley v. Bradley*, 13 Cal. App. 721, 110 Pac. 596; *Brooke v. Tucker*, 149 Ala. 98, 43 South. 141.

[4] Nor is the statement in the complaint that the parties "entered into a parol contract of copartnership" to be regarded, as is the contention, as a mere legal conclusion. Of course, it is true, as may likewise be said of many averments of ultimate facts, that the mere statement alone that two or more persons have formed themselves into a copartnership may be said to involve the statement of a conclusion of law. An averment in an action to recover real or personal property that the plaintiff is the owner thereof is no less the statement of a legal conclusion than the one criticised here, yet such averment of ownership has always been held to involve the statement of an issuable fact.

[5] However, it will be observed that the averment as to the contract of partnership in this case is followed by the allegation, "whereby they agreed to associate themselves together for the purpose of conducting and maintaining" the business therein named, and this language itself is a sufficient statement of a partnership under our Code def-



inition thereof, as construed in *Coward v. Clanton*, *supra*.

There is nothing said in the case of *Hammond v. Borgwardt*, 126 Cal. 613, 59 Pac. 121, in conflict with the construction of the complaint in the respect here considered. In that case a witness at the trial upon an issue of partnership made the statement in his testimony that a certain party was his "partner." This statement, the Supreme Court correctly held, constituted, "at best, a mere legal conclusion." Of course, there can be no proposition less subject to dispute than that it is not for the witnesses but for the court or jury to say from the facts whether a partnership between two or more persons exists, and the former are not permitted to give their opinions upon that proposition, but must simply state facts from which the final arbiter thereof must determine the ultimate truth of such controversy. In pleading, where ultimate and not probative facts are dealt with, much more liberality must of necessity be indulged as to the statement of the facts of the transaction on which the action is founded than can be accorded to the witnesses who must give evidentiary facts only. As before suggested, in many cases it would be impossible to state a cause of action in a pleading without embracing a statement, which, in a strict view, would involve a legal conclusion. For instance, in the case at bar, strictly speaking, the statement that the parties "associated themselves together" for the purpose of jointly carrying on a business might be regarded as the statement of a conclusion from certain acts and facts that had constituted them partners. But it would be difficult, indeed, to perceive how any other statement of the fact of partnership could be made in the complaint without averring probative facts, contrary to the recognized rules of good pleading.

[6] The witnesses are required to state to the court or jury the very facts from which the facts pleaded are drawn, and obviously, as stated, it is beyond their province as such merely to state their conclusion from the facts, which would, of course, throw no more light on the transaction on which the action is founded than do the pleadings themselves.

[7] It is further objected that the complaint is not good for want of facts because it does not appear therefrom that the plaintiff was to have title to any of the property with which the business was to be conducted. There is no merit in this objection. The complaint, as has been shown, alleges that the improvements put upon the real property and the stock in trade and all fixtures and paraphernalia used in connection with the business they embarked in as partners were paid out of the profits of said business; that the real property they purchased, in pursuance of an option they previously secured, was to be paid out of the

profits of said business and the rents derived from certain portions of said real property; that out of such profits and rents payments had been made on the principal of the purchase price and the interest accruing thereon. We are unable to perceive how the plaintiff's title to the property referred to could be made plainer.

[8] But while the question whether the title to the real property was to vest in both the plaintiff and the defendant, and not in the latter alone, is important here because of the prayer for an accounting of the partnership assets, the fact of the joint ownership of the property employed in carrying on the business of a copartnership need not necessarily be shown in order to establish the fact that a partnership exists. "To constitute a partnership, it is not necessary that there should be property forming its capital, jointly owned by the partners. The property employed in the partnership business may be separate property of the partners; but, if they share in the profits and losses arising from its use, a partnership exists." *Brooke v. Tucker*, 147 Ala. 96, 43 South. 141; *Whitley v. Bradley*, 13 Cal. App. 721, 110 Pac. 596.

[9] 2. We see no force in the point that the complaint discloses that the contract pleaded, as to the time within which it is to be performed, is void under the statute of frauds. Subdivision 1, § 1624, Civ. Code, *supra*. This contention is inspired by the following averment in the complaint as it was originally filed: "That said copartnership shall continue for a period of not less than three (3) years," etc. But this allegation and certain other portions of the complaint were stricken out by the court on motion, and, therefore, so far as the complaint is concerned, the point that the contract is void under our statute of frauds is not well taken. But it has been doubted whether the statute has any application whatever to oral partnership agreements. "Certainly not," says the Court of Appeals of New York, in *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979, "when the agreement has been wholly or partially executed. But, if it has, the only effect it could have upon the agreement found by the referee was to convert it into a partnership at will. Such a partnership exists until something is done to dissolve it"—citing *Lindl. Partn.* 571. See, also, *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 443; *Railway Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 53 Am. St. Rep. 766. The agreement here was partially executed—that is, the parties after the formation of the partnership entered into the active prosecution of the partnership business immediately upon securing the property necessary to do so, and continued the partnership until the plaintiff was forcibly excluded from any participation therein by the defendant John J. Shoo, and, even if the allegation as to the time during which the alleged partnership was to

exist had not been stricken out, the objection here made to the agreement as thus pleaded would still have been unavailable, since the partnership would necessarily exist until dissolved. This brings us to the consideration of a cognate question involved in the third ground upon which it is argued that the complaint, in so far as it attempts to disclose that the real property therein described was to be and become a part of the partnership assets, is deficient in the statement of facts.

[10] 3. The contention upon said proposition is that that part of the agreement which relates to said real property is void under our statute of frauds—that is, as before stated, under the terms of section 1624 of the Civil Code. But this precise point has been decided by the Supreme Court adversely to the contention of appellants. In *Bates v. Babcock*, 95 Cal. 479, 484, 30 Pac. 605, 606 (16 L. R. A. 745, 29 Am. St. Rep. 133), it is said that while the question whether such a partnership (that is, to deal in real property) can be formed, except by an agreement in writing, has been the subject of conflicting decisions, yet “the great weight of authority is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence.” In support of this view, the court cited and quoted from a number of English and American cases, among the latter that of *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359, where it was held “that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels, and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing.” See *Pico v. Cuyas*, 47 Cal. 174; *Koyer v. Willmon*, 150 Cal. 785, 787, 90 Pac. 135.

Similar views are to be found in cases from other jurisdictions. In *Dale v. Hamilton*, 5 Hare, 369, it is held that “a partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by such writing.” Approving the doctrine as thus laid down, the court, in *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550, clinches the proposition in the following fashion: “\* \* \* But suppose two persons, by parol agreement, enter into a

partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. *When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other.* The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in the lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing. \* \* \* This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.” In the present case, the object of the agreement of copartnership was not only to carry on the business referred to in the complaint, but also to purchase the real property therein described to be used for the purposes of the partnership. As in the cases above cited neither of the parties conveyed or assigned to the other any of the real estate, but they merely carried out, after becoming partners, one of the objects of the partnership agreement by purchasing the goods and property referred to in the complaint. We can discern no distinction between the transaction by the partners as to the real property and the transaction by said partners involving the purchase of the goods and wares which they agreed to engage in selling.

[11] 4. The next point, arising under the special demurrer, is that there is a misjoinder of parties defendant in the complaint. The complaint, as to the defendant Josephine J. Shoo, was dismissed by the court. As to the defendant Herrick, the complaint alleges that during the pendency of this action, and prior to the filing of the amended and supplemental complaint, the defendant John J. Shoo conveyed to said Herrick by deed the real property involved in this controversy. Manifestly, under such circumstances, there could be no final adjudication with respect to said real property without making Herrick, the grantee thereof, a party to the action. *Cuyamaca Granite Co. v. Pac. Pav. Co.*, 95 Cal. 252, 30 Pac. 525; 30 Cyc. p. 573. Moreover, as this is a proceeding in equity, it was proper “to join as defendants all who have an interest in the subject-matter of the litigation.” *County of Tehama v. Sisson*, 152 Cal. 167, 179, 92 Pac. 64; *Robinson v. Gleason*, 53 Cal. 38; *Stewart v. Smith*, 6 Cal. App. 157, 91 Pac. 667.

[12] 5. There is no misjoinder of causes of action. The principal relief asked for here is the establishment of the existence of a partnership between the plaintiff and the defendant John J. Shoo, and for an accounting of the partnership assets and business. The prayer for an injunction and the appointment of a receiver is only in aid of the main relief sought. The subject-matter of the action relates to but one transaction, and it is a well-settled practice in courts of equity, in order to avoid a multiplicity of suits, to sue in one and the same action for every species of relief which may be necessary to conserve all the rights of the plaintiff in the subject-matter of the action. *Whitehead v. Street*, 126 Cal. 70, 58 Pac. 376; *Story's Eq. Pleading*, §§ 271, 272a; *Wilson v. Castro*, 31 Cal. 429; *Stewart v. Smith*, 6 Cal. App. 152, 157, 91 Pac. 687; *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441.

6. The objection that the complaint is ambiguous and uncertain is untenable. This criticism proceeds principally from the fact that in filing an amended and a supplemental complaint counsel for the plaintiff incorporated the two pleadings into one, and counsel for the defendants declare that the allegations of the amended complaint and those of the supplemental complaint are so "jumbled together" that it cannot be told therefrom "how much is intended as supplemental and how much as the amended complaint." There are other objections to the complaint under this head. But it is deemed sufficient to say generally, in reply to the objection of ambiguity and uncertainty, that the complaint is very clear with respect to the precise purposes of the action or the relief thereby sought, and that, if it be important for any reason that such distinction should be marked or kept in view, it is not at all difficult to apprehend and distinguish from those of the amended complaint those allegations of fact which, by reason of their having obviously arisen after the commencement of the action, must have necessarily been brought in or made issues by way of a supplemental complaint. The amendment of the original complaint appears to have consisted in striking therefrom certain of its averments, and these are designated in the order striking them out by reference to the words at which the elimination was to begin and end, together with the numbers of the lines and pages of the complaint in and on which those words appeared. No difficulty could, therefore, have been experienced by counsel in apprehending what portions of the complaint were so eliminated and thus the particulars in which the pleading was amended. By the aid of the amended complaint as reproduced in respondent's brief, the verity of which is not controverted by the defendants, we have had no trouble in finding the precise averments which were stricken out, and therefore no difficulty in considering that pleading as amended.

[13, 14] 7. The plaintiff testified that upon securing the option to purchase the real property he paid the owner of said property the sum of \$100 as a consideration for the option, said sum, however, to be credited on the purchase price in case of a sale. Counsel for the defendant attempted to show on his cross-examination that the plaintiff loaned said \$100 to Shoo, and asked him this question: "Well, if you testified at the former trial that you loaned him the money, were you correct at that time, or were you not?" The witness, evidently misapprehending the purport of the question, replied: "I don't remember whether I was corrected." A question of like import was again put to the witness, when the court interrupted, saying: "I think that is a matter of inference. I don't think it is worth while to spend any time on it. Proceed with your question." Counsel then asked: "Can you say whether you did make that statement or not?" The court again interrupted counsel as follows: "Mr. Carter, I have ruled on that. Take an exception, if you want to; but go on."

We think the proposed cross-examination involved a legitimate subject of inquiry. The witness had given testimony upon that subject which warranted no other inference than that he, as a partner, had paid the owner of the property the \$100 as a consideration for the option awarded to him and Shoo to purchase the real property, and it would have been strictly proper for the defendant to have shown, if he could, as tending in some measure to negative the claim of partnership in the transaction by the plaintiff, that it was not a payment by the latter on the option or the purchase price of the land, but merely a loan of that sum to Shoo. Therefore the defendant was entitled by the cross-examination of the plaintiff either to secure from the latter an admission that he had previously declared that he had merely loaned the defendant the \$100, or, in case the plaintiff denied having made such statement, to lay the foundation for his impeachment upon that matter. But it cannot be held that the action of the court in disallowing the cross-examination was, under the circumstances, prejudicial, since the questions called for impeaching testimony and for that purpose were not, as is plainly manifest, in the proper form. Where it is sought to impeach a witness by showing that he had previously made statements at variance in material respects with his "present testimony," such "statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements," or, "if the statements be in writing, they must be shown to the witness before any question is put to him concerning them." Section 2052, Code Civ. Proc. If in this case the testimony of the witness at the former trial, where, it was claimed, he stated that he had simply loaned the \$100 to Shoo, was taken down

and transcribed by a stenographer, he was entitled to have that portion of such testimony which related to that subject shown to him before he could be required to answer the questions relative thereto, or, if the testimony was not so taken and transcribed, then counsel was not entitled to replies to his questions until he related to the witness the circumstances under which the alleged inconsistent statement was made. Counsel pursued neither course, and therefore, as stated, his exceptions to the rulings of the court disallowing answers to the questions referred to can be of no avail to the defendant here.

There are some other rulings on the evidence of which complaint is made. As to these rulings, the objection is that the court thus improperly curtailed the cross-examination of the plaintiff. We perceive no necessity for a special review of the rulings here referred to. It will be sufficient to say concerning them that the testimony sought to be elicited by some of the questions so propounded had been previously brought out, while others called for the opinions or conclusions of the witness and for testimony as to matters not within the issues.

[15] 8. There is no merit in the claim that the court committed prejudicial error in adopting the report of the referee, appointed by it to take testimony in the matter of the accounting of the partnership assets, &c. The ground of the complaint on this score is that the referee omitted to notify the defendants or their counsel of the times and places at which such testimony was to be taken. One of the attorneys for the defendants filed an affidavit in which he deposed that no such notice was given, but this was rebutted by the statement of the referee in his report that he did so notify the parties on both sides. It, moreover, appears that notwithstanding that counsel for the defendants were notified on the 6th of September, 1910, that on the 3d day of the same month the referee had filed his report in the office of the county clerk, and that the court did not render its final decision, embracing the report of the referee, until the 15th day of said month, no objection was interposed or filed by the defendants to said report. It is very clear that the time for the defendants to have raised any objection to the report of the referee was before the court approved and adopted the findings of that officer into its own findings. We doubt not that, if it had been shown to the court that neither the defendants nor their counsel were served with notice of the time and place of the hearings before the referee, and no deliberate or unreasonable negligence on their part had been made to appear concerning such hearings, they would have been allowed an opportunity to have corrected such errors, if any, as might have found their way into the findings of the referee. But, as stated, counsel made no objection to said report, and we

must therefore assume that no ground existed for objection thereto.

[16] But whether it be true or not, in point of fact, that counsel received no notice of the times and places at which testimony was to be taken by the referee, it cannot be contended that they did not know of the appointment of the referee for the purpose of investigating the accounts and assets of the partnership. Indeed, they were in court when the order appointing the referee was made and the directions as to his duties given, and thus they received actual notice that certain testimony essential to the final decision of the case would be taken at some time by such referee. We do not hold that in such case the parties should not be given notice by the referee of the time and place fixed for his hearings, although there is no special provision in our Code requiring such notice to be given, yet, under the circumstances shown here, it is clear that, if it be true that they were given no notice, counsel for the defendants had sufficient warning from their actual knowledge of the appointment of a referee for the purpose stated to put them on their guard, so that, by the exercise of a little diligence, they could have ascertained the time and place at which testimony was to be taken by the referee.

[17] 9. Counsel asseverate that the great weight or preponderance of the evidence is in favor of the defendants. We cannot examine the evidence here in detail, nor is it considered necessary to do so. It is conceived to be enough to say that the plaintiff's own testimony, which is corroborated by a number of strong circumstances to which other witnesses testified, amply supports the findings of the trial court. It is true that the testimony adduced on behalf of the defendants squarely contradicts in all material particulars the plaintiff's proofs, and would undoubtedly have sustained a decision in their favor; but the result of the wide variance between the testimony produced in support of the respective positions of the parties is only to create a substantial conflict in the evidence, and therefore, upon the question of the weight or preponderance of the evidence, we must submit to the decision of the trial court.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### On Petition for Rehearing.

HART, J. Counsel for defendants in their petition for a rehearing of this cause make these points: (1) That this court erroneously upheld the ruling of the trial court in refusing to allow the defendants on the cross-examination of the plaintiff to go into the question whether the latter on a previous occasion had stated that he loaned the \$100 to Shoo at the time the contract of option was made. (2) That the ruling by the trial

court sustaining the plaintiff's objection to the question asked of defendant Shoo: "Mr. Shoo, you were asked about the arrangement with Mr. Doudell, and you testified that he was to have \$100 a month. How much has been paid?"—to which ruling we did not specially refer in our original opinion, was erroneous and prejudicial. (3) That the trial court erred in its ruling (to which we did not particularly refer in the former opinion) disallowing the defendant Shoo upon being recalled and interrogated with respect to what occurred and what was said in the conversations between him and Doudell at the time of the exclusion of the latter from further participation in the partnership business to answer the question: "What part did, and what didn't?" (4) That this court erred in sustaining the action of the court below in adopting the report or the findings of the referee, it having been made to appear, so it is claimed, that neither the defendant nor their counsel received notice of the times and places of the hearings conducted by that officer of the court. (5) That "the part of the judgment of the trial court which adjudges that said partnership should exist, at least until said real property should have been paid for, should be reversed, or at least directed to be modified, for the reason that there is no allegation in the amended and supplemental complaint upon which such a finding could be predicated, and the same is wholly outside, and beyond, and not responsive to, any issue made by the pleadings."

1. It may be conceded that the cases cited by counsel appear to sustain the defendants' contention that a witness may properly be required to answer questions tending to show that he had made other statements inconsistent with "his present testimony" without first calling his attention to the "circumstances of times, places, and persons present" under which such alleged statements were made. Section 2052 of the Code of Civil Procedure, it is true, merely provides that, before such witness can be impeached by showing that he had previously made inconsistent statements, such circumstances must first be related to him, and, while the opinion has prevailed to some extent that that rule was intended as well for the benefit of the witness as for the purpose of laying the ground for impeachment—that is to say, that it required that the witness be put in possession of all the circumstances under which he made the alleged inconsistent statement, so that, his memory being thus refreshed as fully as it could be, he could answer the question honestly and, if necessary, explain such statement—still, as counsel contend, the later expressions of the Supreme Court upon that proposition appear to coincide with their views as expressed in the petition.

[18] But we find, upon further examina-

tion of the record, that there is another answer to the criticism of counsel of the ruling under consideration, viz.: That the witness previously to the ruling complained of had answered the question as satisfactorily as he appeared to be able to. At folio 378 of the transcript, the following question was propounded to Doudell by the attorney for the defendants and the following answer returned: "Q. You testified other times that you were on the stand that you loaned him (Shoo) a hundred dollars? A. I do not remember. *I might have said I loaned it to him. I gave it to him, however.*" Thus the witness answered that it was possible that he said at the former time referred to that he loaned the money to Shoo, and we can see no reason why he should have been required to repeat an answer to the very same question subsequently propounded to him. Nothing more was done or said to refresh his memory concerning the matter about which he was interrogated when the question was asked the second time than was done or said when it was asked the first time, and it is to be assumed that he would have returned an answer similar to that given the first time the question was asked if he had been asked the same question a dozen or more times under the same circumstances. In any event, where a question is asked and answered in a manner which, as here, indicates that no different answer could probably be given to the same question, the trial court is not bound to have its time consumed by having such question uselessly repeated. In view of the uncertainty of the witness as to whether he had previously said that he had loaned the money to Shoo, we can see no reason why counsel, had they wished to pursue that course, could not have shown, by way of impeachment or rebuttal, precisely what the witness did say respecting that matter (*People v. Mar Gln Suile*, 11 Cal. App. 42, 55, 103 Pac. 951; *Ehat v. Scheidt*, 17 Cal. App. 430, 436, 120 Pac. 49; *Greenleaf on Evidence* [16th Ed.] § 462), but counsel did not appear to be disposed to thus clear up the matter. In no view of the proposition are we able to perceive anything in the action of the trial court in the matter of the ruling here complained of to justify a reversal.

[19] 2. The question: "Mr. Shoo, you were asked about the arrangements with Mr. Doudell, and you testified that he was to have \$100 a month. How much has he been paid?"—called for testimony which had previously been brought out through the defendant Shoo. At folio 838 of the transcript it will be seen that Shoo was permitted to go into a full explanation of his understanding of the arrangement between himself and the plaintiff, and among other things declared that the latter was merely an employé of Shoo, and was to receive as compensation the sum of \$100 per month and expenses. "He had at least taken a hun-

dred dollars a month out of that," continued Shoo. "We were both satisfied to leave it in that vague way, and it was left that way." Thus it clearly appears that Shoo testified, in effect, that Doudell received \$100 per month for every month he was actively connected with the business, and the aggregate amount so paid to him, which was all that the interdicted question could have revealed, was easily and readily ascertainable by arithmetical calculation. The ruling was not prejudicial, even if erroneous.

[20] 3. The third ground upon which a rehearing is asked involves the ruling of the court refusing to allow the defendant Shoo to answer the question, propounded by his attorney, "What part did, and what part didn't?" Shoo had just testified that "some of the matters that Doudell has testified to concerning himself and me occurred and some didn't," whereupon the above stated question was asked. No answer was made to the question, the court having immediately interrupted before an answer was essayed with, "No further questions," to which counsel for the defendants replied, "Well, if the court please, I don't like to leave things in that indefinite way." The court responded: "Well, I have left it that way now. I have given this case all the time I will give it. I have given it a great deal of time." While it is, of course, the duty of the trial courts, as it is that of all courts, to give to all the cases tried or heard before them all the time they require or that may be necessary to a just and proper decision of all the important questions involved therein, and that the mere fact that a court might in its judgment have given sufficient of its time to a particular case is no excuse or justification for an erroneous ruling, or for refusing to hear further testimony where it is proper in a legal aspect and is designed to illuminate one or all the disputed questions of fact, still we know of no rule of evidence which requires a trial court to allow a large amount of testimony involving, perhaps, various specific topics, to be given in response to an omnibus question such as the one above quoted and as put to the witness Shoo. Doudell had minutely related all the conversations and acts which had occurred between him and Shoo from the time of the commencement of their difficulties or from the time the differences leading to this litigation arose between them. Some of those occurrences Shoo said had occurred and others had not, and, if counsel desired to have their client specify or point out in Doudell's testimony those which had occurred and those which did not occur, then they should have questioned him particularly about the several matters to which Doudell had testified, and not have left it entirely to the witness to recall all of the latter's testimony and himself thus point out and separate the correct and the incorrect statements. In other words, counsel should

have taken up the alleged incorrect statements of Doudell separately if they related to different acts or matters, and have called the attention of Shoo thereto, and have asked him whether they were or were not correct. Besides, it will be seen, by reference to folios 1115 et seq. of the transcript, that Shoo went fully into all the matters pertaining to the differences between the parties, and at folios 1118-1120, it will be observed that he stated several times that "that is all that occurred." Under these circumstances, we cannot see how the defendants could have been damaged in the least by the court's ruling, even if we felt required to hold it to have been erroneous.

4. As to the objection that the trial court committed error by adopting the report of the referee because neither the defendants nor their counsel were notified of the times and places for conducting the hearings of that officer, it is to be said: (1) That we did not say nor intend to say in the former opinion that the failure of the defendants to object to the report of the referee before the decision was filed had the effect of depriving the defendants of the right to interpose objections to said report after the findings were filed. Of course, they had the right to object to said report as part of the findings of the court, just as they had and have the right to object to any of the other findings. But what we intended to say was that, if neither counsel nor the defendants were given notice of the hearings, they should have called the court's attention to that fact before the findings were made and filed, they having been given ample notice of the filing of the report to have done so, and that the court (although no procedure of this sort is expressly authorized), in the exercise of its discretion, and in the interest of justice, would have doubtless caused the referee to proceed de novo in the matter of his investigations so that the parties could have all been present thereat, if they so desired. As stated in the former opinion, the defendants did not elect to take that course. 2. Upon this point the record discloses this situation: That, after the findings were filed, the attorneys for the defendants made a motion to vacate the findings and the report of the referee upon the ground upon which they here urge error in the adoption by the trial court of said report. This motion was supported by affidavits. The bill of exceptions not only shows that the report of the referee was made up almost entirely from the books and papers of the firm, most of which had already been introduced in evidence, and which had been turned over to the referee by the clerk of the court, but also contains an affidavit by the attorney for the plaintiff in which it is alleged that affiant on the 8th day of June, 1910, informed Messrs. Carter & Carter, the attorneys for the defendants, that the referee was proceeding with the

taking of an account as required by the court; that frequently thereafter affiant requested Stanton L. Carter, the senior member of the firm of Carter & Carter, attorneys for the defendants, to join with affiant in assisting the referee to make up his account as speedily as possible, "and, in particular, on the 9th day of July, 1910, in open court and in the presence of the Hon. Geo. E. Church, before which this action was pending, stated to said Stanton L. Carter that said referee was engaged in making up said report, and then and there requested said Stanton L. Carter to join affiant in helping said referee to complete his report as speedily as possible, to which said Stanton L. Carter replied that he would see about it or words to that effect." It is further alleged in said affidavit that, after the exclusion of plaintiff from the business carried on by him and Shoo, one L. C. Shingle was placed in charge and possession of said business to represent Shoo, and thereafter conducted said business; "that the defendant Shoo has not been in the city of Coalinga since the 15th day of April, 1910, and has left the entire charge of said business to said L. C. Shingle, and that said Shoo has known nothing with reference to any of the matters which the referee was required by said order of June 6, 1910, to report to this court; that said Shingle alone was familiar with all the details of said business and premises from and after the 8th day of February, 1910." This affidavit further alleges that it was not necessary to take any testimony or examine any witnesses other than the plaintiff and said Shingle to enable said referee to make a report as required by the court; that, in addition to the books and papers which were delivered to the referee by the clerk of the court, said Shingle "turned over all the remaining books of account, vouchers and papers and whatever else was necessary to or proper to enable said referee to make a report in accordance with the aforesaid order of June 6, 1910"; that said books of account, vouchers, bills, papers, etc., turned over to said referee were sufficient to enable him, with the assistance of said Shingle and the plaintiff, to make a complete report required by the order of the court, and that from time to time, whenever required by the referee, both the plaintiff and said Shingle appeared before him for the purpose of making such explanations as were required by him with respect to the matters which he was to report to the court; "that the character of the report did not necessitate such a trial as required the testimony of other witnesses."

The statements contained in the foregoing affidavit are not controverted by counsel for the defendants or the defendants themselves. And upon that showing alone the court below was justified in refusing to set aside the findings upon the ground here urged against the report of the referee.

Counsel, however, declare in their petition that the court below found as a fact that "none of the attorneys for said defendants had any notice or knowledge of the taking of any testimony by said referee, or of any hearing before said referee, or of any action taken by the court thereon, and the records of said court do not show that any such notice of any said proceedings was given." Counsel are obviously in error in said statement. The language just quoted and which is also quoted in the petition as purporting to be an excerpt from the court's findings constitutes a part of the language of the bill of exceptions on the motion to set aside the findings, and said language in said bill is immediately preceded by the language, "Said motion was supported by affidavits showing that;" thus clearly indicating it to be merely the statement by the attorneys preparing the said bill of exceptions, and not a finding of the court. This is so plainly the fact that we are at a loss to understand how counsel came to treat said language as a finding or as emanating from the court in any form or for any purpose. As a matter of fact, by adopting the report of the referee into its findings, the court found that "both plaintiff and defendant were advised as to the accounting, but very little information could be obtained from either party and the referee was obliged to rely on the books, papers, and records as aforesaid."

[21] Our conclusion upon the point under consideration is that, if the defendant Shoo or his attorneys were not present when the referee was conducting his investigations, it was entirely due to their own negligence. They therefore now have no ground upon which to found a just complaint against the judgment of the court because of their alleged absence from said hearings or investigations, and this would still be true even if it could well be maintained that their rights would have been more circumspectly conserved by the presence of Shoo himself or his attorneys than they were by his representative Shingle, who at the time the referee was investigating the accounts, and for some time prior to the appointment of said referee, had charge of the business, books of account, and papers concerning which the referee was required to report to the court, and who had actual knowledge of the investigations of the referee as they were being prosecuted.

[22] 5. The fifth and last point urged in the petition is that the court erred in finding "that said partnership should exist at least until said real property should have been paid for," the argument being that said finding is not within the issues made by the pleadings. It is true that the allegation in the complaint as to the time during which the alleged partnership was to exist was stricken out and that no language of like import is contained in the complaint upon which the trial was had. But in our opinion the finding is immaterial. As shown in the

original opinion, where a contract of co-partnership has been executed—that is to say, when the parties thereto have actually entered upon the execution of such contract—the partnership will exist and remain such until “something is done to dissolve it.” *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979. The principal point in issue in this case was whether there was a copartnership agreement at all, and, if there was, and the partners had entered upon the execution of the terms of said agreement, it seems to us to be of no material importance in this case whether such partnership was to continue for a specified or limited time or indefinitely. Moreover, we are not altogether satisfied with the position which the appellants necessarily assume that, upon an issue whether two or more parties are copartners, engaged in carrying on a partnership business, it is absolutely necessary to allege the period of time during which such copartnership is by the agreement to subsist in order to justify the court in making a finding as to such time, if there is evidence justifying it. However, as stated, we do not think the finding referred to is of any special importance in this case one way or the other.

We have now, as counsel in their petition requested us to do, specially noticed all the points made on this application, and, while the record is amenable to some criticism (and what record made up in the trial of a case is not?), it is evident that we have not thus been convinced that the judgment or order should be disturbed.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### KOSHER v. STUART et al.

(Supreme Court of Oregon. Jan. 28, 1913.)

##### 1. PLEADING (§ 333\*)—SERVICE—NECESSITY.

In an action on a promissory note, the court properly struck from its records an answer not served upon plaintiff's attorney before filing as required by a rule of the circuit court; such rule being reasonable and authorized by L. O. L. § 913, subd. 5, authorizing the making of needful rules not inconsistent with law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1011, 1012; Dec. Dig. § 333.\*]

##### 2. PLEADING (§ 85\*)—FILING—TERMS.

Where the answer tendered by defendants could easily have been prepared in an hour, and no reasonable excuse was shown for a delay of several weeks in its preparation and service, an order requiring defendants to give bond to pay any judgment plaintiff might recover, as a condition to being permitted to answer out of time, was “just” within L. O. L. § 103, providing that the court may allow an answer out of time upon such terms as may be just.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Frank Kosher against F. Stuart

and others. From a judgment for plaintiff, the unnamed defendants appeal. Affirmed.

See, also, 121 Pac. 901.

This was an action to recover upon a promissory note. The complaint was served upon the defendants, A. Winans and Mattie A. Winans, on May 23, 1911, in Multnomah county. On June 2d the defendants obtained an extension of five days' time in which to plead. On June 15th, the time so granted having expired and no pleading having been filed, plaintiff's attorney moved for a default judgment, and defendants moved for further time in which to plead. The court, over plaintiff's objection, extended the time to June 19th. Within this time the answer was filed, but was not served upon plaintiff's attorney before filing, as required by a standing rule of the circuit court. The plaintiff moved to strike the answer from the files, which was allowed. Thereupon the court made an order permitting defendants to answer on condition that they file a bond conditioned to pay any judgment plaintiff might recover, and, upon their refusal to comply with this order, gave judgment for want of an answer, and defendants appeal.

H. H. Riddell, of Portland, for appellants.  
Loyal H. McCarthy, of Portland, for respondent.

MCBRIDE, C. J. (after stating the facts as above). [1] The circuit court has authority to make reasonable rules governing procedure. Subdivision 5, § 913, L. O. L. The rule requiring service of a pleading before filing the same is not unreasonable, but a proper and salutary regulation; and the court was justified in striking from its records a pleading filed in defiance of its rules.

[2] The defendants being in default, the court, under section 103, L. O. L., was authorized to impose such terms as might be just as a condition precedent to defendants' being permitted to answer. Under the circumstances disclosed here, it was not unreasonable to require defendants to give a bond conditioned to pay any judgment that might be recovered by plaintiff. The answer tendered could easily have been prepared in an hour, and no reasonable excuse is shown for the delay of several weeks in its preparation and service.

The judgment is affirmed.

#### EARECKSON v. CHANDLER et al.

(Supreme Court of Oregon. Jan. 28, 1913.)

JUSTICES OF THE PEACE (§ 164\*)—APPEAL TO CIRCUIT COURT—TIME FOR FILING TRANSCRIPT.

Though L. O. L. § 2460, provides that when appeal from a justice is taken the justice must allow it, he may, before making the order allowing it, wait the five days after the filing of the undertaking allowed appellee by section 2457 in which to except to the sureties, so that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the 30 days following the allowance of the appeal, within which section 2403 requires appellant to file the transcript in the circuit court, commence to run only from the making of such order and not from the giving of notice of appeal or the filing of the undertaking.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by W. J. Eareckson against Laroy Chandler and another. From a judgment for plaintiff on appeal from a justice, defendants appeal. Affirmed.

G. E. Hamaker, of Portland, for appellants. W. S. Moore, of Portland, for respondent.

**EAKIN, J.** This is an action commenced in the justice's court to recover \$185, balance due on the purchase price of a piece of land. The only issue raised by this appeal is the alleged error of the circuit court in denying the defendants' motion to dismiss the appeal from the justice's court, for the reason that the transcript on appeal was not filed in the circuit court within the time provided by law. The notice of appeal was filed with the justice on July 28, 1911. The undertaking was filed July 29th. On the 4th day of August, the justice made an order allowing the appeal. The transcript was filed in the circuit court September 2d. The defendants contend that the justice should have allowed the appeal immediately upon the filing of the undertaking on appeal, which was July 29th, and that the 30 days within which the transcript should be filed should have been counted from that date, relying on the case of *Hughes v. Clemens*, 28 Or. 440, 42 Pac. 617. In that case, under the Justice's Code as then in force, the justice made an order allowing the appeal immediately upon the filing of the undertaking, and at once filed the transcript in the circuit court, before the respondent had an opportunity to except to the sufficiency of the sureties. The transcript having been filed after the allowance of the appeal by the justice, and being within the exact language of the Code, it was held: "The statute not having prescribed the time in which exceptions should be taken to the sufficiency of sureties on an appeal from a justice's court, but having provided that a new undertaking may be given in the circuit court, leads us to believe that a transcript from a justice's court may be filed with the clerk of the circuit court immediately after the appeal has been allowed by the justice."

The question did not arise in that case as to the time within which the transcript should be filed, or the date from which the time should be computed. By the statute then in force, the transcript was required to be filed on or before the first day of the

next term of the circuit court following the appeal. Since that decision, the Justice's Code, as it then existed, has been repealed by Act of 1899, p. 109, by which an entirely new Code was adopted; section 45 of which (section 2461, L. O. L.) provides: "All sureties on an undertaking on appeal \* \* \* if required by the adverse party within five days after filing the undertaking, they must justify. \* \* \*" Section 41 (section 2457, L. O. L.) provides for the giving of the undertaking as thereafter provided. By section 45, above mentioned, the sureties must have the qualifications of bail upon arrest. Section 44 (section 2460, L. O. L.) provides that, when the appeal is taken, the justice must allow the same. Section 47 (section 2463, L. O. L.) provides that, within 30 days next following the allowance of the appeal, the appellant must cause to be filed with the clerk of such circuit court a transcript of the cause. The right of respondent to have an opportunity to except to the sufficiency of the sureties on the undertaking on appeal is statutory and is recognized in *Gobbi v. Refrano*, 33 Or. 26, 52 Pac. 761. In the present case the justice waited until the expiration of the time given to the respondent by statute to except to the sureties, namely, August 4th, before making the order allowing the appeal, which at least was within his right, if not his duty. The transcript having been filed within 30 days after the allowance of the appeal by the justice, it was filed within the time contemplated by the statute.

The only other assignments of error are as to the findings of fact, which we cannot review, and as to the conclusion of law, which is justified by the findings of fact.

The judgment is affirmed.

#### LOVE v. CHAMBERS LUMBER CO.

(Supreme Court of Oregon. Jan. 28, 1913.)

##### 1. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.

Under Const. art. 7, § 3, as amended November 8, 1910 (see Laws 1911, p. 7), providing that no fact tried to a jury shall be otherwise re-examined in any court unless it can affirmatively say that there is no evidence to support the verdict, the Supreme Court cannot disturb a verdict reached under proper instructions, if there is evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

##### 2. MASTER AND SERVANT (§ 121\*)—MASTER'S DUTIES—GUARDING PLACE OF WORK.

Where the crossing of a shafting was incident to the work in which an employé was engaged, it was the employer's duty to guard the shaft so as to protect the employé so far as practicable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. MASTER AND SERVANT (§ 204\*)—ASSUMED RISK—FACTORY ACT.**

Assumed risk is not a defense in an action under the factory act for failure to guard machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

**4. MASTER AND SERVANT (§ 270\*)—INJURIES—EVIDENCE—REPAIRING DEFECTS.**

Evidence of the placing of guards on machinery after an employé was injured is not admissible to show negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**5. MASTER AND SERVANT (§ 270\*)—EVIDENCE—ADMISSION—GUARDING MACHINERY.**

In a factory employé's action for injuries from an alleged unguarded machine, in which it was an issue whether it was practicable to have guarded it, evidence that, after the accident, it was guarded, was admissible to show the practicability of guarding the machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**6. TRIAL (§ 260\*)—INSTRUCTIONS—COVERED BY INSTRUCTIONS GIVEN.**

In a factory employé's action for injuries from unguarded machinery which plaintiff was passing when injured, defendant requested a charge that if plaintiff was injured by performing his duties in a dangerous manner, and might have performed them safely in a manner provided by defendant, he would be guilty of negligence barring recovery, notwithstanding that defendant was also negligent. The court instructed that if there was another safe way of doing his work which plaintiff knew, and notwithstanding he went the way he did, and if such way was dangerous to plaintiff's knowledge, and by going such dangerous way he was injured, defendant would not be liable, that in the absence of instruction by defendant as to what way to take the question was whether the way plaintiff took was one an ordinarily prudent person would have taken, and if defendant provided a safe passageway leading to and from the saw plaintiff was operating to a point where it was necessary for him to go, and plaintiff was instructed to follow such route, but took a more dangerous route and sustained injury as a result thereof, he would be guilty of contributory negligence. *Held*, that the requested instruction was sufficiently covered by the instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**7. MASTER AND SERVANT (§ 293\*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

A requested instruction that, if the shafting with which an employé came in contact was so located as to preclude anticipation of danger therefrom by the employer, its failure to guard the shafting was not negligence, was properly refused as making the employer's anticipation of danger the measure of its liability, irrespective of its due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**8. APPEAL AND ERROR (§ 1069\*)—HARMLESS ERROR—ADDITIONAL INSTRUCTIONS.**

After the jury had retired, the court recalled it, and gave a further instruction, which was strongly favorable to defendant, when a juror stated that they had already come to a verdict. They were, however, directed by the court to consider the additional instruction, and

the jury again retired and returned a verdict, with which they handed in a paper containing another verdict for the same amount with the foreman's name erased. *Held*, that any impropriety in giving the additional instruction after the verdict had been made was harmless to defendant; it being evident that the two verdicts were the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4136, 4138, 4139; Dec. Dig. § 1069.\*]

Appeal from Circuit Court, Lane County; Lawrence T. Harris, Judge.

Action by Ralph E. Love against the Chambers Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a statutory action brought under section 5040, L. O. L., being part of the factory act, which section is as follows: "Any person, firm, corporation, or association operating a factory, mill or workshop where machinery is used, shall provide and maintain in use belt-shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys while running, where the same are practicable with due regard to the nature and purpose of said belts and the dangers to employes therefrom; also reasonable safeguards for all vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set screw, live rollers, conveyors, mangles in laundries, and machinery of other or similar descriptions, which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances, and the dangers to employes therefrom, and with which the employes of any such factory, mill or workshop are liable to come in contact while in the performance of their duties; and if any machine, or any part thereof, is in a defective condition and its operation would be extra hazardous because of such defect, or if any machine is not safeguarded as provided in this act, the use thereof is prohibited, and a notice to that effect shall be attached thereto by the employer immediately on receiving notice of such defect or lack of safeguard, and such notice shall not be removed until said defect has been remedied or the machine safeguarded as herein provided." Plaintiff introduced evidence tending to show that for several weeks prior to the accident he had been employed to operate a rip saw on the main floor of defendant's sawmill. The power operating this saw was furnished by a belt from a supplementary shafting on the ground floor of the mill, and this shafting was, in turn, operated by a belt connected with the main shafting, which was also located on the ground floor, and ran east and west at a height of about 20 inches from the floor for a distance of from 30 to 40 feet. It was a part of plaintiff's duty to remove and replace this belt when it became necessary to

stop the saw at which he had been working or to start the same. He was often required thereby to go down to the ground floor—sometimes four or five times a day—to the place in the basement where the belt attached to the supplementary shafting was operated, to throw off or put on the belt, as occasion might require. Immediately preceding the accident, it being necessary to stop his saw to make some repairs or changes, plaintiff left the place where he was working, and went due east about 30 or 40 feet on the main floor of the mill to the top of a stairway leading down to the main floor of the engine room. After descending into the engine room, and requesting the engineer to slow down, he turned to the right in front of the engine, passing through the belt which ran from the driving wheel to the main shaft, and walked along westerly, parallel with the main shaft, until he came to a place between the supports of the main shaft where there were no pulleys, and there crossed the shaft. The space between the supports where plaintiff crossed was about six feet in width, and was clear except at the extreme end next to the westerly support, where there was a coupling or union in the shaft, which coupling was used as a pulley to operate a grindstone situated about six feet south of the coupling. The belt which operated the grindstone hung loose at the time plaintiff was injured. One end was attached to the stone; the other being looped loosely around the shaft as it had been thrown off the pulley. There was evidence tending to show that there were two other ways by which the belt which plaintiff wished to throw off could have been reached without crossing the main shaft, but both these were obstructed and not practicable on the day of the accident, and that the way he pursued was the only practical way known to him. In passing over the shaft the plaintiff's clothing became entangled, and he received the injuries complained of. None of the shafting or belting where plaintiff received the injury was guarded in any way, and there was testimony tending to show that it could have been so guarded without in any manner interfering with its practical efficiency. Plaintiff had a verdict and judgment, and defendant appeals.

J. S. Medley, of Cottage Grove (Woodcock & Smith, of Eugene, on the brief), for appellant. Maurice W. Seitz, of Portland (Seitz & Seitz, of Portland, and S. D. Allen, of Eugene, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). Many of the facts above stated are strongly contradicted by testimony introduced by defendant, but we are not the judges of the weight of testimony.

[1] Where there is evidence to support a verdict, and the facts have been submitted

to a jury under proper instructions, we are precluded from disturbing such verdict. Section 3, art. 7, of the Constitution, as amended November 8, 1910 (Laws 1911, p. 7); *Wills v. Palmer Lumber Co.*, 58 Or. 536, 115 Pac. 417; *Purdy v. Van Keuren*, 60 Or. 263, 119 Pac. 149.

[2] The testimony of plaintiff's witnesses indicates that the plaintiff's duties in the course of his employment required him to cross the shaft, and that this was his usual and the most practical route to the place where he was compelled to go to throw off the belt. Crossing the shaft was, therefore, an act incidental to the work in which he was engaged, and it was the duty of defendant to have so guarded it as to have so far as practicable protected him from danger.

[3] The contention that plaintiff assumed the risk incident to the unguarded condition of the machinery cannot be sustained. This court has already held that in actions under the factory act assumption of risk is not a defense. *Hill v. Saugested*, 53 Or. 178, 98 Pac. 524, 22 L. R. A. (N. S.) 634; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 4. It was therefore not error for the court to refuse to instruct the jury that the employé assumes the open and visible risks of his employment. While it may be true, as stated in *Byrne v. Nye & Wait Carpet Company*, 46 App. Div. 479, 61 N. Y. Supp. 741, that the employer is not required to guard machinery situated remotely from the place where the employé is at work, and where the employer would not reasonably anticipate that he would go, no such conditions appear in this case. The evidence rather tends to indicate that defendant's manager ought reasonably to have anticipated that plaintiff would go where he actually went, and would probably take the route that he did take.

[4] An exception was taken to the admission of evidence showing that a guard or boxing had been placed over the machinery subsequent to the injury to plaintiff. Where such testimony is offered for the purpose of showing negligence at the time of the accident, it is clearly inadmissible. *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405.

[5] However, the testimony was not offered nor admitted for such purpose, but for the purpose of showing the practicability of operating the machinery when so guarded. The complaint alleged that it was practicable for defendant to have so guarded the machinery as to have prevented the accident without interfering with its ordinary use. This was denied in the answer, so it became necessary for plaintiff to establish the proposition that it could be so guarded. No better evidence could have been introduced for this purpose than to show that after the accident the machinery had been so guarded, and that such safeguards had not in any way impeded or

interfered with its operation. Erickson v. McNeeley & Co., supra.

[6] Defendant requested the following instruction, which was refused: "If you find from the evidence in this case that the plaintiff was injured by performing his duties in a dangerous manner, and that he might have performed them safely in a manner provided by the defendant, the plaintiff would be guilty of contributory negligence and could not recover, notwithstanding the defendant has been remiss in its duty of safeguarding the machinery that caused the injury." We think this instruction is sufficiently covered by the general instruction on this point, which was as follows: "Should you find from the evidence that the way taken by the plaintiff in going to the point in the basement, where the belt was to be adjusted, was the usual ordinary way pursued by plaintiff and other employes, whose duties called upon them to go into the basement and to the place where plaintiff was going, and that said way was not in itself so dangerous that an ordinarily prudent man under the same circumstances and conditions would not have gone the same way, then you are instructed that the plaintiff in adopting such course in going to and from said basement at the time he was injured was not guilty of contributory negligence. However, in this connection as the court has already instructed you, if the plaintiff was instructed by the defendant to take a way different than the one taken by the plaintiff, then, if, notwithstanding such instruction, and notwithstanding another way, safe and open, existed, the plaintiff took the way that he did, then, in that event, the rule would be that the plaintiff would be guilty of contributory negligence, for, by reason of taking the way he did, he sustained the injury. But, in determining whether or not an ordinarily prudent man would have taken the way that plaintiff took, you have a right to take into consideration whether or not such a way was usually and customarily used by employes, if it was so used in going to the place where plaintiff was going to adjust the belt. If there was another safe way, and plaintiff knew it, and notwithstanding such knowledge plaintiff went the way he did, and if the way pursued by plaintiff was dangerous, and plaintiff knew it, and by reason of going said dangerous way plaintiff was injured, then, in that event, defendant would not be liable. In the absence of any instruction upon the part of the defendant, concerning what way to take, the question is, Was the way taken by plaintiff one which an ordinarily prudent person would have taken under the same circumstances? If you find from the evidence in this case that the defendant provided the plaintiff with a safe passageway leading to and from the saw, which it is alleged he was operating, to a point where it was nec-

essary for the plaintiff to go to adjust the belt mentioned in plaintiff's complaint, and the plaintiff had been instructed to follow said route, and in violation of such instructions chose a different and more dangerous route in going to or coming from said point, and in consequence thereof sustained the injury complained of, he would, in that case, be guilty of such contributory negligence as would preclude a recovery in this case, and it would be your duty to find for the defendant. This instruction, however, is predicated upon the assumption that such way, if there was such a way, must have been open. In other words, to be available as a way, it must have been a way that could have been pursued by the plaintiff."

[7] The defendant requested the following instruction, which was refused: "If you find from the evidence that the shafting with which the plaintiff came in contact and which caused the injury was so located as to preclude the anticipation of danger therefrom upon the part of the defendant, the failure of the defendant to safeguard the same cannot be regarded as negligence upon the part of the defendant." This instruction makes defendant's anticipation of danger the measure of its liability, and was properly refused. The question is not what the defendant, or its servants or agents, careless or otherwise, might have anticipated, but what an ordinarily prudent man would reasonably have anticipated.

[8] After the jury had retired, the court recalled them, and gave them further instructions as follows: "The court has asked you to come down for an additional instruction which should have been given you in the first instance, and the court will now give it to you so that you may take it into consideration in connection with the other instructions that have already been given. It is alleged by the defendant that the plaintiff failed to exercise such care as he was required to use in attempting to get over the main shaft. It is denied by the plaintiff that he failed to exercise the care that was required of him. The defendant alleges that the plaintiff was guilty of contributory negligence in attempting to go over the main shaft. That is to say, the defendant says that the plaintiff was guilty of contributory negligence in the act of attempting to get over the main shaft. The plaintiff denies it. So, therefore, one of the questions for you to decide is whether or not the act of the plaintiff in attempting to get over the main shaft was done with a degree of care which the plaintiff would be required to exercise. The court instructs you that if the plaintiff failed to exercise ordinary care, such care as an ordinarily prudent person would have exercised under all the circumstances of the case, and by reason of his failure to exercise such care the accident occurred, then, in

that event, the defendant would not be liable, even though you should find that it was the duty of the defendant to provide safeguards for the belting, the shafting, and the coupling. Now the plaintiff, in getting over, or attempting to get over, the main shaft, was required to exercise such care as an ordinarily prudent person would have exercised under the circumstances. And if he failed to do that, and by reason of such failure the injury was sustained, the defendant would not be liable, even though the defendant should have procured safeguards for the belting, the main shaft, or the coupling. Although the master must provide a guard or other protection to prevent injury to employes for shafting and other machinery, still he will not be responsible for damages occasioned by injury, where the danger is well known to the servant, and could have been avoided by the exercise of due care upon his part. Now this is one of the elements of contributory negligence alleged by the defendant, and the burden of proof rests upon the defendant with respect to this, the same as the other elements of contributory negligence, which have been called to your attention." A juror then said, "We have already come to a verdict and signed it, before we got this information," to which the court rejoined: "It is the duty of the jury to take into consideration this instruction along with the other instructions that the court has given. A Juror: Do we need a new verdict? The Court: Gentlemen of the jury, proceed with your deliberations and take into consideration all the instructions thus far given you. Counsel for Plaintiff: It appearing after the instruction last given that the jury had already reached a verdict, the plaintiff excepts to the instruction of the court that they should return to the jury room and consider the matter further." The jury retired, and thereafter returned with a verdict against defendant for \$5,215. With the verdict they handed in a paper, being a verdict for the same amount with the name of the foreman crossed out. The verdict was received and the jury discharged. It is impossible to see how this additional instruction, or the sending out of the jury, could have injured defendant. The additional charge was strongly favorable to defendant, and was not excepted to, the exception being merely to the action of the court in directing the jury to retire a second time. It is evident that the form of verdict which contained the name of the foreman crossed with a pen mark was the verdict first agreed upon, and that, after deliberation, the jury did not wish to change it, and therefore found another verdict identical with the first. The defendant was not injured by the action of the court in requiring the jury to deliberate further.

The judgment of the circuit court is affirmed.

# STATE ex rel. WATT v. PORT OF BAY CITY et al.

(Supreme Court of Oregon. Jan. 28, 1913.)

## 1. MUNICIPAL CORPORATIONS (§ 23\*)—PORTS AS MUNICIPAL CORPORATIONS—ORGANIZATION.

Under L. O. L. § 6115, relative to the organization of municipal corporations designated as ports, and providing that where the territorial limits do not include the county as a whole the limits shall not extend beyond the natural watershed of any drainage basin whose waters flow into another bay, estuary, or river navigable from the seas, situate within such county, land near the summit of the dividing ridge between two drainage basins, the general trend or inclination of which is toward one of them, is properly included in the corporation including that basin, even though a few trifling rivulets thereon flow in the other direction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 52-59; Dec. Dig. § 23.\*]

## 2. MUNICIPAL CORPORATIONS (§ 18\*)—PORTS AS MUNICIPAL CORPORATIONS—ORGANIZATION.

Where the petition for the organization of a port as a municipal corporation is in proper form, the notice of election properly given, the returns properly made, and the proclamation of the formation of the port duly and properly entered, the county court's finding that the port has been duly organized and incorporated and the entry of such finding in the journal is res judicata as to every fact necessary to constitute a valid corporation including the location of the boundaries, and persons wishing to contest the inclusion of land should appear in the county court and do so prior to such finding, and cannot do so thereafter by quo warranto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 41-44; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Tillamook County; Percy R. Kelly, Judge.

Proceeding in the nature of quo warranto by the State, on relation of George Watt, against the Port of Bay City, a pretended quasi municipal corporation, and others. Decree in favor of respondents, and relator appeals. Affirmed.

H. T. Botts, of Tillamook (John H. McNary, Dist. Atty., of Salem, on the brief), for appellant. John M. Gearin, of Portland, for respondents.

McBRIDE, C. J. This is a proceeding in the nature of quo warranto, brought to test the validity of the organization of a port corporation, created under the provisions of chapter 3, title 41, L. O. L., and called the Port of Bay City.

[1] The facts are as follows: In 1909 the citizens in the vicinity of Nehalem Bay, which is situated north of Tillamook Bay, organized a port under the provisions of the chapter cited, the south boundary of which was placed practically upon the summit of the range of mountains which separates Nehalem Bay from Tillamook Bay, and included all waters tributary to the Nehalem watershed, except a few very small spring branches near the summit of the range. In 1910 the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Port of Bay City, which includes all the watershed drawing into the north side of Tillamook Bay, was regularly organized; the south line of the Port of Nehalem being designated as the north line of the Port of Bay City. The proceedings were in every respect regular, and no objections are urged thereto, except that it is claimed that the brooks before referred to, being tributaries to larger streams flowing into Nehalem Bay, are a part of the Nehalem watershed, and that therefore the attempted organization of the Port of Bay City is void because in contravention of that subdivision of section 6115, which reads as follows: "Where a petition is filed for the incorporation of a port under the provisions of this act, the territorial limits of which do not include such county as a whole, the limits proposed by such petition shall not extend beyond the natural watershed of any drainage basin whose waters flow into another bay, estuary, or river navigable from the seas, situate within such county."

It is conceded, and the evidence taken at the trial conclusively shows, that all the territory embraced within the proposed limits of the Port of Bay City naturally drains into Tillamook Bay, and is part of the watershed of that bay, except that at about the summit of the range some of these small streams overlap in such a manner that upon the same 40-acre tract are found spring branches which drain toward Nehalem Bay; and running parallel to them, but in an opposite direction, are others which drain into Tillamook Bay. Because of these conditions an exact and mathematical construction of the statute would require a line which, extended upon a map, would resemble a crosscut saw, with teeth of irregular length and shape, rather than a boundary by legal subdivisions. Such a line, when surveyed and marked out, would prove to be an endless source of confusion, leaving property subject to port taxation in irregular tracts, whose acreage would not be easily computed. Even when every survey had been completed, it would be difficult for one to stand upon a particular piece of land near the summit of the dividing ridge, and say, with certainty, in which watershed he stood, without a careful topographical survey from his point of view to the neighboring brooklets.

We do not believe that it was the intention of the statute to require such technical accuracy. In a general way the Nehalem watershed is north of the line established between the two ports, and the Port of Bay City watershed is south of the line. The object of the law was to prevent landowners from being taxed to contribute to the improvement of harbors when, by reason of natural conditions and the topography of the country, such owners could not be benefited by the proposed improvement. The watershed with its advantages of a downgrade

to water commerce has suggested to the Legislature a suitable unit upon which ports not embracing an entire county should be formed, and it is evident from the testimony that all these advantages are secured to property owners in the locality by the boundary line selected in this case. Whether a bucket of water emptied at a particular spot would flow north toward the Nehalem or south toward Tillamook Bay is not important. Whether the general trend or inclination of the land included within the proposed boundaries is toward Tillamook or Nehalem is of practical importance. As a general and practical proposition, it is evident that the lands come within the Tillamook watershed, even though a few trifling rivulets may flow in the other direction. This construction follows by analogy the construction given to the various acts of Congress granting to the states the swamp lands within their limits, wherein it has always been held that, if the greater part of a legal subdivision was not swampy in character, the smaller swamp portion did not pass by the grant. *Hogaboom v. Ehrhardt*, 58 Cal. 231.

[2] There is another view of the contention in this case that is not unworthy of attention. It is conceded that the petition was in proper form, the notice of election properly given, the returns properly made, and the proclamation of the formation of the port duly and properly entered. The jurisdiction of the court to declare the organization of the port depends upon the notice given of the election. *State v. Sengstacken*, 61 Or. 455, 122 Pac. 292; *Wright v. McMinnville*, 59 Or. 397, 117 Pac. 298. This notice was sufficient to call the attention of all property owners within the proposed port to the fact that it was proposed to organize a port corporation and to establish the boundaries of the same. By the provisions of the statute the county court was required to convene seven days after the election, to canvass the returns, and to enter upon the journals of the court a proclamation declaring, among other things, that the port had been duly and legally incorporated as a municipal corporation. Plaintiff and all others having interests adverse to the organization of the port were, by the publication of the notice of election required by law, duly and legally apprised of the pendency of the proceedings, and either before the election or within the seven days intervening after the election could have appeared before the court and pointed out the alleged defects in the petition, and in a simple and inexpensive proceeding have made themselves parties to the record there, and settled by review or appeal to the circuit court the questions they here seek to litigate. The finding of the county court that the port had been duly and legally organized and incorporated, and the entry of this finding in the journal, was a final adjudication of every fact necessary under the law to con-

stitute a valid corporation, including the location of its boundaries, and the matter sought to be litigated here is res adjudicata. There should be somewhere an end to litigation in respect to the organization of these ports, and, proper notice being conceded, parties claiming interest adverse to their organization should be required to act promptly and before the final order of the county court is entered, instead of waiting until the preliminaries of organization have been completed and the officers of the corporation have entered upon their duties, and then interfering with the prosecution of the work by a proceeding based upon trifling irregularities. The decree of the circuit court is affirmed.

BURNETT, J., concurs in the result.

### RAIRDEN v. HEDRICK.

(Supreme Court of Montana. Jan. 20, 1913.)

#### 1. CHATTEL MORTGAGES (§ 40\*)—SALE OR MORTGAGE—SUFFICIENCY OF EVIDENCE.

Evidence, in claim and delivery proceedings for horses, held to make it a jury question whether the transaction between the parties amounted to a sale or chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 46; Dec. Dig. § 40.\*]

#### 2. CHATTEL MORTGAGES (§ 159\*)—NECESSITY OF POSSESSION.

While the lien of a pledge depends upon possession, a chattel mortgage is valid, as between the parties, though mortgagor retains possession.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 272-281; Dec. Dig. § 159.\*]

#### 3. CHATTEL MORTGAGES (§ 34\*)—MORTGAGE OR SALE.

Both the general rule and Rev. Codes, § 5768, recognize that a bill of sale, absolute on its face, may in fact be a chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 38; Dec. Dig. § 34.\*]

#### 4. CHATTEL MORTGAGES (§ 34\*)—BILL OF SALE.

A bill of sale with an agreement to repurchase, may amount to a chattel mortgage or conditional sale, depending upon the intention of the parties, as shown by the surrounding circumstances.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 38; Dec. Dig. § 34.\*]

#### 5. CHATTEL MORTGAGES (§ 38\*)—ACTIONS—ADMISSION OF EVIDENCE.

In claim and delivery proceedings for horses claimed by defendant to have been merely mortgaged to plaintiff, though a bill of sale was executed to plaintiff, evidence that plaintiff offered to assign the bill of sale and stated that he was working for a concern which had mortgaged the horses and was present to collect the debt, and inquired whether defendant had made preparations to pay the debt on the horses, and said he was there in the interest of the persons who furnished the money to him to advance to defendant, was admissible as indicating plaintiff's construction of the transaction.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 44; Dec. Dig. § 38.\*]

#### 6. CHATTEL MORTGAGES (§ 38\*)—SALE OR MORTGAGE—PAROL EVIDENCE.

Parol evidence is admissible to show that a bill of sale, absolute in form, is a chattel mortgage, though such evidence tends to contradict or vary the terms of the writing, in view of the provisions of Rev. Codes, §§ 7876 and 7877.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 44; Dec. Dig. § 38.\*]

#### 7. CHATTEL MORTGAGES (§ 237\*)—TENDER—NECESSITY.

A tender of the debt by a chattel mortgagor need not be proved where mortgagee denied the existence of a mortgage, so that a tender would have been futile.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 501, 502; Dec. Dig. § 237.\*]

#### 8. PLEADING (§ 277\*)—MATTERS ARISING AFTER COMMENCEMENT OF ACTION.

In the absence of supplemental pleadings, all issues are to be determined as of the date of the commencement of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 834; Dec. Dig. § 277.\*]

#### 9. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Plaintiff was not prejudiced by the refusal of an instruction, where the jury found according to his theory as outlined therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

#### 10. SALES (§ 182\*)—DELIVERY OF GOODS—QUESTION FOR JURY.

Whether the delivery of horses, sold to a railway company at a particular station, and the designation of the buyer as consignor and consignee in the bill of lading constituted a delivery to the buyer depended on the intention of the parties and was a question of fact for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.\*]

#### 11. SALES (§ 156\*)—"DELIVERY."

No particular formal ceremony is necessary to constitute a delivery of property sold; any act having the effect of transferring dominion over the property, coupled with intent to change ownership, being a "delivery."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 367-371; Dec. Dig. § 156.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

#### 12. APPEAL AND ERROR (§ 974\*)—SPECIAL INTERROGATORIES—DISCRETION OF COURT.

It is within the legal discretion of the trial court to determine whether special interrogatories shall be submitted and its action will not be disturbed, in absence of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3858, 3859; Dec. Dig. § 974.\*]

Appeal from District Court, Custer County; Sydney Sanner, Judge.

Action by William Rairden against W. A. Hedrick. From a judgment for defendant, plaintiff appeals. Affirmed.

Loud, Campbell & Wood, of Miles City, for appellant. George W. Farr, of Miles City, for respondent.

HOLLOWAY, J. This is an action in claim and delivery brought by the appellant, who was plaintiff in the district court, to re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cover possession of 26 head of horses or their value, alleged to be \$1,900. The complaint is brief and in the form usually employed where the plaintiff makes claim of absolute ownership. The answer denies ownership or right of possession in plaintiff, and then sets forth that defendant is the owner of the property and has been such continuously since prior to March 1, 1909; that on the last-mentioned date he executed and delivered to the plaintiff a bill of sale for the property in controversy, and contemporaneously therewith he and plaintiff executed an agreement by the terms of which defendant was given the option to repurchase the property upon paying to plaintiff \$1,281.25, with interest from March 1, 1909, at the rate of — per cent. per annum, and also the expenses necessarily incurred in caring for the property. The contract provides for shipping the horses to North Dakota, and further provides that defendant should have — days after the horses reached their destination in North Dakota within which to make payment of the repurchase price. It is further alleged that on March 1, 1909, defendant borrowed from the plaintiff \$1,281.25, and that it was to secure such loan that the bill of sale and contract to repurchase were made; that possession of the property was retained by the defendant; that by mistake the contract recited that the horses were to be shipped to North Dakota, whereas it was intended that they should be shipped to Baker, in eastern Montana. It is alleged that the horses were shipped to Baker in the name of plaintiff as consignor to himself as consignee; that the defendant paid all the charges and expenses; that at Baker he took possession of the horses and retained sole control thereafter; that it was mutually understood between plaintiff and defendant that defendant was to have a reasonable time, after the horses reached Baker, within which to discharge the debt. These affirmative allegations were put in issue by reply. Upon the trial, eight special interrogatories were submitted to and answered by the jury. A general verdict in favor of defendant was also returned. From a judgment in favor of defendant, and from an order denying plaintiff a new trial, these appeals are prosecuted.

[1] 1. The principal question raised by the pleadings is whether the transactions between plaintiff and defendant on March 1, 1909, amounted to a mortgage or a conditional sale. There are not involved any rights of creditors or subsequent purchasers or incumbrancers, and the questions at issue are to be determined as between the parties to the original proceedings alone.

[2] While the lien of a pledge is dependent upon possession, the same rule is not applicable to a chattel mortgage. As between the parties to it, the chattel mortgage is valid, even though the mortgagor retains possession.

The provisions of sections 5757 to 5773, Revised Codes, are for the protection of creditors and subsequent purchasers and incumbrancers in good faith for value.

[3-5] That a bill of sale, absolute on its face, may be in fact a chattel mortgage is recognized by our Codes (Rev. Codes, § 5768) and by the authorities generally, and so likewise a bill of sale, with an agreement to repurchase, may amount to a chattel mortgage or to a conditional sale, dependent upon the surrounding circumstances, including the intention of the parties. Mechem on Sales, § 688. But the subject has so recently received the attention of this court that an extended examination of it is now unnecessary. In *Murray v. Butte-Monitor T. Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132, we considered the subject at great length. The controversy there was whether certain transactions amounted to a conditional sale or a pledge; but, aside from the one element of possession, the rules applicable in that controversy are equally applicable here: (1) The transaction in this instance in its inception had for its purpose a loan and not a sale. There is not any conflict in the evidence that Hedrick's original application was for a loan to be secured by a chattel mortgage upon these horses. That application was made to George May, who furnished to this plaintiff the money which was turned over to the defendant. (2) Hedrick was in financial distress at the time of the transactions of March 1, 1909. A bank in Missoula held a chattel mortgage upon these horses. Hedrick desired to remove the horses from the Bitter Root valley to eastern Montana, but was not able to do so on account of the incumbrance then on them. These facts were known to the plaintiff and to May, as disclosed by their own testimony. (3) The price (\$1,281.25) which plaintiff claims he paid for the horses was grossly inadequate, according to his own pleadings and the testimony of his witnesses. Within less than 60 days after March 1st he alleged that these horses were worth \$1,900, and his witnesses place a considerably higher valuation upon them than that amount. (4) The fact that the bill of sale was accompanied by an option to the defendant to repurchase is strongly indicative that a mortgage was intended. The foregoing circumstances were considered at length in *Murray v. Butte-Monitor T. Min. Co.*, above, and a reference to the decision in that case suffices. But in addition there is present in this record further evidence in support of defendant's theory that a mortgage was intended. (5) Neither the plaintiff nor May, who furnished the money to him, took into consideration the value of the property at the time of the transactions of March 1st, but only considered the amount of money necessary to discharge the defendant's indebtedness to the Missoula bank. (6) The



plaintiff did not have any money with which to purchase these horses, and there is not anything in the evidence to indicate that he contemplated embarking in the horse business, but rather the contrary appears to be the fact. The negotiations started between defendant and May, and May furnished the money which the plaintiff turned over to this defendant. (7) There is evidence, which the jury apparently believed, that the plaintiff offered to assign the bill of sale to one Herman, and told Herman that he (plaintiff) was working for an outfit that had a mortgage on these horses, and that he was present to see that the debt was collected; that plaintiff further inquired of the cashier of the Baker State Bank whether defendant had made preparations for the money "to pay off the debt on the horses," and said that he was down there in the interest of May Bros. This evidence was properly admitted as indicating the construction which the plaintiff himself put upon the instruments under consideration. Whether the transactions between these parties were intended to constitute a sale or merely security for a loan was properly submitted to the jury, and by special finding No. 3 the jury found that the parties intended them to constitute "security for a loan."

[8] 2. Complaint is made that oral evidence was admitted which, it is said, tends to contradict or vary the terms of the writings, but with this we do not agree. The admission of the evidence in question was fully warranted by the provisions of sections 7876 and 7877, Revised Codes. It tended to place the trial court in the position of the parties whose language was to be interpreted.

3. Complaint is also made that the trial court permitted too wide a latitude in the cross-examination of plaintiff and his witnesses, but with this we do not agree. The examination was well within the limits prescribed in *State v. Rodgers*, 40 Mont. 248, 106 Pac. 3; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; *State v. Barrett*, 43 Mont. 502, 117 Pac. 895; and *Knuckey v. Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280.

[7] 4. It was not necessary for the defendant to prove a tender. The plaintiff in his reply having denied the existence of a debt, it would have been an idle ceremony to make a tender of the amount which defendant claims is only a debt. *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Long v. Needham*, 37 Mont. 408, 96 Pac. 731.

5. According to the defendant's theory, the debt secured by the mortgage upon these horses did not become due until June 1, 1909. Plaintiff commenced this action on April 22, 1909. In answer to special interrogatory No. 4, the jury found according to defendant's contention, and it follows, therefore, that, if there was any error in the refusal of the trial

court to give plaintiff's requested instruction No. 7, the error was without prejudice.

[8] 6. And it was not error for the court to refuse plaintiff's requested instruction 15. In the absence of supplemental pleadings, all issues are to be determined as of the date of the commencement of the action. 21 Ency. Pl. & Pr. 9.

[9] 7. Likewise no prejudice resulted to the plaintiff from the failure of the trial court to give his offered instruction 18, for by special finding No. 1 the jury found according to plaintiff's theory, as outlined in that offered instruction.

[10] 8. Error is predicated upon the refusal of the trial court to give plaintiff's offered instruction No. 10 to the effect that delivery of the horses to the railway company at Stevensville, and the designation of plaintiff as consignor and consignee in the bill of lading, constituted a delivery of the horses to the plaintiff by defendant, as a matter of law. We are not able to agree with counsel for appellant. We think the court properly submitted the question to the jury, and the jury found that there never was a delivery of the property to the plaintiff. Whether the acts mentioned constituted a delivery depended upon the intention of the parties at the time.

[11] In *Webster v. Sherman*, 33 Mont. 448, 84 Pac. 878, this court said: "No particular act or formal ceremony is necessary to make a delivery in law. Any act done, coupled with the intent to change the ownership, which has the effect to transfer the dominion over the thing sold to the buyer, is a delivery."

[12] 9. Fault is found with the action of the trial court in submitting special interrogatories to the jury. Whether special interrogatories shall be submitted in a given case is a question addressed to the sound, legal discretion of the trial court (Rev. Codes, § 6758; *Hollingsworth v. Davis-Daly E. C. Co.*, 38 Mont. 143, 99 Pac. 142; *Poor v. Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645); and, in the absence of any showing of an abuse of such discretion, the action of the trial court will not be disturbed. However, the practice observed by the trial court in this instance has been commended by this court (*O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049), and we are satisfied that, if the same practice was observed more generally, justice would be promoted thereby.

We have examined every error assigned but have treated only those which appear to us most important. We do not find any reversible error in the record, and the judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., concurs. SANNER, J., being disqualified, did not hear the argument and takes no part in the foregoing decision.

## O'MALLEY v. O'MALLEY.

(Supreme Court of Montana. Jan. 25, 1913.)

## 1. JURY (§ 110\*)—SELECTION—PEREMPTORY CHALLENGES.

Where plaintiff used two of her peremptory challenges and waived her third and fourth, and defendant exercised his fourth, and in the place thus vacated another juror was called, the court's denial of plaintiff's peremptory challenge to such juror was proper under the procedure prescribed for the selection of jurors by Rev. Codes, § 6740.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.\*]

## 2. APPEAL AND ERROR (§ 1045\*)—HARMLESS ERROR—SELECTION OF JURY IN EQUITY.

Error in selection of a jury in an equity case is harmless, since the jury's verdict and findings are merely advisory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4124-4127; Dec. Dig. § 1045.\*]

## 3. DOWER (§ 52\*)—RIGHT OF DIVORCED WOMAN—"WIDOW."

Under Rev. Codes, § 3642, providing that a judgment of divorce shall restore the parties to the state of unmarried persons, a divorced woman cannot become the widow of her former husband, and can have no dower interest in his estate, under Rev. Codes, § 3708, providing that a "widow" shall be endowed, etc.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 102-107; Dec. Dig. § 52.\*]

## 4. WORDS AND PHRASES—"WIDOW."

The word "widow" means a woman who has lost her husband by death, and has no application to a divorced woman.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7457-7459.]

## 5. APPEAL AND ERROR (§ 1005\*)—FINDINGS—CONFLICTING EVIDENCE.

In an action for dower, a jury finding on conflicting evidence and adopted by the court will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

## 6. MARRIAGE (§ 22\*) — COMMON-LAW MARRIAGE—"MUTUAL AND PUBLIC ASSUMPTION OF THE MARITAL RELATION."

A "mutual and public assumption of the marital relation," within Rev. Codes, § 3607, defining common-law marriage, means a course of conduct on the part of both man and wife toward each other and toward the world so that people generally will take them to be married, and cohabitation is indispensable thereto.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4647.]

## 7. MARRIAGE (§ 22\*) — COMMON-LAW MARRIAGE—"COHABITATION."

"Cohabitation," as applied to common-law marriage, means to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1243-1245.]

## 8. MARRIAGE (§ 22\*) — COMMON-LAW MARRIAGE—"COHABITATION."

The fact that subsequent to being divorced from each other husband and wife, while main-

taining separate abiding places, and not living together, frequently stayed overnight at the woman's house, occupying the same bed, and stayed one night at the man's house during a period of two years, after which she moved away and they never visited, that he bought supplies for her and gave her money, and spoke of her as his wife to certain persons, did not show that cohabitation necessary to constitute a mutual and public assumption of the marital relation within Rev. Codes, § 3607, defining common-law marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.\*]

Appeal from District Court, Park County; Frank Henry, Judge.

Action by Mary O'Malley against John O'Malley. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank Arnold, of Livingston, for appellant. Miller & O'Connor, of Livingston, for respondent.

SANNER, J. In this action the appellant seeks to have herself declared the owner of a one-third part of certain real estate as dower.

The complaint is in two causes of action.

In the first she pleads that she and one Michael O'Malley were married in April, 1903, and remained husband and wife until November 26, 1904, when they were divorced; that during the coverture Michael O'Malley was seised of certain lots in the city of Livingston which he conveyed on April 1, 1905, to the respondent, she not joining in the conveyance; and that Michael O'Malley died in January, 1911. In the second cause of action it is alleged that she and Michael O'Malley on February 21, 1905, "entered into a legal contract of marriage each with the other, and did on said date and at said time actually intermarry pursuant to the terms of said contract and consent to become husband and wife; that said contract and marriage so entered into between said plaintiff and Michael O'Malley was thereafter followed by a solemnization and by a mutual and public assumption of the marital relation, and said plaintiff and Michael O'Malley thereafter and up to and until the death of said Michael O'Malley cohabited and lived together as husband and wife;" that during the period of this marriage Michael O'Malley was seised of the lots referred to in the first cause of action, which were conveyed on April 1, 1905, by him to respondent without her joinder or consent. The answer admits the first marriage, the ownership of the lots by Michael O'Malley up to April 1, 1905, the conveyance to the respondent, and the death of Michael O'Malley, denies all the other substantial allegations of the complaint, and, by way of affirmative defense, pleads the decree of divorce entered on November 26, 1904. The case was tried to the court sitting with a jury, which returned a general verdict and special findings in favor of respondent, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment was entered accordingly. The appellant moved for a new trial, which was denied, and from the order denying her motion for a new trial she prosecutes this appeal. Twelve alleged errors are specified, but, as will be seen in the sequel, only three questions are presented.

[1] 1. After the appellant had used two of her peremptory challenges, she waived her third and fourth. Respondent then exercised his fourth, and in the place thus vacated the juror Ebert was called. Thereupon appellant sought and was denied a peremptory challenge as to Ebert and assigns this denial as error. There is nothing in this assignment. So far as the record discloses, the proceeding was in substantial conformity with section 6740 of the Revised Codes, and the question presented is essentially settled by the decision of this court in *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

[2] Moreover, this was an equity case. The appellant was not, as a matter of right, entitled to have it tried by a jury, and the verdict and findings were advisory merely, subject to be disregarded by the court. Under these circumstances, it would be of no vital consequence if error were committed in its selection. *Ferris et al. v. McNally et al.*, 45 Mont. 32, 121 Pac. 889.

[3] 2. By the first cause of action, the essential allegations of which are undisputed, the question is raised whether a decree of divorce, absolute on its face and duly entered by a court of competent jurisdiction, bars the subsequent assertion of dower. Upon first impression the mere statement would seem to carry its own answer; but such has not always been the case. Lord Coke tells us: "It is necessary that the marriage do continue, for, if that be dissolved, the dower ceases. 'Ubi nullum matrimonium, ibi nulla dos.' But this is to be understood when the husband and wife are divorced a vinculo matrimonii, as in case of precontract, consanguinity, affinity, etc., and not a mensa et thoro only, as for adultery." Coke, Litt. § 32a. In an interesting discussion in *Scribner on Dower*, c. 19, where the early American authorities are collated, we learn that these words are to be taken to mean that in cases where under the modern procedure there would be an annulment of the marriage there would be no dower, but that, where under the modern procedure a divorce would result, the contrary is the rule indicated by Coke. *Wait v. Wait*, 4 N. Y. 95. Whether or not the modern rule arose upon a misconception of the effect of Coke's dictum, no doubt exists as to what that rule is, and that by the great weight of authority it is to the effect that a divorce absolute in the modern sense is a bar to the subsequent assertion of dower. *Day v. West*, 2 Edw. Ch. (N. Y.) 592; *Whitsell v. Mills*, 6 Ind.

229, 231; *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 137, 43 Am. St. Rep. 42; *Bishop on Marriage & Divorce*, §§ 706, 708; 14 Cyc. 934; 10 Am. & Eng. Ency. Law (2d Ed.) 200.

[4] Indeed, we think the matter is settled by the language of our statutes, without any authorities. Section 3708, Revised Codes, reads: "A widow shall be endowed," etc. The word "widow" is as old as the language itself. Colloquially as well as among the learned, in courts as well as out of them, it has always meant "a woman who has lost her husband by death," and never, outside of slang and then only with a semi-contemptuous prefix, has it had any application to divorced persons. Section 3642 provides: "The effect of a judgment of divorce is to restore the parties to the state of unmarried persons." If this means anything at all, it means just what it says, and its consequence is that she who was a wife ceases, upon the rendition of a decree of divorce, to have any husband. If, then, only a widow is endowed under the statute, and if, to be a widow, a woman must lose a husband by death, and if a divorced woman has no husband to lose, it is quite obvious from the statutes alone that she can assert no dower after a divorce. We see nothing in *Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748, or in section 3623 of the Revised Codes, cited by appellant, that militates with this view, and the fact, if it be a fact, that the innocent wife, driven to court by the sins of her husband, is thus placed at a disadvantage, is a consideration to be addressed to a co-ordinate department of this state government.

[5, 6] 3. In her second cause of action the appellant alleges that the conveyance to the respondent was made while she was in fact the wife of Michael O'Malley by virtue of a second marriage duly solemnized, or, if not solemnized, then by what is generally termed a "common-law marriage," or, as our statute puts it, "a mutual and public assumption of the marital relation." Section 3607, Rev. Codes. The solemnization of the second marriage is supposed to have occurred on the occasion of the visit by Father Blaere to the bedside of Michael O'Malley when Michael O'Malley was sick, and thought likely to die. The appellant testified to a solemnization by Father Blaere; but Father Blaere, when called as a witness in her behalf, testified distinctly and clearly that there was no license and no solemnization. What he did do, he says, was to prepare the sick man for death in accordance with the rites of his church, and in the course of it he merely blessed the former marriage which had not been sanctioned by the church. He considered them already married, because his church did not recog-

nize the divorce as a severance of the tie. This court will not undertake to decide between these witnesses, but upon settled principles will uphold the finding of the jury as adopted by the trial court that there was no solemnization. *Boyd v. Huffine*, 44 Mont. 310, 120 Pac. 228.

The only evidence of mutual consent of the parties to the alleged second marriage is contained in appellant's narrative of the proceedings before Father Blaere and necessarily involved in his denial. But assuming that there was a mutual consent, did the appellant make out a prima facie case of "mutual and public assumption of the marital relation"? We think not. Counsel have been unable to furnish this court with any authorities specifically construing this phrase, perhaps because the words are their own interpreter. To us it means a course of conduct on the part of both man and wife towards each other and toward the world as that people generally would take them to be married.

[7] Indispensable to this is cohabitation; and we say with the Supreme Court of California that "by cohabitation is not meant simply the gratification of the sexual passions, but to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also." *Kilburn v. Kilburn*, 89 Cal. 50, 26 Pac. 637, 23 Am. St. Rep. 447; *Yardley's Estate*, 75 Pa. 207; *Sharon v. Sharon*, 79 Cal. 670, 22 Pac. 26, 131; *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735.

[8] Turning now to the evidence on behalf of appellant only, we find that after the alleged second marriage Michael O'Malley and the appellant never lived together but maintained separate abiding places; that he visited her in her own house with more or less frequency, sometimes staying overnight, and when he did so the parties occupied the same bed; that this continued for a period of over two years, after which she moved away, and the parties never even visited; that only once did she ever sleep with him in his own house; that he bought her supplies and gave her money; that he told two persons that she was his wife, and to others he referred to her as his wife. It is unnecessary to go into the matter at greater length. Suffice it to say the evidence is far short of establishing that consistent and public course of conduct towards each other as husband and wife, that "treatment of each other in the usual way with married people," that cohabitation which we hold to be necessary to constitute a mutual and public assumption of the marital relation. *Hinckley v. Ayres*, supra.

In this view of the case, the other errors assigned are of no consequence. The verdict and findings of the jury as adopted by

the court are justified by the evidence; and the motion for a new trial was properly denied. The order is accordingly affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

LOGIA SUPREMA DE LA ALIANZA HISPANO-AMERICANA v. DE AGUIRRE.

(Supreme Court of Arizona. Jan. 22, 1913.)

1. INSURANCE (§ 290\*)—AVOIDANCE OF POLICY FOR MISREPRESENTATION—AGE.

An applicant for insurance, who misrepresents his true age, imposes upon the company in such a material matter as to invalidate the policy and relieve it from liability thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 671; Dec. Dig. § 290.\*]

2. EVIDENCE (§ 252\*)—ACTION—ADMISSIBILITY OF EVIDENCE—DECLARATORY STATEMENTS AS TO AGE.

Insured, in his first application dated April, 1907, stated that he was born August 2, 1863, and that his age was 44, and in his second application, made July, 1910, he gave the same date of birth and stated that his age was 47. The insurer, defending an action on the policy on the ground of a misrepresentation of age, offered affidavits made by the insured when registering as a voter, in one of which, made October, 1900, he stated that he was 48, in another, made June, 1906, that he was 48, and in a third, dated June, 1908, that he was 50. Held that, as such declarations were no part of the res gestæ, explained no fact in the application for insurance, and were made in a transaction where the exact age of the insured was not material to the matter then before his mind, the affidavits were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 989-993; Dec. Dig. § 252.\*]

3. APPEAL AND ERROR (§ 1047\*)—HARMLESS ERROR—STRIKING OUT EVIDENCE.

It is immaterial that an order striking out incompetent evidence was made during the trial, after its admission without objection, since the appellant could suffer no injury from the exclusion of incompetent evidence at any stage of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.\*]

4. APPEAL AND ERROR (§ 970\*)—TRIAL (§ 59\*)—DISCRETION OF LOWER COURT—EXCLUSION OF INCOMPETENT EVIDENCE.

The order in which evidence is offered, received, or excluded is in the discretion of the trial court, and its order striking out incompetent evidence after its admission was not such an abuse of discretion as to call for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\* Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.\*]

Appeal from District Court, Pima County; John H. Campbell, Judge.

Action by Margarita de Aguirre against Logia Suprema de La Alianza Hispano-Americana. Judgment for plaintiff, and defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The appellee, as plaintiff, commenced this action to recover from the defendant, this appellant, a judgment in the sum of \$1,200 upon an insurance policy or benefit certificate issued by appellant to Feliberto Aguirre, a member of defendant society, in which appellee, as the wife of such member, was named as the beneficiary. The complaint alleges the death of the insured member on December 17, 1910; that at the time of his death he was in good standing in the society; and that on the 20th of December, 1910, due notice and proof of death was given and furnished appellant. The defense is made that the insured, when he was admitted to membership, falsely and fraudulently misrepresented his age both in his application to the society and in his answers to the medical examiner of defendant; that the laws of the society exclude from benefits, such as provided in this certificate, all persons over a certain age; that the statements made in such application and examination are warranties, and they are made a part of the contract of insurance; that, at the date the deceased first made his application for insurance and was examined therefor, the laws of the society excluded persons from benefits who were over the age of 45 years, and in said application and examination insured falsely and fraudulently represented his age as then 44 years; that in fact and in truth insured was then 47 years of age. It is further shown that the by-laws of defendant were amended in January, 1910, by which larger benefits were given members in good standing in consideration of the payment of dues on another basis and upon the surrender of their certificate, limiting the member's age to 50 years. On July 6, 1910, the insured surrendered his original certificate, performed the other conditions required by the said amendment, and received in lieu thereof the certificate or policy sued upon. This policy states the age of the insured as 47 years, and it was accepted by him, subject to the conditions mentioned therein. The policy recites that it is issued "in consideration of the statements made in his application to this lodge and to the medical examiner. \* \* \* All of which is considered a part of this contract." Defendant alleges that its first knowledge of the false and fraudulent representations, made by the insured as to his age, was obtained since his death.

The insured in his first application states that he was born August 2, 1863, and "my age is 44 years," dated April 28, 1907; and in his second application, made July 3, 1910, he states, "My actual age is 47 years, the day of my birth being the second day of August, 1863." These are the statements made upon which the contract in suit was founded and the policy issued.

In support of the defense interposed, the appellant offered affidavits made by the in-

sured for the purpose of registration as a voter of Pima county; one of which was made October 2, 1900, in which the registration officer certifies that affiant stated, among other things, "that I am 42 years of age"; another of which, made June 20, 1906, in which it is certified he stated "that I am 48 years of age"; and in the third, dated June 20, 1908, it is certified he stated "that I am 50 years of age." And appellant offered no other proof upon that fact. At the time of the offer, no objection was interposed by the plaintiff, and the testimony was received. Other proceedings were had, and the evidence closed. Thereafter the case was opened for further evidence, and plaintiff moved to strike the three affidavits as irrelevant, incompetent, and immaterial, which motion was granted and the jury was directed to return a verdict for the plaintiff. To all of which the appellant objected and duly excepted. A judgment followed. From which judgment and order overruling a motion for a new trial, defendant appeals.

Chas. Woolf, of Tempe, for appellant. Tom K. Richey, of Tucson, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The age of an applicant for insurance upon his life is regarded by all insurance companies as very important, both as affecting the risk assumed and in fixing the premium to be charged.

[1] When an applicant for insurance misrepresents his true age, he has imposed upon the company in such a material matter as to invalidate the contract of insurance, and thereby relieves the company from liability thereunder. The issue raised in this case is the true age of the insured, and the question for solution is whether the affidavits offered by the defendant are competent testimony tending to establish his true age as different from his age as represented by him in his application for insurance.

At the most, the statements of his age, made by him to the registration officer, contained in the affidavits could be no more than declarations or admissions made by the insured concerning his age, which are inconsistent with the statements made in his application for insurance concerning the same fact. The statements made in the three affidavits and in his application for insurance and to the medical examiner are nothing more than inconsistent statements of the declarant made by him at different times. If he were under examination as a witness, and his actual or true age was in issue, and he should testify that he was born August 2, 1863, he could be asked concerning his statements made in his registration affidavits for the purpose of showing his credibility as a witness, and the jury could consider such inconsistent statements in arriving at his true age. This contingency does not arise

in this case. The insured is not a party to the suit nor interested therein. He is not a witness in the action. To discredit a material condition in a contract is a very different thing from discrediting a witness' testimony before a jury. It is difficult to understand how a general statement that one is 42 years of age, made on a certain date, could tend to prove the true age of the person as against his definite statement that he was born August 2, 1863, and was 44 years of age, made at another date, when the two statements were made in transactions in which the true age in one was material and in the other immaterial. In the first case, without a further statement of facts, the declarant states his conclusion that he is 42 years of age; in the later statement he says he was born August 2, 1863, and is 44 years of age. If he should have stated the date of his birth, it was a simple matter to reach the conclusion he reached in his application. The two statements are not of equal probative force; one is a mere conclusion of the declarant, while the other states a fact from which a conclusion can be reached. The issue on trial was the true age of the insured on April 28, 1907. If we take the statement made in the affidavit for the purpose of registration of date of June 20, 1906, as nearest in point of time to the date of the application, we find the statement to be "that my age is 48 years." In April following we find the insured stating, when applying for membership in and contract with defendant for insurance, "I was born \* \* \* the 2d of August, 1863. My age is 44 years." In the latter statement his true age was material; in the former the true age is not material nor was the correct statement of the age of the applicant an essential condition of his right to be registered.

[2] The courts are not altogether uniform on the question of the admissibility of the declarations and admissions of the insured, made by him before or after his application for his insurance, relating to his health or his age. The weight of authority appears to establish the general rule that such declarations or admissions of the insured, subject to the general rules relating to evidence of declarations or admissions as a part of the *res gestæ*, are inadmissible to show the falsity of his statements in his application and answers in his medical examination. Case-note 11 L. R. A. (N. S.) 92, to Taylor v. Grand Lodge A. O. U. W.

In a case decided as late as October, 1908, the Wisconsin Supreme Court in Johnson v. Fraternal Reserve Association, 136 Wis. 528, 117 N. W. 1019, passing upon this question, says: "The beneficiary in a policy of insurance, whether issued by a fraternal society or otherwise, has such a vested interest therein that, upon its maturing without such interest having been divested and an action being brought by such beneficiary

to enforce the policy, alleged misrepresentations made by the assured in taking it out cannot be supported by evidence of his declarations, unless they were made so near the time of the application and so closely related thereto as to so characterize some act or fact respecting his then condition as to be a part of the *res gestæ*; that otherwise such evidence is not admissible, in the absence of independent proof of the falsity of the application in respect to matters referred to in the declarations, and then only to prove knowledge of such falsity on the part of the assured." In Supreme Lodge K. of H. v. Wollschlager, 22 Colo. 213, 44 Pac. 598, the court, on the issue of age of the insured, holds that declarations made by him in applications for membership in the Grand Army of the Republic, also for membership in other orders, and for pensions and increase of pensions, are not admissible to contradict statements made in the application for the insurance policy in suit. In Yore v. Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81, the question is the admissibility of statements of the age of the insured made in applications to other companies for insurance, and the statement of his age, appearing on the great register of the county in which he voted, offered to establish the age of the insured as different from that stated in the application for the policy in suit. The court held such statements inadmissible as tending to prove no fact at issue. To the same effect are: G. L. Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Rawls v. Am. Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Union Cent. L. Ins. Co. v. Cheever, 36 Ohio St. 201, 38 Am. Rep. 573; Dial v. Valley Mut. L. Ass'n, 29 S. C. 560, 8 S. E. 27; Valley Mut. L. Ins. Co. v. Teewalt, 79 Va. 421; Wilson v. Life Ass'n of Am., Fed. Cas. No. 17,818; Dillerber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Mobile L. Ins. Co. v. Morris, 3 Lea (Tenn.) 101, 31 Am. Rep. 631. A great many additional cases may be cited to the same effect.

We think the weight of reason, as well as the weight of authority, clearly supports the rule rejecting such declarations where they are no part of the *res gestæ*, explain no fact in the application for insurance, and are made in a transaction where the exact age of the insured is not material to the matter then before the mind of the declarant. The ruling of the court in excluding the affidavits for the purpose of registration was without error.

[3] It follows that it was immaterial that such order was made at a late stage of the trial. The appellant could suffer no injury from the exclusion of incompetent testimony at any stage of the trial. At most, the appellant could only complain that the logical time to exclude the testimony was at the time it was offered.

[4] The order in which a trial is conducted, evidence is offered, received, or excluded, is in the sound legal discretion of the trial court, and nothing less than a clear abuse of such discretion, resulting in apparent injury to a party, should call for a reversal by this court. No such condition is shown by this record.

The judgment and order of the trial court are affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

### COLORADO & S. RY. CO. v. STATE R. COMMISSION OF COLORADO et al.

(Supreme Court of Colorado. Dec. 9, 1912.  
Rehearing Denied Jan. 6, 1913.)

#### 1. RAILROADS (§ 227\*)—POWER TO CONTROL AND REGULATE.

Railroad Commission Act (Laws 1910 [Ex. Sess.] p. 46) § 2, makes it the duty of common carriers to furnish transportation, establish through rates, and provide a sufficient number of cars, and a reasonable time schedule for trains. Section 25 requires railroad companies to transport shipments with the utmost diligence, and move perishable products without unnecessary delays. Section 27 authorizes the Railroad Commission to require railroad companies to furnish such facilities for the convenience of the public for shipping and handling property as in its judgment are necessary and within the reasonable power of the company to furnish. Section 12 authorizes the Commission to enforce the provisions of that act. *Held*, that where a railroad company, by abandoning a part of its line, causes delay in shipments, works a great inconvenience to the public, imposes additional expense in obtaining perishable articles by rail, and embarrasses the operation of mines located along such abandoned portion, the Commission has power to direct traffic to be resumed over such abandoned portion, and to direct what freight trains shall be operated thereover.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

#### 2. RAILROADS (§ 6\*)—REGULATION—STATUTORY PROVISIONS.

The Railroad Commission Act (Laws 1910 [Ex. Sess.] p. 45), being essentially remedial, should be liberally construed to accomplish its object.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 7; Dec. Dig. § 6.\*]

#### 3. STATUTES (§ 181\*)—CONSTRUCTION—ASCERTAINING INTENT.

That possible interpretation should be given to a statute which will render it effective and effect the legislative intent, if such intent can be reasonably ascertained.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

#### 4. STATUTES (§ 211\*)—CONSTRUCTION—RESORT TO TITLE.

The title of an act, although not declaratory of the law, which must appear in the act itself, may be resorted to for the purpose of ascertaining the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

#### 5. RAILROADS (§ 227\*)—REGULATION—STATUTORY PROVISIONS.

The title of the Railroad Commission Act (Laws 1910 [Ex. Sess.] p. 45), recites that its objects, among others, are to create a railroad commission, prescribe and define its duties, insure an adequate railway service, and exercise general supervision over the conduct and operations of common carriers. Section 2 requires common carriers to furnish transportation upon reasonable request, establish through routes and just and reasonable rates applicable thereto, and provide a sufficient number of cars and a reasonable time schedule for trains. Section 3 provides that all charges for any service rendered in the transportation of passengers or property shall be just and reasonable. Section 5 makes it unlawful, for common carriers to give undue or unreasonable preferences or advantages to particular persons or localities. Section 12 authorizes the Railroad Commission to execute and enforce its provisions. *Held*, that where a railroad, by abandoning a portion of its line, requires travelers between the termini of such abandoned line, and points beyond to pay additional fares and suffer loss of time by traveling to their destinations over a circuitous route, it subjects the locality thereby affected to an undue disadvantage, and the Railroad Commission has power to direct it to operate passenger trains over such abandoned portion, although the act nowhere expressly authorizes the Commission to direct the running of passenger trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

#### 6. OFFICERS (§ 6\*)—MODE OF FILLING OFFICE—DESIGNATION BY LEGISLATURE.

Railroad Commission Act (Laws 1907, p. 531), provided for the election of commissioners at the general election. The Railroad Commission Act (Laws 1910 [Ex. Sess.] p. 45), amending and re-enacting the earlier act, provided for the appointment of the commissioners by the Governor, but also provided that the commissioners then in office, naming them, should be the commissioners under that act for the terms for which they were elected. *Held*, that this did not unlawfully create an office and designate the particular persons who should fill the office, but merely provided that the Governor, although empowered to appoint commissioners, should not exercise that power as to the commissioners then in office until their terms had expired.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 7; Dec. Dig. § 6.\*]

#### 7. CONSTITUTIONAL LAW (§ 62\*)—CARRIERS—REGULATION—COMMISSIONERS—STATUTORY PROVISIONS.

Railroad Commission Act (Laws 1910 [Ex. Sess.] p. 46) § 2, requires common carriers to furnish cars to shippers, and fix reasonable time schedules for trains. Section 5 prohibits carriers' giving undue advantage to particular localities, or subjecting them to undue disadvantage. Section 12 creates a railroad commission with authority to execute and enforce its provisions. Section 25 requires railroad companies to transport shipments with the utmost diligence. Section 27 authorizes the Commission to make such orders with respect to increased facilities as in their judgment may be necessary and within the reasonable power of the carrier to adopt. *Held*, that this act does not delegate legislative power to the Railroad Commission contrary to Const. art. 3, and article 5, § 1, as amended by Laws 1910 (Ex. Sess.) p. 11, but that it imposes on common carriers the duty of furnishing adequate railway service, and merely authorizes the Commission to administer the law by as-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

certaining as a fact whether its provisions are violated; and, if violated, to enforce them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.\*]

**8. CONSTITUTIONAL LAW (§ 66\*)—LEGISLATIVE POWERS—DELEGATION.**

While the General Assembly cannot delegate the power to make a law, it may delegate the power to determine some fact or state of things upon which the law as prescribed makes its action depend.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 115, 117-122; Dec. Dig. § 66.\*]

**9. RAILROADS (§ 9\*)—REGULATION—UNREASONABLE REGULATIONS—BURDEN OF PROOF.**

A railroad company, attacking an order of the State Railroad Commission directing it to resume traffic over an abandoned portion of its line as unreasonable because compliance therewith would subject the company to a substantial loss, has the burden of establishing such loss as a fact.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.\*]

**10. RAILROADS (§ 9\*)—REGULATION—UNREASONABLE REGULATIONS—REGULATIONS CAUSING LOSS.**

In determining whether resumption of traffic over an abandoned portion of a railroad, as directed by the Railroad Commission, would subject the company to a loss, interest on bonds and investments, which could not be materially different whether the road was operated or not, should not be taken into account.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.\*]

**11. RAILROADS (§ 214\*)—DUTY TO OPERATE.**

Railway corporations are organized for public purposes, and have been granted valuable franchises and privileges, and primarily owe duties to the public of a higher nature than that of earning large dividends for their shareholders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.\*]

**12. RAILROADS (§ 214\*)—OPERATION—DISCRETION OF COMPANY.**

In the absence of a statute limiting its power, a railway company is vested with a wide discretion in operating its line of road, but this discretion is not absolute, and must be exercised with due regard to the public welfare.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.\*]

**13. RAILROADS (§ 223\*)—POWER TO REGULATE—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Neither Const. art. 15, § 3, authorizing the General Assembly to alter charters of corporations, but only in such manner that no injustice shall be done the incorporators, nor Mills' Ann. St. § 602, providing that railway corporations shall have power to regulate the time and manner in which passengers and property shall be transported, constituted a surrender by the state of its power to require railroads to observe their legal obligation to so operate their trains and to furnish such service as would reasonably serve the needs of the public, since the state will not be considered as having surrendered such power, either by statute or constitutional provision, in the absence of positive words to that effect or their equivalent in law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 725-729, 738; Dec. Dig. § 223.\*]

**14. CONSTITUTIONAL LAW (§ 297\*)—EMINENT DOMAIN (§ 2\*)—REGULATION OF RAILROADS—DUE PROCESS OF LAW.**

Railroad property is protected by the constitutional guaranties against deprivation without due process of law or devotion to a public use without compensation, but these rights are not abridged by the reasonable exercise of the governmental power to regulate.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.\* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

**15. RAILROADS (§ 214\*)—DUTY TO OPERATE—ACCEPTANCE OF FRANCHISE—EFFECT.**

A railroad company, by accepting from the state its franchise, rights, and privileges, becomes bound to operate the road when constructed in the manner and for the purpose contemplated by its charter.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.\*]

**16. RAILROADS (§ 227\*)—REGULATION—UNREASONABLE REGULATIONS—REGULATIONS CAUSING LOSS.**

A railroad company, operating as one system under one management and control a number of lines at a large profit, which has not surrendered, but continues to enjoy, its franchise and corporate rights, may be required by the Railroad Commission to resume operation of an abandoned portion of its line, and furnish such service thereover as is sufficient to accommodate the traffic, although such operation will result in a loss, but the fact that a loss will occur is to be considered in connection with the company's duties and the productiveness of its business as a whole in determining whether the order of the Railroad Commission is reasonable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.\*]

En Banc. Error to District Court, Summit County; J. E. Rizer, Judge.

Proceeding by the State Railroad Commission of Colorado and another against the Colorado & Southern Railway Company to enforce an order of the Railroad Commission. To review a judgment granting a mandatory injunction, defendant brings error. Affirmed.

E. E. Whitted, John A. Ewing, and R. H. Widdicombe, all of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen. and Theo. M. Stuart, Jr., Asst. Atty. Gen., for defendant in error State R. Commission of Colorado. Barney L. Whatley, of Breckenridge, for defendant in error Breckenridge Chamber of Commerce.

**GARBERT, J.** The Colorado & Southern Railway Company is a corporation organized under the laws of this state. It owns a standard gauge line from Orin Junction, 150 miles north of Cheyenne, Wyo., extending southerly through Colorado to Denver, and thence to a point near the New Mexico-Texas line. In addition to this system, it owns a narrow gauge line, extending southwesterly up and along Platte Cañon to Como, from Como over Boreas Pass, down into Breckenridge, then up and over Climax Pass into Leadville; also, a line extending from Como southwesterly through the Town of Buena

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Vista to Gunnison, and thence to Baldwin, about 20 miles from Gunnison. This narrow gauge line is about 335 miles in length, is known as the South Park Division of the Colorado & Southern Railway Company, and is connected with, and forms a part of, the system operated by the company as a whole. It is shown more particularly on the following map:

ridge, with a stub train from Breckenridge to Como, and a combination train from Como to Grant, connecting with a passenger train at the latter point for Denver. This service was continued until January, 1912, when the stub train between Breckenridge and Como was discontinued. In the meantime the passenger train from Grant to Denver was taken off, and a combination train run between



The South Park Line has been operated continuously previous to the winter of 1910-1911 by the railway company and its predecessors for about 30 years, during which period the service consisted of not less than one passenger train each way each day from Denver to Leadville, and one freight train each way each day between the same points. In November, 1910, the railway company ceased to operate that portion of its line from Como to Breckenridge, and refused to receive or transport either passengers or freight over its road between these points. The service was then limited to a combination freight and passenger train between Como and Denver, and a similar service between Breckenridge and Leadville. In the summer of 1911 a passenger train daily, except Sunday, was operated between Leadville and Brecken-

Como and Denver. The passenger service between Breckenridge and Leadville was continued, and also a triweekly freight train between these points. By reference to the above map it will be seen that passengers from Breckenridge for Denver were compelled to go to Leadville, and thence over the Denver & Rio Grande, via Pueblo, or over the Midland, via Colorado Springs.

In the latter part of 1911 the Breckenridge Chamber of Commerce filed a petition with the State Railroad Commission, setting forth the facts above narrated concerning the operation of trains down to that time, and charged that, unless restrained, the railway company during the winter of 1911-1912 would cease to operate its road between Como and Breckenridge, and probably for all time to come; and that freight from Breckenridge

to Denver, or vice versa, had to be shipped over the Denver & Rio Grande via Leadville and Pueblo. The petitioner asked that the railway company be ordered to operate its line between Como and Breckenridge, and to receive and transport freight between Denver and Breckenridge and all intermediate points, and provide an exclusive passenger service between Denver and Leadville daily, including Sunday. The railway company filed an answer, challenging the jurisdiction of the Commission to make any order in the premises, denied that closing the road between Como and Breckenridge occasioned any damage to the citizens of Breckenridge and Summit county; admitted that it had declined to receive freight for transportation from Denver, through Como to Breckenridge; that such freight, when conveyed to Breckenridge, was shipped via other lines of road through Colorado Springs and Pueblo to Leadville, and then reshipped to Breckenridge; admitted that it refused to receive for transportation any freight between Como and Breckenridge consigned to Breckenridge, and had refused to receive and transport over its own line freight consigned to Breckenridge originating at Denver or points between Denver and Como. It then set forth at some length the physical character of its line from Denver to Leadville, the fact that it was built through a cañon and over high mountain passes; that the grades and curves between Como and Breckenridge were excessive; that there was no business between these points; that the line was often closed by storms and snowslides, which imposed upon the company a heavy expense; that during the year 1910 the operation of the road between Como and Leadville resulted in a heavy deficit; that there was no prospect of an improvement of business over the line; that there was no necessity for operating a railroad between Como and Breckenridge, and not enough business between these points to pay the operating expenses of running trains and maintaining a road; and that the railroad facilities to and from Breckenridge via Leadville were adequate and conducted at a heavy loss. On the issues thus made the trial before the Commission resulted in an order directing the railway company on or before the 1st day of January, 1912, and during a period of two years thereafter, to maintain, operate, and conduct a through freight service between Denver and Leadville by way of Como and Breckenridge at least three days each week, and also, from the same date and during the same period, to operate and maintain a through and exclusive passenger train service daily, excepting Sunday, between Denver and Leadville via Como and Breckenridge. The railway company declined to obey the order of the Commission. Thereafter proceedings were instituted in the district court to enforce the order of the Commission; the State Railroad Commission and the

Breckenridge Chamber of Commerce joining as plaintiffs in the case. The complaint set out the order of the Commission and the refusal of the railway company to obey it. It prayed for an order that the railway company be required to answer the petition, and show cause why the order of the Commission should not be obeyed, and for an injunction or other process requiring the defendant to comply with the order of the Railroad Commission. To this petition the railway company filed a demurrer, raising various questions, which was overruled. Thereafter the company filed its answer, wherein it pleaded three separate defenses which, in the main, raised the same questions presented by the answer filed with the Commission, and in addition pleaded that the order of the Commission, if enforced, would deprive the company of its property without due process of law. This answer will be noticed more in detail, so far as necessary, in the course of the opinion. The cause was tried to the court on the testimony taken before the Commission, and some additional evidence introduced by the respective parties. The facts thus established will be noticed later in connection with the questions presented for determination. The court directed that an injunction issue, commanding the railway company to comply with the order of the Railroad Commission. The railway company brings the case here for review on error.

From the record and briefs of counsel, the questions presented for consideration are substantially as follows: (1) Whether the Railroad Commission Act confers authority upon the Railroad Commission to make the order sought to be enforced. (2) Whether any of the members of the Commission were legally chosen as members of that body. (3) Whether, if the Commission was validly chosen and is a legal and constitutional body, its order is, in effect, the exercise by the Commission of legislative power. (4) Whether the constitutional and statutory provisions of the state in effect at the time the plaintiff in error was organized required it to operate the abandoned portion of its line. (5) Whether, if it be conceded that the Commission had power to make the order complained of, the act of 1910, giving this power, is constitutional; that is, whether the act and the order by the Commission do not amount to an impairment of the plaintiff in error's charter or contract rights. (6) Whether the order of the Commission in effect is so oppressive, unjust, and unreasonable, if enforced, as to result in taking the property of the plaintiff in error without due process of law, and without just compensation, contrary to the Constitution of the United States.

Counsel for plaintiff in error contends that the act of 1910, by virtue of which the Railroad Commission acted, does not confer upon the Commission the power or authority

which it exercised, in that it does not confer authority upon the Commission to order the resumption of traffic over an abandoned line, and particularly does not confer authority upon that body to say what number of freight trains shall be operated, and that it has no authority whatever to direct the movement of passenger trains. In other words, counsel for plaintiff in error contends that with respect to freight trains the authority of the Commission is limited to orders directing a railroad company to provide a sufficient number of cars to transport its freight traffic, a reasonable time schedule for such trains, to require such repairs to be made, and to provide such equipment as will be necessary and within the reasonable power of the railroad to make or adopt for the promotion of the security of persons as to life and limb, or for the convenience and accommodation of the public in the handling and shipment of property, and, as to passenger trains, that the authority of the Commission is limited to orders requiring a railroad company to make such repairs and provide such reasonable equipment as may be necessary for the safety of persons as to life and limb. The sections of the act (Laws 1910, p. 45 et seq.) upon which this contention is based are as follows:

"Sec. 2. The term 'common carriers,' as used in this act, shall also include express companies, private freight car lines and pipelines. The term 'railroad,' as used in this act, shall include all bridges used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and shall also include all switches, spurs, tracks and terminal facilities of every kind, used or necessary, in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property; and the term 'transportation' shall include all cars and all other vehicles and instrumentalities and facilities of the shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, demurrage, storing, or handling of property transported, and it shall be the duty of every common carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor and to establish through routes, and just and reasonable rates applicable thereto, and to provide a sufficient number of cars and a reasonable time schedule for trains."

"Sec. 25. It shall be the duty of every common carrier to transport any and all shipments between points in this state with the utmost diligence, and to move livestock

and perishable products towards destination continuously, without unnecessary delays, or longer stops than, or regular stops at stations, or stops for feeding, icing, or watering, and at a minimum speed of not less than ten miles per hour. \* \* \*

"Sec. 27. If, in the judgment of the Commission, after a careful personal examination and investigation, and after a hearing before the Commission, or the opportunity for such hearing, the Commission shall find that repairs, improvements or increased facilities in respect to roadbed, trackage, rolling stock, stations and depots, yards, terminal facilities, switches, signals, or any other element of the service of any common carrier shall be necessary and within the reasonable power of any common carrier to make or adopt for the promotion of the security of persons as to life and limb, or for the convenience and accommodation of the public, in the shipping and handling of property, the Commission shall make such reasonable order requiring any common carrier to do any such thing deemed by the Commission to be proper in respect to such matters within a reasonable time, to be fixed by the Commission, as to them shall seem so necessary and so within such reasonable power of such common carrier; and the orders of the Commission in such respect shall be enforced by the proper writs and orders of courts of common jurisdiction."

One of the defenses interposed and upon which the railway company justifies its action in abandoning the portion of its road between Breckenridge and Como, which is 21 miles in length, is that on account of the altitude, heavy grades, and sharp curves trains cannot be operated over it except at a heavy loss. Eliminating, for the present, this feature of the case, we will consider, first, the contention with respect to ordering the resumption of trains over the abandoned portion of the road, and the authority of the Commission to direct what freight trains shall be operated between Leadville and Denver; and, second, the authority of the Commission to order the operation of exclusive passenger trains between these points.

[1] The questions involved in the first propositions are closely related, and can be considered together. It appears from the testimony that perishable, as well as other, articles of property are shipped from Denver to Breckenridge, and likewise from Breckenridge to Denver. The route by which they are now shipped is over the Denver & Rio Grande Railroad, a standard gauge line, via Pueblo and Leadville to Breckenridge, and from Breckenridge to Denver over the same route, a distance of 317 miles. At Leadville a shipment from Denver to Breckenridge must be transferred to narrow gauge cars and hauled to Breckenridge, while shipments to Denver from Breckenridge or other points between must be reloaded from narrow to

standard gauge cars. From Breckenridge to Denver over the narrow gauge line is 110 miles. In order to make a shipment from Breckenridge to Como, the cars in which freight is transported are hauled to Leadville, where the articles being transported are loaded into standard gauge cars, and from thence taken via Pueblo to Denver, where the shipment must again be transferred to narrow gauge cars and hauled over the South Park Division to Como, a distance of something like 400 miles, in order to reach a point distant only 21 miles from the place of shipment. In addition to this, it is also proper to note that Denver is the capital and commercial center of the state; that the mail, express, and passenger service between Denver and Breckenridge and vice versa is now between fourteen and twenty hours, where, prior to the abandonment of the service from Como to Breckenridge, it was between six and seven hours; that passengers traveling between these places must pay additional fares above that paid when the South Park Line was operated from Denver to Leadville; that it now takes from four to five days to transport freight from Denver to Breckenridge via Leadville, when before freight from Denver would reach Breckenridge on the same day it was loaded on the cars. This was important to the citizens of Breckenridge in view of the fact that perishable articles in many instances could be shipped by freight instead of by express, as they generally must be when transported via Leadville. It is apparent that the change necessitates residents of Breckenridge paying the difference between freight and express rates on perishable articles of merchandise. It also appears from the testimony that, after the company ceased to operate its line between Breckenridge and Como, it refused to furnish cars at stations between these points in which to ship ores, or transport supplies to such points, and that on this account at least one mine could not be operated unless a wagon road was constructed to Breckenridge at a cost of about \$10,000, and that it cost the operators of another mining property between Breckenridge and Como \$1.50 per ton more to haul by wagon to Breckenridge than it did to haul it to a switch or spur where ore was received for shipment before the line between Breckenridge and Como was closed.

On the subject of freight and express, the Commission, in its finding and order, said: "The defendant urges that it is offering as a compensation to the patrons of their road a through route around by way of Colorado Springs or Pueblo; but is this adequate compensation? It was testified to by the witnesses that, when this line was operated as a through route from Denver to Leadville, a merchant could order his merchandise in the evening in Denver, and receive the same the next morning in Breckenridge or Leadville by freight. Now all perishable merchandise

must be sent by express, if it goes over defendant's line; and, if sent by freight, it takes from three to six days to go around by the way of Pueblo or Colorado Springs, and may thus be destroyed." That the change in the operation of the road causes delay and works a great inconvenience to the inhabitants of Breckenridge, imposes upon them additional expense in obtaining perishable articles from Denver, and at least embarrassed the operation of mines located between Como and Breckenridge, is manifest. These results are caused entirely by the refusal of the railway company to operate trains over its 21 miles of track between Como and Breckenridge. Eliminating, as we have said, for the present, any valid reason which might excuse the railway company from operating its 21 miles of railway between Como and Breckenridge, ample authority is found in the sections of the act quoted, as well as others, for the Commission to direct traffic to be resumed over this abandoned portion of the road, and what freight trains shall be operated over it. In section 2 of the act it is made the duty of every common carrier, subject to the provisions of the act, to furnish transportation, to establish through rates, to provide a sufficient number of cars, and a reasonable time schedule for trains. By section 25 it is made the duty of a railroad company to transport all shipments between points in this state with the utmost diligence, and to move perishable products without unnecessary delays; while, by section 27, the Railroad Commission is empowered to require a railroad company to furnish such facilities for the convenience of the public for shipping and handling property as, in the judgment of the Commission, is necessary and within the reasonable power of the railroad company to furnish. The prime purpose of these provisions is to impose upon a railroad company in its capacity as a common carrier the duty to afford shippers reasonable facilities for the transportation of property without unnecessary delay. Merely furnishing cars would not effect this object. They must be moved, and hence we find the act requires the common carrier to transport shipments with the utmost diligence; and, if it fails in this particular, the Commission, by virtue of the provisions of section 12 of the act which empowers that body to enforce its provisions, may require it to furnish such facilities within its reasonable power as may be necessary, in order to compel it to discharge its duty to the public. Clearly, then, if a railroad company does not operate a sufficient number of trains to reasonably serve the needs of shippers, the Commission has the power to direct it to increase its service in this respect; or, if it operates its trains over such routes, by reason of a link in its line being abandoned, that unnecessary delays are occasioned, it is

not transporting shipments with that degree of diligence which the act requires, and the Commission, by virtue of the provisions of sections 12 and 27, is empowered to direct that it transport freight over the abandoned part of its line when by so doing shipments will be greatly facilitated, and burdens imposed upon shippers removed, unless the railroad can justify its action in abandoning such part of its line—a proposition we shall consider later.

[2-5] Counsel for plaintiff in error contends the act does not authorize the Commission to direct the running of passenger trains. In express terms it does not, but the act is essentially remedial, and will therefore be liberally construed to accomplish its object. *Consumers' League v. Colorado & Southern Ry. Co.*, 125 Pac. 577. The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably ascertained. The title of an act, although not declaratory of the law which must appear in the act itself, may, nevertheless, be resorted to for the purpose of ascertaining the legislative intent. By reference to the title of the act under consideration it will be found that its object, among other things, is to create a State Railroad Commission, to prescribe and define its duties, to insure an adequate railway service, and to exercise general supervision over the conduct and operations of common carriers. From this title, declaring as it does that the purpose of the act is to regulate common carriers, and to this end to "insure an adequate railway service," it must be presumed that the purpose of the General Assembly in passing the act was to require common carriers to provide each locality along its line with adequate passenger service, unless the contrary clearly appears in the body of the act.

Turning to section 5 of the act, we find it provides "that it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or concerning any particular description of freight traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation or locality, or any particular freight traffic, to any undue or unreasonable prejudice or disadvantage in any such respect whatsoever. \* \* \*" According to the title of the act, one of its objects was to insure an adequate railway service. Such service is not limited to freight traffic, but embraces the transportation of both passengers and freight. That it was clearly the intention of the Legislature to make the provisions of the act applicable to both freight and passenger traffic is made clear by section 1, which states:

"That the provisions of this act shall apply to any corporation or to any person or persons who shall be held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property by railroad from one point or place within the state to any other point or place within the state." By section 2 of the act, although somewhat ambiguous on the subject, we think it is made the duty of a railroad company to furnish, upon reasonable request, sufficient cars for the transportation of passengers, and establish through routes for that purpose. This view is strengthened by the next section, which states that "all charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, shall be just and reasonable," thus manifesting an intention on the part of the Legislature, in connection with the declaration in section 1, to the effect that the act applies to carriers engaged in the transportation of either property or passengers to exercise a reasonable control over a railroad with respect to the transportation of passengers. By section 5, as above noted, a railroad company is inhibited from subjecting any locality to any undue or unreasonable disadvantage. By section 12 authority is conferred upon the Commission to execute and enforce its provisions. If the company, by operating its passenger trains, or refusing to operate them, over a portion of its road, brings about a result which the law inhibits, then it is not only violating the law, but imposing upon a community a disadvantage which the act intended to prevent. The fact that passengers from Breckenridge to Denver must travel to Leadville, and thence to Denver over the Denver & Rio Grande via Pueblo, or over the Colorado Midland via Colorado Springs, and, in returning, travel the same circuitous route, a distance in the one case of 317 miles, and in the other of 253 miles, when the distance over the direct line of the South Park is but 110 miles, and that by traveling over these routes to and from Denver they must pay additional passenger fares and suffer loss of time much in excess of that required when the line between Como and Breckenridge was operated, or that persons at Breckenridge, desiring to reach Como by rail, would have to travel to Denver over one or the other of the lines indicated, and then from Denver to Como, a distance, in all, of several hundred miles, in order to reach a point but 21 miles distant, manifestly subjects Breckenridge to an unreasonable disadvantage, which is the direct result of the railroad company abandoning that portion of its road between Como and Breckenridge. With the act expressly inhibiting a railroad company from subjecting a locality to an undue disadvantage, and with express authority conferred upon the Commission to enforce the

provisions of the act, we think it has power to direct the railroad company to operate passenger trains over its line to Denver, so that the disadvantage imposed upon the inhabitants of Breckenridge by the railroad company abandoning its line between that point and Como will be removed, provided, of course, the company cannot justify its action in abandoning that portion of its road.

The first railroad commission act was passed in 1907 (Laws 1907, p. 531). By section 11 of that act, the Governor was empowered to appoint three commissioners to serve until January, 1909. This section further provided that at the general election in 1908 three commissioners should be elected, one for the term of two years, one for four years, and one for six years, for terms beginning in January, 1909. At the general election in 1908 Commissioners Anderson and Staley were elected for the respective terms of six and four years. At the general election in 1910 Commissioner Kendall was elected for the term of six years from January, 1911. These gentlemen by virtue of these elections constituted the Railroad Commission when the proceedings were commenced which afterwards resulted in the case now under review being instituted in the district court, and also at the time that case was commenced and judgment entered. In 1910 the General Assembly, at a special session, passed the Railroad Commission Act now in force. By its terms it purported to amend, and, as amended, to re-enact the act of 1907. Section 28 of the new act recites: "All acts and parts of acts inconsistent herewith, are hereby repealed. All parts of the act hereby amended and not re-enacted in this act, are hereby repealed." By section 11 of the new act it was provided: "That a commission is hereby created and established, to be known as 'The State Railroad Commission of Colorado,' which shall be composed of three commissioners who shall hereafter be appointed by the Governor, by and with the consent of the Senate, provided that the three commissioners who were elected in November, 1908, shall be the commissioners hereunder for the terms for which they were elected; that is to say, Worth L. Seeley shall be a commissioner to serve until the second Tuesday in January, 1911, Daniel H. Staley shall be a commissioner to serve until the second Tuesday in January, 1913, and Aaron P. Anderson shall be a commissioner to serve until the second Tuesday in January, 1915." Section 1 of the act of 1907 exempted from its operation mountain railroads operating less than 20 miles of road, the principal traffic of which was the hauling of mineral from, and supplies to, mines.

Under these provisions it is contended (1) that the act, on account of exempting mountain railroads of the character mentioned, is in violation of the Constitution of the United States, which forbids any state to deny any person the equal protection

of the laws; and (2) that, as commissioners were elected under the act of 1907, they are without authority to enforce its provisions if the act is unconstitutional; (3) that, inasmuch as the act of 1910 repealed all parts of the original act not re-enacted, Kendall's election was invalid; (4) that by the act of 1910 it was provided that the commissioners should thereafter be appointed by the Governor, by and with the consent of the Senate, and that the proviso to which we have referred under which Commissioners Anderson and Staley were continued in office is invalid, for the reason that the Legislature is without power to create an office not connected with the Legislature itself, and in the same act designate the person who shall fill that office. The constitutionality of the act of 1907 is settled by the decision of this court in the Consumers' League Case, supra, and it is unnecessary to discuss that question here. This conclusion renders it unnecessary to consider the second proposition. The validity of Commissioner Kendall's election is settled in *Kendall v. People*, 125 Pac. 586, and is no longer open to question.

[6] The fourth proposition is clearly without merit. It is true that the act of 1910 provides that the members constituting the Railroad Commission should be appointed by the Governor, but it expressly exempted from its operation Commissioners Anderson and Staley, by declaring that they should continue in office under their election until the terms for which they were respectively elected expired. By so doing the Legislature did not, as contended, create an office, and in the same act designate the persons who should fill it, for the very obvious reason the act simply provided, so far as Commissioners Anderson and Staley were concerned, that the Governor, although empowered to appoint the railroad commissioners, instead of being elected, as the act of 1907 provided, should not exercise that power as to these two commissioners until their respective terms for which they had been elected had expired.

[7, 8] The next point urged by counsel for plaintiff in error for us to consider is to the effect that, if the act of 1910 confers upon the Commission authority to make the order involved, then the order is an exercise of legislative power on the part of the Commission, and is unconstitutional and void. Our state Constitution inhibits the delegation of legislative power to a body like the Railroad Commission (article 3; article 5, § 1, and the amendment to section 1, Laws 1910, p. 11). Section 27 of the Railroad Commission Act empowers the Commission to make such orders with respect to increased facilities as in their judgment may be necessary and within the reasonable power of any common carrier to adopt for the convenience of the public in handling property, and to "make such reasonable order requir-

ing any common carrier to do any such thing deemed by the Commission to be proper, in respect to such matters within a reasonable time, to be fixed by the Commission as to them shall seem so necessary, and so within such reasonable power of such common carrier." In support of the proposition under consideration, it is urged that the law does not specify what increased facilities shall be furnished by a common carrier, that it does not direct trains to be run daily, or that all parts of a line shall be operated, or that trains shall move at any particular time, and that whatever is necessary with respect to these matters is not determined by the law, but rests in the judgment of the Commission. In other words, the contention is that the duties imposed upon a common carrier do not exist until the Commission makes an order, and that the extent of the duty of a carrier and whether it exists or not arises wholly out of the order of the Commission. In determining this proposition there are other portions of the act which should be considered. By section 2 a common carrier is required to furnish cars to shippers, and to fix reasonable time schedules for trains. By section 5 a common carrier is inhibited from giving any particular locality an undue advantage, or to subject any locality to an undue disadvantage. By section 25 a railroad company is required to transport shipments with the utmost diligence; and by section 12 a commission is created, with authority to execute and enforce its provisions. It is true the time within which or the number of trains that shall be run or the equipment of trains has not been specified in the act in detail; but the purposes of the act in imposing the duties upon common carriers to which we have referred was to compel them to furnish an adequate railway service. To this end power is conferred upon the Commission to execute the law. The General Assembly has passed the law, but it has not conferred upon the commission the power to make or unmake the law in any respect. That body is merely charged with the administration of the law by directing in a proper case what equipment shall be supplied, what trains shall be run, and what other requirements expressly or impliedly imposed on common carriers they shall perform and observe in order to comply with the provisions of the act, as therein prescribed; so that the authority of the Commission is limited to administering the law prescribed by the Legislature, by ascertaining, as a fact, whether its provisions are violated, and, if violated, to enforce them. This is in no sense the exercise of a legislative power, but its purpose is to afford a means to aid in carrying the law into effect. *C. & N. W. Ry. Co. v. Dey* (C. C.) 35 Fed. 866; 2 Wyman on Public Service Corporations, § 1403; *C. & B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 378, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St.

Rep. 278; *State v. R. R. Co.*, 38 Minn. 281, 37 N. W. 782. In other words, while it is true the General Assembly cannot delegate the power to make a law, it may, however, make a law delegating the power to determine some fact or a state of things upon which the law, as prescribed, makes its action depend.

On behalf of plaintiff in error it is urged: (1) That its charter is permissive, and does not require it to operate and maintain an unproductive line. (2) That the order of the State Railroad Commission, directing the operation of through freight and passenger trains between Denver and Leadville, impairs the obligation of contract, in violation of Const. U. S. art. 1, § 10, and Const. Colo. art. 2, § 11. (3) That the order of the Commission takes the property of the plaintiff in error without due process of law, and denies it the equal protection of the law, in violation of the fourteenth amendment to the Constitution. These propositions can be considered together, as they involve, to a considerable extent, a consideration of the same propositions of law and fact.

In support of the proposition that the charter of the railroad company is purely permissive, and that the company cannot be compelled to operate an unproductive line, the following constitutional provisions and statutes are relied upon: Article 15, § 3, of our Constitution, provides, in substance, that the General Assembly may alter any charter of a corporation thereafter created, when, in their opinion, it may be injurious to the citizens of the state, but only in such manner that no injustice shall be done to the incorporators. Section 4 of the same article provides that railroads shall be public highways, and that any corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state. Section 6 of the same article provides that all individuals and corporations shall have equal rights to have persons and property transported over any railroad in this state, and that no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight in this state. Section 599, *Mills' Stats.*, provides that five or more persons may form a company for the purpose of constructing a railroad, and that their certificate of incorporation, among other things, shall state: "First. The place from and to which it is intended to construct the proposed railway. Second. The time of the commencement and the period of the continuance of such proposed corporation." Section 602, *Id.*, provides that such corporation shall have the power: "First. To lay out its road, not exceeding two hundred feet in width and to construct the same. \* \* \* Fourth. To receive and convey persons and property on its railway. Fifth. To erect and maintain



all necessary and convenient buildings and stations, fixtures, and machinery for the convenience, accommodation and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway. Sixth. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor." By the next section it is provided that if any railway corporation shall not, within two years after its articles are filed and recorded, begin the construction of its road, and expend 20 per cent. of the amount of its capital within five years after the date of its organization, its corporate existence and powers shall cease. By section 614, Id., it is provided that where the property and franchises of any railroad company organized and existing under the laws of this state shall be sold and conveyed under any power contained in any trust deed or mortgage, or pursuant to the judgment or decree of any court of competent jurisdiction, it shall be lawful to organize a railroad company under the laws of this state for the purpose of purchasing, maintaining, and operating the property so sold and conveyed. By the section following it is provided that the railroad company so organized shall have power to acquire the property and franchises sold and conveyed as contemplated in the preceding section, and to enjoy all the estate, franchises, rights, powers, and privileges in law or equity of the corporation whose property and franchises have been so sold. By section 632, Id., provision is made for a railroad company, upon a vote of two-thirds in value of its stockholders, at any meeting thereof, to amend its articles of association, so as to change its terminal, and, when so determined, to amend or alter its articles of association, such amendments, when filed in the offices where they are to be recorded, shall have the same force and effect as though such amendments had been included in and made a part of, and embraced in the original articles of incorporation. By section 3703, Id., authority is conferred upon a railroad company to make a new location of its line, and that, where such location is made, the previous right of way shall revert to the owner of the land through which such right was granted on payment to the railroad company of the amount assessed by the board of appraisers and paid by the railroad company for its previous right of way.

The plaintiff in error was organized in 1898, and in 1899 purchased the narrow gauge lines exhibited on the map at a sale ordered under foreclosure proceedings against the Denver, Gunnison & Leadville Railway Company, the former owner of this property. The alleged impairment of the obligations of a contract by the order of the Commission in directing the operation of through freight

and passenger trains is based substantially upon the statutory provision above noted, to the effect that a railroad company, organized under the laws of this state, has the power to regulate the transportation of both passengers and freight, and compensation therefor, and the constitutional provision that in changing the charter of a corporation injustice shall not be done to the incorporators.

The third proposition is based substantially upon the ground that the order of the Railroad Commission cannot be complied with except at a heavy loss to the company. The testimony shows that the grades between Breckenridge and Como are steep, the curves sharp, and that by reason of the high altitude between these points, which, in places, is above timber line, the operation of the road between Breckenridge and Como is expensive, for the reason that a locomotive can only handle a light tonnage, and that in the winter snow must be shoveled from the track which at times accumulates to such an extent as to stop traffic for a considerable time. On the subject of losses incurred in operating the entire South Park system for several years prior to 1902, elaborate tables are submitted, from which it appears the loss has been great. The same result appears from the operation of the road between Como and Leadville, and Breckenridge and Leadville. In computing losses, taxes and interest on bonds and investments are charged, although, eliminating these items, the tables mentioned show a loss. Our attention is not directed to any testimony from which it is made to appear what losses (if any) the company would suffer in operating trains between Breckenridge and Como in compliance with the order, above that which it now claims to suffer in operating its line from Breckenridge to Leadville. The company does not claim a loss will be incurred in operating trains as directed by the Commission, because they are not necessary to accommodate the freight and passenger traffic from Breckenridge to Denver. The evidence establishes that for the years 1906 to 1911, both inclusive, the net earnings of the company on its entire system ranged from \$1,897,000, to \$2,876,000, and that during this period the following dividends were paid: 1906, \$340,000; 1907, \$680,000; and that for each of the years 1908 to 1911, inclusive, \$1,300,000. Breckenridge has a population of over 800. We have already called attention to the inconveniences and expenses imposed upon the people of Breckenridge and vicinity resulting from closing the road between that point and Como. As we understand the record, the rates charged for freight shipped to Denver under the arrangement by which the railroad company handles that traffic via Leadville over the Denver & Rio Grande are the same as previously charged when transported over the South Park from Breckenridge to Denver. Passengers from Breck-



enridge to Denver, however, must pay an additional charge proportionate to the increased distance they travel in going via Leadville, as compared with the distance between Breckenridge and Denver over the South Park Line. The time consumed is much greater, by many hours, than it would be by going direct over the South Park. In addition, the people of Breckenridge, in some instances, at least, must pay express rates on perishable merchandise, instead of freight rates, as before.

In support of the contention on the part of plaintiff in error that the judgment of the district court is erroneous, when tested by the several propositions under consideration, it is urged that the right to build and operate a railroad in this state is purely permissive; that the statutes do not impose any obligation upon a company owning such road to operate it at a loss; that, when the plaintiff company was organized, the statute empowering railroad companies to regulate the time and manner in which passengers and property should be transported over their lines and the compensation to be paid therefor was in force; that this section was, in effect, a part of its charter; that to now require the company, either by virtue of the Railroad Commission Act or the order of the Commission, to operate trains in accordance with such order deprives it of a contract right; that this cannot be justified under the authority vested in the General Assembly to change the charter of a corporation, because a change is inhibited which will do an injustice to the incorporators; and that compelling the plaintiff in error to operate its road between Leadville and Denver at a loss violates federal and state constitutional provisions, because thereby its property is taken without due process of law, and it is compelled to devote its property and revenues to a public use without compensation.

[9] In considering these several questions, the first important question of fact to determine is whether or not the record discloses that a compliance with the order of the Commission subjects the company to a substantial loss. In considering this question, it should be borne in mind the company does not claim that the trains directed by the commission are not necessary to accommodate the freight and passenger traffic between Breckenridge and Denver, but bases its right to be excused from complying with the order upon the ground that to operate the trains ordered causes a loss which it should not be required to suffer when a freight and passenger service is provided via Leadville. The company claims that the operation of its trains from Breckenridge to Leadville entails a loss. The record does not disclose what loss, if any, would be caused by operating trains between Breckenridge and Como in compliance with the order of the Commission above that which the company now claims

to suffer by operating its line between Breckenridge and Leadville. With trains, both freight and passenger, only operated between Breckenridge and Leadville, it is fair to assume that the company only receives a portion of the freight and passenger charges which shippers from Breckenridge to Denver, and passengers to and from the same points, must pay for transportation freight and as passenger rates, and that, if the order of the Commission were complied with, the company would receive the entire revenue derived from both passenger and freight traffic between Breckenridge and Denver, in place of the portion it now receives for handling this traffic from Breckenridge to Leadville. Manifestly the change in the operation of its road as ordered by the Commission would increase the revenue of the company, as it would thus receive on both the freight and passenger traffic between Breckenridge and Denver the charges for such traffic over its own line for the entire distance between these points, instead of the amount which it receives therefor for the short haul between Breckenridge and Leadville. This additional revenue might materially reduce the loss which the company now claims to sustain in operating its trains between Breckenridge and Leadville. Clearly, if the company relies upon the ground that the order is unreasonable because a compliance therewith entails a loss, the burden is upon it to establish such loss as a fact. This it has failed to do.

[10] If, however, we assume the record discloses that a compliance with the order of the Commission will entail a substantial loss in excess of the revenues derived from the operation of the trains ordered, then we think that neither this fact nor any of the propositions to be considered in connection with it justify a reversal of the judgment. In considering losses we deem it pertinent to suggest that interest on bonds and investment should not be taken into account as the amounts representing these items could not be materially different, whether the road was operated or not. Taxes might be less on an abandoned road than one in operation.

[11] It may be (but we do not so decide because not involved) that a railway company cannot be compelled to build a projected line. That, however, is a radically different proposition from compelling it to maintain and operate a line which has been constructed in accordance with its charter and thereafter operated, but which it ceases to operate in order to reduce expenses. It must be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges, and that primarily they owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 332, 17 Sup. Ct. 540, 41 L. Ed. 1007. The franchise which

plaintiff in error obtained by incorporating under the laws of this state was not granted for its profit alone, or that of its stockholders, but in a large measure for the benefit of the public, and, while it is a private corporation, the public is interested in the business in which it is engaged in the capacity of a common carrier. In this capacity it is a public servant, and amenable as such. *People ex rel. v. C. & A. Ry. Co.*, 130 Ill. 175, 22 N. E. 857.

[12] It is undoubtedly true that a railway company, in the absence of a statute limiting its power, is vested with a wide discretion in operating its line of road; but this discretion is not absolute. It must be exercised with due regard to the welfare of the public. *People ex rel. v. C. & A. R. R.*, *supra*.

[13] At the time the plaintiff in error was organized, and when it purchased the South Park system, the statute did grant it the right to regulate the time and manner in which passengers and property should be transported over the lines of that system; but this did not confer upon it the unlimited right to operate its trains as it saw fit, without regard to the interest of the public. This grant of power must be read in connection with the obligation which the law, independent of the statute, impliedly imposed upon it to so operate its trains and furnish such service as would reasonably serve the needs of the public. The right of a state to reasonably control a railroad company in the operation of trains, within its jurisdiction, will not be considered as having been surrendered either by statute or constitutional provision, in the absence of positive words to that effect, or their equivalent in law. There is nothing in either the statutes or the Constitution of the state to indicate the intention to surrender such control; so that simply granting to a railroad company the right to fix the manner of running its trains does not deprive the state of its power to act upon the reasonableness of its action in this respect. *Railroad Commission Case*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636. The Constitution of the state inhibits the General Assembly from so changing the charter of a corporation as to work injustice to the incorporators; but in our opinion this provision is not applicable. Merely requiring the railroad company to observe the obligations which the law imposes upon it to reasonably serve the public, by either the terms of the Railroad Commission act or the order of the Commission, by virtue of the authority vested in them, is nothing more than requiring it to comply with its legal obligation. This does not invade any constitutional right, neither does it work an injustice to the incorporators. As previously stated, the railroad company does not claim that the service ordered it unnecessary, except upon the ground that operating its trains between Breckenridge and Leadville affords a service which ought to excuse

it from complying with the order of the Commission. We have called attention to the fact that refusing to obey the order of the Commission subjects the people of Breckenridge and vicinity to great inconvenience, pecuniary loss, and loss of time; and this brings us to a consideration of the question of whether or not compelling the railroad company, under these circumstances, to operate its trains between Leadville and Denver, by resuming the operation of its line between Como and Breckenridge, at a substantial loss, deprives it of its property without due process of law, and requires it to devote its property to a public use without compensation.

[14, 15] Unquestionably, railroad property is protected by constitutional guaranties, but these rights are not abridged by being subjected to reasonable governmental power of regulation. *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472. The consideration for the franchise, rights, and privileges granted a railroad company by a state is the resulting benefits to the public, and the acceptance by the company, generally speaking, imposes upon it the obligation to operate, when constructed, the railroad it was incorporated to construct, and of doing so in the manner and for the purpose contemplated by its charter. *State ex rel. Grinsfelder v. Street Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; *People ex rel. v. C. & A. R. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Gates v. Boston R. R. Co.*, 53 Conn. 333, 5 Atl. 695; 33 Cyc. 635.

[16] One of the obligations thus imposed, as we have said, is to so operate its trains as will reasonably serve the needs of the public. Applying these propositions to the case at bar, it follows that plaintiff in error, by organizing for the purpose of purchasing the South Park system, and purchasing it, was granted and accepted a franchise for the benefit of the public, which obligated it to operate the road it purchased in such manner as to reasonably accommodate the public. At the time it purchased the South Park system it purchased other lines, as stated in a former part of this opinion. It operated, or heretofore has operated, all these lines as one system under one general management and control. They are in no sense separate or independent. It appears, as previously stated, that the operation of its entire system has resulted in net returns aggregating large sums for each of the six years previous to the date the action was instituted before the Commission, and that during that period it has paid its stockholders, annually, large sums in the way of dividends. It has not surrendered its franchise, and continues in the enjoyment of all its corporate rights. It does not claim that the service ordered is more than sufficient to accommodate the traffic between Denver and Leadville. In such circumstances the question of loss must be

considered in connection with its duties and the productiveness of its corporate business as a whole. The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part; and it cannot be excused from performing its full duty merely because by ceasing to operate a part of its system, the net returns would be increased; so that it cannot be said, under the facts, that requiring plaintiff in error to perform its duty to the public by furnishing an adequate service over its line between Denver and Leadville, although a pecuniary loss is entailed, is unreasonable or deprives it of any constitutional right, either federal or state. *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; *Atl. Coast Line R. R. Co. v. N. C. Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *Corporation Com. v. Railroad*, 137 N. C. 1, 49 S. E. 191. In brief, under the facts of the case at bar, an order requiring a railroad company in the possession and enjoyment of its charter powers and privileges to furnish a necessary service does not, even though a compliance with the order entails a loss, deprive it of its property without due process of law, or compel it to devote its property and revenues to a public use without just compensation, for the obvious reason that such an order merely requires it to discharge its legal obligations. Of course, that a service ordered will entail a loss is a circumstance to consider in determining the reasonableness of the order, but a common carrier cannot successfully complain that a loss will thus be occasioned when it appears that the ordered service requires nothing more than necessary transportation facilities.

In the *Missouri Pacific Case*, supra, a writ of error was prosecuted to the judgment of the Supreme Court of Kansas, directing the railroad to obey an order of the Railroad Commission of that state, requiring the company to furnish an exclusive passenger service on one of its branches in lieu of a mixed train service. There, as here, the company attacked the validity of the order upon the ground that a compliance with it would result in a pecuniary loss in that the expense of furnishing an exclusive passenger train service would exceed the revenues derived from such service. The company contended that compelling it to suffer such loss invaded its constitutional rights. The Supreme Court held that, so long as the company was in the possession and enjoyment of its charter powers, it was its duty to furnish adequate facilities for transporting passengers, and that requiring it to perform a service in this re-

spect, which was not unreasonable, although such performance would entail a loss, did not deprive the railroad company of its property without due process of law, or result in the taking of its property for a public use without compensation, for the reason that such order was nothing more than requiring it to do that which it was essentially its duty to perform. In speaking to this point, the court quoted with approval from the *Atlantic Coast Line Case*, supra, where it was said: "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order; but it is not the only one, as the duty to furnish necessary facilities is coterminous with the powers of the corporation. The obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." In considering further the duties imposed upon a railroad company to furnish adequate transportation facilities, the court, speaking through Mr. Justice White, said: "But, where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that the order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that it was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred." Counsel for plaintiff in error cite many authorities in support of their contention that the charter of the company is permissive, that the order of the Commission impairs the obligation of contract and deprives the company of property without due process of law, which we do not deem it necessary to review, as, in our judgment, the cases cited, in connection with those cited from 116, 206 and 216 U. S., sustain our conclusion that neither of these propositions is tenable. In our opinion, the law and the facts fully justify the order of the Commission and the judgment of the district court directing the company to obey it, and that judgment will, therefore, be affirmed.

Judgment affirmed.

HILL, J., not participating.

**BUTSCHER v. YOXALL.**

(Court of Appeals of Colorado. Jan. 13, 1913.)

**FRAUDS, STATUTE OF (§ 95\*)—APPLICATION—SALES—"PART PERFORMANCE."**

Where defendant individually bought and accepted certain lambs from plaintiff, and made an unqualified part payment for same, this constituted such an acceptance and part payment as took the contract out of the statute of frauds, though subsequently defendant refused to pay the balance, because the firm of which plaintiff was a member had not or might not fulfill a contract to sell a certain number of lambs to the firm of which defendant was a member.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 183-185; Dec. Dig. § 95.\*

For other definitions, see *Words and Phrases*, vol. 6, p. 5182; vol. 8, p. 7746.]

Appeal from District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Edward Yoxall against Louis C. Butscher. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Leftwich, of Ft. Collins, for appellant.

MORGAN, J. The appellee recovered a judgment in the lower court for \$1,318, alleged in his complaint to be due him from appellant upon a verbal agreement, made between them, individually, for the purchase and sale of some lambs. The appellant contends that the contract was within the statute of frauds, and that a reversal should be had, because the proof did not show such a delivery and acceptance of the lambs as would take the contract out of the statute.

At the time the lambs were delivered, and when the appellee demanded the payment for them, the appellant refused to pay the agreed price of five cents per pound, although he had accepted the lambs, at that time, but claimed the right to take them on another contract of purchase, that the appellee and his partner had made for the sale and delivery of a larger number of lambs, at a less price, with the appellant and his partner. The appellant stated, however, in his testimony, that he recognized the lambs delivered at that time to be the lambs which he had agreed to buy from the appellee, individually, under the contract sued upon, at five cents a pound, and further stated that he was willing to pay for them under this latter contract, provided appellee and his partner, afterwards, should deliver all of the lambs which they had agreed to deliver under the contract made between the two partnerships aforesaid. The contract sued upon

was made—and this was conceded—between the appellant and the appellee as individuals, and not in any way connected with their partnership affairs. Part of the money due for the lambs, 2,527 in number, under the contract sued upon, was paid at the time of said delivery, and accepted by the appellee as a payment upon the contract sued upon; and the appellant, after such part payment and after the delivery aforesaid, wrote the appellee that he would want to know that the partnership contracts "shall be filled to their complete number" before he paid in full for the 2,527 head. Appellant's refusal to pay in full, on the ground that the appellee and his partner had not fulfilled or might not fulfill the contracts made between the two firms, did not have any binding effect upon the appellee as an individual, especially when taken in connection with his testimony aforesaid, and in view of the further fact that part of the purchase price was paid under the distinct statement of the appellee that he would accept such payment as a payment upon the contract between himself and the appellant individually, and not in payment upon any other contract that existed between the two partnerships, and the further fact that when such payment was made it was in no way limited, but apparently paid with the understanding that it was upon the individual contract as set forth in the complaint, and also the admission in the letter aforesaid that part payment had been made. Under these conditions, the statute of frauds was in no way applicable to the case, because the acceptance and part payment would prevent such application.

The statute of frauds was not pleaded by the defendant in the lower court in his answer, but the case seems to have been tried upon the theory that such defense had been properly pleaded; but, as before stated, the question as to whether it was or was not pleaded becomes of no importance, when it is concluded that the acceptance and part payment was sufficient to avoid the statute. The lower court heard all of the testimony, and necessarily came to the conclusion that the statute did not apply, and also that the appellee fully performed his part of the contract and delivered the lambs on the same, and, having been paid a portion of the purchase price, was entitled to recover, under the facts, the balance that was due.

There are no other assignments of error sufficient to warrant any investigation, and, finding no substantial error in the trial, the judgment of the lower court is affirmed.

Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**EMPIRE RANCH & CATTLE CO. v.  
GIBSON.**

(Court of Appeals of Colorado. Jan. 13, 1913.)

**1. TAXATION (§ 761\*)—TAX DEED—VALIDITY.**

A tax deed showing that several noncontiguous tracts of land were sold en masse for a gross sum, or that the certificate of sale issued to the county was assigned by the county clerk more than three years after the date of issuance, and failing to show that the lands were offered from day to day until the last day of the sale, when they were stricken off to the county, is void on its face.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1509, 1513; Dec. Dig. § 761.\*]

**2. JUDGMENT (§ 951\*)—EVIDENCE—ADMISSIBILITY.**

A county court decree, offered in evidence in ejectment in the district court, was properly excluded when unaccompanied by the judgment roll showing the service of process on which the county court acquired jurisdiction.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

**3. JUDGMENT (§ 951\*)—EVIDENCE—ADMISSIBILITY.**

A county court decree quieting title and the judgment roll, when offered in evidence in ejectment in the district court, were properly excluded where the judgment roll showed no personal service and the affidavit for service by publication failed to state the post office address of the defendant or that the same was unknown to affiant; the judgment roll being inadmissible because insufficient to support the decree, and the decree being inadmissible because not supported by a sufficient judgment roll.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

**4. JUDGMENT (§ 490\*)—COLLATERAL ATTACK—SUBSTITUTED SERVICE—AFFIDAVIT.**

A decree quieting title, based on substituted service, was void and open to collateral attack where the affidavit for publication failed to state the post office address of the defendant or that the same was unknown to affiant.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 926-928; Dec. Dig. § 490.\*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Charles E. Gibson against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

**KING, J.** Action by Charles E. Gibson, appellee, in the nature of ejectment to recover possession (1) of the N. E.  $\frac{1}{4}$  of section 11, (2) the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 8, all in township 5 north, range 46 west, in Yuma county, Colo. Appellant's answer consisted of four separate defenses: (1) a general denial; (2) as to the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , section 8, aforesaid, an allegation of ownership in fee simple and right to possession under certain treasurer's deeds issued upon tax sales, and judgment and decree of the county court of

Yuma county quieting title in a proceeding wherein appellant was plaintiff and one Henry A. Bartholomew was defendant; (3) same allegations as to the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 8, as alleged in the second defense; (4) as to the N. E.  $\frac{1}{4}$  of section 11, aforesaid, an allegation of ownership in fee simple and right to possession under certain treasurer's tax deeds, and judgment of the county court of Yuma county, quieting title, in an action wherein appellant was plaintiff and Charles A. Thompson and others were defendants, also a certain correction tax deed. The replication put in issue the title under the tax deeds and the decrees, alleging the tax deeds to be void on the face thereof, denying the due making and entry of said decrees, and alleging that they were void. Plaintiff demanded title from the patentee, and such title is not disputed, except as it is claimed to have been divested by appellant's treasurer's tax deeds, and by the decrees quieting title.

[1] Each and every of the tax deeds offered was void on its face for either or all of the following reasons: That it appeared that several noncontiguous tracts of land were sold en masse for a gross sum, or that the certificate of sale issued to the county was assigned by the county clerk more than three years after the date of issuance, or failed to show that such lands were offered from day to day until the last day of the sale.

[2] As to the N. E.  $\frac{1}{4}$  of section 11, defendant offered in evidence Exhibit 4, a decree of the county court of Yuma county quieting title in the defendant, dated July 10, 1902, in an action then pending wherein the Empire Ranch & Cattle Company was plaintiff and Charles A. Thompson and others were defendants. The judgment roll in said cause was not offered in evidence, and plaintiff's objection to the offer of the decree, as incompetent for the reason that no foundation had been made for the offer by first introducing the judgment roll, was sustained, and the decree excluded as evidence. Inasmuch as this decree was offered as an estoppel and to establish title in the defendant, it was not admissible, when unaccompanied by the judgment roll, showing the service of process on which the court acquired jurisdiction. *McLaughlin v. Reichenbach* (Sup.) 122 Pac. 47; *Empire Ranch & Cattle Co. v. Gibson* (No. 3,482) 128 Pac. 473, and *Terry v. Gibson* (No. 3,560) 128 Pac. 1127 not yet officially reported.

[3, 4] As to the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 8, defendant offered in evidence Exhibits 7 and 8, being decrees of the county court of Yuma county quieting title to the lands in question in the Empire Ranch & Cattle Company. Objection was made on the ground that said decrees were immaterial, irrelevant, and incompetent, and for the specific reason that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the evidence shows that plaintiff claims title through Harry S. Bartholomew, and the decrees offered were against Henry A. Bartholomew. Defendant then offered the judgment roll in case No. 464 of said county court as Exhibit 9. This was objected to as incompetent for the specific reason that the affidavit made to secure publication of summons, and appearing in the roll, neither stated the post office address of the defendant nor that such address was unknown. The objections were sustained, and the decrees and judgment roll excluded.

An examination of the judgment roll offered shows that the decree was against Henry A. Bartholomew; that the complaint was against Harry S. Bartholomew; that the summons was directed to Henry S. Bartholomew and returned not served. The affidavit for publication of summons gave the name of the defendant as Henry S. Bartholomew, failed to state the post office address, or that such address was unknown. In view of the void affidavit, if the judgment roll had been admitted, the decree quieting title must have been held void upon the authority of *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005. And for the same reason the judgment roll was properly held inadmissible because incompetent and insufficient to support the decree, and the decree, unsupported by a sufficient judgment roll showing jurisdiction, was also properly excluded. Appellant could not have been prejudiced by the exclusion of the judgment roll, because, whether admitted or excluded, the effect was the same. The judgment being void for lack of jurisdiction of the parties, it will be unnecessary to determine the question raised as to the variance in the given name and the middle initial of the defendant, Bartholomew.

The decree of the court should be so modified as to confine the effect of annulling the tax deeds to the parcels of land herein in controversy, and the trial court is directed to make such modification upon motion of appellant.

As modified, the judgment is affirmed.

# EMPIRE RANCH & CATTLE CO. v. HOWELL.

(Court of Appeals of Colorado. Jan. 13, 1913.)

## 1. EJECTMENT (§ 12\*)—EVIDENCE—RECITALS OF TRUSTEE'S DEED—PRIMA FACIE EVIDENCE.

The recitals in a trustee's deed, offered in evidence by plaintiff in support of his title in ejectment, were prima facie evidence of the facts therein stated, though the trust deed did not in terms so provide, and, in the absence of evidence tending to contradict or impeach them, were sufficient proof of title to put the defendant on his proof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 47-55; Dec. Dig. § 12.\*]

## 2. TAXATION (§ 761\*)—DEED—VALIDITY.

A tax deed, showing that several noncontiguous tracts were sold en masse for a gross sum and were struck off to the county on the first day of the sale, was void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1513; Dec. Dig. § 761.\*]

## 3. EJECTMENT (§ 24\*)—ADVERSE POSSESSION—PAYMENT OF TAXES.

A payment of taxes by a defendant in ejectment, after the filing of the complaint, is not available to invoke the seven-year statute of limitations.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 94-98; Dec. Dig. § 24.\*]

## 4. ADVERSE POSSESSION (§ 110\*)—EVIDENCE—PLEADING.

Evidence to show title by the payment of taxes for seven years, under claim and color of title through a tax deed, was properly excluded in ejectment where the statute of limitations was not pleaded as a defense.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 636-645; Dec. Dig. § 110.\*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

KING, J. Lardner Howell, as plaintiff, brought his action in the nature of ejectment to recover possession of the N. W. ¼ of section 19, township 1 south, range 46 west, in Yuma county, Colo., alleging ownership in fee simple and right to possession. The answer is a general denial. Judgment was rendered in favor of the plaintiff and, among other things, adjudged that a certain treasurer's deed recorded in Book 1599 at page 189 of the records of said county, through which the defendant claimed title, should be "set aside and for naught held forever," and that plaintiff should pay to the clerk of the court, within 60 days from the date of said decree, a certain sum of money to reimburse the defendant for taxes, interest, and costs paid on account of said lands under its void tax deed. Plaintiff deraigned title from the United States and through a deed of trust given to secure the payment of a promissory note, and a trustee's deed executed and delivered upon a sale of said real estate pursuant to the terms of said deed of trust. Defendant objected to the deed of trust and the trustee's deed as being incompetent and irrelevant, and assigns as error the overruling of its objection.

[1] The same questions are raised and argued in this case as to the validity of plaintiff's title under the trustee's deed as were considered and determined in *Empire Ranch & Cattle Co. v. Howell*, 125 Pac. 593, to wit, that the recitals in a trustee's deed are prima

facie evidence of the facts therein stated, even where the deed of trust does not in terms so provide, and that, in the absence of any evidence tending to contradict or impeach the recitals in the trustee's deed, such deed will be held sufficient proof of title to put the defendant on his proof. And, upon the authority of that case, the plaintiff's title must be held good, unless divested by the alleged paramount title of the defendant under the treasurer's tax deed.

[2] Defendant offered in evidence as paramount title, and relies on, a treasurer's tax deed from the treasurer of Arapahoe county to Arthur Hale, dated December 19, 1900, and recorded December 27, 1900, in Book 1399 at page 189 of the records of said county, describing and conveying the quarter section herein in litigation, together with a number of other tracts of land not in litigation in this suit. Upon the objection of plaintiff, this deed was excluded as evidence. It shows on its face that several noncontiguous tracts of land were sold en masse for a gross sum, and that the land was offered for sale for the first time on the 18th day of December, 1897, and on that date sold to the county of Arapahoe. The deed was therefore void on its face, and the objection was properly sustained.

[3, 4] Defendant also offered to prove payment of taxes assessed for seven successive years, under claim and color of title. The treasurer's deed was recorded December 27, 1900, and the complaint was filed and the suit commenced herein August 13, 1907, less than seven years from the time defendant obtained color of title by the recording of the deed. For that reason, and for the further reason that the statute of limitations was not pleaded as a defense, the court did not err in sustaining plaintiff's objection to the proof offered.

The decree of the court should be so modified as to confine the effect of annulling the tax deed to the parcel of land herein in controversy, and the trial court, upon motion of appellant, is directed to make such modification.

As modified, the judgment is affirmed.

#### EMPIRE RANCH & CATTLE CO. v. COLEMAN.

(Court of Appeals of Colorado. Jan. 13, 1913.)

#### 1. TAXATION (§ 761\*)—TAX DEED—VALIDITY.

A tax deed, showing a sale of several noncontiguous tracts of land en masse for a gross sum and the assignment of the certificate by the county clerk more than three years after its issuance, and failing to show that the land was offered from day to day until the last day before being stricken off to the county, was void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1513; Dec. Dig. § 761.\*]

#### 2. JUDGMENT (§ 951\*)—ADMISSION IN EVIDENCE—REQUISITES.

A judgment quieting title, upon which defendant in ejectment relied as an estoppel and to establish title in himself, was not admissible in evidence when unaccompanied by the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

#### 3. JUDGMENT (§ 497\*)—COLLATERAL ATTACK.

The district court has power to hold a county court judgment void on collateral attack when it affirmatively appears from the judgment roll that the judgment was void for want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.\*]

#### 4. JUDGMENT (§ 495\*)—COLLATERAL ATTACK—ADJUDICATION AS TO VALIDITY.

Where, in ejectment in the district court, defendant introduced in evidence a decree of the county court quieting title in him, but such evidence was rejected on the ground that the decree was not accompanied by the judgment roll, it was improper for the district court to adjudge that the county court's decree was void; it being regular on its face.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.\*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Clara G. Coleman against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant.  
John F. Mail, of Denver, for appellee.

KING, J. This was an action in the nature of ejectment. The judgment was in favor of plaintiff, adjudging that she was the owner in fee simple and entitled to possession of the N. W. ¼ of section 13, township 5 north, range 48 west, in Yuma county, Colo., and that defendant had no right, title, or interest in the lands. It further adjudged that defendant's tax deed, recorded in Book 28 at page 163 of the records of said county, conveyed no title; that a certain decree of the county court, recorded in Book 29 at page 121 of said records, was null and void; and that the said treasurer's deed and the said decree be set aside, annulled, and for naught held forever. Plaintiff deraigned title from the United States. Her title depended upon a trustee's deed executed by a substituted trustee pursuant to the terms of a deed of trust given by the patentee of said lands. The deed of trust, the appointment of a substitute trustee or successor in trust, the trustee's deed, and the objections thereto are substantially the same as considered in *Empire Ranch & Cattle Co. v. Howell*, 125 Pac. 592, and in *Empire Ranch & Cattle Co. v. Stratton*, 126 Pac. 1094, not yet officially reported, and the reason and authorities sustaining the sufficiency of such trustee's deed, in the absence of evidence overthrowing its prima facie showing, are

there given and collated by Judge Cunningham, and no good purpose would be served by repeating them here. Defendant, as evidence of its paramount title, offered two treasurer's tax deeds, the first dated January 20, 1902, and the second, a correction tax deed, dated June 25, 1908, more than seven months after the beginning of the suit.

[1] The first tax deed was void on its face, as it showed a sale of several noncontiguous tracts of land en masse for a gross sum and the assignment of the certificate of purchase by the county clerk more than three years after the issuance of said certificate, and failed to show that the land was offered from day to day until the last day of the sale before being stricken off to the county. The correction deed was also void for some, though not all, of the reasons hereinbefore mentioned as applying to the first.

[2] Defendant offered in evidence, presumably as an adjudication of the subject-matter and as an estoppel, a decree of the county court purporting to quiet title in the said defendant. The judgment roll was not offered as a foundation for, or in support of, the said decree, and upon objection the decree was excluded. The exclusion of the decree upon plaintiff's objection is sustained by the authority of *McLaughlin v. Reichenbach* (Sup.) 122 Pac. 47. If not offered for the purpose named, it was not admissible at all.

[3, 4] Counsel for appellant objects to the decree of the court in so far as it annulled the tax deeds and held void the county court decree. So far as the objection pertains to the tax deeds, this court has repeatedly decided adversely to appellant. There is no doubt as to the right of the district court to hold a county court decree void on a collateral attack, provided it affirmatively appears from the judgment roll that the judgment was void for want of jurisdiction in the county court. *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005. But we think that where, as in the instant case, the decree of the county court, regular on its face, containing recitals which, if true, would give the court jurisdiction to pronounce the decree, is rejected when offered as evidence of title and as an estoppel for

the sole reason that the judgment roll was not offered to support it—in other words, the decree is excluded for want of competent and sufficient evidence to show that the court had jurisdiction of the parties, instead of for the reason that an affirmative showing has been made that the court had not jurisdiction to render the decree—the court was without authority to adjudge the decree null and void, and the judgment should have been limited to holding the said decree of no force or effect as against the plaintiff's title. A decree that is not affirmatively shown to be void should not, upon a collateral attack, be so adjudged.

We will not search the record nor enter into the field of conjecture to ascertain whether a judgment so repugnant to legal principles, is or may be prejudicial in this case. The decree was appellant's property, of which he may not be deprived without due process of law. Suppose the instrument in question had been a warranty deed duly executed, acknowledged, and delivered by plaintiff's grantor, conveying the same, or the same and other, property to appellant, and senior to appellant's deed, but unrecorded, and of which plaintiff had no knowledge or notice, and for that reason unavailing as against his title, or duly executed and delivered but not acknowledged, and therefore incompetent and insufficient as evidence, would it be contended that, without further proof, the court could adjudge the instrument void and order it canceled and annulled? It was appellant's privilege to rest its case on the naked decree, and plaintiff's right, if within the issues, to offer the judgment roll to defeat the decree, but, having failed so to do, she cannot insist on the judgment of annulment. The judgment appealed from should be so modified, in respect to the county court decree, as to conform to the views hereinbefore expressed. Inasmuch as the tax deed, adjudged to be void and held for naught, described many parcels of land not in litigation in this suit, the judgment should also be so modified as to limit its application to the land mentioned in the complaint, and the trial court is directed to make such modifications upon motion of appellant.

As modified, the judgment is affirmed.



## DAVIS v. WRIGHT.

(Court of Appeals of Colorado. Jan. 13, 1913.)

**APPEAL AND ERROR (§ 14\*)—DISPOSITION OF CAUSE—RE-ENTRY AS PENDING ON ERROR—"DISMISSAL FOR WANT OF JURISDICTION."**

Under Mills' Ann. Code, § 388a, which provides that on dismissal of an appeal for lack of jurisdiction, when the court would have jurisdiction if the action had come up on writ of error, the court shall order an entry of the cause as pending on writ of error, the dismissal of an appeal for failure to comply with an order requiring a new appeal bond within 30 days, which was tendered, but not accepted, was not a "dismissal for want of jurisdiction," and the cause could not be re-entered as pending on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.\*]

Appeal from District Court, Mesa County; Sprigg Shackelford, Judge.

Action between Alfred H. Davis and D. B. Wright. There was a judgment for the latter and the former appeals. On motion of appellant to have cause re-entered as pending on writ of error. Motion denied.

Benjamin Griffith and T. M. Morrow, both of Denver, for appellant. Fry & Welsh, of Grand Junction, and Rothgerber & Appel, of Denver, for appellee.

KING, J. December 16, 1912, the appeal herein was dismissed for failure of appellant to comply with an order of the Supreme Court requiring appellant to file a new appeal bond within 30 days thereafter, with sureties to be approved by the clerk of the Supreme Court. A new bond was tendered March 27, 1911, but the clerk refused to approve the sureties. Appellant now moves this court to re-enter said cause as pending on writ of error.

Section 388a, Mills' Annotated Code, which provides that when the Supreme Court, or the Court of Appeals, shall dismiss an appeal for lack of jurisdiction to entertain the same, and it shall appear that the court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk to enter the cause as pending on writ of error, does not, we think, apply to the condition here found to exist. There was no lack of jurisdiction to entertain the appeal when taken and perfected. The appeal was perfected as provided by law. The cause was dismissed, not for lack of jurisdiction, but because of the failure of appellant to comply with an order of the Supreme Court based upon a showing of insufficiency of the sureties on the appeal bond.

We think no authority exists for re-entering this cause as pending on writ of error, and the motion therefor will be denied.

## RILEY v. DAY et al.

(Supreme Court of Kansas. Jan. 11, 1913.)

*(Syllabus by the Court.)*

**1. ADOPTION (§§ 20, 21\*)—RIGHTS OF INHERITANCE.**

Under the adoption act, a child legally adopted takes the name of the adopting parent and is given the same personal rights and is entitled to the same rights of inheritance as a natural child.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 29-32, 35-40; Dec. Dig. §§ 20, 21.\*]

**2. ADOPTION (§ 3\*)—RIGHTS OF INHERITANCE.**

The amendment of 1891 of the act concerning descents and distributions (Gen. St. 1909, § 2952) did not repeal or limit the rights conferred on an adopted child by the adoption act and to which he was entitled prior to the amendment mentioned.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.\*]

**3. ADOPTION (§ 21\*)—RIGHTS OF INHERITANCE—"LIVING ISSUE"—"LIVING CHILDREN."**

The words "living issue," as used in the amendment, were employed by the Legislature in the sense of living children, and hence an adopted child of a prior deceased daughter of an intestate does inherit a portion of the estate of such intestate through her adopting mother.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35-40; Dec. Dig. § 21.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. WORDS AND PHRASES—"ISSUE."**

While in its strictest sense the word "issue" applies to those who are of the blood, in common parlance the meaning of the word is "children," and, when used in legal documents, its prima facie meaning is "descendants."

Appeal from District Court, Stafford County.

Action by G. W. Riley against Allie G. Day and Gertie McCaffrey. Judgment for plaintiff, and defendant McCaffrey appeals. Reversed.

T. W. Moseley, of St. John, and O. M. Williams, of Hutchinson, for appellant. Robert Garvin, of St. John, for appellees.

JOHNSTON, C. J. G. W. Riley and his wife, Drucilla K. Riley, had two children, named Haida Clothier and Allie G. Day. Haida Clothier adopted a child named Gertie McCaffrey. In 1907 Haida Clothier died intestate and left surviving her parents, her sister, and the adopted daughter. Later Drucilla K. Riley, who owned a tract of land, died intestate, leaving as her survivors her husband, G. W. Riley, her daughter, Allie G. Day, and the granddaughter, Gertie. G. W. Riley and Allie G. Day each claimed one-half of the real estate mentioned, while Gertie claimed the share that her foster mother, Haida Clothier, would have inherited if she had survived the decedent, Mrs. Riley.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

These were the respective claims of the parties in a proceeding brought to determine the ownership of the decedent's land. The question then is, Will the property of Mrs. Riley descend to the adopted child of her deceased daughter? The validity of the adoption of Gertie is not questioned, and there is no doubt that she does inherit from her adopting mother; but the contention is that she does not inherit the property of the parent of the adopting mother.

[1] After prescribing the steps necessary to the adoption of a minor child, the statute declares that the person adopting the minor is entitled to exercise all the rights of a parent, and is subject to all the liabilities of that relation, and, as to the statute and rights of the adopted child, it provides that: "Minor children adopted as aforesaid shall assume the surname of the person by whom they are adopted, and shall be entitled to the same rights of person and property as children or heirs at law of the person thus adopting them." Gen. Stat. 1909, § 5066. According to this provision, which has been in force since 1868, the minor so adopted is not only given the position of a child, but is placed on an equality with the other children and heirs of the adopting parent as to all personal and property rights. It is claimed, however, that a provision of the act concerning descents and distributions limits the rank and rights thus conferred on an adopted child. After defining the rights and portions of a widow in the estate of her deceased husband and of the surviving husband in the estate of the deceased wife, it is provided that: "Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seised shall, in the absence of other arrangements by will, descend in equal shares to his children surviving him, and the living issue, if any, of prior deceased children; but such issue shall collectively inherit only that share to which their parent would have been entitled had he been living." Gen. Stat. 1909, § 2952. This is an amendment of two sections of that act which had been in force unchanged from the enactment of the act in 1868 until the amendment of 1891. The sections amended read: "Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seised shall, in the absence of other arrangements by will, descend in equal shares to his children. If any one of his children be dead, the heirs of such child shall inherit his share, in accordance with the rules herein prescribed, in the same manner as though such child had outlived his parent." Gen. Stat. 1889, §§ 2609-2610.

[2] All agree that, under the law as it existed prior to the amendment, an adopted child took all the rights of a natural child, and, if it had remained unchanged, Gertie would have inherited the share that would

have descended to her adopting mother, Haida, if Haida had outlived her mother, Mrs. Riley. It is contended that the Legislature, by the use of the words "living issue" in the amendment, intended to make a distinction between adopted and natural children, and that only natural children of a deceased parent should inherit from the ancestors of that parent. In the amendment no reference is made to the adoption statute which gives the adopted child the status and rights of a child by blood, and there is nothing in the amendment, except the words "living issue," which looks towards limiting or repealing the adoption act. It has been said that the adoption act, which is of recent origin, "is founded upon a wise and beneficent purpose, which should be sustained and promoted by giving the law a liberal construction." *Boaz v. Swinney*, 79 Kan. 332, 334, 99 Pac. 621. It is hardly conceivable that the Legislature intended to abrogate the provisions of the adoption act or to cut out the rights expressly conferred upon adopted children by that act in such an indirect, blind way. In fact, the words "living issue" are frequently used interchangeably with "living children," a phrase which fairly includes adopted children.

[4] It is true that in its strictest sense the word "issue" applies to those who are of the blood; but in common parlance the meaning of the word is "children," but, when the term is used in legal documents, its *prima facie* meaning is descendants. Webster's New International Dictionary; 23 Cyc. 359.

In the act concerning the construction of statutes it is provided that: "The word 'issue,' as applied to the descent of estates, includes all the lawful lineal descendants of the ancestor." Gen. Stat. 1909, § 9037. But the term "descendants" is sometimes used synonymously with "children" (*Schmaunz v. Goss*, 132 Mass. 141), and lineal descendants has been held to include adopted children. *Warren v. Prescott et al.*, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370. It does not appear that the word is used in its strictest sense in other sections of the statute concerning descents and distributions. In the section following the one under consideration (Gen. Stat. 1909, § 2953), the word means "child" or "children." It is there provided that: "If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leave no wife nor issue, the whole of his estate shall go to his parents." This provision has stood unchanged since the act was passed, and yet it would hardly be claimed that, if an intestate left an adopted child, the whole of the estate would go to the widow. It has been the generally accepted interpretation of this provision that "issue" is used as the equivalent of "children," and that an adopted child of an intestate would share in the estate with the widow, and that, if no wife was

left, a surviving adopted child would take the estate rather than the parents of the intestate. Authorities are cited wherein the word "issue" is given a stricter and narrower meaning, which excludes adopted children. *Phillips, Ex'r v. McConica*, Guardian, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; *Van Derlyn v. Mack*, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879; *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956, 138 Am. St. Rep. 247; *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775; *Burnett's Estate*, 219 Pa. 599, 69 Atl. 74.

The word is used in different senses in the various statutes, and its interpretation depends largely on the connection in which it appears and the sense in which it is used in the same act or in others on related subjects. A case somewhat like this one was decided in Massachusetts. There a statute provided that an adopted child should inherit as if born in lawful wedlock. In a statute of descents, which was enacted after the adoption statute was passed, it was provided that, when a husband dies intestate and "leaves no issue living," the widow shall receive a certain share. It was there contended that, by the use of the words "issue living" in the later statute, it was intended and had the effect to exclude adopted children. The court held, however, that the adopted child is "issue" within the meaning of that statute, and saying that, if the statute was given a stricter meaning, it would operate to repeal, pro tanto, the adoption act wherein the adopted child had been placed on an equality with a natural child. It was also said that, as an adopted child was expressly given the status of a natural child, it was not supposable that the Legislature intended by the use of the term quoted to take from an adopted child the rights so explicitly given, and that therefore the words "issue living" should be construed in the sense of child or children, and, when so treated, the term fairly included adopted children. *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768. Other authorities in which the word was held to include adopted children are *In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; *Estate of Wardell*, 57 Cal. 484; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Warren v. Prescott et al.*, supra; *Shick v. Howe*, 137 Iowa, 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Rowan's Estate*, 6 Pa. Co. Ct. R. 461.

We think that the Legislature did not intend to repeal the provisions of the adoption act which fixed the status of an adopted child and gave it the inheritable rights of a natural born child, and also that the words "living issue" in General Statutes of 1909, § 2952, were used in the sense of living chil-

dren. It is said that this interpretation, if adopted, will leave the amendment of 1891 without effect, and operate to reinstate the statute as it existed before the amendment. The appellee inquires, What possible purpose could the Legislature have had except to restrict the descent of property to the natural children of any prior deceased child of an intestate? There are good reasons to infer that the amendment was enacted to cut out the right of the husband or wife of the intestate and of the deceased child to inherit a share of the estate of the ancestors of such child. After *Delashmutt v. Parrent*, 40 Kan. 641, 20 Pac. 504, was decided, there was some surprise at the interpretation there given to the word "heirs" under which the surviving husband or wife of an intestate could take the share that a prior deceased child would have taken if he had outlived his parent. An agitation was at once started for the enactment of a measure that would give the remaining estate of an intestate to the surviving children and to the living children of a prior deceased child, so as to cut out the right of the surviving husband or wife of the intestate to inherit the share of a deceased child, and also to exclude the husband or wife of such deceased child from inheriting any part of that share. At the succeeding Legislature the amendment was made to meet this demand and which, as we have seen, gives the remaining estate of an intestate to his surviving children and the living children of a prior deceased child instead of to the heirs of such child. This, we think, was the purpose of the amendment rather than to nullify the principal provisions of the adoption act or to discriminate among the children of a deceased child of an intestate.

The judgment will therefore be reversed, with the direction to enter judgment awarding to Gertie McCaffrey a one-fourth interest of the real estate involved in this proceeding. All the Justices concurring.

#### BANCHOR v. PROCTOR et al. SAME v. CROCKETT et al. HAYS LAND & INVESTMENT CO. v. BANCHOR.

(Supreme Court of Kansas. Jan. 11, 1913.)

#### (Syllabus by the Court.)

#### 1. TAXATION (§ 736\*)—TAX DEEDS—POSSESSION—LIMITATIONS.

In an action by a tax deed holder in possession to quiet title against the holder of an elder tax deed, who was out of possession, the defendant proved that an entry was made upon the land and actual possession was taken in his name within two years from the date upon which his tax deed was recorded. Held, that proof of antecedent authority on the part of the person taking possession for him was un-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

necessary, and that the condition of the two-year statute of limitations was satisfied.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1475; Dec. Dig. § 736.\*]

**2. TENANCY IN COMMON (§ 55\*)—ACTIONS BY JUDGMENT—CONCLUSIVENESS.**

In the action referred to, the plaintiff quieted his title against all the heirs of the deceased holder of the original title. Afterwards two of the heirs procured the judgment to be opened, showed defects in the plaintiff's tax deed invalidating it as a conveyance, and asked for possession. They did not claim to be sole heirs and made no proof of the respective shares of their ancestor's estate to which they were entitled. *Held*, the judgment quieting title was conclusive upon all the heirs who did not defend, and that, while the answering heirs were entitled to possession, they were only entitled to possession in common with the plaintiff.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 140-156; Dec. Dig. § 35.\*]

**3. TAXATION (§ 697\*)—SUIT TO REDEEM—“OWNER.”**

Within five years from the time the holder of the second tax deed took possession, a grantee of the holder of the first tax deed brought an action to redeem. Possession had been taken under the first deed, which was good on its face, within two years, and the five-year statute of limitations had run in its favor against the original owner. *Held*, the plaintiff was an owner within the meaning of the statute providing that “any owner, his agent or attorney,” may redeem land sold for taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1394-1400; Dec. Dig. § 697.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

Appeal from District Court, Ellis County.

Action by Franklin Banchor against Marion Proctor and others, and against Eben C. Crockett and others, and against the Hays Land & Investment Company. From a decree canceling plaintiff's interest in the land, he appeals. Affirmed.

J. S. Simmons and Ray H. Tinder, both of Hutchinson, for appellant. C. M. Monroe and Lee Monroe, both of Topeka, for appellees.

**BURCH, J.** The actions in which these appeals were taken were instituted by the holders of rival tax titles to the land in controversy. The original title was vested in Adelaide S. Alden, who died in 1902. Neither she nor her heirs ever held actual possession. In February, 1903, a tax deed, regular on its face but based on irregular proceedings, was issued to Marion Proctor and was duly recorded. In September, 1906, another tax deed was issued to Franklin Banchor and was duly recorded. This deed was good on its face, but was voidable for a number of reasons. In December, 1909, Banchor found the land unoccupied and took possession. In 1910 he brought suit to quiet his title, making Proctor and the unknown heirs of Adelaide S. Alden parties defendant. Proctor answered, claiming title under his

tax deed, alleging possession, and asking that his title be quieted against Banchor. At the trial, the allegation of possession and the prayer for affirmative relief were withdrawn. Judgment was rendered refusing to quiet Banchor's title as against Proctor, and Banchor appeals. Case No. 17,889.

[1] It is claimed that Proctor suffered his interest in the land to lapse by failing to take possession within two years from the recording of his tax deed. In 1904 an agent of a company, said to be acting for Proctor, entered upon the land in his name and leased to a tenant, who sublet to a resident of the neighborhood for farming and grazing purposes. The lessee kept the land rented for two years. The principal defect in this proof, to which attention is called, is the lack of antecedent authority in the company acting for Proctor. Even if the act of taking possession in his name were not authorized at the time, Proctor could subsequently ratify it, as he did by producing the proof relating to it in support of his title. The condition of the statute was satisfied by taking possession and excluding adverse occupancy within the time limited for that purpose. *Buckner v. Wingard*, 84 Kan. 682, 115 Pac. 636. There is no evidence of a subsequent intention to abandon possession generally to any one who might desire it. Some contention is made that actual possession under Proctor was not in fact shown. If this were true, the land was vacant until Banchor entered, the statute did not begin to run until that time (*Gibson v. Hinchman*, 72 Kan. 382, and cases cited at page 384, 83 Pac. 981, 982), and the two years within which Proctor might sue for possession had not elapsed when judgment was rendered. The general finding of the court, however, disposes of the contention in Proctor's favor.

[2] In the action to quiet title, a judgment was taken by default against the Alden heirs. Afterwards Eben C. Crockett and Adelaide A. C. Somes appeared and procured this judgment to be opened. They answered the petition, claiming that they were heirs of Adelaide S. Alden and asserting that the Banchor tax deed was invalid, and prayed for possession. Judgment was rendered to the effect that Banchor had no claim upon the land except a lien for taxes, and providing that he be ejected and Crockett and Somes be placed in possession upon their satisfying the lien. Banchor appeals. Case No. 18,118.

Crockett and Somes established inheritance from Adelaide S. Alden, but the number of such heirs and the fractional interest of each one were not shown. For this reason it is claimed the judgment is erroneous. The respective shares to which Crockett and Somes are entitled are matters which may well wait for determination in an action for

partition. Meanwhile they are entitled to possession upon satisfaction of Banchor's tax lien, but the court should not have excluded him from possession in common with them, without definite proof on their part that they are the sole heirs of Adelaide S. Alden. They made no such claim, and the fair inference from the evidence adduced is that there are other heirs. The judgment quieting title against all persons inheriting from Adelaide S. Alden stands in full force and effect except against Crockett and Sones. No defenses except theirs were interposed, and the rights of their coheirs are cut off. While the judgment quieting title did not transfer the title of such heirs to Banchor (*Lockwood v. Meade*, 71 Kan. 739, 81 Pac. 496), it did render his tax deed unassailable by them. He no longer holds under a tax deed voidable by them, and Crockett and Sones were not entitled to the entire and exclusive possession, as the tenant in common was in the case of *Horner v. Ellis*, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446. However, in view of the turn which the litigation took, and which is about to be discussed, it is not necessary that the judgment be modified.

The Hays Land & Investment Company purchased the Proctor title and in March, 1911, brought an independent action to redeem from Banchor. The cause was submitted on the evidence introduced in the suit to quiet title, and judgment was rendered for the land company. Banchor appeals. Case No. 18,119.

[3] The statute provides that "any owner,

his agent or attorney," may redeem. It is argued that the Hays Land & Investment Company is merely the assignee of a tax lien, and consequently is not an owner, within the meaning of the statute. The court has already held, in accordance with the universal view of the authorities, that the word "owner" means any one who has a substantial interest in the property which might be affected by the tax proceeding. *Steele v. Dye*, 81 Kan. 286, 290, 105 Pac. 700. It is said that the special statute allowing a mortgagee to redeem should be interpreted as denying the right to all other lienholders. The purpose of that statute, however, was not simply to confer the right to redeem, but to give a mortgagee an additional foreclosable lien for taxes which he may be compelled to pay to protect his mortgage. Gen. Stat. 1909, § 9494. It is said that Banchor holds the superior title, although his tax deed is voidable, because he is in possession, and that, if the holder of the Proctor title should be permitted to redeem, he may be deprived by indirection of a possession from which he could not be ousted by ejectment. Banchor's title is not, however, superior to the Proctor title. Proctor took possession within two years, and the five-year statute has run in favor of his deed as against the original owner. Therefore he and his grantee are no longer mere claimants under a tax deed and occupy the position of the original owner. *Cone v. Usher*, 86 Kan. 880, 122 Pac. 1049.

The judgment in each case is affirmed. All the Justices concurring.

UNION PAC. LIFE INS. CO. v. FERGUSON,  
State Ins. Com'r.

(Supreme Court of Oregon. Feb. 4, 1913.)

1. INSURANCE (§ 83\*)—INSURANCE COMPANIES  
—“CAPITAL”—“CAPITAL STOCK.”

Under L. O. L. § 4610, providing that no domestic insurance corporation shall be permitted to do business until it shall have a paid-up unimpaired cash capital, equal to \$100,000 United States gold coin, invested as therein required, a corporation, the par value of whose stock actually sold and fully paid up is less than \$100,000, is not entitled to do business, although the stock actually sold was sold above par for \$100,000 or more, since the word “capital,” when used to mean “capital stock,” as it does in that section, does not include surplus or profits subject to withdrawal in dividends.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 88; Dec. Dig. § 83.\*

For other definitions, see Words and Phrases, vol. 1, pp. 964-968; vol. 8, p. 7595; vol. 1, pp. 958-967; vol. 8, p. 7595.]

2. INSURANCE (§ 8\*)—INSURANCE COMPANIES  
—CAPITAL—INVESTMENT.

Under L. O. L. § 4610, providing that domestic insurance corporations shall not be permitted to do business until they shall have a paid-up unimpaired cash capital amounting to \$100,000 invested in state or United States bonds, or notes secured by a first mortgage on real estate, the market value of which shall at least be double the amount of the loan, loans secured by mortgages on land, the value of which is not double the amount of the loan, should be counted as assets or valid loans to the amount of one-half of the value of the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 7; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Marion County;  
Wm. Galloway, Judge.

Mandamus by the Union Pacific Life Insurance Company against J. W. Ferguson, as Insurance Commissioner of the state of Oregon. From a judgment granting a peremptory writ, defendant appeals. Reversed, and action dismissed.

This action was commenced in October, 1912, by the issuance of an alternative writ of mandamus, in which it is recited that the plaintiff is incorporated under the laws of the state of Oregon for the transaction of a life insurance business, with a capital stock of \$100,000; that it has a paid-up, unimpaired cash capital exceeding \$100,000, invested as required by section 4610, L. O. L.; that the defendant, the State Insurance Commissioner, although application has been duly made therefor and the license tax paid, refuses to issue to plaintiff a certificate authorizing and permitting it to carry on an insurance business in the state. The defendant demurred to the writ, which was overruled, and on November 7, 1912, a peremptory writ was ordered to be issued, from which defendant has appealed. Thereafter, as the license ordered on November 7, 1912, to be issued by the Commissioner would have expired on December 31, 1912, on January 2, 1913, plaintiff caused to be issued herein another peremp-

tory writ of mandamus, commanding defendant to issue to plaintiff a license for the year 1913, from which writ, also, defendant appealed.

A. M. Crawford, Atty. Gen., and Bert E. Haney, of Portland (Joseph & Haney, of Portland, on the brief), for appellant. Guy O. H. Corliss, of Portland, and J. A. Carson, of Salem (Corliss & Skulason, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). Two principal questions are presented: (1) Does the recital in the writ show that plaintiff has a paid-up, unimpaired cash capital equal to \$100,000 gold coin of the United States? (2) Are the securities to which defendant objects such as are required by the statute? The term “capital” is used in varying senses by text-writers and in the decisions of the courts, which are well defined and distinguished in the text and notes in 5 Am. & Eng. Enc. Law, p. 134 et seq., in which it is said, at page 137: “‘Capital’ and ‘capital stock’ are frequently used interchangeably; ‘capital stock’ sometimes referring to the property and assets of the corporation, and ‘capital’ to the amount paid in or to be paid in by the stockholders. In general, profits and surplus earnings do not constitute ‘capital stock,’ or ‘capital,’ when the latter term is used in the sense of the capital stock of the corporation.”

In *Mechanics' & Farmers' Bank of the City of Albany v. Townsend*, 5 Blatchf. 315, Fed. Cas. No. 9,381, it is said that “capital” means the amount of capital fixed by charter, and does not include surplus earnings. Boon on Corporations, § 105, says that the word “capital,” as used with respect to corporations, primarily signifies the aggregate of the sums subscribed for and either paid in, or agreed to be paid in, by the stockholders.

In *People ex rel. Union Trust Co. v. Coleman et al.*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762, it is said: “The capital stock of a company is one thing; that of the shareholders is another and different thing. That of the company is simply its capital existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power.

\* \* \* While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock.

\* \* \* The capital cannot be divided and distributed; the surplus may be. But that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.  
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surplus does enter into and form a part of the share stock, for that represents and absorbs into its own value surplus as well as capital."

It is said in *Kohl v. Lillenthal*, 81 Cal. 385, 22 Pac. 691, 6 L. R. A. 522, that: "'Capital stock,' as used in this section, is frequently otherwise and as well expressed by the simple word 'capital,' and means the money and property with which the company carries on its corporate business. \* \* \* It is vested in the corporation as a sacred trust for the protection of its creditors. \* \* \* This money and property of the corporation constitutes the actual capital of the company, to which all persons having dealings with the corporation, by means whereof they may become its creditors or become personally liable for its debts, \* \* \* look, and have a right to look, to determine the measure of the company's responsibility and of their security."

In *Bailey v. Clark*, 21 Wall. (U. S.) 286, 22 L. Ed. 651, it is said by Mr. Justice Field: "When used with respect to the property of a corporation or association, the term [capital] has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed."

In *Farrington v. Tennessee*, 95 U. S. 679, at page 686 (24 L. Ed. 558), it is said: "The capital stock is the money paid, or authorized or required to be paid, in as the basis of the business of the bank, and the means of conducting its operations. \* \* \* If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without a like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund, held by the corporation as a trustee."

In *State v. Morristown Fire Association*, 23 N. J. Law, 196, it is said: "The phrase 'capital stock,' as employed in acts of incorporation, is never, that I am aware, used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. \* \* \* The value of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same."

The case of *Sun Mutual Ins. Co. v. Mayor*, etc., of New York, 8 N. Y. 241, at page 250, holds that profits are not capital, except where, by contract or legislative act, they are directed to accumulate, as a basis of credit, and cannot be withdrawn. Undivided profits and surplus are part of the assets of the corporation while they remain, and in that sense

are capital until withdrawn, but are subject to be withdrawn at any time; not so with the capital proper, which cannot be withdrawn. It is a trust fund, to stand as security to policy holders and to other creditors of the company.

[1] Applying the law as thus stated to the facts in this case, the statute under consideration (section 4610, L. O. L.) provides that the corporation shall not be permitted to do business "until such corporation shall have a paid-up unimpaired cash capital equal to \$100,000 United States gold coin, which shall be invested in this state \* \* \* in state or United States bonds, bonds or notes secured by first mortgage upon first-class, otherwise improved, unincumbered real estate, the market value of which shall be at least double the amount invested in or loaned thereon. \* \* \*" This language clearly indicates that the term "capital" means the capital stock of the corporation, as fixed by its articles, which must not be impaired, but which is to be safely invested and remain as a fund for the security of policy holders, and therefore does not include surplus or profits, unless specially made a part of the capital or set apart as a basis of credit, and not subject to withdrawal, and it clearly contemplates that the corporation shall have \$100,000 of its capital stock fully paid up that cannot be thereafter impaired by withdrawals.

Plaintiff admits that its capital stock has not all been subscribed or paid up, and seeks to show a compliance with the statute by the fact that the stock actually sold has been sold for sums above par, and that the amount realized therefrom was largely in excess of \$100,000, constituting a paid-up capital of \$100,000. It is alleged that 7,541 shares have been sold and fully paid up, and that other shares have been sold, though not fully paid for; but it is not shown how much has been paid, so we will assume that the 7,541 shares sold for \$100,000, \$24,590 of which was profit and neither capital nor capital stock within the meaning of the statute, because it is profits accumulated in the sale of stock, and subject to withdrawal at any time in dividends. The two items of interest mentioned in the statement of the assets of the company are of the same class and cannot be included as part of the \$100,000 paid-up capital, which must be invested. This \$100,000, mentioned in the statute, must be the trust fund that cannot be withdrawn or in any manner diverted by the corporation. It is the fund with which the corporation transacts its business, and stands as security to the policy holders. It does not include profits or surplus until they have been made capital in some legal way.

[2] As to the five loans secured by mortgage, to which the Commissioner objects, we think in each case they should be counted as assets or valid loans to the amount of one-

half of the value of the property included in the mortgage. For the reason that plaintiff has not a paid-up, unimpaired cash capital equal to \$100,000 in United States gold coin, we find that defendant was not entitled to a certificate or license at the time the application was made therefor.

The judgment, of date November 7, 1912, and the peremptory writ of mandamus issued on January 3, 1913, are reversed, and the action is dismissed.

**HENDRY et al. v. CITY OF SALEM et al.**  
(Supreme Court of Oregon. Feb. 4, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 445\*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—EFFECT OF IRREGULARITIES.**

Where the proceedings for making a street improvement were regular, and the city council had jurisdiction to order the improvement, and to enter into the contract, mere irregularities in the method of carrying on the work did not release the property owners from the obligation of paying their assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1065; Dec. Dig. § 445.\*]

**2. MUNICIPAL CORPORATIONS (§ 365\*)—PUBLIC IMPROVEMENTS—PERFORMANCE OF WORK—ACCEPTANCE.**

Where a city council accepts a street improvement, its decision that the improvement complies with the contract is, in the absence of fraud, conclusive on the property owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 898; Dec. Dig. § 365.\*]

**3. EVIDENCE (§ 83\*)—PRESUMPTIONS—OFFICIAL ACTS.**

In an action to enjoin the collection of a special assessment for a street improvement, where the complaint does not allege that the notice to property holders interested, required by the city charter to be given before the issuance of the warrant for the collection of the tax, was not given, it will be presumed that this official duty was regularly performed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**4. MUNICIPAL CORPORATIONS (§ 513\*)—JOINER—PERSONS WHO MAY JOIN.**

Where several property owners join in an action to enjoin the collection of a special assessment for a street improvement, relief against the assessment can only be given on a ground common to all the plaintiffs, and hence two of the plaintiffs cannot be granted relief on the ground that their lots were described in the notices of the improvement as the property of other persons, where this was not true as to the lots of the other plaintiffs.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. § 513.\*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by W. W. Hendry and others against City of Salem and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. O. Condit, of Salem, for appellants. Grant Corby and R. K. Page, both of Salem, for respondents.

McBRIDE, C. J. This is a suit to enjoin the city from collecting an assessment for the improvement of North Front street.

The principal contention is that the improvements made do not correspond to the specifications in a number of particulars, and that the council fraudulently accepted the work knowing this fact.

[1, 2] The proceedings for making this improvement seem to have been entirely regular, and the council had jurisdiction to order the improvement and to enter into the contract. This being the case, mere irregularities in the method of carrying on the work will not be sufficient to release the property owners from the obligation of paying their assessments. *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9; *Rubin v. Salem*, 58 Or. 91, 112 Pac. 713. The council accepted the improvement, and, in the absence of fraud, their decision that it complied with the contract is conclusive. *Rubin v. Salem*, supra; *Wingate v. Astoria*, 39 Or. 603, 65 Pac. 982; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407. No fraud on the part of the city council or of any city official is disclosed by the evidence. While there may have been slight deviations from the contract in respect to the size and quality of gravel employed, we think the evidence tends to show that as a net result the property holders have as good and substantial a street as they would have had in the event of a strict and literal compliance with the contract. There was a substantial compliance with the plans and specifications. *Barkley v. Oregon City*, 24 Or. 515, 33 Pac. 978.

[3] It is claimed that under the charter of the city of Salem no warrant can be issued for the collection of a tax until after 10 days' service of notice has been given to property holders interested, but the complaint does not charge any failure to give this notice. In the absence of any allegation in the complaint to the contrary, the presumption arises that official duty has been regularly performed in this regard. This is a court of equity, and plaintiffs stand in a poor position in a court of conscience when they come here declaring that they will never pay their assessments, which they deem wholly void, and when they specify particularly just the amount demanded of each of them, and in the same breath complain that they have not been informed, personally or by mail, of the amount claimed from them.

[4] It is also claimed that there was a mistake in the notices of the improvement, the lots of plaintiff Hendry and Bybee being wrongly described as being the property of other persons from whom they have received conveyances of the property, and this appears to be the case; but they cannot obtain relief in this suit upon grounds which are not common to all the plaintiffs. If the tax is void as to all for a reason common to all, all can



have a decree; but where the grounds of suit arise out of circumstances wholly variant as in this case, where all claim that the assessment should be enjoined because of fraud of the council in accepting the improvement, and, as to these two plaintiffs, for another reason constituting an entirely different cause of suit, we can only consider those propositions where all the plaintiffs meet upon common ground. Though different interests may unite in a suit to prevent a wrong, it must be a wrong common to all. *Paulson v. City of Portland*, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673.

The decree of the circuit court is affirmed.

### HOLTON v. HOLTON.

(Supreme Court of Oregon. Jan. 28, 1913.)

#### 1. APPEAL AND ERROR (§ 422\*)—NOTICE OF APPEAL—UNDERTAKING.

Though the notice of appeal does not sufficiently designate the judgment appealed from, nor the court to which the appeal is taken, the undertaking may be examined together therewith to supply the defects.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2149; Dec. Dig. § 422.\*]

#### 2. APPEAL AND ERROR (§ 91\*)—FINAL ORDER—ORDER AFTER JUDGMENT—"ORDER AFFECTING A SUBSTANTIAL RIGHT."

Where, after a decree of divorce, application was made to have an allegation as to the residence of the plaintiff inserted into the complaint which was necessary to jurisdiction, and it was entered after a hearing over the objections of the defendant, such decision was a final "order affecting a substantial right," and was appealable under L. O. L. § 548, providing that such an order for the purpose of being reviewed shall be deemed a judgment or decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 612-641; Dec. Dig. § 91.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6739-6741; vol. 8, p. 7808.]

#### 3. DIVORCE (§ 91\*)—JURISDICTION—PLEADING.

Where the complaint in a divorce case failed to allege plaintiff's residence in the state for a year, but did state the defendant's residence, the court did not have jurisdiction, and the appearance of the parties affected nothing, and the whole proceeding was void; L. O. L. § 509, requiring that the plaintiff reside in the state for a year, being mandatory, and prescribes an essential element of the jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 287-289; Dec. Dig. § 91.\*]

#### 4. PLEADING (§ 236\*)—TIME FOR AMENDMENT.

L. O. L. § 102, providing that a court at any time before trial, or before a cause is submitted, may allow a pleading or proceeding to be amended, when the amendment does not substantially change the cause of action or defense, does not give the court power to allow an amendment to a pleading after final decree.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

#### 5. PLEADING (§ 248\*)—AMENDMENT—VOID SUIT—"SUBSTANTIALLY CHANGE THE CAUSE OF ACTION."

The allowing of the insertion of an allegation of the residence of the plaintiff into the complaint in a divorce case was "substantially to change the cause of suit" under L. O. L. § 102, allowing the court to permit amendments

to pleadings and proceedings when they do not substantially change the cause of action or defense, since it changed a void proceeding to something efficacious.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.\*]

#### 6. COURTS (§ 40\*)—JURISDICTION—AMENDMENTS.

Jurisdiction over the subject-matter of a suit cannot be acquired by a mere amendment subsequent to the final submission of the cause, since a court cannot move affirmatively until it has jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 157-161; Dec. Dig. § 40.\*]

#### 7. APPEAL AND ERROR (§ 112\*)—APPEALS FROM VOID ORDERS.

The mere fact that an order was void because out of time and dependent upon a proceeding originally void does not render it not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 749-757; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Action by Frank Holton against Josephine Holton. From an order amending the complaint after a decree for plaintiff, defendant appeals. Reversed.

The parties to this suit were married January 4, 1906, at Vancouver, in the state of Washington. On February 3, 1910, the husband as plaintiff filed in the circuit court of Washington county, Or., a complaint for divorce, in which he alleged "that the defendant now is and for more than one year last past has been a resident, inhabitant, and domiciled within the state of Oregon, and that such residence and inhabitancy has been actual, continuous, and bona fide," but said nothing whatever about his own residence. On February 24, 1910, an attorney in the employ and pay of the plaintiff, but authorized by the defendant, entered an appearance for the wife consenting that the suit go to trial without further notice, and waiving all right to plead or be heard therein. On the same day testimony was taken and reported by a referee and a decree of divorce rendered in favor of plaintiff so far as the court might lawfully adjudicate the matter. The findings of fact upon which the decree was based followed the very words of the complaint in respect to the residence of the parties. On May 15, 1911, almost 15 months after the rendition of the decree, the plaintiff applied to the circuit court to correct the complaint so as to change the word "defendant" to "plaintiff" in order to show that the latter, instead of the former, had resided in the state for more than one year prior to the commencement of this suit, and to change the findings of fact in the same manner. The defendant appeared specially by different counsel of her own choosing to resist the motion. Disregarding the retainer and appearance of other counsel, the attorney engaged

by the plaintiff to represent the defendant at the beginning of the suit appeared and consented to the allowance of the motion to correct the complaint and findings. Overruling the objections of the defendant urged by her counsel under her special appearance the court on May 15, 1911, entered nunc pro tunc as of February 24, 1910, an order allowing the motion and making the alterations desired. From this order the defendant appeals.

I. N. Smith, of Portland (John F. Logan, of Portland, on the brief), for appellant. John C. Shillock and Dan J. Malarkey, both of Portland (O'Day & Haddock, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] It is first necessary to dispose of a motion filed by the plaintiff to dismiss this appeal on the grounds that notice is insufficient, in that it does not designate the court to which the appeal is taken, nor sufficiently describe or identify the decree appealed from, and that it appears from the transcript that no decree was rendered on May 15, 1911. Further reasons are specified, but they are only elaborations of those mentioned. The notice, besides containing the title of the court and cause and direction to the plaintiff and his attorney, naming him, reads as follows: "You and each of you are hereby notified that the defendant, Josephine Holton, has this day appealed from that certain decree entered against this defendant on the 15th day of May, 1911, by Judge J. U. Campbell, in the county of Washington, state of Oregon, and has appealed from the decree and the whole thereof." This notice was signed by the attorneys for defendant, service thereof accepted by the attorney for the plaintiff, November 14, 1911, and was filed the next day. The undertaking on appeal after the same title of court and cause contains this preamble: "Whereas the defendant in the above-entitled circuit court appeals to the Supreme Court of the state of Oregon from an order made and entered against the defendant in the said cause in said circuit court in favor of the plaintiff in the said cause and against the defendant on the 15th day of May, A. D. 1911, for an order attempting to correct the complaint, findings of fact, conclusions of law, and the decree, now therefore," etc. Then follows the usual form of undertaking on appeal. "The undertaking on appeal may be examined in order to identify the judgment or the decree sought to be reviewed." *Moorhouse v. Donica*, 13 Or. 435, 11 Pac. 71; *Salem Traction Co. v. Anson*, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675; *Keady v. United Rys. Co.*, 57 Or. 325, 100 Pac. 658, 108 Pac. 197. Taking the notice and the undertaking together, we are convinced that there was sufficient data in the hands of the plaintiff to identify fully the proceeding of

the circuit court to which objection is made and to disclose the tribunal to which the appeal is taken.

[2] The plaintiff urges that the order of the court on May 15, 1911, was not a decree and relies upon section 534, L. O. L., which reads thus: "Every direction of a court or judge made or entered in writing and not included in a judgment or decree is denominated an order." Turning, however, to section 548, L. O. L., we find that among other things "a final order affecting a substantial right and made in a proceeding after judgment or decree \* \* \* for the purpose of being reviewed shall be deemed a judgment or decree." Here was an order made in a proceeding after a judgment or decree. Having fully determined on their merits the matters involved in the application to correct the complaint and the findings, the ensuing order of the court was a final order. In the sense that it undertook to inject into the complaint an allegation about the residence of the plaintiff where no such averment existed before, and in that manner to give jurisdiction to the court to render the decree, the order affected a substantial right. There are therefore present in the order of May 15th all the elements of an appealable decree as defined by section 548, L. O. L. The motion to dismiss the appeal must be denied.

[3] On the merits we read in section 509, L. O. L., that: "In a suit for the dissolution of the marriage contract the plaintiff therein must be an inhabitant of the state at the commencement of the suit and for one year prior thereto which residence shall be sufficient to give the court jurisdiction without regard to the place where the marriage was solemnized or the cause of suit arose." This mandatory language about the habitat of the plaintiff prescribes an ingredient of the jurisdiction of the subject-matter in a litigation of this kind. This is a manifest deduction to be drawn from the case of *Parrish v. Parrish*, 52 Or. 160, 96 Pac. 1066. In that case the plaintiff failed to allege in the complaint that he had been an inhabitant of the state at the commencement of the suit, and for one year prior thereto. The defendant appeared, filed her answer, and contested the suit to final decree in her favor. On the plaintiff's appeal this court set aside the findings of the court below and dismissed the complaint. On the face of the complaint in the case at bar the court had no jurisdiction over the subject-matter of the suit. The appearance of the parties did not cure this defect; for, while this may confer jurisdiction over their persons where the court has already jurisdiction over the subject-matter of the suit, yet, in the absence of this latter element, personal submission to the jurisdiction of the court effects nothing. Mere consent cannot confer jurisdiction in such cases.

[4] While under the provisions of section

102, L. O. L., a court at any time before trial or before a cause is submitted may allow a pleading or proceeding to be amended in many respects when the amendment does not substantially change the cause of action or defense, it does not possess such power after the case has gone to final decree. *Scott v. Ford*, 52 Or. 299, 97 Pac. 99.

[5] In any view, the amendment was not permissible under that section, for its purpose was substantially to change the cause of suit from what was void to something efficacious.

[6] Jurisdiction over the subject-matter of a suit cannot be acquired by a mere amendment subsequent to the final submission of the cause. Archimedes boasted, "Give me a place to stand and I will move the world." So it is, in order to give a court authority to move affirmatively in a suit, it must first have jurisdiction over the subject-matter. Its lack of such jurisdiction having been apparent on the face of the record, the court in limine ought to have refused to proceed further, and after decree when the matter was called to its attention, even informally, it ought to have swept it from its records, especially in a case so permeated with collusion as this was at the outset.

[7] Although the order of May 15, 1911, was void because out of time and dependent upon a proceeding originally void, yet it is none the less appealable. *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Sturgis v. Sturgis*, 51 Or. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724. Something was said at the argument about fraud and imposition practiced upon the defendant on the one hand and the fact that the plaintiff had contracted another marriage; but with these things we have nothing to do. We deal with the record of the case before us.

The order appealed from is reversed.

#### STATE v. WHITEAKER.

(Supreme Court of Oregon. Jan. 28, 1913.)

##### 1. FALSE PRETENSES (§ 6\*)—OBTAINING SIGNATURES TO WRITTEN INSTRUMENTS—ELEMENTS OF OFFENSE.

L. O. L. § 1964, makes it an offense to obtain money or property "by any false pretenses, or by any privy or false token, and with intent to defraud," or by obtaining the signature of any person to a writing with like intent, the false making of which would be punishable as forgery. Section 1541 provides that "upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memorandum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant." *Held*, that if the false pretenses are expressed orally they must be accompanied by a false token or writing, and if not so accompanied the false pretense, or some note or memorandum thereof,

must be in writing, signed by or in the handwriting of defendant; the latter clause of section 1541 not referring to a false pretense expressed orally and accompanied by a false token.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 4; Dec. Dig. § 6.\*]

##### 2. FALSE PRETENSES (§ 6\*)—FALSE TOKENS—"FALSE WRITINGS"—WHAT CONSTITUTES.

"False token or writing," within the meaning of L. O. L. § 1541, has reference to something real, visible, and substantial, or some writing purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauding; but such writing need not be subscribed by or in the handwriting of the defendant.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 4; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2971.]

##### 3. FALSE PRETENSES (§ 43\*)—FALSE "TOKENS."

In a prosecution for falsely pretending that land contained valuable oil deposits, whereby prosecutor was induced to execute a deed for land in payment for stocks of an oil company which, it was claimed, owned the land, a prospectus of the company describing the property in question, as well as a bottle of oil labeled "Taken from Our Property," were proper exhibits to go to the jury as tokens, within the contemplation of L. O. L. §§ 1541, 1964.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 57; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6993.]

##### 4. CRIMINAL LAW (§ 373\*)—FALSE PRETENSES—EVIDENCE—CONTINUING OFFENSES.

Under an indictment charging that on a certain date the defendant made false representations and obtained a signature by false pretenses, etc., it was proper to admit evidence of representations made before that date, such as the issuing of an untrue prospectus and representations made during the negotiations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 373.\*]

##### 5. FALSE PRETENSES (§ 42\*)—ADMISSION OF EVIDENCE—INTENT.

The admission in evidence of statements of one charged with obtaining a signature by means of false pretenses, after the transaction, was proper to show previous intent.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 56; Dec. Dig. § 42.\*]

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

W. H. Whiteaker was convicted of obtaining a deed by false pretenses, and he appeals. Affirmed.

Defendant was jointly indicted with four others, charged with the crime of obtaining the signature of a person by means of false pretenses, in that on December 10, 1910, they made representations to Mrs. Emma A. Smith that the Lake Oil, Gas & Pipe Line Company, a corporation, hereinafter referred to as the company, was the owner of and had legal title to 800 acres of land in California, upon which paraffin oil had been discovered, and that the land was very valuable, being worth \$500,000, and exhibited bottles of oil said to have been taken from a

hole on said land, and made many other representations in relation thereto, which representations, as alleged, were false and untrue, and well known to defendant to be so false and untrue, and were made to Mrs. Smith with intent to injure and defraud her and feloniously obtain her signature to a writing, namely, a warranty deed, conveying to the defendant 91.8 acres of land in which she owned an undivided half interest; that Mrs. Smith was ignorant of the facts, and believed and relied upon the representations so made, and was thereby induced to and did sign the said deed. The defendant pleaded not guilty to the indictment, and was given a separate trial upon his demand therefor. The jury found him guilty, and judgment was rendered thereon, from which he appeals.

Samuel White and J. B. Upton, both of Portland (Manning & White and McAllister & Upton, all of Portland, on the brief), for appellant. Joseph H. Page, of Portland (George J. Cameron, Dist. Atty., of Portland, on the brief), for the State.

EAKIN, J. (after stating the facts as above). The first and most important question involved on this appeal is based on defendant's contention that the false pretenses must be in writing, and either subscribed by or in the handwriting of the defendant, and that the pretenses upon which the state relies were not of such character. The statute under which the charge is made is section 1964, L. O. L., which reads: "If any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain or attempt to obtain from any other person any money or property whatever, or shall obtain or attempt to obtain with the like intent the signature of any person to any writing the false making whereof would be punishable as forgery, such person, upon conviction," etc. Section 1541, L. O. L., prescribes what evidence shall be requisite as proof of said crime, providing: "Upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memorandum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant. \* \* \*"

Aside from the oral statements of the defendant, the principal representation relied upon by the state is a prospectus prepared and printed by defendant and his co-conspirators, and purporting to have been issued by the company, which said prospectus was offered for inspection to Mrs. Smith. It is headed in large capital letters: "ANOTHER GREAT OPPORTUNITY IN OIL ENTERPRISE. LAKE OIL, GAS AND PIPE

LINE COMPANY. INCORPORATED SEPTEMBER 10, 1910. AUTHORIZED CAPITAL STOCK \$500,000. \* \* \* THE GREATEST PARAFFIN OIL IN THE WORLD IS FOUND ON OUR PROPERTY." This prospectus contains pictures of a gushing well, of derricks and wells, of parties on the surface of the ground dipping oil from a hole, of the ground where the timber has been killed by oil forced to the surface, and of a basin or hole said to have been caused by a blow-out of gas. Also it makes the statement that the company owns 800 acres of land, which includes some of the best located and most valuable oil land in California, being considered absolutely proven oil land, where discoveries have already been made, and that the entire property is owned outright. The land is described therein by legal subdivisions. Upon the prospectus the company's name and office number are affixed at the bottom of the first and of the last pages, and on the first page is printed in capital letters the name of W. H. Whiteaker, president, and the names of the other officers and directors of the company. Defendant's name is also affixed to the description of the picture showing the timber killed by the exuding oil. There were exhibited to Mrs. Smith a small vial of oil labeled "Oil Taken from Holes Dug at Three Feet in Depth from Our Property in California," and a large bottle of similar oil, taken at the same time and place, namely, at the hole pictured on page 4 of the prospectus; also fossils, pieces of shale, and sugar sand, represented to have been taken from the said land. Many oral statements and representations were made by defendant in connection with and of the same tenor as the prospectus, a number of which were made before the company was incorporated, with a view to induce Mrs. Smith to locate claims adjacent to said land, which she and her friends did. The testimony tends to show that later defendant asked Mrs. Smith to buy stock in the company, but she said that she was not able to take any at that time. Afterwards, she and her daughter being the owners of 91.8 acres of land in Multnomah county, which she was desirous of selling, defendant offered to buy it if she would take as part payment stock in the company; and relying upon the said representations of defendant in relation thereto, and without knowledge of their falsity, she agreed to sell the land to the defendant and accept as part payment 7,950 shares of stock in the company at the value of \$1 a share, and was induced to and did sign the deed conveying the same to the defendant by reason of said representations and relying upon the same as being true. These negotiations continued for a period of over three weeks, and were finally consummated, through Mr. Cornelius, on December 10, 1910.

We think the testimony tended to establish that the representations were made by

defendant, and that many of them, as well as the statements contained in the prospectus and the source of the samples of oil, were false, and did induce Mrs. Smith to sign the said deed, and were sufficient to be submitted to the jury upon those questions, if the proof comes within the requirements of section 1541, *supra*, namely, if the false pretenses were accompanied by a false token or writing.

[1] There are two ways in which the crime defined by section 1964, *supra*, may be accomplished: By false pretense, or by a privy or false token. Section 1541 distinguishes the evidence essential in establishing each: If the false pretenses are expressed orally, they must be accompanied by a false token or writing; if not accompanied by a false token or writing, then the false pretense, or some note or memorandum thereof, must be in writing, signed by or in the handwriting of defendant. The meaning of section 1541, *supra*, is not rendered obscure or doubtful by the latter clause. That clause cannot be held to refer to a false pretense expressed orally and accompanied by a false token or writing. At common law cheats or frauds accomplished by means of false tokens were indictable only when the false token was of a public nature; but St. 33, Henry VIII, c. 1, created it an offense to obtain any money or goods by color of any false privy, token, or counterfeit letter. Our statute (section 1964) has defined the crime of obtaining goods by false pretenses, and is a modification of St. 33, Henry VIII, c. 1, and by the words "false token or writing" includes not only the counterfeit letter of that statute, but any false writing that would tend to effect a fraud.

[2] As said in *People v. Gates*, 13 Wend. (N. Y.) 311, 320, the token "must be something real, visible, and substantial. \* \* \* The word 'false writing' must mean some writing or instrument purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauding." The Indiana statute involved in the case of *Jones v. State*, 50 Ind. 473, 475, provides: "If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain \* \* \*" etc. The opinion says that "the offense may be committed by two means: First. By color of any false token or writing. Second. By any false pretense." In substance that is the language of our statute, and section 1541, *supra*, must be construed with reference to those two methods of violating it, namely, by false token or writing, and by the false pretense. The latter only must be in writing, and subscribed by or in the handwriting of the defendant, and relates to false representations made by the defendant without the false token or writing; the former, the

false token or writing, refers to something real, visible, and substantial, or some writing purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauding. The latter need not be subscribed by or in the handwriting of the defendant. The courts and some of the text-writers use the term "token" as referring to anything that is meant by or included in the term "token or writing." In *State v. Renick*, 33 Or. 584, at page 590, 56 Pac. 275, at page 277, 44 L. R. A. 266, at page 268 (72 Am. St. Rep. 758), a false token is held to be a false mark or sign, forged object, counterfeit letter, key ring, etc., used to deceive. *Black's Law Dictionary* defines it as: "A sign or mark; a material evidence of the existence of a fact. Thus, cheating by 'false tokens' implies the use of fabricated or deceitfully contrived material objects to assist the person's own fraud and falsehood in accomplishing the cheat." In *State v. Hanscom*, 28 Or. 427, at page 439, 43 Pac. 167, at page 171, a false telegram, neither signed by nor in the handwriting of the defendant, was held to be a false token. And in *Wagoner v. State*, 90 Ind. 504, a false order for the payment of money is held to be a false token. The same principle is announced in *Jones v. State*, *supra*, where a false business card is held to be a false token. It is said in that case, in construing the Indiana statute above mentioned: "The gravamen of the crime consists in obtaining the signature of any person to any written instrument, or in obtaining from any person any money, transfer, note, bond, or receipt, or anything of value. The offense may be committed by two means: First. By color of any false token or writing. Second. By any false pretense. The word 'token,' in its ordinary signification, means 'a sign,' 'a mark,' 'a symbol.' The words 'writing' and 'written' include printing, lithographing, or other mode of representing words and letters. \* \* \* The first question is whether the printed card set out in the indictment comes within the meaning of the words 'token or writing,' used in the statute. *Bouvier's Law Dictionary* defines the legal meaning of the word 'token' thus: 'Token. A document or sign of the existence of a fact. Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating.' To the same effect is 2 *Russell on Crimes*, p. 613; *Burrill's Law Dictionary*, title "False Token"; *Lesser v. People*, 73 N. Y. 78. *Abbott's Law Dictionary* defines "token" as: "A material, visible sign of the existence of a fact. Thus, cheating by false tokens is perpetrating a fraud by employment of some material device, some cunningly de-

vised false thing, in corroboration of one's lying representations. Token, as used in a statute punishing false pretenses, signifies 'a sign,' 'a mark,' 'a symbol.' And the term 'written token' will include matters printed or lithographed."

[3] Not only the prospectus, but the bottle of oil labeled as "taken from our property," was a proper exhibit to go to the jury as a token, in connection with the prospectus, for it to find whether they were false and gave credit to defendant's statements, or were sufficient to induce a person of ordinary caution and prudence to act upon them.

[4, 5] It is contended by defendant that the court erred in admitting evidence of representations made to Mrs. Smith prior to December 10, 1910. After the time of the formation of the company all acts and representations by the defendant, including the issuing of the prospectus, were for the purpose of selling stock. The representations and tokens were public and general, and within the common-law definition of cheats and frauds, and therefore were continuing. They were presented to Mrs. Smith in October, and when she accepted the stock she was acting exclusively upon them. The negotiations were commenced three weeks prior to December 10th, and it was not error to admit evidence of the previous representations. The admission in evidence of the statements made by defendant to Mrs. Smith after the signing of the deed was only in line with his former representations as cumulative evidence of his previous intent, and was not error.

The conclusion we have reached in regard to the admissibility of the prospectus and the sample of oil disposes of the other assignments of error. Although the trial court did not admit them in evidence upon the ground upon which their admissibility is here determined, nevertheless they were properly admitted. We find no error in the record.

The judgment of the lower court is affirmed.

## LANDESS et al. v. CITY OF COTTAGE GROVE et al.

(Supreme Court of Oregon. Feb. 4, 1918.)

### 1. MUNICIPAL CORPORATIONS (§ 34\*)—ANNEXATION OF TERRITORY—PROCEDURE—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 2, as amended (Laws 1911, p. 10), grants to the legal voters of each city and town power to enact and amend their municipal charters subject to the Constitution and the criminal laws. The council of a city duly called a special election on the proposition of an amendment to the charter enlarging the city boundaries, but the question of annexation was not separately submitted to the voters within the city and those outside, but their votes were mixed so that it could not be determined whether the voters without the city approved annexation or not. *Held*, that the constitutional pow-

er did not authorize the people of the city to annex territory without the approval of the legal voters residing within such territory, and that the vote was invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 98-101; Dec. Dig. § 34.\*]

### 2. MUNICIPAL CORPORATIONS (§ 34\*)—CONSTITUTIONAL PROVISIONS—LOCAL SELF-GOVERNMENT.

Under the constitutional provision for local self-government, the people of a district have a right to express themselves upon the question of their annexation to a municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 98-101; Dec. Dig. § 34.\*]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by Wm. Landess and others against the City of Cottage Grove and B. F. Keeney, as assessor of Lane county, Or., to enjoin the imposition of a tax on the property of plaintiffs by the defendant city, for the reason that the land is situated outside the corporate limits, and therefore not subject to such taxation. The circuit court sustained a demurrer to plaintiffs' complaint, and dismissed the suit. Plaintiffs appeal. Reversed.

C. A. Hardy, of Eugene, and J. S. Medley, of Cottage Grove (Thompson & Hardy, of Eugene, on the brief), for appellants. J. C. Johnson, of Cottage Grove (J. E. Young, of Cottage Grove, on the brief), for respondents.

BEAN, J. The following facts are shown in plaintiffs' complaint: The city of Cottage Grove is a municipal corporation created by an act of the legislative assembly of 1903, which defined the limits of the city. In 1911 the common council of Cottage Grove, pursuant to an initiative petition therefor, called a special election for the purpose of submitting to the legal voters an amendment to the city charter enlarging the corporate boundaries of the municipality. On May 1, 1911, an election was held in the city, as provided by an ordinance passed by the council and pursuant to a notice thereof. The electors of the city and the legal voters residing within the limits of the territory sought to be annexed were permitted to vote together promiscuously, and their ballots were mingled in the same ballot boxes. In the canvass of the votes it was not determined whether the voters residing without the city and within the area proposed to be annexed approved such annexation or not. The proceedings resulting in the adoption of the amended charter, and declaring the boundaries changed, are set out in detail in the complaint.

[1] Plaintiffs assert that their lands are situated within the portion attempted to be added to the city, and are therefore not subject to a municipal tax. Since this suit was heard by the trial court we have had two cases before this court involving a similar question. It may now be stated as the settled law of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this state that the power reserved to the legal voters of a municipality to enact and amend their charter (article 11, § 2, Const.; Laws 1911, p. 10) does not authorize the people of a city to extend the corporate limits so as to embrace other lands, without the approval of the legal voters residing within the territory to be annexed. *State v. Port of Tillamook*, 124 Pac. 637; *Thurber v. Henderson*, 128 Pac. 43. The question of annexation was not submitted separately to the legal voters of the city, and those of the territory designed to be included within the municipality, in compliance with the rule above stated. Section 3209, L. O. L., provides a convenient method by which a city may acquire new territory.

[2] The people of the district sought to be annexed have a constitutional right to be permitted to express themselves upon the question under some method whereby it may be known and recorded whether they consent to annexation or reject the proposition. This, we think, is within the letter and spirit of the organic law providing for local self-government. *Schubel v. Olcott*, 60 Or. 503, 120 Pac. 375; *McBee v. Springfield*, 58 Or. 459, 114 Pac. 637.

It was error to sustain the demurrer. The decree of the lower court will therefore be reversed, and one entered here declaring the plaintiffs' lands not within the city of Cottage Grove and enjoining the taxation thereof as city property.

**LEFFINGWELL v. LANE COUNTY et al.**  
(Supreme Court of Oregon. Jan. 28, 1913.)

**1. HIGHWAYS (§ 122\*)—ROAD TAX—MEETING ON NOTICE BY TAXPAYERS—STATUTES.**

Laws 1909, p. 295, amending Laws 1903, p. 272, § 34 (L. O. L. § 6320), which empowered the county court to levy a tax of a certain amount on all the property of the county to be set aside as a general road tax by making an addition thereto (section 6321) empowering the taxpayers of any road district to vote an additional tax for road purposes, provided 10 per cent. of such taxpayers give notice by posting in certain public places and publishing in a weekly newspaper a notice signed by such 10 per cent., giving notice of time, place, and object of said meeting, is so defective as to be invalid, it not directing whether notice be given before or after the meeting, not expressly authorizing the taxpayers to call such a meeting, not specifying the length of time notice shall be given, and not prescribing a method of proving notice was given, or that the persons participating in the meeting were taxpayers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**2. HIGHWAYS (§ 125\*)—ROAD TAX—LEVY BY MEETING OF TAXPAYERS—CERTIFICATE BY OFFICERS OF MEETING.**

The certificate by the chairman and secretary of a meeting of taxpayers of a road district held under Laws 1909, p. 295 (L. O. L. § 6321), on notice by taxpayers of the levy of an additional road tax is insufficient to render the tax enforceable; it not showing, or being accompanied by proof of, the levy by a proper res-

olution spread on the minutes, or the giving of the notice, as required by sections 6384, 6387, and 6390 in case of meeting under section 6384 on notice by the road supervisor at petition of freeholders.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 382; Dec. Dig. § 125.\*]

Bean, J., dissenting.

**Appeal from Circuit Court, Lane County;**  
L. T. Harris, Judge.

Suit by Madalon Leffingwell against the County of Lane and others. From a decree dismissing the suit, plaintiff appeals. Reversed and remanded.

The plaintiff is the owner in fee simple of a quarter section of vacant land in road district No. 2 of Lane county, Or., and brings this suit against the county, the county judge, the commissioners, and sheriff to quiet her title against any claim by the defendants in their official capacity in the enforcement of a tax, the levy of which is said to have been attempted by the taxpayers of said district in December, 1910. She avers payment by her in full prior to the commencement of this suit of all other taxes of every kind charged against her land mentioned on the assessment roll of that year, and says that the county court of the defendant county never levied on that roll any tax of any kind except what she has already paid as stated. Her complaint contains these allegations: "That on the 20th day of December, 1910, there was filed in the office of the clerk of Lane county a certificate of taxpayers' road district meeting in words and figures as follows: 'To E. U. Lee, County Clerk of Lane County, Oregon: We, the undersigned duly elected chairman and secretary of the taxpayers' meeting of road district No. 2, of Lane county, Oregon, held on the 17th day of December, 1910, at the hour of 1 o'clock p. m. of said day for the purpose of voting upon the question of levying an additional tax upon the taxable property of said district for the purpose of improving the roads of said district, do hereby certify that at said meeting the taxpayers of said road district by a majority vote of the taxpayers present at said meeting voted to levy an additional tax of seven mills on each dollar of the taxable property of said district to improve the roads of said district. Dated this 17th day of December, 1910. Glen O. Powers, Chairman. Chester E. Edwards, Secretary.' That no additional paper in reference to said taxpayers' meeting, the calling of the same, the giving of notice thereof, or what was done thereat has been at any time filed or of record with any officer of said Lane county or any department of its government. That the meeting mentioned was not called by the supervisor of said district, but was called by persons claiming to constitute more than 10 per cent. of the taxpayers of said district who caused notice of said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taxpayers' meeting to be posted in three places in said district and to be published for three weeks prior to said meeting in the Eugene Twice a Week Register, a paper of general circulation, printed and published at Eugene, Or." She alleges that, solely by authority of the certificate quoted, the county clerk extended upon the assessment roll of 1910 the tax mentioned in the certificate, that the tax roll has been placed in the hands of the defendant sheriff for the collection and enforcement of the taxes, and that the defendants and all of them claim that the said taxpayers' road district levy appearing upon the roll is a valid and subsisting lien upon the plaintiff's land, and the sheriff threatens to enforce the same by the usual method for collecting taxes. On a general demurrer to this complaint a decree was passed dismissing the suit, and the plaintiff appeals.

S. D. Allen, of Eugene, for appellant. E. R. Bryson, of Eugene (Potter & Bryson, of Eugene, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] In 1903 the legislative assembly passed an act on the subject of roads and highways designed to supersede all previous legislation on that subject. Laws 1903, p. 262. Section 34 of that act compiled as section 6320, L. O. L., empowered the county court to levy a tax of not exceeding 10 mills on the dollar on all taxable property of the county at the time of making the annual tax levy on the previous year's assessment which should be set aside as a general road fund, one-half to be apportioned among the several road districts according to the amount of taxable property in each and the remainder to be kept in the general county road fund. Other sections of the act provided for calling district road meetings and defined their powers. So far as deemed material they are here set out: "Whenever three freeholders of any road district in this state shall petition the road supervisor of such district to call a district road meeting of the legal voters of the district and shall state in such petition the object for which the meeting is desired, the supervisor shall cause written notices of such meetings stating the objects thereof and the time and place of holding the same and signed by himself to be posted in three public places in the district at least ten days before the day appointed for the meeting and the said supervisor shall make due proof of the giving of such notice by affidavit, which proof together with the petition calling for the meeting shall be filed with the secretary of the meeting and shall become a part of the minutes thereof." L. O. L. § 6384. "District road meetings legally called shall have power to determine what, if any, county roads or portions thereof of the road district shall be improved in any special manner and to determine the extent

and character of the improvement or improvements they shall make thereon \* \* \* and shall have power to levy a special tax not to exceed ten mills on the dollar upon all the taxable real and personal property of the district for the purpose of raising money with which to defray the expense of such special improvement or improvements. \* \* \*" Section 6386, L. O. L. "If any road district in this state shall determine to specially improve any county road or roads or portions thereof in such district and to levy a special tax to defray the expense thereof as provided in the last preceding section they shall do so by proper resolution describing therein the road or roads or portions thereof they wish to improve, giving the initial and terminal points of the desired improvements \* \* \* and also the rate of tax levied, which resolution shall be signed by the chairman and secretary of the meeting and transmitted to the county court by its next regular meeting following and shall also be spread upon the minutes of the district road meeting." Section 6387, L. O. L. "The county road supervisor shall be ex officio chairman of all road district meetings of the district to which he belongs and in case of his absence or inability to act the meeting shall proceed to elect a temporary chairman from among their own members who shall be a legal voter of the road district holding the meeting and they shall also elect a competent secretary whose duty it shall be to keep the minutes of the meeting which minutes shall be submitted to the chairman of the meeting for his approval or correction and as so approved or corrected shall be signed by the chairman and secretary and certified by the chairman of the meeting, shall be transmitted to the clerk of the county court who shall preserve it on file with the other records of such road district." L. O. L. § 6390. In 1909 the legislative assembly amended section 34 of the original act by making an addition thereto which appears in codification as section 6321, L. O. L., as follows: "The taxpayers of any road district in any county of this state may vote an additional tax for road purposes providing that at least ten per cent. of the taxpayers of said district shall give notice by posting notices in three public places in said road district and one in court house and publish one notice three weeks in one weekly newspaper of general circulation signed by at least ten per cent. of the taxpayers of said road district giving time, place and object of said meeting which meeting shall be held in the month of December and at the time of said meeting it shall be organized by the election of a chairman and a secretary and at such meeting they may by a majority vote of such taxpayers levy such additional tax as they may deem advisable to improve the roads of said district and if a tax be levied it shall be the duty of said chairman



and secretary to certify to the county clerk of such county prior to January 1, the levy so made by the taxpayers of said district and the county clerk shall compute and extend said levy on the assessment roll for that year the same as other taxes are extended and it shall be the duty of the tax collector to proceed to collect said taxes in money the same as any other taxes are collected and turn the same over to the county treasurer in the same manner and at the same time as he pays over other taxes collected by him and shall be credited and kept by the treasurer to the account of the road district making such levy."

It is surmised that the proceedings of which the plaintiff complains were undertaken by virtue of the amendment just quoted. In the case of *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 512, 57 Pac. 1017, 1021, Mr. Justice Bean, quoting with approval the language of Mr. Justice Earl in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, says: "The constitutionality of a statute must be determined by what can be done under it and not by what actually takes place." Adverting to the terms of section 6321, L. O. L., we observe that it does not direct whether notice be given prior or subsequent to the meeting; that it does not in express terms authorize the taxpayers to call such a meeting; that it does not specify the length of time for which notice shall be given; and, finally, that it does not in any manner prescribe a method of proving that notice has been given or that the persons participating in the meeting are taxpayers. For all that appears in the statute last quoted nonresident owners of land liable to be taxed in any road district might with impunity style themselves secretary and chairman of an imaginary meeting as set forth in the certificate quoted, execute such a document, send it to the county clerk, and afterwards give the notices mentioned in the section, all within the letter of the law.

[2] Further, this amendment, being part of the general act of 1903, must be construed, if possible, in harmony with the other provisions of that legislation. Giving to the later enactment the utmost force arising from a liberal construction of its terms, at best it only provides for a manner of calling a district meeting in addition to that prescribed in section 6384, L. O. L., upon the petition of three freeholders addressed to the supervisor. It may be conceded, also, that a new provision has been interpolated into the statute providing for the election of a chairman and a secretary to the exclusion of the supervisor as the presiding officer of the district road meetings. Otherwise the regulations respecting the conduct of meetings and the authentication of their proceedings remain unchanged. Nothing appears to supersede the provisions of section 6387 providing that the determination of the meeting to

levy a special tax shall be by proper resolution which shall be spread upon the minutes of the district road meeting, which minutes under the provisions of section 6390, L. O. L., shall be transmitted to the clerk of the county court to be preserved on file with the other records of the road district. As said by Mr. Justice Moore in *Vaughn v. School District*, 27 Or. 57, 64, 39 Pac. 393, 395, quoting with approval the language of Mr. Justice Campbell in *Moser v. White*, 29 Mich. 59: "The evidence of the levy of a tax must therefore affirmatively appear from an inspection of the record of the meeting of the electors or their representatives in making the same and parol testimony is not admissible to aid, vary or contradict it." *Hecht v. Boughton*, 2 Wyo. 385; *Cardigan v. Page*, 6 N. H. 182; *Farrar v. Fessenden*, 39 N. H. 268; *Paul v. Linscott*, 56 N. H. 347; *Andrews v. Boylston*, 110 Mass. 214; *Hilton v. Bender*, 60 N. Y. 75.

Section 6384 provides for the proof of giving the notice, and the petition calling for the meetings, both of which shall become a part of the journal of such assembly. The minutes of a meeting containing such elements, together with a resolution levying the tax when transmitted to the county clerk, will furnish information to that officer that all the provisions of the statute in question have been complied with in the levy of the tax. Although loosely drawn, the general purpose of the statute is not only to provide for notice, but also proof of the same, so that a memorial may exist on file in the office of the county clerk exemplifying the proceedings culminating in the levying of the tax, to the end that any one aggrieved thereby may examine the record to determine his course in protection of his rights. In good reason there should not only be due process of law notifying the property holder beforehand of the intention to levy a burden on his holdings, but there should also be a record to prove the same. This the statute has required, and documentary proof of it is essential to the validity of a tax levied in pursuance of its terms. If this is not a sound principle, then would the imposition of a tax be made to depend upon exceedingly loose methods operated by persons without any official authority or responsibility. The amendment of 1909 is defective, in that it does not expressly provide for the calling of a meeting. It does not specify whether the notice shall be given prior or subsequent to the meeting nor the length of time during which notice shall be extant. Moreover, the certificate quoted does not show that notice has been given, or that the taxpayer has an opportunity to be heard in opposition to the proposed burden. The action of such a meeting, if valid, is final, as there is no subsequent time or opportunity accorded by the statute to the landowner to combat the levying of the tax.

Other questions were presented at the argument, but we deem it unnecessary to consider them. It was error to sustain the demurrer to the bill.

The decree is reversed, and the cause remanded for further proceedings.

BEAN, J., dissents.

**Ex parte FLACK.**

(Supreme Court of Kansas. Jan. 11, 1913.)

*(Syllabus by the Court.)*

**1. EXTRADITION (§ 41\*)—RETURN OF FUGITIVE—SUBSEQUENT PROSECUTION—OTHER OFFENSES.**

A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, and who on demand of the executive authority of the state from which he fled shall be delivered up and removed to the state having jurisdiction of the crime, may there be prosecuted for crimes other than the one specified in the demand for his delivery without first giving him a reasonable opportunity to return to the state which surrendered him.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 51-53; Dec. Dig. § 41.\*]

**2. PRIOR DECISION—ERRONEOUS RULING—OVERRULED CASE.**

The case of *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200, is overruled.

*(Additional Syllabus by Editorial Staff.)*

**3. EXTRADITION (§ 21\*)—OBLIGATION TO DELIVER FUGITIVE.**

A charge of crime, flight, discovery, and a formal demand by the state from which the accused is alleged to have fled on the state to which he fled to deliver up the fugitive, imposes on the latter state an imperative obligation to comply therewith.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 26; Dec. Dig. § 21.\*]

Application by John A. Flack for a writ of habeas corpus to discharge petitioner from custody along informations for offenses other than that for which he was extradited. Writ denied.

C. S. Crawford, of Abilene, for petitioner. John S. Dawson, Atty. Gen., and S. N. Hawkes and S. M. Brewster, both of Topeka, opposed.

**BURGH, J.** The petitioner, John A. Flack, was cashier of the Abilene State Bank. On or about September 1, 1910, he absconded. Soon afterwards a complaint was filed before a justice of the peace of Dickinson county, charging him with forging the name of James A. Strachan to a note for \$2,000 with intent to defraud Strachan and the Abilene State Bank. A warrant of arrest was issued and placed in the hands of the sheriff for service. In August, 1912, Flack was discovered in the state of New York and was arrested there upon a fugitive warrant and held pending further rendition proceedings. Such proceedings followed, resulting in his return to Dickinson county for trial upon the

forgery charge. A preliminary examination was waived, and he gave bond for his appearance at the ensuing term of the district court. While awaiting trial, 11 other prosecutions were instituted against him for false and fraudulent alterations of entries upon the books of the bank. Motions to quash the informations in these cases and to stay proceedings in them until after the original case should be disposed of were overruled, and in default of bail he was committed to the county jail. This proceeding is brought to discharge him from custody in the 11 cases instituted against him for crimes not embraced in the rendition proceedings.

[1] The question involved is not new and has provoked great argument about and about. It has been decided favorably to the petitioner by this court in the case of *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200. The syllabus of that case reads as follows: "An alleged fugitive from justice, extradited from one state to another, can be prosecuted in the state to which he has been extradited, only for the offense for which he was extradited, until after he has had a reasonable time and opportunity afforded him to return to the place from which he was extradited." Similar views have been expressed by the Supreme Court of Ohio. *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128. The courts of other states which have considered the question, and the Supreme Court of the United States, hold to the contrary. *Carr v. State*, 104 Ala. 43, 16 South. 155; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; *Knox v. State*, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291, 3 Ann. Cas. 539; *State v. Kealey*, 89 Iowa, 94, 56 N. W. 283; *Taylor v. Commonwealth (Ky.)* 96 S. W. 440; *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; *In re Little*, 129 Mich. 454, 89 N. W. 38, 57 L. R. A. 295; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *State ex rel. v. Leidigh*, 47 Neb. 126, 66 N. W. 308; *Rutledge v. Krauss*, 73 N. J. Law, 397, 63 Atl. 988; *People ex rel. Post v. Cross*, 135 N. Y. 536, 82 N. E. 246, 31 Am. St. Rep. 850; *State v. Glover*, 112 N. C. 896, 17 S. E. 525; *State v. Wine*, 7 N. D. 18, 30, 72 N. W. 905; *Dows' Case*, 18 Pa. 37; *Ham v. State*, 4 Tex. App. 645; *State ex rel. v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549. Text-writers are divided in opinion. *Spear on Extradition*, c. 12, favors the rule stated in the syllabus of *Hall's Case*. The following authorities take the opposite view: 2 *Moore on Extradition*, c. 8; *Hawley on Interstate Rendition*, 78 et seq.; *Rorer on Interstate Law*, 307; 2 *Wharton on the Conflict of Laws*, 1696; 1 *Bishop's Crim. Proc.* § 224b.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The written law on the subject is contained in the Constitution of the United States and an act of Congress passed pursuant thereto. The Constitution reads as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Article 4, § 2. In the constitutional convention this provision first appeared in the report of the committee of detail as follows: "Any person charged with treason, felony or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offense." § Documentary History of the Constitution, 456. Afterwards the words "high misdemeanor" were stricken out and the words "other crime" were inserted in order to comprehend all proper cases; it being considered doubtful whether the term "high misdemeanor" did not have a technical meaning too limited. *Ib.* 634. The section was given its final form by the committee of "style and arrangement."

The act of Congress referred to reads as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of arrest, the prisoner may be discharged. All costs and expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory. \* \* \* Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year." Rev.

St. U. S. §§ 5278 and 5279 (U. S. Comp. St. 1901, p. 3597).

The primary question for consideration is, of course, the meaning of the Constitution of the United States, of which the Supreme Court of the United States is the final interpreter. When this court approached the subject in *Hall's Case*, the Supreme Court of the United States had not spoken upon the precise question under consideration. Among other eminent authorities, Judge Cooley (*Princeton Review*, January, 1879, p. 76) and Doctor Spear (*Extradition* [2d Ed.] c. 12) had expressed opinions to the effect that, in cases of interstate rendition, it would be a violation of the Constitution to put the fugitive on trial for any other offense than the one specified in the rendition proceedings without first giving him an opportunity to depart from the jurisdiction to which he had been returned. These opinions coincided with the right of asylum as understood in international law, with the practice of independent sovereignties in extradition cases under treaties, and with the rules of the common law exempting suitors and witnesses from abuse of judicial process. Reasoning by analogy, the court reached the conclusion that the principles governing extradition between independent sovereignties under treaties and rendition between separate states under the Constitution of the United States were the same. This conclusion accorded with that of some other courts, and was believed to be fortified by the then very recent decision of the Supreme Court of the United States in the case of *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

The *Rauscher Case* arose under the Webster-Ashburton treaty with Great Britain, the preamble of which, so far as pertinent, reads as follows: "And whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties, respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up. The United States of America and her Britannic Majesty, having resolved to treat on these several subjects, have for that purpose appointed their respective plenipotentiaries to negotiate and conclude a treaty." Article 10 specified seven extraditable offenses and reads as follows: "It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided,

that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed. And that the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." *Compilation of Treaties of 1899 under Act of 1898, pp. 225, 230.*

Rauscher was extradited for murder. He was not tried for murder, however, but for a minor offense not embraced in the treaty. On a motion in arrest of judgment, the judges of the circuit court in which the action was pending divided in opinion, and the matter was presented to the Supreme Court of the United States on their certificate. The principal question was the true import of the treaty. The recognized public law on the subject prevailing in the absence of treaties was examined and stated. The provisions of the treaty itself were analyzed and considered according to the approved canons of interpretation, and the interpretation placed upon all treaties of this character by Congress in the extradition act was adverted to. The conclusion was that, although the treaty contained no express limitations upon the right of the country in which the crime was committed to try the fugitive for that crime alone for which he was extradited, nevertheless sound construction rendered an implication of such a limitation unavoidable; that, under the treaty and the act of Congress, Rauscher could not lawfully be tried for any crime but murder; that he was clothed with the right to exemption from trial for any other offense until he had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender; and that the national honor required that good faith should be kept with the country which surrendered him. This decision is manifestly sound. Every independent nation has the right to grant an asylum to a person residing peacefully within its borders, even though he be an offender against the law of some foreign state, and this right supersedes the right of the foreign state to demand that

he be given up for trial. However desirable it may be that fugitives from justice should be surrendered to answer for their misdeeds, no obligation to do so rests upon the asylum state which has the right to make the peace and security of any person residing upon its territory its own cause. It may relinquish this right either by comity or by agreement, but any concession it may make does not waive the right generally. If the relinquishment be made by treaty, the asylum is abridged only with respect to the crimes specified in the treaty, and then only subject to the limited forms of procedure agreed upon. These considerations are fundamental in the interpretation of any extradition treaty, and their importance is emphasized when attention is drawn to political offenses. Such crimes, being directed against the political system of the state or its administrators, do not of necessity render those who commit them undesirable citizens of another state. What would be called treason in the parent country might be regarded as a legitimate struggle for liberty by another country which, on the highest principles of justice and humanity, would be authorized to afford refuge to exiled participants in such a struggle. Consequently political crimes are not considered extraditable, and it would offend against the law of nations if a fugitive were extradited for a crime specified in a treaty and then were put on trial for a political offense. Turning to the treaty in question, it waives the right to afford asylum to fugitive offenders with respect to seven designated crimes only; and the sovereignty upon which the demand for surrender is made expressly reserves the right to examine the case presented by the requisition, hear the evidence of criminality, and determine whether or not the offense charged justifies the government in depriving the accused of his asylum. These facts in themselves are quite conclusive that, as to all other offenses the fugitive, if surrendered, is to be regarded as still in the asylum state. The extradition act (Rev. St. title 66 [U. S. Comp. St. 1901, p. 3591]) provides for a hearing, upon complaint made under oath, to determine whether the evidence is sufficient to sustain the charge of criminality before a warrant may issue for the surrender of a fugitive whose return is desired by a foreign nation. Section 5270. It further provides that the Secretary of State is authorized to order a person demanded of the United States to be committed to be delivered up "to be tried for the crime of which such person shall be so accused" (section 5272); and that a person delivered up to the United States for trial shall have protection and safe-keeping "until the final conclusion of his trial for the crime or offense specified in the warrant of extradition, and until a final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time there-

after" (section 5275). Under these circumstances, it would have violated the convention between the two governments and would have compromised the national honor if the United States had suffered Rauscher to be tried, not only for an offense not named in the requisition, but for an offense not specified in the treaty itself.

In Hall's Case the court applied the arguments whereby the interpretation of the Webster-Ashburton treaty was sustained to an interpretation of the Constitution of the United States. The states of the Union were treated like independent sovereignties having the right to grant asylum to fugitives from justice who could not be surrendered without the consent of the asylum state. The Constitution was regarded in the light of an extradition treaty between such sovereignties, and it was declared that the Rauscher Case, among others of like import, which were cited, was perfectly applicable to the one under decision.

On the same day that the opinion in the Rauscher Case was filed, a decision was rendered by the Supreme Court of the United States in the case of *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, which greatly impaired the basis upon which the constitutional argument in Hall's Case was founded. Ker was kidnapped from Peru, with which country the United States had an extradition treaty, and brought to the state of Illinois for trial for embezzlement and larceny. He was convicted, and the case was taken by writ of error to the Supreme Court of the United States where he claimed that the full faith and credit of the treaty with Peru had not been kept and enforced. He contended that under the treaty he had acquired by his residence in Peru a right of asylum—a right to be free from molestation for the crime committed in Illinois, a right that he should be forcibly removed from Peru to the state of Illinois only in accordance with the provisions of the treaty—and that this right was one which he could assert in the courts of this country. The court said: "There is no language in this treaty or in any other treaty made by this country on the subject of extradition, of which we are aware, which says, in terms, that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum? Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the state of

Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and, if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum." 119 U. S. at page 442, 7 Sup. Ct. at page 228 (30 L. Ed. 421). Consequently, it was held that Ker was clothed with no rights which a proceeding under a treaty would have protected, and the judgment of conviction was not disturbed.

In 1887 the rule stated in Ker's Case was applied to a case of kidnapping from one state to another. *Mahon v. Justice*, 127 U. S. 700, at pages 712, 714, 8 Sup. Ct. 1204, at pages 1211, 1212 (32 L. Ed. 283). Mahon was indicted for murder committed in Kentucky. He fled to West Virginia. He was then forcibly abducted to Kentucky, where he was committed for trial upon the indictment. It was held that he was not entitled to be discharged under a writ of habeas corpus. The court said: "There is indeed an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. It would indeed be a strange conclusion if a party charged with a criminal offense could be excused from answering to the government, whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state. \* \* \* It is contended that, because under the Constitution and laws of the United States a fugitive from justice from one state to another can be surrendered to the state where the crime was committed, upon proper proceedings taken, he has the right of asylum in the state to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is that the laws of the United States do not recognize any such right of asylum, as is here claimed, on the part of a fugitive from justice in any state to which he has fled."

The principle that a fugitive from justice does not bear in his own person the sovereignty of the state to which he has fled,

and that, if any one is within the jurisdiction of a court and there properly charged with crime, the court may hold him and proceed to try him without reference to the circumstances under which he was brought within its jurisdiction, was clearly and forcibly stated by Chief Justice Gibson in *Dows' Case*, 18 Pa. 37, at page 39, decided in 1851. After having been indicted for forgery in Pennsylvania, Dows escaped to the state of Michigan. Without legal authority he was returned to Pennsylvania. Pursuant to a requisition made upon him, the executive of Michigan issued a warrant to arrest and surrender Dows, but it was not utilized. The opinion reads: "The Governor of Michigan, so far from resenting the prisoner's arrest, had put a warrant for his extradition into the hands of the proper officer. The sovereignty of the state, therefore, was not outraged, unless it resided in the prisoner's person. A sovereign state is doubtless bound to fight the battle of its citizen, when he has his quarrel just; but it is not bound to maintain him against demands of foreign justice from which he has fled. It may, or it may not, interpose its shield at discretion; but the exercise of this discretion will be directed, not by any claim he may be supposed to have on it, but by a consideration of the consequences to the general weal. The federal Constitution takes away this discretion in the case of an executive demand, and makes that a matter of duty which else had been a matter of grace; but it does not prevent a state from dispensing with a demand. The constitutional provision was not devised for the benefit of the fugitive. It was intended to obviate the principle that one government may not execute the criminal law of another."

In the case of *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, the Governor of West Virginia demanded the restoration of the prisoner to the jurisdiction of that state, but that fact afforded him no immunity from trial upon the indictment found in the state of Kentucky. The effect of these decisions is that the so-called right of asylum is not a right possessed by a fugitive from justice in any case; that it is merely the right of an independent sovereignty to grant asylum if it so desires; and that a state of the United States possesses no such right respecting fugitives from the justice of another state.

In 1892 the precise question involved in the present proceeding was decided by the Supreme Court of Georgia in the case of *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216. *Lascelles* was extradited from New York for one crime and placed on trial in Georgia for another. By a motion to quash the indictment add a plea in abatement, he contended that it was unlawful to try him without first allowing him to return to the state which surrendered

him. The court held that his objections were properly overruled. A very able opinion was delivered by Mr. Justice Lumpkin who, after discussing the *Rauscher Case* and the treaty and act of Congress which it involved, said: "When we go back of the express law on the subject, and consider the matter independently of the statute referred to or of the obligations assumed by treaty, it will be found that the right of the person extradited to return to the country from which he was surrendered is based upon the right of that country to afford asylum to the fugitive and to refuse to give him over to another except upon such terms as it may see fit to impose. It is well settled that the criminal himself never acquires a personal right of asylum or refuge anywhere. Such right as he may have in this respect grows entirely out of the rights of the government to whose territory he has fled. It matters not, so far as the right to try him is concerned, that he may have been abducted while in another state and brought back illegally and against his will to the state whose criminal laws he has violated, nor, in legally and against his will to the state from which he was taken has demanded his return. *Mahon v. Justice*, 127 U. S. 700 [8 Sup. Ct. 1204, 32 L. Ed. 283]. See, also, *Ker v. Illinois*, 119 U. S. 436 [7 Sup. Ct. 225, 30 L. Ed. 421], decided on the same day as the *Rauscher Case*, *supra*. That the right to protect the fugitive who has taken refuge in its territory exists on the part of every independent nation, except in so far as it may have been agreed to forego the right, is recognized by the Supreme Court of the United States in the *Rauscher Case* as an established principle of international law. But to our minds it is clear that, under the organic law of the Union, no such right exists on the part of the several states with reference to each other. The Constitution declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' Article 4, § 2, subsec. 2. And it is settled that this provision extends without exception to all offenses punishable by the laws of the state where the act was done. It is immaterial that the thing complained of is not a crime in the state in which the accused is found; nor can the authorities of that state inquire into the question of his guilt or innocence. The sole question is whether he is a fugitive charged with crime under the laws of the demanding state. If he is, the duty to deliver him up is imperative. The framers of the organic law clearly intended that there should be no reserved right to convert any state into a place of refuge for fugitives from the justice of another, and that state

lines should constitute no insuperable obstacle to the enforcement of the criminal laws of any part of the Union as to offenses committed within the field of their operation. By the act of 1793, Congress has constituted the executive authority of the state to which the accused has fled the agency for carrying into effect the provisions of the federal Constitution and laws as to arrest and delivery. His sole function is to ascertain whether the authorities of the demanding state have on their part complied with the constitutional and statutory requirements, and, if so, to cause the arrest and delivery of the fugitive. If these requirements are complied with, he has no further interest in the matter and cannot set up any right of his state to protect the fugitive. The sole right which his state can set up as against the right of the demanding state is that its own justice shall be satisfied if, at the time of the demand, the accused stands charged with a violation of its laws. In such cases the right of the demanding state is not denied, but is merely suspended until a prior claim shall have been discharged. \* \* \* It may be true that there is no power on the part of the federal government or of the demanding state to compel performance of this duty, but it is not on that account in any less degree a duty. If, therefore, the demand cannot, as a matter of right, be refused when made in compliance with the federal requirements, it would be idle for the authorities of the state, to whom the accused was surrendered, to set him at large so that another demand might be made before trying him for an offense other than that charged in the requisition upon which he was surrendered. Certainly they are under no obligation, before trying him for other violations of law, to place the executive of the surrendering state in a position to do or refuse to do that which, under the supreme law of the land, it is his imperative duty to do. If what we have said is true, considerations of comity and good faith on the part of the state to which the surrender was made are not involved in the matter." 90 Ga. at pages 363, 364, 365, 366, 367, 16 S. E. at page 946 (35 Am. St. Rep. 216).

Lascelles removed the controversy to the Supreme Court of the United States, which approved the opinion of Justice Lumpkin and affirmed the judgment of the Supreme Court of Georgia. The opinion, written by Mr. Justice Jackson, contained the greatly desired interpretation of the Constitution of the United States and of the extradition act, so far as it relates to interstate rendition. The material portions follow:

"Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one state to demand, and the obligation of the other state upon which the demand is made to surrender, a

fugitive from justice. Now the proposition advanced on behalf of the plaintiff in error in support of the federal right claimed to have been denied him is that, inasmuch as interstate rendition can only be effected when the person demanded as a fugitive from justice is duly charged with some particular offense or offenses, his surrender upon such demand carries with it the implied condition that he is to be tried alone for the designated crime, and that, in respect to all offenses other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the states of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do, in fact, afford, to all persons within their boundaries an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in *United States v. Rauscher*, 119 U. S. 407 [7 Sup. Ct. 234, 30 L. Ed. 425], et seq., is invoked as a controlling authority on the question under consideration. If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations in the same sense in which the general government stands towards independent sovereignties on that subject, and in the further assumption that a fugitive from justice acquires in the state to which he may flee some state or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another state, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement, in another form, of the question presented for our determination. The sole object of the provision of the Constitution and the act of Congress to carry it into effect is to secure the surrender of persons accused of crime, who have fled from the justice of a state, whose laws they are charged with violating. Neither the Constitution nor the act of Congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done there-

in. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done. *Kentucky v. Dennison*, 24 How. 66, 101, 102 [16 L. Ed. 717]; *Ex parte Reggel*, 114 U. S. 642 [5 Sup. Ct. 1148, 29 L. Ed. 250].

"The case of *United States v. Rauscher*, 119 U. S. 407 [7 Sup. Ct. 234, 30 L. Ed. 425], has no application to the question under consideration because it proceeded upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offenses that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for his surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the states of the Union, such as the *Ashburton* treaty contains, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description punishable by the laws of the state where the forbidden acts are committed. It is questionable whether the states could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process. \* \* \*

"If a fugitive may be kidnapped or unlawfully abducted from the state or country of refuge, and be thereafter tried in the state to which he is forcibly carried, without violating any right or immunity secured to him by the Constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a state's authority or jurisdiction to try him for another or different offense than that for which he was surrendered. If the

fugitive be regarded as not lawfully within the limits of the state in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offenses any more than if he had been brought within such jurisdiction forcibly and without legal process whatever.

"We are not called upon in the present case to consider what, if any, authority the surrendering state has over the subject of the fugitive's rendition, beyond ascertaining that he is charged with crime in the state from which he has fled, nor whether the states have any jurisdiction to legislate upon the subject, and we express no opinion on these questions. To apply the rule of international or foreign extradition, as announced in *United States v. Rauscher*, 119 U. S. 407 [7 Sup. Ct. 234, 30 L. Ed. 425], to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded; there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned. \* \* \*

"The highest courts of the two states immediately or more directly interested in the case under consideration hold the same rule on this subject. The plaintiff in error does not bear in his person the alleged sovereignty of the state of New York, from which he was remanded (*Dows' Case*, 18 Pa. 37), but, if he did, that state properly recognizes the jurisdiction of the state of Georgia to try and punish him for any and all crimes committed within its territory. But, aside from this, it would be a useless and idle procedure to require the state having custody of the alleged criminal to return him to the state by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offenses on which it desired to prosecute him. The Constitution and laws of the United States impose no such condition or requirement upon the state." *Lascelles v. Ga.*, 148 U. S. 541, 542, 543, 545, 546, 547, 13 Sup. Ct. 688, 37 L. Ed. 549.

This opinion is necessarily conclusive upon the question decided, and deprives the decision in *Hall's Case* of support on constitutional grounds. The subject of the return of



a fugitive from justice found in one state to the state from which he had fled, for prosecution and punishment, was lifted bodily out of the law governing extradition in international cases, in which it had so long been submerged, and was given a standing and character of its own. The right of independent sovereignties to grant asylum, which is the nidus from which all the doctrines of international extradition took their rise, does not exist in any state of the American Union. In respect to the return of fugitives from justice, the various states are not to be regarded from the standpoint of international law as separate and independent sovereignties with selfish and jealous purposes to serve, but as governmental organizations having mutual interests, duties, and relations, and pledged to mutual support; each one acting as an instrumentality for the suppression of crime and the advancement of justice in the other. Such being the true attitude of the states toward each other the Constitution loses all semblance of a treaty between sovereigns and becomes a supreme law of the land for the promotion of the general welfare. The specifications in the Constitution of treason, felony, and other crimes leaves no ground for distinction between political and other offenses, and no ground for the application of the rules and principles which govern in the case of limited treaty concessions hedged about by conditions and restrictions, express and implied. Disincumbered of the legal impedimenta attending the subject of international extradition the article of the Constitution relating to interstate rendition is left to operate with all the force of its chaste simplicity and to fulfill the purpose expressed in the preamble: "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

[3] A charge of crime, flight, discovery, and a formal demand for return are all that are necessary to raise the obligation to deliver up the fugitive, and that obligation is imperative. The act of Congress passed to execute the provisions of the Constitution is in full harmony with the spirit of that instrument. The duty to cause the fugitive to be arrested and delivered is imposed upon the executive authority of the state to which he has fled, without any of the reservations and restrictions imposed by other provisions of the act upon international extradition, to the end that state boundaries shall no longer act as barriers to the administration of justice. Besides the constitutional ground, the decision in Hall's Case was rested in part upon considerations of good faith and fair dealing. It was said that a state should

not be allowed to obtain jurisdiction over a fugitive from justice for one purpose, and then to take advantage of the jurisdiction thus obtained and use it for another and different purpose. No such question as this can arise between the state of Kansas and the state of New York in the present case, because the state of New York recognizes the right of any state to which it has delivered a fugitive from justice to try him for crimes other than the one specified in the requisition proceedings. With the asylum doctrine excluded from consideration, however, no such question can arise in any case in which rendition is regularly sought in good faith under the Constitution and the extradition act. To all intents and purposes the state upon which the demand is made is constituted an agency to supplement the judicial process of the demanding state, which otherwise could not be extended beyond its own boundaries, and the only right which the surrendering state has in the matter is to see that the prescribed conditions are present and that the prescribed formalities are observed. To hold a returned fugitive to answer for a crime different from that specified in the requisition is not to hold him for a purpose foreign to the original demand. The end to be accomplished is the punishment of crime. That end is constant and identical in both instances. The state to which the fugitive has fled has no right to detain him in opposition to the accomplishment of that end. It cannot grant an asylum. It cannot impose conditions upon surrender. Its duty to deliver up the fugitive on demand is immediate and imperative, and it would have no more discretion over a second demand than it had over the first. Consequently it can suffer no deprivation of right or affront to its sovereignty if, after surrender, the returned fugitive be dealt with in the same manner as if he had not fled.

So far as the fugitive himself is concerned, it is impossible that he should be prejudiced or defrauded by detaining him for trial upon other charges. He cannot build up rights against the state, whose laws he has broken, by fleeing from its justice. He has no lawful right of asylum in any other state. By taking refuge in another state he acquires no right to demand conditions upon his return, and no conditions upon his return can be lawfully imposed by the surrendering state itself for his benefit. Consequently there is no implication that he is surrendered for the purpose of one proceeding only, and no implication of any limitation upon the jurisdiction and authority of the state to which he is returned. By resorting to compulsory proceedings to secure the return of a fugitive, the state holds out no inducements whatever to him. It gives him no assurances that he will be afforded an opportunity to depart from its jurisdiction as soon as the

charge specified in the requisition is disposed of. It obtains custody of him outside of the state, irrespective of his will or consent, precisely as it might do within its own borders if he had not fled, and it cannot be guilty of bad faith when it is impossible for the fugitive to be overreached or misled, and when no duty toward him, which the law governing the subject of rendition imposes, is violated.

In Hall's Case the analogy was invoked of the exemption of suitors and witnesses attending court outside the jurisdiction of their home tribunals from service of judicial process. The analogy, however, fails. In such cases the party or witness has a personal right to all the benefits and advantages flowing from a lawfully established domicile, and ought not to be held to waive them by answering a call to assist in the administration of justice elsewhere, while an offender against the criminal laws of a state acquires no right by flight which the court administering those laws is bound to regard when he is again found within its jurisdiction. *Lascalles v. State*, 90 Ga. 347, 368, 16 S. E. 945, 35 Am. St. Rep. 216. Besides this, the privilege is accorded to litigants and witnesses on grounds of public policy. The purpose is to subserve great public interests by promoting the administration of justice. *Moleitor v. Sinnen*, 76 Wis. 308, 312, 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. Rep. 71. That policy encourages the voluntary personal appearance in the trial of causes of persons whose presence is necessary for a better solution of controversies, and whose attendance cannot be compelled. *Reid v. Ham*, 54 Minn. 305, 307, 56 N. W. 35, 21 L. R. A. 232, 40 Am. St. Rep. 333. No such considerations as these arise in favor of one who has fled from the scene of his crime to defeat justice, and who has been brought back by compulsory process. *Rutledge v. Krauss*, 73 N. J. Law, 397, 63 Atl. 988.

Speaking upon this subject the Supreme Court of Nebraska said: "The immunity from service of process extended to suitors and witnesses attending court is founded on considerations of wisdom, and is well calculated to assist in the due administration of justice. It needs no argument to sustain the proposition that whatever encourages the attendance of witnesses at the trial of any case in controversy in the courts will conduce more certainly to a rightful determination and assure to a party litigant the protection of all his rights guaranteed by law. This desired result can best be accomplished by steadily adhering to a policy which will save to all, whose attendance is desirable in the furtherance of the ends of justice and who come voluntarily, annoyance, inconvenience, and oftentimes oppression by the service of process upon them while present in any stated jurisdiction for the purposes mentioned. This privilege has constantly been safeguarded by the courts, and the rule can

doubtless be safely and confidently invoked by all who come within its scope and purview. The petitioner in the case at bar does not, however, come within the reason of the rule. His presence is involuntary and against his will. He was brought into the state forcibly and for the purpose of answering a charge of violating its laws. The reason for extending the rule of immunity is wanting in his case." In re Application of Walker, 61 Neb. 803, 816, 86 N. W. 510, 515.

In the case of *State v. McNaspy*, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756, a fugitive from justice was found in another state by a pursuing deputy sheriff who held a warrant of arrest issued by a justice of the peace. Although informed of the officer's lack of authority to make an arrest, the fugitive voluntarily accompanied the officer to Kansas, where he was prosecuted for a crime other than the one specified in the warrant. It was held that the prosecution might lawfully be maintained. In a dissenting opinion it was said that there is no conflict between Hall's Case and *Lascalles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549, but that in any event the argument based upon principles of good faith toward the surrendering sovereignty and the fugitive himself were sufficient to sustain the Hall decision. Manifestly there is a direct conflict between the two decisions upon the constitutional question, and, as already shown, the good-faith argument is unsound.

The case of *In re Cannon*, 47 Mich. 481, 11 N. W. 280, was cited in Hall's Case as one of substantial authority. Courts and text-writers have experienced considerable difficulty in classifying that case, but its scope has been made clear by the Supreme Court of Michigan itself in the case of *In re Little*, 129 Mich. 454, 89 N. W. 38, 57 L. R. A. 295, wherein the doctrine of *Lascalles v. Georgia* is accepted and conclusions antagonistic to the decision in Hall's Case are announced.

The case of *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128, was decided after the decision in the *Rauscher* Case and before the decision in *Lascalles' Case*. The position was taken that the Constitution is to be interpreted according to the rules, principles, and usages governing international extradition under treaties. *Rauscher's Case* was accepted as of controlling authority. Nothing but the constitutional question was considered, and consequently the grounds of the decision were invalidated by *Lascalles v. Georgia*.

Some fear has been expressed that, unless a returned fugitive be allowed to depart in peace after the immediate purpose of the requisition proceeding has been accomplished, interstate rendition may be abused for illegitimate private ends. It is always open to the courts, however, to relieve against perversions of rendition process the same as they are in the habit of doing against

perversions of ordinary judicial process. The case of *State v. Simmons*, 39 Kan. 262, at pages 264, 265, 18 Pac. 177, at pages 178, 179, furnishes an example of the latter kind. A sheriff of this state, holding merely an order to attach the person of a witness who was not a fugitive from justice, executed it in the state of Nebraska, in the nighttime, by force and violence. When the prisoner was brought within the jurisdiction of the court issuing the attachment, a criminal complaint was lodged against him, upon which he was tried and convicted. In quashing the conviction, the court said: "It would not be proper for the courts of this state to favor, or even tolerate, breaches of the peace committed by their own officers in a sister state by sustaining a service of judicial process procured only by such breach of the peace. Indeed, it would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together." On the same principle relief may be granted whenever rendition proceedings are in fact prostituted to fraudulent purposes.

In the course of this opinion the term "interstate rendition" has been used when speaking of the return of fugitives from one state to another, following a suggestion contained in the preface to Moore's admirable treatise on Extradition and Interstate Rendition: "In the judgment of the writer, such rendition is not properly described as extradition, for, as confirmed by the Constitution and regulated by the legislation of Congress, it proceeds upon a principle precisely antipodal to that from which are derived the leading doctrines of extradition in its true and international sense. This is the necessary consequence, not only of the form and character of the specific provision in the Constitution, but also of the mutual relations, duties, and limitations of sovereignty of the states under the federal government. Whatever may be our theories as to the duties of nations, the leading rules on the subject of extradition presuppose and are deduced from the right, in strict law, of every sovereign power to grant asylum to fugitives from justice. Such a right has no place among states united under a common government, and, as between the states of the United States, it is excluded by the explicit re-

quirements of the Constitution. Since the accurate employment of terms is of the utmost importance, and the use of the word 'extradition' invites the application of the principles of international law to the interstate proceeding, the second part of the present work has been called 'interstate rendition.'" Pages 7, 8.

[2] The decision in the case of *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200, is overruled, and the petitioner is remanded to the custody of the sheriff of Dickinson county. All the Justices concurring.

### BUSH v. BAKER.

(Supreme Court of Montana. Jan. 25, 1913.)

#### 1. APPEAL AND ERROR (§ 799\*)—DISMISSAL OF APPEAL—AFFIDAVITS—ADMISSIONS.

In the absence of counter affidavits to affidavits in opposition to a motion to dismiss an appeal, the statements in the affidavits are to be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3158-3160; Dec. Dig. § 799.\*]

#### 2. TRIAL (§ 31\*)—RECORD—OFFICE OF EXCEPTION.

The office of an exception is to reserve a question upon matter arising in the record for future consideration, either of the trial court or of the court of review, and upon which the exceptant claims some right.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 55, 84; Dec. Dig. § 31.\*]

#### 3. JUSTICES OF THE PEACE (§ 159\*)—APPEAL BOND—WAIVER OF DEFECTS.

Rev. Codes, § 7124, provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of an appeal undertaking, and unless they or other sureties justify within five days thereafter, upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given. Defendant appealed from a judgment on September 6th, and filed an appeal undertaking on the same day, and on September 9th, while his counsel in charge of the case was ill, plaintiff served exceptions to the undertaking upon the other of defendant's counsel, and plaintiff consented to make personal service upon counsel in charge, and agreed that justification would be sufficient at any time before September 16th, and defendant on that day produced the sureties who were examined and approved without objection by plaintiff, and, after the case had been transferred to the district court, plaintiff moved for a dismissal on the ground that the sureties had not justified within the time prescribed by statute. *Held*, that the plaintiff had waived his right to object.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

#### 4. JUSTICES OF THE PEACE (§ 159\*)—APPEAL BOND—JUSTIFICATION.

When an appeal undertaking has been given, accompanied by the formal affidavits required by the statutes (Rev. Codes, § 7195), the right to appeal is made effectual, subject only to the adverse party's personal right to require a justification of the sureties.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. JUSTICES OF THE PEACE (§ 159\*)—APPEAL BOND—WAIVER OF DEFECTS.**

Since the adverse party's privilege to require justification of the sureties on an appeal undertaking is personal, he may waive it entirely, either by failure to file an exception or by withdrawing his exception after he has filed it and given notice of it.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

**6. STIPULATIONS (§ 6\*)—POWER OF COURT—NECESSITY FOR WRITING.**

It is within the power of the district court to adopt a rule that no agreement between parties to a proceeding will be regarded by the court unless made in open court, and then entered on the minutes, or unless it shall be in writing, subscribed by the party against whom it may be alleged, or by his attorney; the purpose of such rule being to relieve the presiding judge of the necessity of determining controversies between counsel as to their unexecuted agreements.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 5-13; Dec. Dig. § 6.\*]

**7. STIPULATIONS (§ 6\*)—ORAL STIPULATIONS—SPECIFIC PERFORMANCE.**

There can be no specific performance of oral stipulations made in judicial proceedings.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 5-13; Dec. Dig. § 6.\*]

**8. STIPULATIONS (§ 6\*)—ORAL STIPULATIONS—RULE OF COURT—JURISDICTION.**

The requirement of the rule of the district court that agreements between parties shall be made either in open court and entered on the minutes, or shall be in writing, is not jurisdictional.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 5-13; Dec. Dig. § 6.\*]

**9. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—TRANSFER OF PAPERS—STATUTES.**

Under Rev. Codes, § 7123, which commands a justice of the peace to transmit the papers to the clerk of the district court within 10 days after appeal has been perfected, if his fees have been paid, an appellant, who is not at fault, may compel the performance of this duty; and the court, in flagrant cases, may fine a justice for dereliction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

**10. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—TRANSFER OF PAPERS—RULE OF COURT.**

The rule of the district court in requiring appellant to file a transcript in the district court within 10 days from the time of perfecting such appeal, on penalty of dismissal, applies only to those cases in which appellant has failed to pay the fees of the justice, or in which the papers have been delivered to appellant and he has failed to file them with the clerk within the prescribed time; but, after the papers have been filed, the rule has no application, and whether an appeal should be then dismissed depends upon the facts appearing upon the hearing of the motion.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

**11. JUSTICES OF THE PEACE (§ 166\*)—APPEAL—FILING TRANSCRIPT—WAIVER.**

Rev. Codes, § 7127, which declares that the district court may dismiss an appeal for failure to prosecute, or for unnecessary delay in bringing it to a hearing, merely gives a court a discretionary power in cases of inexcusable neglect; but where counsel for appellant was ill, and overlooked the time for filing his appeal,

and where plaintiff, after the papers were filed, allowed the case to stand for more than three months, and showed no prejudice from a failure to file within the prescribed time, plaintiff waived his objection to the failure to file the transcript in time, and was not entitled to a dismissal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 638-646; Dec. Dig. § 166.\*]

**12. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—NOTE OF ISSUE—EFFECT.**

The filing of a note of issue, after transfer of the papers from the justice's to the district court, if done by plaintiff, amounts to a waiver of defendant's laches in filing the papers, and, if done by defendant, amounts to notice that he will proceed at once with the trial, so that the plaintiff's silence thereafter implied consent to trial on the merits.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Mary Bush, executrix of the last will and testament of Mary Miller, deceased, against Charles A. Baker. Plaintiff had judgment before a justice of the peace, and defendant appealed to the district court, and from a judgment of that court dismissing such appeal defendant appeals. Reversed and remanded.

Baldwin & Baldwin, of Butte, for appellant. N. A. Rotering, Peter Breen, and Nolan & Donovan, all of Butte, for respondent.

BRANTLY, O. J. This action was commenced in a justice's court in Silver Bow county on July 15, 1911. At the conclusion of a trial had on August 3d the justice reserved a decision until August 7th, when he found the issues in favor of the plaintiff, and rendered judgment accordingly. On September 6th counsel for defendant served upon counsel for the plaintiff and filed with the justice his notice of appeal to the district court. At the same time he filed with the justice the undertaking required by the statute. On September 9th Mr. Rotering, one of counsel for plaintiff, served, upon John T. Baldwin, a member of the firm of Baldwin & Baldwin who were representing the defendant, a notice that plaintiff excepted to the sufficiency of the sureties on the undertaking. At that time James H. Baldwin, the other member of the firm, who had theretofore had exclusive personal charge of the case, was ill at his home under the care of a physician unable to attend to any business, and continued thereafter in that condition until September 14th. The notice of exception was not filed with the justice until September 16th. At the time the service of the notice was made upon John T. Baldwin, he stated to Mr. Rotering that he was not familiar with the proceedings in the case; that the defense therein had theretofore been in the exclusive charge of James H. Baldwin; and that he would prefer to have service of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the notice made personally upon James H. Baldwin. He requested Mr. Rotering to make personal service upon James H. Baldwin. This Mr. Rotering consented to do. On September 11th James H. Baldwin being still suffering from illness, John T. Baldwin went to the office of Mr. Rotering, and, having called his attention to the conversation had on September 9th, informed him of the condition of James H. Baldwin, and requested him to consider service of the notice to have been made as on the latter day and justification of the sureties in pursuance thereof sufficient if made at any time on or before September 16th. This request was granted and an agreement was made accordingly. On September 14th James H. Baldwin, being able to leave his home for a short time, went to the office of Mr. Rotering, and inquired of him as to the agreement with John T. Baldwin. He was informed that the agreement had been made as John T. Baldwin stated, and that the justification would be deemed sufficient if had in conformity with it. On September 15th he gave to Mr. Rotering the statutory notice that he would have the sureties present before the justice at 4 o'clock on the afternoon of September 16th. Mr. Baldwin and the sureties were present at the appointed time, as was also Mr. Rotering, and after the sureties had been examined by the justice the undertaking was approved. Mr. Rotering offered no objection. He at that time filed with the justice his notice of exception to the sufficiency of the sureties, as has heretofore been stated. Thereafter nothing was done until towards the end of October, when James H. Baldwin paid the justice his transcript fee, and the clerk of the district court his filing fee. Within 10 days thereafter the justice transmitted the papers to the clerk, and they were properly filed. The case was then under the rules of the court assigned to department 1, and appeared upon the calendar of cases awaiting trial in that department thereafter, prepared and published by the clerk on January 29, 1912. No proceedings were thereafter had in the case until February 13th. On that date James H. Baldwin filed with the clerk a motion for leave to amend the answer, and gave notice to counsel for the plaintiff that he would call up this motion on February 19th. On the following day counsel for plaintiff gave notice that they would on the 19th move for a dismissal of the appeal on the grounds (1) that the court was without jurisdiction of the appeal, because the defendant had failed to have the sureties justify within the time prescribed by the statute; and (2) that the defendant had failed to pay the transcript fee of the justice and have the papers filed in the district court within the time prescribed by the rule of court upon that subject. These motions were heard together on March 11th, and taken under advisement.

[1] At that time there were called to the

attention of the court affidavits in opposition to the motion to dismiss the appeal by John T. and James H. Baldwin, stating in detail the facts touching the condition of the health of the latter, the connection of the two with the defense in the case, and the agreement as to the service of notice and the justification of the sureties upon the undertaking on appeal. It further appears that the ill health of James H. Baldwin continued until and including November 2d, when the papers were filed with the clerk, and that he was during the interval in the care of a physician; that he was "hardly able to attend to business of any kind"; that, owing to the condition of his health, he failed to remember that the papers had not been filed with the clerk until the latter part of October, when he paid the necessary fees to the justice and the clerk; and that within 10 days thereafter the papers were properly filed and the case placed upon the calendar for hearing. It is further alleged by James H. Baldwin that he is fully acquainted with all the facts relating to the issues in the case, and that he is of the opinion that defendant has a meritorious defense. No counter affidavits were filed. The foregoing narrative of facts is, therefore, to be taken as true. On March 25th the court denied defendant's motion for leave to amend, and ordered judgment entered dismissing the appeal. Subsequently, and prior to the entry of judgment, the defendant moved the court to reinstate the appeal. This motion was also denied. The appeal to this court is from the judgment.

Under the rules of the court, the clerk is required to prepare and publish on the last Saturdays in February and August of each year a calendar of cases in which notes of issue have been filed before the first days of these months. No other cases can be placed thereon except by order of the court on good cause shown. The notes of issue in any case may be filed by either party. The cases are then placed upon the calendar in the order in which the notes of issue have been filed. The rules contain these provisions: "No agreement or consent between the parties or their attorneys, in respect to the proceedings in the cause, will be regarded by the court, unless the same shall have been made in open court, and at the time entered in the minutes, or unless the same shall be in writing, subscribed by the party against whom the same may be alleged or his attorney. And it shall be the duty of the party relying upon any minute entry to see that the same is duly made. Whenever an appeal from a justice's court has been perfected, and the appellant therein fails to file a transcript and the papers in the case in the district court within ten days from the time of perfecting such appeal, the respondent in such case may obtain the certificate of the justice, certifying the amount or character of the judgment, the date of its rendition, the fact and date

of the filing of the notice of appeal and the fact and date of service thereof and character of evidence by which service appears, the fact and date of filing the undertaking on appeal and the amount thereof, and also that appellant has requested and received a duly certified transcript, or that he has not received the same; or if he has made such request, that he has not paid the fees therefor if the same have been demanded; and, on filing such certificate with the clerk of the district court and giving five days' notice to appellant, may have such appeal dismissed on the first motion-day thereafter, and such dismissal shall be a bar to another appeal in the same action. An appeal dismissed under this rule may be restored on notice to the opposite party, on good cause shown." The provision of the statute authorizing the adverse party to require the sureties on an undertaking on appeal from a justice's court to justify is the following: "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or a judge of the district court of the county in which such action has been tried within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." Rev. Codes, § 7124.

It is contended by counsel for defendant that the sureties in this case justified in time because the exception to their sufficiency was not filed with the justice until September 16th, and that, therefore, the defendant was not obliged to have them justify before that time. He also contends that the right to require justification is personal to the exceptant, and that by her conduct the plaintiff waived her right to object that the justification was not had in strict conformity with the statute. We shall not stop to determine the merit of the first contention. We are inclined to the view that, to be effectual for any purpose, the exception should be filed with the justice, if the papers have not already been transmitted to the district court (section 7123), or, if such is the case, with the clerk of the district court. The statute is not more explicit with reference to the exception than it is with reference to the giving of notice.

[2] The office of an exception is to reserve a question arising upon matter in the record, for future consideration either of the trial court or of the court of review and upon which the exceptant claims some right. It would seem that orderly procedure would require the exceptant to file his exception as a part of the record, and then give notice that the justification proceedings would take place before the officer who has the record in his control.

[3] However this may be, upon the facts appearing in the record, the plaintiff, we

think, waived her right to object that the proceedings were not had in conformity with the requirements of the statute.

[4] The right to require justification is personal to the exceptant, and is accorded to him by the statute in order that he may test, by personal examination, the ability of the sureties to respond in damages upon a breach of their obligation. *Stark v. Barrett*, 15 Cal. 367; *Bank of Escondido v. Superior Court*, 106 Cal. 43, 39 Pac. 211. When the undertaking has been given, accompanied by the formal affidavits required by the statute (section 7195, Rev. Codes), the right to the appeal is made effectual, subject only to the right of the adverse party to test the responsibility of the sureties, and thus protect himself from possible loss.

[5] Since the privilege thus accorded to him is personal, he may waive it entirely, either by failing to file the exception at all, or by withdrawing his exception after he has taken it and given notice of it. *Morin v. Wells*, 30 Mont. 76, 75 Pac. 688; *Davidson v. O'Donnell*, 41 Mont. 308, 110 Pac. 645; Rev. Codes, § 6181; *Bank of Escondido v. Superior Court*, supra; *Blair v. Hamilton*, 32 Cal. 50. The case of *Morin v. Wells*, supra, is in principle directly in point here. The respondent having excepted to the sufficiency of the sureties, they failed to justify within five days. Thereupon counsel stipulated for an extension of time. Within such time the sureties appeared and justified. It was held that the stipulation was binding, and hence that the sureties were liable on the undertaking notwithstanding the justification was not in conformity with the statute.

That the admitted facts here show a waiver by plaintiff cannot be questioned. To hold otherwise would be to say that a party may profit by his own wrong. But counsel for plaintiff insist that, since the agreement between counsel was oral, it falls within the rule, and hence that the court properly disregarded it.

[6] That it was within the power of the court to adopt the rule cannot be questioned. *Martin v. De Loge*, 15 Mont. 343, 39 Pac. 312; *Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Beach v. Spokane R. & W. Co.*, 21 Mont. 184, 53 Pac. 493; Rev. Codes, § 6293. But the purpose of such a rule is to promote orderly procedure and protect the rights of litigants, and may not be invoked to perpetrate a wrong. The rule in question here was enacted to relieve the presiding judge of the necessity of determining controversies between counsel as to their unexecuted agreements, often more perplexing than the case itself. *Borkheim v. Insurance Co.*, 38 Cal. 628. Neither it nor the statute invoked by counsel (section 6389, Rev. Codes) was intended to prevent the court from enforcing "executed oral agreements or stipulations admitted by the party or his attorney against whom they

are alleged, although neither reduced to writing nor made in open court." *Beach v. Spokane R. & W. Co.*, supra. In considering an identical provision of the Code of Civil Procedure of California, in *Reclamation District, etc., of Sacramento Co. v. Hamilton*, 112 Cal. 603, 44 Pac. 1074, the Supreme Court of that state said: "If, under the terms of a mutual stipulation which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court."

[7] While there can be no specific performance of such agreements (*Borkheim v. Insurance Co.*, supra), to hold that where an attorney admits that he has made an agreement and permitted his adversary to act upon it, the client, not interfering or dissenting, shall not be held to be bound by it, would be to convert both the statute and the rule into mere devices to promote injustice and wrong.

[8] The last requirement of the rule is not in any sense jurisdictional. *Stevenson v. Cadwell*, 14 Mont. 311, 36 Pac. 185.

[9] There is no provision in the statute requiring the papers to be filed in the district court within any specified time. True, section 7123, supra, commands the justice to transmit them to the clerk within ten days after the appeal is perfected, if his fees have been paid. No penalty is exacted of appellant if he fails to do so. If the appellant is not at fault, he may invoke the power of the court to compel the performance of this duty, and in flagrant cases the court may impose a fine for dereliction on the part of the justice.

[10] The purpose of the last provision of the rule is to require prompt action on the part of the appellant in so far as he is responsible for the filing of the papers, and subjects him to the penalty of dismissal if without excuse he is guilty of laches. In terms it applies only to those cases in which the appellant has failed to pay the fees of the justice and thus made it incumbent upon him to act, or to cases in which the papers have been delivered to the appellant, and he has failed to have them filed with the clerk within the prescribed time. Though he lodges the papers with the clerk, yet, if he fails to pay the clerk's fees, the clerk is not bound to file them. Under these circumstances, the rule will also apply. It was intended to prevent the appellant from holding the appeal in abeyance, and preventing the adverse party from bringing the case to a hearing in the district court. After the papers have been filed the rule has no application, and whether the appeal should then be dismissed is to be determined upon the facts as they are

made to appear upon the hearing of the motion.

[11, 12] The statute declares: "For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the district court may order the appeal to be dismissed, with costs." Rev. Codes, § 7127. This means nothing more nor less than that the court is clothed with a discretionary power, to be exercised against the appellant only when he has been guilty of inexcusable neglect or inadvertence. The appeal should be retained in all cases where there is a reasonable excuse for the delay, and it is apparent that the adverse party has not suffered prejudice by reason of the delay. *Stevenson v. Cadwell*, supra. Now, what are the circumstances which may be treated as excusatory of the defendant's laches in this case? It must be borne in mind that by the stipulation of counsel John T. Baldwin's connection with the case, so far as counsel for the plaintiff is concerned, was entirely severed. The implication was that James H. Baldwin was thereafter to be regarded as the only counsel representing the defendant. He was in ill health all the time intervening between the date of the perfection of the appeal and the time the papers were lodged with the clerk of the district court. During this interval he was under the care of a physician, and experienced difficulty in attending to business of any kind. It is not strange that in this condition he should overlook the appeal and fail to prosecute it with the same degree of diligence that he would have exercised, and that he would have been required to exercise, had his condition been otherwise. Moreover, after he had caused the papers to be filed, counsel for plaintiff allowed the case to stand for three months and ten days. In the meantime a note of issue must have been filed prior to January 29th, for the case was placed upon the calendar for trial without protest or objection. The record is silent as to who filed the note of issue. If this was done by counsel for plaintiff, it amounted to a waiver of defendant's laches. If it was done by counsel for defendant, it amounted to notice that he would proceed at once with the trial, and the silence of adversary counsel thereafter should be deemed to imply consent to try the case on the merits. Finally, when counsel for defendant began to get ready for the trial, the court was asked to dismiss the appeal upon grounds which were purely technical, though the plaintiff, so far as now appears, had suffered no detriment or inconvenience whatever. Let it be conceded that counsel for defendant ought to have been more diligent, the plaintiff cannot, under the circumstances, claim to have been more so, for indeed by her long delay she should be held to have acquiesced in the fault of her adversary, and this, considered in connection with the condition of the health of defendant's counsel, should

have led the court to exercise its discretion in favor of the appeal by a denial of the motion.

Counsel for plaintiff cite and rely on the case of *Meyers v. Gregans*, 20 Mont. 450, 52 Pac. 83. In that case, however, the appellant wholly failed to allege any excuse for his delay. For this reason the appeal was properly dismissed.

We think the facts of this case bring it within the principle of the decision in *Stevenson v. Cadwell*, supra, and that the district court abused its discretion in holding otherwise.

The judgment is reversed, and the cause is remanded, with direction to set aside the judgment, and to try the issues on the merits.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

**GIRTON v. DANIELS. (No. 2,006.)**

(Supreme Court of Nevada. Feb. 1, 1913.)

**1. FRAUDS, STATUTE OF (§ 46\*)—ORAL AGREEMENT TO DEVELOP MINING CLAIM.**

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease in consideration of an assignment of a one-third interest is not void under the statute of frauds, where the parties contemplate that the development work shall be completed within a year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 72; Dec. Dig. § 46.\*]

**2. FRAUDS, STATUTE OF (§ 51\*)—ORAL AGREEMENT TO DEVELOP MINING CLAIM.**

An oral agreement to bear one-third of the expenses of developing a mining claim covered by a two-year lease was not void under the statute of frauds, where the lease could have been terminated by act of the parties within a year according to its specific provisions.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 73; Dec. Dig. § 51.\*]

**3. MINES AND MINERALS (§ 66\*)—LEASES—RIGHT TO ABANDON.**

Under the common form of lease of undeveloped lode mining property, wherein the lessor seeks to have his property developed at the lessee's expense, and the latter assumes such burden, the lessee, after discovering that future expenditures would be useless, may abandon the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 185, 186; Dec. Dig. § 66.\*]

**4. MINES AND MINERALS (§ 58\*)—CONTRACTS—CONSIDERATION—ASSIGNMENT OF INTEREST IN MINE.**

An assignment of a one-third interest in a mining lease was a sufficient consideration for an agreement to bear one-third of the expenses of developing the mine, though the lease proved of no value.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.\*]

**5. APPEAL AND ERROR (§ 1011\*)—FINDINGS.**  
The court's finding of fact on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**6. FRAUDS, STATUTE OF (§ 138\*)—LIABILITY FOR EXPENSES OF DEVELOPMENT—QUANTUM MERUIT.**

Where a one-third interest in a mining lease is assigned in consideration of an oral agreement to bear one-third the expense of development, and the other contracting party pursuant to the agreement thereafter does development work and advances money to pay such expense, the assignee is liable on quantum meruit for his share of the work and expense, though their agreement be void under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. § 138.\*]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by C. W. Girton against W. H. Daniels. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for damages for breach of contract. The contract as alleged in the complaint was as follows: "That at Tonopah, Nye county, Nev., and on or about November 15, 1910, the plaintiff, defendant, and one R. Krabbenhoff made and entered into an agreement, under and by which it was mutually agreed, that said three named persons should be equal co-owners of a certain mining lease, and should work and develop certain mining claims covered by said lease, situate at Silver Bow, in said county and state; that each should contribute equally towards the expense of said work and business, and should be equal owners, share and share alike in said lease, as well as in any profits arising from said business, and in like manner should pay equally all costs and expenses thereof; that it was further agreed that said three named persons should contribute their own time and labor to said work, or, failing so to do, the one not so contributing should employ a substitute or pay to the persons who did do said work one-third of the total value thereof, to the end that an equal amount of work be either personally done by said persons or its value contributed in cash by each. It was further agreed that, in the event defendant did not personally perform his one-third share of said personal labor, he should either employ a substitute to perform same, or that plaintiff and said Krabbenhoff might perform the labor, and that defendant should pay to plaintiff and said Krabbenhoff for each day's work so done by them for the benefit of defendant at the rate of \$4 per day per man; that it was further agreed that each of the persons named should advance and pay the costs and expense of employing laborers in addition to the work to be done by said above-named three persons. It was further agreed between plaintiff and defendant that plaintiff should advance and pay the defendant's one-third share of all cash expenditures for labor of employés, and for supplies and disbursements incident to or arising from said work or business during the months of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



December, 1910, and January, 1911, and that defendant would reimburse plaintiff to the full amount of said one-third share of such advances so made by plaintiff for the use and benefit of defendant."

The court made the following findings in the case:

"(1) That on or about November 29, 1910, the plaintiff and one R. Krabbenhoff were the owners of a certain mining lease dated November 15, 1910, for two years, on seven lode claims, situate in Silver Bow Mining District, Nye county, Nev.; that plaintiff owned a two-thirds interest, and said Krabbenhoff a one-third interest; that on or about said November 29, 1910, the plaintiff and defendant entered into an agreement under which defendant was to receive one-half of plaintiff's said two-thirds interest or a one-third interest in the whole lease, and, in consideration thereof, defendant was to pay one-third of the expenses of operating it, said expense being limited to the work of three men and necessary cost of supplies for same for the period of work then in contemplation by the parties, to wit, December, 1910, and January, 1911; that, pursuant to said agreement, plaintiff on or about November 30, 1910, delivered an assignment of said one-third interest to said defendant, defendant agreeing to send a man to represent his share of the work or pay the wages of such man, and, in addition thereto, he agreed to bear one-third of cost of supplies for three men and certain other necessary expenditures; that defendant's portion of the expenditures was advanced and fixed by plaintiff; that, instead of three men being out on the work it appears that Girton, who directed the work, employed, including himself and Krabbenhoff, six men, or twice what the agreement called for; that defendant had no notice that the additional three men were to be employed; that the work of the six men and the statement of total expenditures made by plaintiff in evidence is correct, and that said work was valuable and benefited all parties, including the defendant; that Krabbenhoff, prior to commencement of this action, had duly assigned to plaintiff all his interest in the demand sued for. That defendant had a right to withdraw from his venture at any time, thereby releasing himself from liability for subsequent expenditures; that the total expenses of supplies, assaying, and the like for said period was \$716.99, and the total amount of wages at \$4 per day for 263 days was \$1,052, making a total of \$1,768.99, from which should be deducted \$330.15, total cost of board for men, leaving \$1,432.84, of which sum, under foregoing facts, defendant agreed to pay one-sixth or \$238.81, and that no part of the same has ever been paid.

"(2) The agreement referred to in finding 1 entered into by the defendant was oral, except as evidenced in document referred to in finding 3, and no written contract or

memorandum of any such contract was signed by defendant."

Findings 3, 4 and 5 set out in full the assignment to defendant, the original lease to plaintiff, and the lease or sublease to Krabbenhoff referred to in finding 1.

"(4) On February 6, 1911, defendant delivered to plaintiff the paper referred to in finding No. 3, and at the same time told plaintiff that he did not care to have anything to do with the proposition; and plaintiff has had possession of the said paper ever since. At that time all the work mentioned in finding No. 1 had been done and all the expense therein mentioned had been incurred."

"(7) Defendant has never had any other interest in said lease or the mining ground mentioned therein, except as in these findings mentioned, and the only benefit derived from the work and expense mentioned in these findings by him is by virtue of whatever interest he acquired by the oral agreement mentioned in these findings and the paper set out in finding No. 3.

"(8) The matter of defendant having a right to withdraw from the agreement at any time was never expressly mentioned between the parties."

The document referred to in finding 3 as an assignment to defendant was in the form of a lease or sublease, dated October 10, 1910, and was signed by the plaintiff and delivered to the defendant, but was never signed by the latter. The lease of the Nevada Silver Bow Mining & Milling Company to the plaintiff, Girton, incorporated in finding 4, contained a provision to the effect that when the lessee shall have done \$700 worth of work on the demised premises during the year 1910, sufficient to hold the claims leased under the provisions of the laws of the United States relative to the performance of annual work on mining claims, then the lease was to be extended for an additional period of six months or until May 15, 1913. One of the considerations of the lease was that the lessee agreed: "To work said premises and to work the same with at least thirty shifts of eight hours each during each month of the continuation of this lease," etc. It was further covenanted in the lease that "upon the violation by said lessee, or any person under him, of any covenant herein contained, the term of this lease shall, at the option of the lessor, expire and the same and said premises shall become forfeited to said lessor," etc. The lease further specified that it was "for the term beginning on the 15th day of November, 1910, and ending on the 15th day of November, 1912, at noon, unless sooner forfeited or determined by violation of any covenant herein contained."

P. E. Keeler, of Tonopah, for appellant.  
McIntosh & Cooke, of Tonopah, for respondent.

NORCROSS, J. (after stating the facts as above). Two questions of law are presented upon the appeal in this case. It is the contention of the appellant that the judgment is not supported by the findings for the following reasons: First, that the contract was void under the statute of frauds, it being an oral contract which by its terms was not to be performed within one year; second, it was an oral executory contract and there was no part performance sufficient to bind the defendant, the work performed by the plaintiff being of no benefit to the defendant.

[1] The work for which the defendant was held liable for a one-third part appears to have been done in pursuance of that provision of the original lease relative to the annual work for the year 1910 on the seven demised claims. This work was optional under the provisions of the lease, and to be effective had to be begun during the month of December, 1910, and prosecuted without interruption until completed. The agreement to do this work may, we think, be regarded as an independent agreement to do a certain character of work which was contemplated to be completed within a year, and as to such agreement the statute of frauds would not apply.

[2] But, if we consider the terms of the original lease as controlling, we are of the opinion that the agreement is not void under the statute of frauds as an oral agreement by its terms not to be performed within a year. While the lease by its terms, if fully complied with, may have extended for two years and even longer, nevertheless it could have been terminated by act of the parties within a year according to its specific provisions and without violation of its terms.

[3] If the lessee failed to perform the requisite amount of labor monthly, the lease could be terminated by the lessor. The lease in question in this case is a common form of lease of undeveloped lode mining property. The lessor seeks to have his property developed at the expense of the lessee, while the latter assumes the burden of expense of developing the property in the hope of finding a paying mine. As long as the lessee properly performs the required labor, his lease is nonforfeitable. Should he fail to perform the required amount of work, the lease may be terminated at once by the lessor. If, after the performance of a certain amount of labor upon the property, it appears that further expenditures would be useless, without liability to himself, he may, and usually does, abandon or surrender his lease. 27 Cyc. 719. Because the finding of ore in paying quantities is usually problematical when mining leases of this character are entered into, in the absence of provisions to the contrary in the lease, it may be considered within the contemplation of

the parties that a showing of conditions upon the leased property which would not justify further expenditure upon the part of the lessee will warrant the latter in withdrawing from the lease. As such a showing may be made within the year, the court below did not materially err in finding "that the defendant had a right to withdraw from his venture at any time," even though such right to withdraw from the agreement "was never expressly mentioned between the parties."

[4] It cannot be said, we think, that the defendant is in a position to contend that he received no benefit from the contract. The contract was for the development of mining property, and the work done might have disclosed a mine of great value. If it did, defendant was in a position to reap a proportional part of the reward of such discovery, and it is not to be presumed that any one in such position would then decline to claim the interest which his contract entitled him to. The right which one has to share in the profits of a rich ore body if discovered ought to be deemed to be a valuable consideration and benefit in mining contracts of this character.

[5] Appellant strenuously contended that he never entered into the contract sued upon. That question having been determined by the trial court on conflicting evidence, its finding is conclusive on this court. The court did not err in its conclusions of law based on its findings of fact.

[6] Even if it could be said that the contract sued upon was within the statute of frauds, the plaintiff, as contended by counsel for respondent, was entitled to recover on a quantum meruit. *Lapham v. Osborne*, 20 Nev. 175, 18 Pac. 881; 20 Cyc. 299. Whether recovery in this case could have been made on a quantum meruit without an amendment of the pleadings is, however, a question we have not considered. See *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025.

The judgment is affirmed.

STATE ex rel. EGGERS, State Controller, v. ESSER et al. (No. 2,048.)

(Supreme Court of Nevada. Jan. 31, 1913.)

1. STATUTES (§ 122\*)—TITLES—SUBJECT-MATTER.

St. 1911, c. 133, entitled "An act concerning public schools," section 135 of which provided for a tax for the support of public schools, was not void for embracing a subject not included in the title, contrary to Const. art. 4, § 17; Rev. Laws, § 275.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. § 122.\*]

2. STATUTES (§ 225\*)—CONSTRUCTION—IN PARI MATERIA.

Statutes which relate to the same subject-matter are in *pari materia* and should be construed together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. STATUTES (§ 159\*)—CONFLICT—REPEAL.**

If two statutes are irreconcilably conflicting, the last enacted controls.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 229; Dec. Dig. § 159.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 91\*)—TAXATION—STATUTES—IMPLIED REPEAL.**

Act March 13, 1911 (St. 1911, c. 90) § 1, Rev. Laws, § 3617, imposing a tax of 6 cents on the \$100 for the general school fund, was impliedly repealed by Act March 20, 1911 (St. 1911, c. 133) § 135; Rev. Laws, § 3374, imposing a tax of 10 cents on the \$100 for school purposes; the statutes being irreconcilably in conflict.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 210; Dec. Dig. § 91.\*]

**5. TAXATION (§ 40\*)—UNIFORMITY.**

St. 1911, c. 133, § 135, Rev. Laws, § 3374, imposing a tax on all taxable property in the state for school purposes, and requiring the county commissioners to add such amount to the other taxes, could take effect during the fiscal year 1911 without violating the constitutional requirement of equality and uniformity, though it resulted in two different levies during the same fiscal year.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 68–89; Dec. Dig. § 40.\*]

Proceedings by the State on the relation of J. Eggers, as State Controller, against E. P. Esser and others, as county commissioners of the county of Ormsby, state of Nevada, and another. Writ ordered issued.

Cleveland H. Baker and George B. Thatcher, Atty. Gen., and E. T. Patrick, Deputy Atty. Gen., for petitioner. George L. Sanford, Dist. Atty., of Carson City, for respondents.

**NORCROSS, J.** This is an original proceeding in mandamus to require respondents, commissioners, at the time of the making of the next annual tax levy for said county of Ormsby, to levy an additional tax, sufficient to raise therefrom the sum of \$547.54 due from said Ormsby county to the state of Nevada, and that, when said sum has been so realized from such levy, that respondent treasurer be commanded to pay the same over to petitioner as required by law. The question involved in this case is, what was the legal state levy of taxes for state general school purposes for the year 1911?

An act entitled, "An act to fix the state tax levy, and to distribute the same in the proper funds," which became a law, by approval of the Governor, March 18, 1911, reads: "Section 1. For the fiscal year commencing January first, nineteen hundred and eleven, and annually thereafter, an ad valorem tax of sixty cents on each one hundred dollars of taxable property is hereby levied and directed to be collected for state purposes, upon all taxable property in the state, including net proceeds of mines and mining claims, except such property as is by law exempted from taxation: General fund, thirty-nine and six-tenths cents; state interest and sinking fund, three cents; territorial interest

fund, three cents; general school fund, six cents; contingent university fund, five cents; contingent university fund, 1905, No. one, one-tenth of one cent; contingent university fund, 1905, No. two, three-tenths of one cent; state prison interest and sinking fund, three cents." Stats. 1911, P. 106, Rev. Laws, § 3617.

Section 135 of an act entitled, "An act concerning public schools, and repealing certain acts relating thereto," which became a law, by the approval of the Governor, March 20, 1911, provides: "Sec. 135. An ad valorem tax of ten cents on the hundred dollars of all taxable property in the state is hereby levied and directed to be collected and paid in the same manner as other state taxes are required to be paid; and said tax shall be known as the state school tax, and the board of county commissioners of the several counties shall, annually, at the same time other state taxes are levied, add this to the other taxes provided by law to be levied and collected, and it shall be annually collected at the same time and in the same manner as other state taxes are collected, and if, from any reason whatever, in any year said taxes are not levied as herein required, by the board of county commissioners, the county auditor shall enter them on the assessment roll, as required by law for other taxes." Stats. 1911, p. 220; Rev. Laws, § 3374.

Sections 134 to 152½, inclusive, of the act last mentioned (Rev. Laws, §§ 3373–3392), constitute chapter 10 of the act entitled "school funds," and deal with the whole subject of school funds.

Section 2 of article 9 of the state Constitution, dealing with the subject of "finance and state debt," provides: "Sec. 2. The Legislature shall provide by law, for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year shall exceed the income, the Legislature shall provide for levying a tax sufficient with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years." Rev. Laws, 349.

Section 6 of article 11 of the state Constitution, dealing with the subject of education, provides: "Sec. 6. The Legislature shall provide a special tax, which shall not exceed two mills on the dollar of all taxable property in the state, in addition to the other means provided for the support and maintenance of said university and common schools." Rev. Laws, 358.

The statement, which we presume is correct, is made in the opening brief of counsel for respondents, that for the fiscal year 1911 "the counties of Churchill, Douglas, Elko, Eureka, Humboldt, Nye, Storey, Washoe, and Ormsby, levied and collected at the rate of 60 cents on the \$100; the state superintendent of schools some time subsequently called

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attention to the act concerning public schools, and particularly section 135 thereof, and the following counties levied the rate of 64 cents, thereby increasing the school tax to 10 cents: Clark, Esmeralda, Lander, Lincoln, Lyon, Mineral, and White Pine counties." This is a test suit to determine the liability of the first-named counties to levy and collect the four cents difference in the school rate made by section 135 of the school law, *supra*.

The only question discussed in the briefs is, Did section 135 of the school law, *supra*, make a valid levy for general school purposes of 10 cents on the \$100 of taxable property for the year 1911? It is the contention of counsel for respondents that it did not for two reasons: First, that section 135 is unconstitutional and void because relating to a subject not embraced in the title of the act of which it is a part (Const. art. 4, § 17; Rev. Laws, § 275); second, that section 135 is prospective in effect, and as the tax rate for the year had previously been determined and fixed, and all property had become impressed with a lien therefor as provided by law, its provisions are in abeyance, so far as the tax rate is concerned, for the year 1911.

[1] The contention that the section of the school act in question is violative of the Constitution is clearly without merit. A provision for a tax for the support of public schools is certainly germane to an act "concerning public schools." *Ex parte Ah Pah*, 34 Nev. —, 119 Pac. 770. It is conceded that the 6 cents for the "general school fund" provided for in the act to fix the state tax levy, approved March 18, 1911, and the tax of 10 cents, which shall be known as the "state school tax," mentioned in section 135 of the general school law, approved March 20, 1911, are levies for one and the same purpose.

[2] In so far as the two sections relate to the same subject-matter, they are in *pari materia* and should be construed together.

[3] In so far as there is any irreconcilable conflict between the two sections, the section which last became a law controls the provisions of the earlier enactment.

[4] The 6 and the 10 cent provisions of the two sections being in conflict, the 10-cent levy for school purposes, being included in the law last to take effect, supersedes the levy made for the same purpose in the earlier enactment.

[5] There is no merit, we think, in the contention that, because section 135, *supra*, is not by its terms retrospective, it cannot be deemed to take effect during the fiscal year 1911, for the reason that there would be two different levies in force during different portions of the year, in violation of the constitutional provision requiring equality and uniformity in rates of assessment and taxation. Rev. Laws, 352. There is no pro-

vision in the state Constitution fixing a maximum levy beyond which the Legislature may not go, as in the case of statutory provisions regulating the levy by county commissioners for county purposes. There is also no provision to the effect that, after the Legislature has made one levy, it may not make another levy changing the rate fixed in the former levy. Most, if not all, of the tax levies made by the Legislature have been acts which would apply to all succeeding years, unless changed by subsequent legislation. Whenever a change was made in the rate, as has occurred frequently, it could technically be said that two different state rates were in force during different portions of the year. In effect, however, this is not the case. The only difficulty that could be imagined as occurring by reason of the change in the rate would be in cases where the assessor had collected taxes upon personal property before the controlling state rate had been fixed for the year. The assessor does not usually, if ever, collect the tax on personal property when the owner has real property assessed to him, for the amount of the tax on the personal property, in such case, is made a lien on the real property, and the tax thereon is not required to be paid prior to December following. Rev. Laws, § 3619. Of the tax collected by the assessor on personal property from owners not having real estate, but a small portion, doubtless, in practice, is collected between the date of the county levy and the 1st of April. But, conceding that the assessor may collect the state and county tax on personal property prior to a change in the state rate, such property is not immune from the collection of a further tax in case the state rate is subsequently increased. It is as much liable for the additional tax as any other property not as yet assessed. The rule of uniformity in rate or assessment is not violated by the subsequent change in the state rate.

We are of the opinion that Ormsby county, and all other counties similarly situated, are liable to account to the state controller, for taxes for the year 1911, on a basis of a state rate of 64 cents upon the \$100 of taxable property, as contended for by petitioner. As the Legislature is now in session, it can provide that the additional tax required to be paid under the levy of 1911 may not become unnecessarily burdensome. As the money collected from this tax must be paid into the general school fund, and will become available for future expenses, that fact may be taken into consideration in fixing the levy for the present fiscal year.

No question has been raised as to the propriety of issuing the writ in the event petitioner's contention as to the law relative to the tax was sustained, and it is therefore ordered that the writ issue as prayed for.

## GRISWOLD v. GRISWOLD.

(Court of Appeals of Colorado. Jan. 18, 1918.)

## 1. STATUTES (§§ 142, 161\*)—REPEAL—CONFLICTING STATUTES ON SAME SUBJECT.

A statute conflicting with the provisions of an earlier statute on the same subject operates as an amendment to or repeal in part of the former statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 210, 230-234; Dec. Dig. §§ 142, 161.\*]

## 2. STATUTES (§ 158\*)—REPEAL BY IMPLICATION.

Repeals by implication are not favored.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 153.\*]

## 3. STATUTES (§ 184\*)—CONSTRUCTION—POLICY OF LAW.

Generally, words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistent with the intention of leaving the existing policy intact.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.\*]

## 4. STATUTES (§ 212\*)—CONSTRUCTION—PRE-SUMPTIONS.

After a statutory policy has long been established and is well-defined, it will not be presumed to be departed from or abandoned.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.\*]

## 5. STATUTES (§ 239\*)—CONSTRUCTION—STATUTE IN DEROGATION OF COMMON LAW.

Statutes in derogation of common law are to be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. § 239; Common Law, Cent. Dig. § 12.]

## 6. STATUTES (§§ 191, 212\*)—STATUTE IN GENERAL TERMS—RESTRICTIVE CONSTRUCTION.

In the absence of clear and conclusive words, a court will not presume that the Legislature intended to violate a fundamental principle of law or the law of nations, and a statute in general terms, but susceptible of a reasonable application, will be restricted to a sense consistent with the general system of law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. §§ 191, 212.\*]

## 7. MARRIAGE (§ 3\*)—WHAT LAW GOVERNS—STATUTES.

Under Rev. St. 1908, § 4165, declaratory of the law of nations, which provides that all marriages contracted without the state which shall be valid where contracted shall be valid in this state, the marriage in New Mexico of parties domiciled in this state who complied with the statutory requirements there is valid in this state, although they are married there to avoid a prohibitory decree in force in this state.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3.\*]

## 8. DIVORCE (§ 158\*)—PROHIBITION TO MARRY—EFFECT UPON DECREE.

Rev. St. 1908, § 2122, which provides that, where no appeal is taken from a decree of divorce, the court may within one year set it aside and reopen the case, and that during such period neither party to the divorce suit shall remarry, does not suspend the operation of the decree, but expressly treats the marriage as dissolved and the decree absolute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 520; Dec. Dig. § 153.\*]

## 9. MARRIAGE (§ 3\*)—WHAT LAW GOVERNS—LAW—EXTRATERRITORIALITY.

Rev. St. 1908, § 2122, which provides that, where no appeal or writ of error is taken from a decree granting a divorce, the court within a year may set it aside, and reopen the case, and that during the year neither party shall remarry, does not repeal section 4165, declaratory of the *jus gentium*, which provides that marriages, valid where contracted, shall be valid in this state, and does not apply to or affect marriage contracted in another state, even by domiciled inhabitants of this state intending to violate such prohibitory law.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3.\*]

## 10. DIVORCE (§ 320\*)—VACATION OF DECREE OF DIVORCE—VALIDITY OF SECOND MARRIAGE.

Under Rev. St. 1908, § 2122, which provides that a decree granting a divorce may be opened or vacated within one year, and which forbids the parties to remarry within that time, the vacation of such decree restoring the former married status makes a second marriage within that time *ipso facto* void in this state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.\*]

Appeal from District Court, Prowers County; Henry Hunter, Judge.

Action by Hattie E. Griswold against Adam H. Griswold for divorce and alimony. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Todd, of Jefferson, N. C., and O. G. Hess, of La Junta, for appellant. Merrill & McCarty, of Lamar, and A. Watson McHendrie, of Trinidad, for appellee.

KING, J. At all times hereinafter mentioned the plaintiff and the defendant were residents of Prowers county, Colo. On the 20th of August, 1908, at Raton, N. M., a contract of marriage was made and entered into by and between plaintiff and defendant, and duly solemnized by a civil magistrate of that territory. Thereafter they lived and cohabited together as husband and wife for a period of some months, until as a result of said marriage plaintiff became pregnant, following which the defendant, after a brief period of cruel treatment of plaintiff, permanently deserted her. She brought this suit in the district court in and for said Prowers county for divorce and alimony, which on November 24, 1909, resulted in a verdict and judgment in her favor. For a special and affirmative defense, defendant alleged that on the 20th day of August, 1908, in said Prowers county, plaintiff herein was granted a decree of divorce by the county court of said county from one Warren W. Young, theretofore her lawful husband, and that "the said plaintiff and the said Warren W. Young were thereby freed and absolutely released from said bonds of matrimony and from all rights and claims accruing to either of said parties by reason of their marriage to each other"; that subsequently and on the same day plaintiff and defendant, for the purpose of evading the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

provisions of the laws of Colorado prohibiting the marriage of a party to a divorce within one year from the date of said decree, went to the town of Raton, in the territory of New Mexico, and had the ceremony of marriage performed, and immediately returned to said Prowers county, where they have since resided. These allegations were not denied. The decree offered in evidence is absolute in form, and contains no prohibition against remarriage of the parties thereto. It does not appear that the decree was appealed from, or in any manner assailed.

The sole question presented, and necessary for determination on this appeal, is the validity of the marriage contract entered into in New Mexico within one year from the date of the decree of divorce dissolving the bonds of matrimony theretofore existing between plaintiff and her first husband, when such marriage contract is called in question, in the courts of this state, by a party thereto. Its determination depends upon the construction of section 2122, Revised Statutes of 1908, and its effect upon marriages contracted in another state, when considered in connection with section 4165 of said statutes. Section 4165 is a part of a chapter concerning "marriages," and is as follows: "All marriages contracted without this state, which shall be valid by the laws of the country in which the same were contracted, shall be valid in all courts within this state; Provided, nothing in this section shall be construed so as to allow bigamy or polygamy in this state." Section 2122 is a part of "an act to provide for a system of practice and procedure in relation to divorce and alimony, and to repeal certain acts in conflict therewith," approved April 3, 1893, (Laws 1893, p. 240, § 10), and is as follows: "In case no appeal or writ of error shall be taken from a decree of the court granting a divorce, the court shall have power to set aside such decree and reopen such case at any time within one year from the date of entering such decree, upon application of the defeated party under oath showing good reason therefor; but if no such application be made within such time, or the same be denied, then such decree shall never be reopened for any cause; and during said period of one year from the granting of a decree of divorce, neither party thereto shall be permitted to re-marry to any other person." In *Mock v. Chaney*, 36 Colo. 60, 87 Pac. 538, the Supreme Court, speaking by Mr. Justice Steele, said that: "Very many intricate questions of law and public policy are involved in a consideration of the question presented concerning the validity of a marriage in New Mexico within one year from the granting of a divorce in this state." The public policy of the state, as to the matter under consideration, is declared in the two sections of the statutes hereinbefore quoted. The first has been a part of the

statute on that subject since territorial days, and declares and expressly adopts as the law and public policy of this state the *jus gentium*, or law of nations, by which the validity of the marriage contract is referred to the *lex loci contractus*, and which is made binding by the common consent of all nations—the public policy of the civilized world. The second, so far as the clause prohibiting remarriage of parties divorced is concerned, was not in the statutes prior to 1893.

[1] And if said last-named provision is given extraterritorial effect, or is held to apply to and invalidate or affect a marriage of citizens of this state contracted in another state, it is clearly in conflict with the provisions of said section 4165, as well as with the *jus gentium*, and, being the later declaration, would operate as an amendment to, or repeal in part of, said former section as to marriages made within one year from the date of divorce. *Purmort v. Tucker Lumber Co.*, 2 Colo. 470; *Branagan v. Dulaney*, 8 Colo. 408, 412, 8 Pac. 569; *Calhoun G. M. Co. v. Ajax G. M. Co.*, 27 Colo. 1, 14, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17.

[2] But repeals by implication are not favored. In view of the apparent conflict, it is the province and duty of the court to ascertain whether both sections of the statute may not be so construed as to be given full force and effect in conformity with recognized and approved rules of statutory construction and interpretation. The provision of section 2122, prohibiting remarriage within one year, is general in its terms, contains no exceptions as to the place where such contract may be entered into, and therefore *prima facie* applies to and includes such marriages everywhere—out of this state as well as within its borders. But this section contains no words expressly making it extraterritorial in effect, or declaring such marriage void, or which evidence an intention to repeal section 4165 or to in any manner affect it.

[3, 4] The following rules of construction are in point: "Generally words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistent with the intention of preserving the existing policy untouched." "After a statutory policy has long been established and is well defined, it will not be presumed to be departed from or abandoned." 2 *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 531.

[5, 6] Statutes in derogation of common law are to be strictly construed. "In the absence of words express and conclusive, admitting of no other interpretation, a court will not presume that the Legislature intended to command the judicial tribunals to violate the established principles of law and even the law of nations; so that a statute in general terms yet susceptible of a reason-

able application without being carried so far will be restricted by construction to a narrower sense consistent with the law of nations." 1 Bishop on Marriage, Divorce and Separation, § 835. "Where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." Chief Justice Marshall in *U. S. v. Fisher*, 2 Cranch, 389, 2 L. Ed. 304; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 37, 40 Am. Rep. 505.

[7] Upon the question involved herein, the authorities are not entirely harmonious, but in the construction of this statute, and in its application to the facts of this case we follow and adopt the reasoning of, and the rules laid down by, the following authorities, text-writers, and court decisions: 2 Kent's Commentaries (14th Ed.) p. \*93; 1 Bishop on Marriage and Divorce, §§ 283, 286, 306a; *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 424, 60 Am. St. Rep. 936; *Conn v. Conn*, 2 Kan. App. 419, 42 Pac. 1006; *Mason v. Mason*, 101 Ind. 25; *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Van Voorhis v. Brintnall*, supra; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193. Kent, in his Commentaries (2 vol. [14th Ed.] pp. \*92, \*93), says: "As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is that a marriage, valid or void by the law of the place where it is celebrated, is valid or void everywhere. An exception to this rule is stated by Huberus, who maintains that if two persons, in order to evade the law of Holland, which requires the consent of the guardian or curator, should go to Friesland, or elsewhere, where no such consent is necessary, and there marry, and return to Holland, the courts of Holland would not be bound by the law of nations to hold the marriage valid, because it would be an act *ad eversioem juris nostri*. In opposition to this opinion, we have the decision of the court of delegates in England in 1768, in *Compton v. Bearcroft*, 2 Hagg. Cons. 443, 444, where the parties, being English subjects, and one of them a minor, ran away, without the consent of the guardian, to avoid the English law, and married in Scotland. In a suit in the spiritual court to annul the marriage, it was decided that the marriage was valid. This decision of the spiritual court has been since frequently and gravely questioned. Lord Mansfield, a few years before that decision of the delegates, intimated pretty strongly his opinion in favor of the doctrine in Huberus, though he admitted the case remained undecided in England. The settled law is now understood to be that which was decid-

ed in the spiritual court. It was assumed and declared by Sir George Hay in 1776, in *Harford v. Morris*, 2 Hagg. Cons. 428-433, to be the established law. This principle is that in respect to marriage the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence. This rule was shown, by the foreign authorities referred to by Sir Edward Simpson in 1752, in the case of *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 412-416, to be the law and practice in all civilized countries by common consent and general adoption. It is a part of the *jus gentium* of Christian Europe, and infinite mischief and confusion would ensue with respect to legitimacy, succession, and other rights, if the validity of the marriage contract was not to be tested by the laws of the country where it is made. This doctrine of the English ecclesiastical courts was recognized by the Supreme Court of Massachusetts in *Medway v. Needham* (16 Mass. 157, 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433), and though the parties in that case left the state on purpose to evade its statute law, and to marry in opposition to it, and, being married, returned again, it was held that the marriage must be deemed valid, if it be valid according to the laws of the place where it was contracted, notwithstanding the parties went into the other state with an intention to evade the laws of their own. It was admitted that the doctrine was repugnant to the general principles of law relating to other contracts; but it was adopted in the case of marriage, on grounds of public policy, with a view to prevent the public mischief and the disastrous consequences which would result from holding such marriages void. It was hinted, however, that this comity, giving effect to the *lex loci*, might not be applied to gross cases, such as incestuous marriages which were repugnant to the morals and policy of all civilized nations. This comity has been carried so far as to admit the legitimacy of the issue of a person who had been divorced a vinculo for adultery, and who was declared incompetent to remarry, and who had gone to a neighboring state, where it was lawful for him to remarry, and there married." Bishop, in his work on Marriage and Divorce, lays down the rule that all such marriages are valid unless the statute contains some express words of nullity. "Consequently, the doctrine has been established that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity*. This rule applies not only to the statute as a whole, but to the several parts of it; so that, if it declares the marriage void for noncompliance with a particular provision, it is good notwithstanding a failure to comply with any other provision." Section 283. And

distinguishing the marriage contract from other contracts, the author says: "The rule of interpretation we are considering was admitted by Dr. Lushington not to be in accordance with the constructions which some other acts, relating to other subjects, have received; but 'it must always be remembered,' he said, 'that marriage is essentially distinguishable from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favor of the validity and against the nullity of marriage, but it is so on this principle, that a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed, according to the acknowledged rule, most strictly.' Thus, as already mentioned, negative and prohibitive words in a statute are often held to render what is done under them void, but in a marriage act they do not have this effect." Section 286.

Upon the question of a prohibitory statute, such as ours, and its effect upon a remarriage in the state as well as out of it, it is said: "If we are to look at this question as one of principle, we must doubtless be governed in some measure by the particular language of the statute. We have already seen that where in England, the divorce act forbade a remarriage until the period for appeal had elapsed, a remarriage after sentence pronounced, and before the expiration of this time, was held, and it is believed by the author properly so, to be void. In the principal case in which this was so adjudged a doubt was expressed whether, in the absence of any statutory provision on the point, a divorce dissolving a valid marriage operates in law to authorize the divorced parties to remarry. Whatever foundation, or whether any, there may be for such a doubt in England, there is none in this country; for with us it was never questioned that, in the absence of all provision on the point, a divorced person, whether plaintiff or defendant in the divorce suit, is entitled to remarry the same as though the first marriage had never existed. Now if, after a system of divorce laws has been established, and parties have sought and obtained divorces, a statute should be passed forbidding any divorced person to contract a new marriage, this statute would subject the person violating it to indictment, even though it was silent as to the penalty. Then, after the statute had thus expended itself, it could not on principle be carried further and render the marriage null, unless it also contained an express clause of nullity. There could be no doubt about this proposition as applied to divorces which had already occurred, and one cannot see why it should not apply equally to future divorces. On the other hand, if the same

statute which authorized the divorce expressly provided that it should not operate to authorize the divorced party to remarry, the case would seem pretty plainly to fall within a principle already considered, and a new marriage contracted in the same state would be void, although it would be good if contracted in another state or country. It cannot be doubted that these two points, standing at the extremes, are correct as thus stated; but, between these points, there are various shades and kinds of statutory provisions, the effect of which may be more or less open to question." Section 306a.

Directly in point is the case of *State v. Shattuck*, *supra*, in which the Supreme Court of Vermont, upon a statute similar to ours, but containing a clause making the remarriage a felony, and applied to persons who left the state of Vermont, went to the state of New Hampshire, and there had the marriage performed, for the sole purpose of evading the laws of their domicile, said: "It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and, with an intention of returning to reside there, go into another state or country and are married, and afterwards return and reside in Massachusetts, the marriage shall be deemed void. We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. If they are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question if such international law is a part of the law of the state as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterritorial marriages; and therefore parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is therefore no foundation for an ar-



gument based simply on the idea of an evasion of the law of domicile."

Under the statutes of New Mexico (Compiled Laws of 1897 and amendments thereto) marriage is a civil contract, for which the consent of the contracting parties capable in law of contracting is essential. And, before persons can be lawfully joined in marriage, it is made the duty of the official or other person solemnizing the marriage to ascertain from the contracting parties that they are not on any account incapable of contracting marriage, that they are free persons, and particularly that they are not in any way bound by marriage contract with any other person; in other words, are unmarried. Plaintiff and defendant were free persons, of full age, of sound mind, under no restraint, consented to the marriage contract, secured license from an official authorized to issue the same, caused the marriage to be solemnized by a person duly authorized and qualified, and in every other respect, as to form and substance, complied with the laws of New Mexico, so that the said marriage was valid and of full force and binding effect in that territory, and therefore was valid in this state, and must be so held by all of its courts under the express provision of section 4165 hereinbefore quoted, unless, by reason of the provision of section 2122 of our statutes, the plaintiff herein was rendered incapable, in law, of contracting marriage under the laws of New Mexico, and under the laws of that state such incapacity, as to the plaintiff herein, could only arise from the fact that the decree of divorce granted to her in Colorado did not dissolve the bonds of matrimony between her and her former husband, but left her still married, and this condition, if it existed, would, of course, render a second marriage in any state invalid.

[8] The provision of our statute invoked for the purpose of nullifying the New Mexico marriage, while it forbids the parties to a divorce suit to remarry any other person within one year, does not in terms suspend the operation of the decree, does not denounce a remarriage within the prohibited time as void, or a nullity, nor make such act criminal, nor attach any penalty to a violation of such statute. (In this respect it contrasts with, and may be tested by, section 4163 prohibiting certain marriages and in terms declaring them absolutely void.) Nor does it in terms apply to such marriage elsewhere than in the state of Colorado. It does not purport to suspend the operation of the decree. It deals with divorced persons. It expressly treats the marriage as dissolved, the decree absolute, final and conclusive, to the extent that even the parties thereto must contract a new marriage as between themselves if they wish to resume their marital relations. The statutory inhibition does not affect the decree. In *re Wood's Estate*, 137

Cal. 129, 69 Pac. 900. This is admitted by defendant's answer.

[9] Applying the rules of construction heretofore mentioned and adopted, we are constrained to hold that the prohibitory provisions of the statute do not apply to nor affect marriages contracted in any other state or country. It will be presumed that the lawmaking body in enacting that provision knew the law as declared by the courts of the several states with substantial uniformity for more than a century; that, in the absence of express terms making the inhibition apply to foreign marriages, the effect thereof is restricted to those contracted within the state; and that the Legislature so intended, and did not contemplate a repeal or modification of section 4165. The rule established by the preponderance of authorities, and we think the better rule, and therefore the one which we adopt, is that if a statute, silent as to marriages abroad, prohibits classes of persons from marrying generally, or from intermarrying, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts just as though the statute did not exist, and this would be true, even if the parties went into another state with the intention of avoiding the laws of their own. This rule is held to be the law by the authorities hereinbefore cited, as well as the following: In *re Wood's Estate*, supra; *Dumaresly v. Fishly*, 3 A. K. Marsh. (10 Ky.) 369; *Clark v. Clark*, 52 N. J. Eq. 660, 30 Atl. 81; *Minor v. Jones*, 2 Redf. Sur. (N. Y.) 289; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158; *Campbell v. Crampton* (C. C.) 2 Fed. 417; *Pearson v. Pearson*, 51 Cal. 120; *Dannelli v. Dannelli's Adm'r*, 4 Bush. (67 Ky.) 51; *Fornhill v. Murray*, 1 Bland (Md.) 479, 18 Am. Rep. 344; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Johnson v. Johnson's Admr*, 30 Mo. 72, 77 Am. Dec. 598; *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39; *Ex parte Chace*, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493, 3 Ann. Cas. 1050; *Mason v. Mason*, supra; *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155. In *Conn v. Conn*, supra, under a statute prohibiting remarriage within six months after the decree, and providing "it shall be unlawful for either of said parties to marry, and any person so marrying shall be deemed guilty of bigamy," it was held that such inhibition applied only to marriages within the state, and did not declare an incapacity to contract marriage. In that case, and also in *State v. Walker*, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556, the distinction was made between a statutory prohibition and a declaration of incapacity to contract. The Supreme Court of California in *Re Woods' Estate*, supra, under a statute in effect the same as ours, forbidding marriage within one year after divorce, and providing that such remarriage within the

time named should be void, held that such statute had no extraterritorial effect, did not apply to a marriage contract entered into in the state of Nevada in evasion of that statute, and, further, that said statute did not enter into and become a part of said decree so as to suspend the operation of the same during the year, but was a prohibition pure and simple against the marriage of either party within one year; the penalty for violation thereof being nullity of the marriage.

A number of well-considered cases take, or seem to take, a view exactly contrary to some of the decisions hereinbefore cited. The principal ones are *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835; *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 18, 39 L. R. A. 542, 63 Am. St. Rep. 776. But an examination of these authorities will generally show that they were based upon statutes expressly declaring the marriages (1) void, or (2) declaring incapacity to contract, or (3) which by express terms suspended the operation of decrees of divorce, or were held to suspend it by necessary implication, or (4) such statutes were held to be declarations of public policy, superseding the *jus gentium* that a marriage valid where performed is valid everywhere. For instance, in Wisconsin the statute provides: "It shall not be lawful for any person divorced from the bonds of matrimony, by any court of this state, to marry again within one year from the date of the entry of such judgment or decree, and the marriage of any person solemnized within one year from the date of the entry of any such judgment or decree of divorce, shall be null and void." In passing upon the question, Chief Justice Winslow classified the exceptions to the general law that a marriage valid where celebrated is valid everywhere, as follows: (1) Marriages contrary to the laws of nature as generally recognized by Christian civilized states; (2) marriages which the lawmaking power of the forum has declared shall not be allowed validity. It will be noticed that the Wisconsin statute contained express words of nullity.

In *McLennan v. McLennan*, supra, it is shown that the statute of Oregon declares that "no party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given until the suit has been heard and determined on appeal," under which the court held that the declaration of incapacity to remarry within a fixed time suspended the operation of the decree as to both parties, and rendered them absolutely powerless to make a valid contract of marriage, and declared a well-recognized distinction between statutes which

provide an incapacity for remarriage, and those which simply prohibit remarriage. At this point, however, we call attention to the fact that capacity to marry is governed by the *lex loci contractus*, except general incapacity such as extreme youth or mental incompetency to give consent, recognized everywhere; and that statutory incapacity is non-extraterritorial.

In *Pennegar v. State*, supra, the statute involved was: "When the marriage in absolutely annulled, the parties shall, severally, be at liberty to marry again; but a defendant who has been guilty of adultery, shall not marry the person with whom the crime was committed, during the life of the former husband or wife." After stating that the marriage, being prohibited by statute, would be void if solemnized in that state, the court classified the exceptions in substantially the same manner as stated by Chief Justice Winslow in *McLennan v. McLennan*, supra, except that the second was stated as follows: "Marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication." And after recognizing the extreme difficulty of solution of the question, and the conflicting decisions thereon, finally concluded that, under the public policy of Tennessee, the statutory inhibition was intended to be imperative, and sustained the prohibitory terms as against the *jus gentium*. It may be noted in passing that in no one of these decisions was there shown to exist a statute such as our section 4185, expressly declaring the *jus gentium* to be the public policy of the state.

In the *Estate of Stull*, supra, the marriage was with a former paramour, which marriage was specially prohibited, and under which letters of administration were asked. The statute involved was that the wife or husband "who shall have been guilty of the crime of adultery, shall not marry the person with whom the said crime was committed." In that case it was flatly held that a personal incapacity was imposed, and that the necessary meaning of the language of the statute was that the parties should not marry at all, under any circumstances, at any time or place, that the relation itself was absolutely prohibited, and hence within the words of the statute without reference to the place where marriage occurs.

But, as we have said, the great preponderance of authority, and we think the better reason, favors the position we have adopted. In Colorado we have two statutes of equal dignity, force, and effect; one declaring that the courts shall give validity to marriages which are valid in other states where made, and the other prohibiting, generally, marriage of divorced persons for a specified time. Both declare the public policy of the state. The construction which we make, and which is clearly authorized by reason and

authority, gives effect to both statutes and invalidates neither in whole or in part. It is urged that if a marriage within the year is upheld, and thereafter the former divorce should be vacated, there would be two valid marriages, thus permitting bigamy or polygamy in contravention of law and the exceptions of the general provisions of said section 4165. Such cannot be the result.

[10] If the decree of divorce should be vacated and the former marriage status reinstated, the second marriage becomes *ipso facto* void in this state, not because of anything existing in the statute under consideration, but because the former marriage relation has been duly declared not dissolved. The same condition would have existed before the statutory provision was enacted, and still is possible as to marriages after expiration of the prohibited time in case of a reversal of said decree upon appeal or review. By reason of the statute, and the strong preponderance of authority holding that marriages contracted outside the state are valid here, many such contracts have been entered into in good faith, not for the purpose of violating law, but for the purpose of making valid marriages, and we think much greater harm is likely to arise by declaring such marriages invalid than by adhering to the construction generally given to such statutes. As was said in the *Estate of Wood*, *supra*: "An opposite conclusion to that declared by the court would nullify hundreds of marriages, place the stamp of illegitimacy upon scores of children, and change the source of title to great property interests. Unless the law plainly points to that end, such a conclusion should not be declared, and, as the court views the law, it is not plainly to that end, but plainly to the contrary." If the law as herein declared need be changed, or modified, the remedy is with the Legislature. As was said by the Supreme Court of Massachusetts in 1829, in *Putnam v. Putnam*, 8 Pick. (Mass.) 433, speaking through Parker, chief justice, upon a similar declaration of the law: "If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the Legislature will explicitly enact that marriages contracted within another state, which if entered into here would be void, shall have no force within this commonwealth. But it is a subject which, whenever taken into consideration, will be found to require the exercise of the highest wisdom." And it is worthy of note that the Legislatures of Massachusetts, Kansas, and other states have provided remedies by explicit declarations of nullity, incapacity to contract, or suspending the operation of the decree for the prohibitive period, and making the prohibition expressly applicable to contracts of marriage without the state as well as within.

To summarize: (1) The marriage contract

in question was valid under the laws of New Mexico, and therefore is valid in this state by virtue of express provision contained in section 4165 above quoted. (2) The provisions of section 2122, prohibiting remarriage within one year from date of divorce, have no extraterritorial effect, do not suspend the operation of the decree dissolving the bonds of matrimony, and do not affect the marriage contracted in New Mexico, nor in any manner repeal or amend said section 4165.

For the reasons given, the judgment is affirmed.

#### MISSOURI PAC. RY. CO. v. ATKINSON.

(Court of Appeals of Colorado. Jan. 13, 1913.)

##### 1. PLEADING (§ 248\*) — AMENDMENT — NEW CAUSE OF ACTION.

Under Mills' Ann. Code, § 75 (Code Civ. Proc. § 81), authorizing amendments, it was permissible, in an action for injuries from an automobile accident due to an obstruction of a public highway, to permit a portion of the complaint, after sufficient notice and cause shown, to be amended to read that the defendant wrongfully, "wantonly, willfully, recklessly, intentionally" and negligently obstructed the highway, by inserting the quoted words; such amendment not necessarily stating an entirely different and new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.\*]

##### 2. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO CASE.

It was reversible error for the court to try such case upon the theory that the amended complaint stated a cause of action to which contributory negligence would be a defense, and also stated a cause based entirely upon willful and intentional acts to which such defense would not lie, and then take from the jury, or to fail to properly submit to them, the question of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

##### 3. HIGHWAYS (§ 68\*)—OBSTRUCTION—ACTION FOR INJURIES — ESTABLISHMENT OF HIGHWAYS—PRESUMPTION.

Where, in an action for injuries from the obstruction of a public highway, the validity of the proceedings establishing the highway are involved only incidentally, every reasonable presumption should be indulged in favor of such validity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 226-233; Dec. Dig. § 68.\*]

##### 4. HIGHWAYS (§ 68\*)—OBSTRUCTION—ACTION FOR INJURIES — ESTABLISHMENT OF HIGHWAY—PLEADING AND PROOF—COLLATERAL ATTACK.

Where the answer, in an action for damages from the obstruction of a public highway alleged to be duly established, is a general denial, the plaintiff need prove only such facts as show the commissioners had jurisdiction of the subject-matter and of the parties; but when he introduces the entire record in proof of the establishment of the highway as basis of recovery the defendant may collaterally attack such proof.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 226-233; Dec. Dig. § 68.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. HIGHWAYS (§ 63\*)—OBSTRUCTION—PROOF OF ESTABLISHMENT OF HIGHWAY.**

Where the jurisdiction of the commissioners to establish a public highway is once established, the further proceedings will be construed liberally on collateral attack; and a substantial compliance with the statute will be sufficient.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168; Dec. Dig. § 63.\*]

**6. HIGHWAYS (§ 68\*)—OBSTRUCTION—ACTION FOR INJURIES—EVIDENCE.**

Where the complaint states a cause of action for injuries from the wrongful obstruction of a "public highway," and the instructions follow this theory, evidence tending to prove long user of the road by the public, as licensees, should be excluded, unless the complaint be amended in accordance with such evidence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 228-233; Dec. Dig. § 68.\*]

**7. HIGHWAYS (§ 213\*)—OBSTRUCTION—ACTION FOR INJURIES—QUESTION FOR JURY.**

In an action for injuries from the obstruction of a public highway, a question in issue, whether defendant's acts amounted to a wanton, willful, or reckless disregard of the rights of others, was for the jury; and failure to definitely and specifically submit such question was error.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 535; Dec. Dig. § 213.\*]

Appeal from District Court, Otero County; O. S. Essex, Judge.

Action by James L. Atkinson against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. H. Devine, of Pueblo, Henry A. Dubbs, of Denver, and J. W. Preston and Henry C. Vidal, both of Pueblo, for appellant. Fred A. Sabin, of La Junta, for appellee.

MORGAN, J. Appellee recovered a judgment for \$2,000, on the verdict of a jury, against the appellant in the district court of Otero county for injuries sustained on account of driving his automobile into a barbed wire fence that was built by the appellant across what the appellee states in his complaint to be a public highway.

Fifty-six assignments of error are discussed by the appellant under four general divisions, which will be considered in the order presented.

[1, 2] 1. Appellee was permitted to amend his complaint by inserting the words "wantonly, willfully, recklessly, and intentionally," thus making that part of it, when so amended, read as follows: "The defendant, through its agents, servants and employees, wrongfully, wantonly, willfully, recklessly, intentionally, and negligently built, and caused to be built, an obstruction across and upon a certain public highway." This amendment was permissible under section 75, Mills' Ann. Code (Code, § 81, Rev. Stat. 1908), as it appears from the record that notice was given and a sufficient cause shown to satisfy the discretion of the trial court; and such amendment did not necessarily state an entirely different and new cause of action. However, if such amendment be construed,

as the lower court seems to have construed it, to change the cause of action so as to make it one for intentional injury such as would prevent any defense on the ground of contributory negligence, and thus make the cause of action one based entirely upon the willful and intentional acts of defendant, without reference to acts of pure negligence, then such amendment should be made as an additional cause of action, in order that the defendant might not be deprived of its right to plead contributory negligence as a defense to the complaint as it stood before the amendment was made. If the plaintiff wished to stand upon his complaint as amended, then a defense of contributory negligence would be obnoxious on demurrer to it, but the plaintiff would then be required to make out his case by proof of willful and intentional acts alone, aside from negligence pure and simple. If two separate statements were made, then the defendant could plead contributory negligence to the one relying on simple negligence, and a general denial to the one based upon willful and intentional acts. There may be some cases, and a case may arise where a recovery has been or may be allowed for a willful and negligent act, wherein the rule of the "last clear chance" is not involved, as intimated in 2 Cooley on Torts, p. 1442, and in Highland Ave. & Belt R. R. Co. v. Robbins, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153; but this bridge may be in a better condition for passage when it becomes necessary to cross it. It is sufficient to say that it was reversible error for the lower court to try the case upon both theories of the complaint, and then to take the question of contributory negligence, by its instructions, from the consideration of the jury, or fail to instruct them that contributory negligence would be a defense if they should find that the acts of the defendant were not wanton, willful, reckless, and intentional.

[3] 2. The next contention is that, as the plaintiff alleged in his complaint "that said highway \* \* \* has for many years been a duly laid out and open public highway dedicated to and used by the public as such for the purposes of travel; that said obstruction consisted of a fence built of four barbed wires nailed to posts securely set in the ground directly and transversely across said highway from side to side"—he should prove such fact as alleged, and that he failed to do so, and therefore the case should be reversed. He introduced all the proceedings of the board of county commissioners, and some other evidence, in order to prove this fact, and contends that such proof shows that the statute was substantially complied with by the board of county commissioners in establishing the same. In a case of this character, where the validity of the proceedings to establish a public highway is an incident of proof, rather than the cause of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

action involved, every reasonable presumption should be indulged in favor of such validity. *Chicago & Atl. Ry. Co. v. Sutton*, 180 Ind. 405, 30 N. E. 291; *Boulder Co. v. Briery*, 39 Colo. 99, 88 Pac. 859.

[4, 5] Furthermore, where an action is for damages resulting from an obstruction of a public highway alleged to be duly laid out and used as such, and the answer is a general denial only, the plaintiff is required to prove only such facts as show that the commissioners had jurisdiction of the subject-matter and of the parties to the proceeding; but when he introduces the entire record in proof of such allegation in his complaint as an instrument of evidence and as a basis of recovery, the defendant may attack such proof as being insufficient in the premises, although such attack be collateral. *Thatcher v. Crisman*, 6 Colo. App. 49, 54, 39 Pac. 887; *Van Fleet on Collateral Attack*, c. 1, § 12 et seq. Nevertheless, when jurisdiction is once shown, the courts will construe further proceedings with liberality; and a substantial compliance with the statute in such cases will be held sufficient. *Howard v. Dakota County*, 25 Neb. 229, 41 N. W. 185; *State v. Smith*, 100 N. O. 550, 6 S. E. 251; *Thatcher v. Crisman*, *supra*. However, an inspection of the evidence introduced by the plaintiff makes it very doubtful that there was a substantial compliance with the statute, sufficient to give the board of county commissioners in this instance jurisdiction, and construing the further proceedings with the utmost liberality the same doubt exists. Under the authorities the evidence was insufficient, especially concerning residence of ten freeholders within two miles of the proposed road, the notice given by the viewers, the change from the route as described in the petition, and the absence of anything in the proceedings concerning the laying out of the road over the land owned by or held for the defendant, where the accident occurred. Another trial may develop further evidence or additional grounds of recovery.

[6] The complaint states a cause of action against the wrongful obstruction of a public highway, and the court in its instructions followed this theory of the complaint. And while the court, by its remarks at the trial, indicated that it made no difference whether it was a public highway or not, as the plaintiff could recover as a licensee, such remarks were not warranted by the allegations of the complaint nor remembered in the instructions, and no amendment of the complaint was requested or made in compliance with such theory. All evidence admitted tending to prove long user of the road by the public, as licensees, should have been excluded, unless the complaint had been amended in accordance with such testimony. If the action had been tried on this theory by counsel on both sides, and the court had so instructed the jury, it could be held that no amendment was required.

[7] 8. It is extremely doubtful if the facts of this case could ever be brought within the rule that excludes the defense of contributory negligence of the party injured, in causes based upon the willful and intentional acts of the injuring party; however, the jury should have been instructed in plain and specific terms that they should consider the defense of contributory negligence, in case they should find that the acts of the defendant were not willful and intentional, or in reckless disregard of the rights of others. It was not wholly for the court to say that the defendant's acts were not such as to amount to wantonness, willfulness, or a reckless disregard of the rights of others, but an issue of fact to be settled by the jury, as well as the issues of negligence and contributory negligence.

It was not prejudicial error to try the case with both simple and willful negligence relied upon as stated in the complaint, if the court had not practically taken from the jury all consideration of the issue of contributory negligence; and, while all the members of this court are not in entire accord as to whether such consideration was wholly withdrawn from the jury, all concur in the conclusion that the defendant was entitled to a more definite and specific submission thereof.

It must be true, as discussed in the first paragraph of this opinion, that if the issue of contributory negligence be wholly withdrawn from the jury, then the plaintiff must recover wholly upon the issue of willfulness or wantonness, or acts showing a reckless disregard of the rights of others; and under such issue the question of simple negligence of defendant, as an issue, should be eliminated, except as it may be used in the instructions given to better understand them. But if both issues be submitted, then an instruction must be given clearly submitting and defining contributory negligence, to meet the contingency, if the jury should find no willfulness, wantonness, or reckless disregard of the rights of others.

4. Upon another trial the testimony of the witnesses as to how long the road had been traveled, and whether it was a regular public thoroughfare, and as to the taking down and reconstruction of the fence, if offered, may be confined within the issues as they may be joined, and admitted or excluded under proper instructions to the jury; and it will not be necessary to indicate in this opinion the way in which this may be done. For the reasons that the proof of the public highway was not entirely satisfactory to the view of some of my Associates, and because of the failure to exclude the evidence of public user, some of which was even hearsay in character, and because some of the instructions were faulty, as hereinbefore indicated, it becomes necessary, under the law, that the judgment be reversed and the cause remanded, with the direction that the plead-

ings may be amended and the issues made up as the parties may be advised.

Reversed and remanded.

**MISSOURI PAC. RY. CO. v. LEIB.**

(Court of Appeals of Colorado. Jan. 13, 1913.)

**INFANTS (§ 88\*) — ACTION — PARTIES — SUBSTITUTION.**

Where the complaint, in an action by the father of a girl injured in an automobile accident due to an obstruction of the public highway, claimed only such damages as could be recovered by the daughter, the court, upon the daughter's becoming of age pending the action, properly permitted her name to be substituted for that of her father.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 253, 254; Dec. Dig. § 88.\*]

Appeal from District Court, Otero County; C. S. Essex, Judge.

Action by Corinne Leib against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. H. Devine, of Pueblo, Henry A. Dubbs, of Denver, and H. C. Vidal and J. W. Preston, both of Pueblo, for appellant. Fred A. Sablin, of La Junta, for appellee.

**MORGAN, J.** Appellee was one of the automobile party in Missouri Pacific Railway Co. v. Atkinson, 129 Pac. 566, just decided, and as that case is reversed and remanded on account of errors concerning the issues, the proof, and the instructions involving the public highway, all of which appear in this case, the judgment herein, for such errors, is reversed and the cause remanded, with the same directions. There are two questions discussed on this appeal, however, which are not involved in the other case that should be disposed of in view of another trial.

1. The lower court permitted the name of Corinne Leib to be substituted for that of her father, in whose name the action was pending until she became old enough to maintain the action in her own name. This was not error, as it appears in the complaint that the action was for such damages only as could be recovered by the daughter; and, while the complaint should have contained apt language that the father sued as next friend or natural guardian, the court was nevertheless justified in permitting the substitution.

2. Concerning the contention that the jury should have been instructed that, "if they believed from the evidence that the driver's negligence was the proximate cause of the injury, the plaintiff could not recover," the opinion in the case of Denver City Tramway Co. v. Armstrong, 21 Colo. App. 640, 123 Pac. 136, recently decided by this court, will serve as a sufficient guide, on another trial, to both court and counsel.

Reversed and remanded.

**WEBSTER et al. v. HEGINBOTHAM.**

(Court of Appeals of Colorado. May 13, 1912.

On Rehearing, Jan. 13, 1913.)

**1. PROCESS (§ 111\*)—SERVICE BY PUBLICATION—COLLATERAL ATTACK.**

The provision of Civ. Code, § 45, permitting service by publication, is made from necessity, and the legal presumption that such publication has come to defendant's notice is not open to collateral attack, and thereafter the jurisdiction of the court to hear and determine the cause is as complete as in other cases of default after service.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 138, 139; Dec. Dig. § 111.\*]

**2. PROCESS (§ 111\*)—HARMLESS ERROR—PROCESS—CODE PROVISIONS.**

The Code provision that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, applies to a proceeding in which the court takes jurisdiction upon service by publication.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 138, 139; Dec. Dig. § 111.\*]

**3. NAMES (§ 16\*)—IDEM SONANS.**

The names "Monson" (pronounced as if spelled "Munson") and "Munson" are idem sonantia, and the variance is immaterial; not being such as to tend at least to mislead the opposite party, to his prejudice.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. §§ 4, 12-14; Dec. Dig. § 16.\*]

**4. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN.**

The initials being the same, the middle name in the suit and judgment being that by which defendant was actually known, and the identity of "John F. Monson," patentee, with "J. Fred Munson," defendant in the suit, being established by evidence, a service by publication of notice to "J. Fred Munson" was as good as notice to "John F. Monson," so that judgment therein was binding on him.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.\*]

**5. NAMES (§ 16\*)—IDENTITY—LIS PENDENS AS NOTICE.**

A lis pendens or notice of suit against "J. Fred Munson," duly recorded, containing a description of the land in suit, and complying in all respects with the statutory provisions, was constructive notice of the suit to a subsequent purchaser from "John F. Monson."

[Ed. Note.—For other cases, see *Names*, Cent. Dig. §§ 4, 12-14; Dec. Dig. § 16.\*]

On Rehearing.

**6. QUIETING TITLE (§ 27\*)—NATURE OF ACTION—STATUTES.**

The statutory action to quiet title is an action quasi in rem.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 61; Dec. Dig. § 27.\*]

Appeal from District Court, Phillips County; H. P. Burke, Judge.

Action by W. E. Heginbotham against B. M. Webster and others, with cross-complaint by defendant Webster. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to vacate the judgment in favor of plaintiff, and to enter judgment in favor of defendant Webster, quieting title as prayed for in his cross-complaint.

Allen & Webster, of Denver, for appellants. Munson & Munson, of Sterling, for appellee.

KING, J. This was a statutory proceeding by appellee to quiet title to certain lands in Phillips county, Colo. The complaint was in the usual form, alleging title and possession in plaintiff and adverse claim by the defendants. For answer the defendant B. M. Webster (1) denied all allegations of the complaint except his adverse claim to the premises; (2) pleaded as an estoppel, and as an adjudication of the title, a judgment and decree of the county court of Phillips county in his favor, rendered May 8, 1906, in a suit to quiet title in which he was plaintiff and J. Fred Munson (and others whose names it is not necessary to mention) were defendants, alleged that notice of the pendency of said action was filed for record in the office of the county clerk and recorder of said county at the time of the commencement of said suit, to wit, November 23, 1905, and that plaintiff in this case has no interest in said premises except as derived from the said J. Fred Munson; (3) title under a treasurer's tax deed. Defendant asked that his own title be quieted. For reply plaintiff admitted the judgment and the filing of the notice of suit pending, but alleged that the judgment was null and void, and the notice of no force or effect. The cause was tried to the court without a jury, and judgment rendered in favor of the plaintiff.

Plaintiff deraigned title by patent from the government to "John F. Monson" dated August 5, 1890, and recorded March 27, 1907, and a quitclaim deed from said "John F. Monson" to plaintiff, dated and executed in Arkansas May 7, 1906, and recorded July 25, 1906. No attempt was made to prove possession. Defendants offered in evidence the judgment roll of a case in the county court entitled "B. M. Webster v. J. Fred Munson et al.," consisting of complaint, summons, and return thereon after 10 days that after diligent search the defendant could not be found, affidavit for publication, proof of publication and decree, in regular form and in full compliance with the provisions of the Code relative to publication of summons and proof thereof, supported by the testimony of a witness that he had known the land, title to which was in dispute, for many years; that it had been occupied and owned by a man whose full name was "John Fred Monson," but who was commonly known as "Fred Munson"; that the surname of said person was spelled "M-o-n-s-o-n," but pronounced as if it were spelled "M-u-n-s-o-n." Plaintiff objected to the admission of the judgment roll, assigning as reason that the parties to the proceedings were not the same, but a different party, both as to the initials and the surname, to wit, that the patentee was named "John F. Monson," while the defendant in the proceedings under consideration was "J. Fred Munson," and that service upon said "John F. Monson" had not been obtained by the publication; also that the affidavit of publication showed that the name

"J. Fred Munson" had not been properly published, but there were two affidavits of publication, one of which showed no error. The objections were overruled, and the judgment roll admitted. The *lis pendens* notice was offered and received in evidence without objection. This notice was in the usual and regular form, as provided by the Code, describing the plaintiff, and the defendant in that case (J. Fred Munson), with a full description of the land in litigation. The evidence showed that aside from the patent and quitclaim deed heretofore mentioned, both of which were recorded long after the decree pleaded as an estoppel, there was no record title to the land in the name of "John F. Monson." The trial court seems to have rendered judgment upon the theory that although the evidence had established the identity of the patentee with the defendant in the judgment pleaded, and that the service by publication was sufficient as against said defendant, yet, inasmuch as no showing had been made that the plaintiff in this case had knowledge of the different pronunciations of the name "Monson," he was not bound nor affected by the recorded notice of suit pending, nor charged with knowledge or notice that the action against the defendant in that case was in reality an action against the patentee from whom he derived title by quitclaim deed, and thereupon held the proceedings in the county court and the notice of suit pending a nullity as to the plaintiff in this case, and that proof of actual possession was unnecessary.

1. From the foregoing statement it is apparent that the judgment appealed from must stand or fall according to the effect to be given to the judgment against "J. Fred Munson" under service of summons by publication, and to the notice of *lis pendens*; that is to say, whether, if the proceedings were regular in every respect, such judgment and notice were binding upon "John F. Monson" and his assignee.

[1, 2] Substituted service by publication is permitted only where personal service cannot be made, and in certain classes of cases wherein specific property is to be affected, or the procedure is such as is known as a proceeding in rem, Civil Code (Rev. Stats. 1908) § 45. Provision for such service is made from necessity. The actual or natural presumption that the defendant, usually a non-resident of the state, will see the published notice, is not very strong, nor the probability great; but the legal presumption that it has come to his notice, or, in other words, that he has been regularly served with summons, is conclusive as against collateral attack, in case all requirements of the Code have been complied with, and thereafter the jurisdiction of the court to hear and determine the cause is as full and complete as in other cases of default after service, and that part of the Code which says, "The court

shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect," is applicable. In this case the court found, and the record shows, that the judgment pleaded as an estoppel was based not only upon substantial but technical compliance with the provisions of the Code relative to service of summons by publication, so that as to the defendant "J. Fred Munson," as well as to any one claiming by, through, or under him, the judgment was both valid and binding; and also that by reason of the record of the notice of suit pending, as provided by the Code, the effect of the judgment upon the purchaser or privy related back to the date of the filing of such notice for record in the office of the county clerk and recorder, if such notice was sufficient and effective to charge him with constructive notice of the suit affecting title to the property described in the complaint. As has been heretofore stated, the record notice contained a complete description of the land, the name of the defendant as in the complaint, and all other matters required by the Code, and was therefore notice that the title to this particular land was in litigation as against "J. Fred Munson."

[3] 2. There is good reason and abundant authority for holding, as we do, that the names "Monson" and "Munson" are idem sonantia, and the variation in orthography is immaterial and the objection trivial. The modern doctrine seems to be, and ought to be, that variant orthography must be such as to tend at least to mislead the opposite party, to his prejudice. As illustrating the doctrine of idem sonans, we cite the following instances wherein names have been held to be idem sonantia: "Bosse" and "Busse" in *Ogden et al. v. Bosse*, 86 Tex. 336, 24 S. W. 798; "Bubb" and "Bobb" in *Myer v. Feagly*, 39 Pa. 429, 80 Am. Dec. 534; "Forris" and "Farris" in *Lynne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; "Herman" and "Harman" in *Kahn v. Herman*, 3 Ga. 206; "Johnston" and "Johnson" in *Bank v. Kuhnle*, 50 Kan. 420, 31 Pac. 1057. A large number of similar cases are collected in 29 Cyc. p. 272.

[4] Further difficulty is found in this case because of the difference between the Christian name and the middle name as given in the patent, and as written in the judgment and proceedings leading thereto. It will be observed, however, that the initials are the same; that the middle name as in the judgment and proceedings is correct; and that by which he was known. The identity of the patentee of the land with the defendant in the suit is established by the evidence. There was no record evidence that the defendant's name was other than that by which he was commonly known. The object of the publication of summons is to give

notice to the defendant of a suit pending, and of its purpose. It must be evident to every person that a published notice, using the name by which the defendant is commonly known in the community, will as readily attract his attention as if his real name were used, particularly where the initials are the same; and that the use of the name as commonly known will much more readily and probably attract the attention of his acquaintances and friends by whom information might be communicated to him than if the publication had been by his real name by which he was not commonly known. *Whitney v. Masemore*, 75 Kan. 522, 89 Pac. 914, 11 L. R. A. (N. S.) 676, 121 Am. St. Rep. 442. Therefore, so far as service by publication is concerned, as against the patentee, the grantor of plaintiff in this proceeding, the service should be held good, and the judgment thereon binding as against him. We are well aware that respectable authorities hold that in substituted service by publication the name of the defendant must not only be exact as to orthography, but must contain the full Christian name. With these authorities, however, we are not in accord, and therefore will not follow them, but believe that under modern conditions the better rule is expressed by the Supreme Court of Kansas in *Ferguson v. Smith et al.*, 10 Kan. 396, in which it was said: "The papers do not give the full Christian names of all the parties, but give the initial letters thereof only. This we think is sufficient. The reason upon which a different rule was once founded in England has never existed in this state. And, when the reason for the rule has ceased, the rule itself should cease."

\* \* \* The full Christian name is now seldom written anywhere. Search the records of our courts, our statutes, the lists of members of the Legislature, election returns, written contracts, and other written instruments, newspapers, etc., and everywhere it will be found that as a rule the initials only of the Christian name are used. \* \* \* In consideration of the almost universal custom of using the initial letters only of the Christian name, it is our opinion that no written instrument can at the present time be regarded as a nullity simply because the Christian name of some person mentioned therein has not been written in full."

[5] 3. Plaintiff in this case did not receive his deed for the land until after the judgment quieting title as against his grantor was rendered. At that time the notice of suit pending was, and for more than five months had been, on file and of record in the office of the county clerk, and was constructive notice to plaintiff herein that this land was in litigation upon a suit to quiet title thereto in B. M. Webster as against J. Fred Monson. If he had examined the record, or had it examined, it would have been found that the suit was against a man whose



surname was *idem sonans* with that of the person from whom he was contemplating purchase, whose initials were the same; that "J.," the initial of the Christian name, might well stand for "John." And upon slight investigation he would have found that the name "Fred" was not only his real middle name, but also that by which he was commonly known. And further inquiry must have readily disclosed that the person named in the said recorded notice was the person who had owned and occupied the land in litigation. Notwithstanding the conditions revealed by the evidence in this case, the plaintiff failed to introduce any evidence to show that he did not have actual notice or knowledge that the person named in the summons, the decree, and the *lis pendens* notice was the same person with whom he was negotiating for the purchase of the land; nor that he had examined the record and was deceived or misled by the slight difference in the names mentioned. Sounding an alarm gives no warning to a person who stops his ears, nor visual signal to him who closes his eyes. The law only contemplates that the warning shall be given, and, if it is such as the law requires, the ordinary and usual effect thereof will be presumed. While many of the ancient and some recent authorities hold that to constitute notice the name must be exact and in full, it will be observed that, according to these same authorities, a man might be indicted for crime, tried, condemned and executed in his nickname, or any other name by which he was commonly known, but it was not so when the sacred rights of property were involved, for in such case it was conclusively presumed that a defendant had a full Christian name until otherwise disclosed by the evidence. But rulings of this kind are rapidly passing with the reasons therefor. We think the distinction made in *Cruzen v. Stephens*, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549, wherein it was said that notice directed to Etta R. Fisher and ——— Fisher, her husband, was a sufficient description plainly to indicate his identity, and good as against a collateral attack, is applicable to the circumstances here shown. The name as given in the judgment and in the notice herein was sufficient to indicate identity to a person of ordinary prudence and caution. In *Jenny v. Zehnder*, 101 Pa. 296, it was held that the name "Fred Zehnder" in the index of a judgment was sufficient notice to put a purchaser on inquiry as to judgment liens against "John Jacob Frederick Zehnder." In *Burns v. Ross*, 215 Pa. 293, 64 Atl. 526, 7 L. R. A. (N. S.) 415, 114 Am. St. Rep. 963, it was held that a docket entry against one whose Christian name is "Francis," if indexed in the name of "Frank,"

charges a prospective purchaser from the judgment debtor's heirs with notice of the existence of the judgment, and that a docket entry indexed "D. J. Murphy" would be notice to purchasers that it might be a lien against property owned by "Daniel J. Murphy," and cites the case of *Jones' Estate*, 27 Pa. 336, in which it was held that a judgment docketed against "A. Jones" was notice of a lien on property in the name of "Abel Jones," the court saying: "A description of persons by the names by which they are commonly known is sufficient in pleading, either criminal or civil."

For the reasons stated, plaintiff is charged with constructive notice of the pendency of said action, and bound by the judgment therein against his grantor. In arriving at this conclusion we have not overlooked nor failed to consider the fundamental distinction between personal service and substituted service by publication of summons. An examination of numerous cases has shown that, as said by the Supreme Court of Iowa (*Hubner v. Reickhoff*, 103 Iowa, 368, 72 N. W. 540, 64 Am. St. Rep. 191), variance in orthography in names has been held fatal, or otherwise, as the facts of the case would warrant, having in view safety in the application of the rule, and just results. We have no doubt as to just results being accomplished by our decision, and, having in view safety in the application of the rule here applied, we add that it should not be extended beyond the facts as disclosed by the evidence. The judgment of the district court is reversed, and the cause remanded, with directions to vacate the judgment in favor of plaintiff and enter judgment in favor of the defendant B. M. Webster quieting title as prayed for in his cross-complaint.

Reversed and remanded.

#### On Rehearing.

Petition for rehearing was granted because of the claim therein made that this court, upon reversal of the judgment of the trial court, should not have directed judgment for the appellant. The arguments upon rehearing were addressed to other matters—in fact to every other—than that claim.

[8] We are confirmed in our view that in our statutory action to quiet title, which is at least quasi in rem, publication of summons containing accurate description of the property, together with the name of the defendant as he was commonly known to himself, as well as by his acquaintances and friends, as in this case, was good notice and service as to him; and that the recorded notice of suit pending by like description of property and defendant, was sufficient to charge a subsequent purchaser with notice. We adhere to the former opinion.

PEARSON v. NORTHERN PAC. RY. CO.  
(Supreme Court of Washington. Jan. 28,  
1913.)

MASTER AND SERVANT (§ 278\*)—INJURIES TO  
SERVANT—RAILROADS—EVIDENCE.

Where, in an action for injuries to a railroad servant by defendant's alleged negligence in causing a train to collide with a string of box cars on which plaintiff was working, causing him to be thrown to the ground, there was no evidence that the train collided violently with the cars, or what it was that caused the cars to move, plaintiff could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Joe Pearson against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for appellant. Governor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, all of Tacoma, for respondent.

MORRIS, J. Respondent was injured while in the employ of appellant, and brought this action alleging that his injury was caused by the appellant causing a train "to collide violently" with a string of six box cars, standing upon a switch, and upon one of which he was at the time engaged in covering the roof with tar paper. The appeal is taken from a judgment following verdict in his favor.

The only question suggested by the appeal is insufficiency of the evidence to justify the verdict. It follows that, if there was any substantial evidence upon which the verdict can rest, it must be sustained. With this rule in mind, we have read the transcript of the testimony, and must hold that appellant's claim of error is well taken. There is no evidence, as alleged in the complaint, that a train collided violently with the string of box cars upon the switch, causing respondent to be thrown from the car upon which he was working. At the time of the accident, and about 5:30 p. m., respondent was on the roof of the fourth car in the string, placing the tar paper upon the roof. These six cars were upon a switch near Winlock, and were used by a bridge gang as living quarters; one of them being a tool car, another being used as a kitchen and dining car. It was a wet day, and the tar paper was covered with mica dust, making it slippery. Respondent was standing in a stooping position about the center of the car, trying to shove the paper under a tin plate surrounding the smoke stack, when, as he says, "the roof felt like it went out, and the next I knew they picked me up." His testimony then proceeds as follows: "Q.

What moved the cars? A. Something hit it. Q. What hit it? A. I didn't see. Q. What could hit it? A. The engine when kicking cars. Q. Could anything else hit it? A. No, sir; not to make it jar." He then says he saw no engine, nor heard any, and in response to the question, "How do you know an engine struck the cars?" he replied, "I could feel when I was standing that it went out, what I was standing on"; that the car moved "like it struck"; could not say "how hard it hit." There is no evidence in this testimony that a train "collided violently," or at all, with these box cars. Respondent heard no train; saw no train. The only reference to any collision is "that an engine kicking cars could hit the string of box cars." This is not positive testimony of any degree that any engine did collide with these box cars. To say an engine could do it is no proof that an engine did do it. When stripped of its opinion and conjecture, respondent's evidence goes no farther than that something hit the cars hard enough to throw him to the ground. What it was is not disclosed.

The respondent nor any other witness in his behalf testified to the presence of any engine near the scene of the accident, either before it happened or afterwards. It seems to us that, if the law does not require some evidence that an engine did do it, it would at least require some evidence that there was an engine working around there that could do it. But the evidence does not go that far. That respondent is only guessing at his engine theory is apparent from his answer to the question, "How do you know an engine struck the cars?" If there was any fact within his knowledge upon which to base his belief that it was an engine, it seems to us he would have given it in response to this question; but he answers it, "I could feel when I was standing that it went out, what I was standing on." This is nothing more than to say, because he fell off from the car upon which he was standing, or, using his own idiom, when what he was standing on went out from under him, he knew an engine had collided with the string of cars. We cannot see how one fact proves the other, or under what rule of law a jury should be permitted to say it does. A brother of respondent was painting in one of these box cars. He says: "Something hit the train and jarred it." He felt the shock; but it did not affect him and he paid no attention to it. It also appeared that respondent was using a crowbar, saw, hatchet, hammer, wood chisel, and knife in his work, and that some of these tools, the knife at least, were found upon the ground. That proves nothing save that the knife or other tools fell off. True, any jar sufficient to throw respondent off might cause the tools to fall. It would be equally true that respondent, losing his footing because

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the wet and slippery mica dust, might have pushed them off in his fall. One guess is as good as another; there was no proof of either.

When counsel for respondent, in seeking to establish his case, asked, "What could hit it?" and depended upon a reply that an engine switching cars could, he brought this case within the rule of *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit Co.*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; and other supporting cases,—where it has been said that it is not sufficient, in seeking to establish causes of injury, to show that there were causes which might have produced it, without showing that it could not have been produced in any other manner. In fact, respondent's case is not as strong as the plaintiff's case in any of those cited, for the reason that, while showing that an engine backing cars against this string of box cars could have produced a jar sufficient to cause him to lose his footing and fall, he failed to show that there was an engine doing such work, or to show any engine in that vicinity that could have done it. The jury was therefore left to speculation and conjecture to find a proximate cause for this injury which, in the language of Dunbar, J., in the *Armstrong Case*, "must not be confused with legitimate testimony," admitting that "it is true that the weight of the testimony is entirely for the jury."

We can see no escape from the conclusion that this case is controlled by the rule of the cited cases, and that, for the reasons here and there given, the court should have granted appellant's motion for judgment. These conclusions are strengthened by the testimony introduced by appellant, which it was not sought to dispute, that no switching had been done at this point that afternoon, and that, at the time of the accident, the switching engine and crew were "tied up" on a spur track near Winlock, some distance from the scene of the accident.

The judgment is reversed and remanded, with instructions to dismiss.

MOUNT, ELLIS, and MAIN, JJ., concur.

FULLERTON, J. (dissenting). The opinion of the majority proceeds upon the assumption that it was incumbent on the respondent not only to prove that something struck the car upon which he was working with sufficient force to throw him therefrom to the ground, but the particular something that struck the car. But such is not the rule. This burden was not upon the respondent. The appellant, as the respondent's employer, was obligated to furnish him with a reasonably safe place in which to work, and to keep

the place reasonably safe as long as the work continued. The respondent, therefore, made a prima facie case when he showed a violation of this obligation—when he showed that, while he was working on the top of the car in the manner directed by the appellant, something struck it, caused by no fault of his own, sufficiently hard to throw him therefrom to the ground. The burden of accounting for the accident is on the appellant. It is obligated to show that the striking of the car was caused by some act for which it is not responsible, if it is to be relieved from liability therefor. This is the necessary corollary of the rule which required it to keep the place of work furnished by it to the respondent reasonably safe.

I think, therefore, that this court errs in holding that the judgment is not sustained by the evidence.

#### DE KAY et ux. v. NORTH YAKIMA & V. RY. CO.

(Supreme Court of Washington. Jan. 24, 1913.)

##### 1. EMINENT DOMAIN (§ 276\*)—RIGHT TO COMPENSATION—DAMAGING PROPERTY.

Const. art. 1, § 16, providing that no private property shall be taken or damaged for public or private use without just compensation, will not authorize an injunction at the suit of a property owner, claiming his property was injured by the running of trains on a warehouse switch constructed on the company's land as a result of the smoke, noise, and vibration, to restrain the use of the track until the right to use it as against plaintiff is obtained by condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 774; Dec. Dig. § 276.\*]

##### 2. EMINENT DOMAIN (§ 276\*)—CONSTRUCTION OF TRACK—INJURY TO LOT OWNER.

The owner of a lot abutting on an alley, at a point about nine feet from which defendant's switch track crossed the alley under permission from the city council, would at most have only the right to have the track so constructed across the alley as not to interfere with the usual travel, and could not wholly enjoin its operation by virtue of his ownership.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 774; Dec. Dig. § 276.\*]

##### 3. RAILROADS (§ 49\*)—CONSTRUCTION—COMMERCIAL SIDE TRACKS—PRIVATE TRACKS.

Under Laws 1911, c. 117, § 13, requiring a railroad company, upon application of a shipper, to construct a switch connection with a private side track owned by the shipper, and provide upon its own property, on the shipper's application, a side track where the business justifies it, a railroad company could, with the city's consent, maintain a commercial side track for the exclusive use of a private shipper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 110-112, 226; Dec. Dig. § 49.\*]

Department 1. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

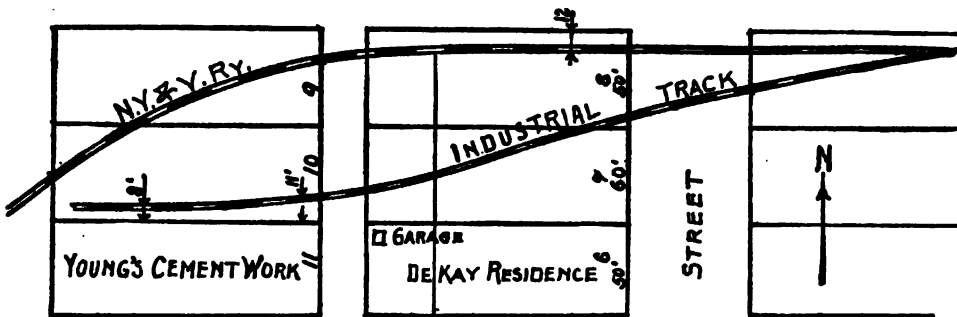
Suit by R. E. De Kay and wife against the North Yakima & Valley Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and action dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Englehart & Rigg, of North Yakima, for appellant. Holden & Shumate, of North Yakima, for respondents.

**PARKER, J.** The plaintiffs seek an injunction restraining the defendant from maintaining and using a spur track on its line of railway near their residence in the city of North Yakima until such time as the defendant shall acquire, as against the plaintiffs, the right to so maintain and use such spur track by eminent domain proceedings. From a decree in favor of the plaintiffs, the defendant has appealed.

The accompanying plat, which is a portion of one introduced in evidence, will aid in a correct understanding of the facts:



Respondents own lot 6 on which they maintain their residence, and also a garage on the northwest corner thereof. Appellant owns lots 7, 8, 9, and 10, on which it maintains its railway and also a spur track called "Industrial track." Benjamin Young owns lot 11, on which he maintains a manufacturing plant and a warehouse contiguous to appellant's industrial track. In June, 1911, when appellant commenced the construction of its industrial track upon the line indicated on the plat, respondents commenced this action. While they prayed for a temporary injunction, we assume from the record before us that none was issued. In any event, the industrial track was constructed some time before the trial of the cause upon the merits, which occurred in October, 1911. This track is used for a team track, at least as far as the alley, beyond which it appears to be used only for shipments to and from Young's warehouse. Before the trial, appellant had acquired from the city of North Yakima a franchise, giving it the right to construct its industrial track across the alley, which franchise provided: "That said track shall only be used to serve the warehouse to be constructed and maintained on lot 11." This track is about nine feet from the northwest corner of respondents' lot, about 35 feet from the north line of their lot at its middle point and about 50 feet from the northeast corner of their lot. Where the track crosses the alley, there is maintained a good plank crossing, so that travel through the alley is not interfered

with in the least, except while cars or engines may be crossing the alley.

Respondents rest their right to have appellant restrained from maintaining and using its industrial track in such close proximity to their property until it acquires the right so to do as against them by eminent domain proceedings, upon the damage which they allege results to their property from the smoke, fumes, and cinders emitted and cast upon their property from engines running upon the track, and also from noise and vibration caused by the running of cars and engines upon the track.

The nature and extent of this alleged damage is told in the testimony of respondent R. E. De Kay as follows:

"Q. Now, can you state what effect the running of trains on this spur track has on your property with reference to smoke? \* \* \* A. Why, we get smoke whenever they come in and the wind is right. Q. About how much smoke, Mr. De Kay? A. It is pretty hard to state. It varies in the amount according to how hard they work getting out. Q. Where are your bedrooms situated in this house? A. They are on the north side of the house. Q. Have you ever opened your bedroom window when a train was on that spur track, an engine? A. Why, we have them open, as a rule, all the time. Q. State to the court what the effect was with the window open. A. I think it was Tuesday or Wednesday night my wife and I were in the room, sitting there, when the switch engine came in. There was enough smoke came in to fill the bedroom with smoke. \* \* \* Q. Now, when did you say that was? A. Tuesday or Wednesday night, this week. Q. Have you noticed inconveniences from smoke on other occasions, Mr. De Kay? A. Yes, sir. Q. State what the facts are with reference to cinders. A. Well, there is more or less cinders. Of course we haven't noticed them so much as we have the smoke. They, as a rule, light on the ground or on the roof; considerable soot comes out with the smoke. Q. Have you noticed any soot in the rooms in your house? A. No, I don't know as I have. Q. Have you noticed any soot on the porch? A. Yes, I have noticed it around on the walks and clothes. \* \* \* Q. You do

some washing out home, do you, Mr. De Kay? A. Yes, some. Q. And hang it out on a line in the rear of the lot? A. Yes. Q. State what effect smoke and cinders have on the clothing. A. Well, I haven't noticed the effect, except that I have seen them on the clothes. \* \* \* Q. Now, do they run trains in there at night? A. As a rule most of their switching is done nights. Q. What effect does that have upon you? A. Why, the noise wakes us up, as a rule, every time they come in. Q. Have you noticed any jarring or vibration? A. Yes, sir. Q. To what extent have you noticed vibration, Mr. De Kay? A. Well, three or four occasions in the last month I have noticed it enough to jar the window sills. That is a sign the house is well built. If it was of a less substantial character, there would have been more of it. Q. Now, what effect, if any, does the noise at night have upon you and your family? \* \* \* A. As a rule, it wakes all of us up. Q. About how often do they run trains in there, Mr. De Kay? A. Most every day; most every night."

Respondent Gertrude De Kay testified, in part, as follows: "Q. Now you may state what effect the running of trains has upon you and your property with reference to smoke. \* \* \* A. Why, if the wind is toward the house the house is filled with smoke. A good deal depends upon the weather and the prevailing winds. Q. Well, what are the prevailing winds, Mrs. De Kay? A. Usually from the northwest. Q. That would have the effect, then, of driving the smoke towards your property? A. In our bedroom windows, in our north windows. Q. You say your bedroom windows open to the north next to the track? A. Yes, all of our sleeping rooms open to the north. Q. Can you recall any particular time, Mrs. De Kay, when you especially noticed smoke in your bedroom? A. Well, we heard the train coming, we sat at the window especially to notice so as to be sure just how the smoke came, and it came directly, was wafted into our bedroom window, and filled our room full of black smoke, not only that room, but our dining room and the parlor was filled. Q. Now, Mrs. De Kay, state what the facts are from the running of trains, what effect it has with reference to soot. A. Well, any clothing that is out— The porches are covered with fine soot, the window sills, and so forth; any clothing that is on the line is covered with soot. Q. State whether or not there is any soot found in your rooms. A. Yes, sir; in dusting I notice it every day. Q. Now what effect does the running of trains on the spur track have with reference to vibration? A. Well, the house vibrates, the windows shake, and we can notice it at night when we are lying in bed; we can notice the bed shake. Q. Do you notice any inconvenience from noises? A. Yes, sir."

We find no evidence in the record indicat-

ing any different or greater damage resulting to the property of respondents from the use of the industrial track than that shown by this testimony of the respondents. There is, however, some testimony of real estate men, showing the property to have a somewhat less market value because of the construction and use of the industrial track.

[1] It is evident, from the prayer of the complaint and the argument of counsel for respondents, that they are not proceeding upon the theory that the use of appellant's industrial track is attended by any negligence, nor that its operation creates a nuisance; but that appellant may acquire the right to so cause such damages as against respondents by eminent domain proceedings. They invoke the provision of section 16, art. 1, of our state Constitution, which reads: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner."

The question of the correct construction of this provision, in so far as there is involved the nature of the damage which is required to be compensated for, was given consideration and exhaustively reviewed by this court in *Smith v. St. Paul, etc., R. Co.*, 39 Wash. 355, 360, 362, 81 Pac. 840, 842 (70 L. R. A. 1018, 109 Am. St. Rep. 889). We said: "Applying to the constitutional provision in question the usual tests and rules, and having due consideration for the weight of judicial opinion, as we find it expressed by the courts that have passed upon this question, we are disposed to hold that the word 'damaged,' as used in our Constitution, does not give a right of action in a case where the injuries would have been, in the absence of said word, *damnum absque injuria* in an action against a natural person or private corporation. It would seem to be only reasonable to suppose that persons acquiring property in a thickly settled community must have anticipated the use of neighboring property in a manner not always to be agreeable and pleasant. A person buying property in a growing city must be presumed to have done so for the benefits to come to him by reason of being a property owner in such a city. The presence and operation of railroads are necessarily attendant upon the growth and prosperity of such a city as Spokane. Probably respondents would not have become property owners therein had it not been for the present and prospective railroad facilities of the city. As such purchasers and owners, they knew that more railways would be required as the city grew and became more important. The very growth and development which made city property, as a whole, more valuable, and opportunities for business prosperity greater, required the building and operation of more railway lines. No one could buy property in such a growing city without realizing that this would be a natural and necessary re-

sult. Where such new lines might be constructed, a person could not foretell. But he would know that they must be near other property, and that their operation, however legitimate and careful, must entail consequential injuries upon the owners of such nearby property. Electing to purchase property in such a community where his property might profit by the industrial and commercial activities of others, it is but just to hold that, with the advantages, he should also accept the burdens necessarily incidental thereto. \* \* \* The ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors are necessarily incidental to the proper operation of the road, and, when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by any one acquiring property in or about such a city, and are regarded as *damnum absque injuria*. The nature of the alleged damage there involved, aside from the question of negligence, was the same as that here involved. If it differed in degree, it was only because the track of the railway was not so near to the property claimed to be damaged as in this case. In both cases the track was maintained upon property belonging to the railway company, except in so far as the alley here involved is concerned. The doctrine of that case was reaffirmed in *Clute v. North Yakima & Valley Ry. Co.*, 62 Wash. 531, 114 Pac. 513. Except in so far as the alley crossing is concerned, it seems to us those decisions effectually dispose of the case in favor of appellant. The mere difference in the degree of injury resulting from the operation of the railway does not affect the principle involved. Difference of damages in kind, or damages flowing from negligence on the part of appellant, would present a different question. Some contention is made by counsel for respondents, rested upon the provision of the franchise restricting the use of the alley crossing to the service of the warehouse; the argument being that this is a grant for a private purpose, and is therefore void.

[2] It is manifest that respondents have no such special property interest in that portion of the alley upon which the crossing is situated as they have in that portion of the alley upon which their lot directly abuts. In *re Fifth Ave.*, 62 Wash. 218, 113 Pac. 762; *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886. The maintaining and use of a railway track in that portion of the alley upon which respondents' lot abuts would probably give them some ground for relief under our holding in *Lund v. Idaho & Wash. N. Ry.*, 50 Wash. 574, 97 Pac. 665, 128 Am. St. Rep. 916, but clearly that is not the question before us. In view of the close proximity of the crossing of the alley to respondents' lot, they possibly have the right to have the track so con-

structed across the alley at this point that the usual travel through the alley will not be obstructed or interfered with; but we are unable to see that their rights go beyond this, in any event. This being true, it may be well doubted that respondents are in any position to challenge the validity of the franchise ordinance. Indeed, it may well be doubted whether they would have any right to challenge the appellant's right to maintain this crossing, even though it were being maintained under a license created merely by sufferance on the part of the city.

[3] But, however that may be, it seems plain, under section 13, p. 548, Laws 1911, being a part of our Public Service Commission law, that the railway company has the right to maintain such a track by consent of the city, even though it be maintained for the exclusive use of a private shipper. There is, however, nothing in this franchise ordinance which indicates that this warehouse is to be a private warehouse for the accommodation of its owner alone as a shipper. Indeed, there is evidence in the record indicating that it is intended to be a warehouse for the use of the public.

We are of the opinion that the judgment of the learned superior court must be reversed and the action dismissed. It is so ordered.

GROW, C. J., and CHADWICK, GOSE, and MOUNT, JJ., concur.

SORENSEN v. CHRISTIANSEN et al.  
(Supreme Court of Washington. Jan. 29, 1913.)

SCHOOLS AND SCHOOL DISTRICTS (§ 65\*)—PURCHASING LAND FOR GYMNASIUM AND PLAYGROUND.

A school district can purchase land on which to erect a gymnasium and construct a playground for children of the district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 162-167; Dec. Dig. § 65.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by Samuel K. Sorenson against P. N. Christiansen and others. Judgment for plaintiff. Defendant Wm. D. Perkins & Co. appeals. Reversed and remanded, with instructions.

Kerr & McCord and J. N. Hamill, all of Seattle, for appellant.

FULLERTON, J. On December 9, 1911, a special meeting of the voters of school district No. 6 of Snohomish county was held, at which meeting the directors of the school district were directed to purchase certain specifically described tracts of land to be used by the children of such district "as a gymnasium and playground." Acting pur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—37

suant to the direction so given, the board of directors purchased the lots described from the owner thereof, taking title thereto in the name of the district, and issued to such owner two warrants aggregating \$550 drawn on the funds of the district in payment thereof. These warrants were duly presented to the county treasurer for payment, but the treasurer, conceiving that he had no funds applicable to their payment, indorsed them, as required by statute, and returned them to the holder. Subsequently the warrants were purchased by the appellant in the present action. After the purchase of the warrants by the appellant, this action was begun by the respondent to enjoin their payment. In his complaint, the respondent alleged, in substance, that the warrants were illegal and void for want of regularity in their issuance, and because issued as the purchase price of property acquired for a purpose not authorized by law. To the complaint the appellant answered, setting out in detail the proceedings leading up to the issuance of the warrants. To this answer a demurrer was interposed, which the trial court sustained. Subsequently a judgment was entered enjoining the payment of the warrants; the judgment being rested on the ground "that the action of said school district in purchasing said lots for the purposes aforesaid, and in issuing said warrants, was ultra vires and of no legal effect, and that said warrants were and are null and void." This appeal is prosecuted for the judgment so entered.

As the respondent has not favored us with a brief, and as the complaint does not specifically point out the objections to the school meeting at which the purchase of the land was directed, we are uncertain what constitutes the particular irregularity in the proceedings that is thought to render them void. We have examined the proceedings, nevertheless, in the light of the statute, and can find nothing therein which seems to us to justify the conclusion that they are either irregular or void. The notice of the meeting given by the clerk may not have been as full as could be made, but it is sufficient under the rule laid down in *Regan v. School District No. 25*, 44 Wash. 523, 87 Pac. 828, and *State ex rel. School District No. 56 v. Superior Ct.*, 69 Wash. 189, 124 Pac. 484.

The case last cited is conclusive, also, of the principal question in the case. We there held that school districts could exercise the power of eminent domain to acquire land for the use of school children as an athletic field and general playground; and certainly, if it be within the power of the school district to acquire land for these purposes by condemnation proceedings, it is within its powers to purchase land on which to erect a gymnasium and construct a playground.

The judgment appealed from will therefore be reversed and remanded, with instructions to the lower court to overrule the demurrer to the answer and proceed to a final determination of the cause.

MOUNT, ELLIS, MORRIS, and MAIN, JJ., concur.

#### DOLLAR v. NORTHWESTERN IMPROVEMENT CO.

(Supreme Court of Washington. Jan. 25, 1913.)

##### 1. MASTER AND SERVANT (§ 278\*)—INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for personal injuries from a gas explosion in a coal mine, held not to raise the issue of negligence in not providing sufficient air for ventilation.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

##### 2. EVIDENCE (§ 207\*)—ADMISSIONS OF COUNSEL.

A retort by defendant's counsel in an action for injuries to a miner by a gas explosion, made when interrupted by plaintiff's counsel, that the mine was a gaseous mine and gas was likely to come quickly in some parts of it did not amount to an admission that the mine was gaseous.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 707-712; Dec. Dig. § 207.\*]

##### 3. EVIDENCE (§ 265\*)—ADMISSIONS—EFFECT.

Any admission by defendant, in an action for injuries to a miner by a gas explosion, that the mine was a gaseous mine and that gas was likely to come quickly in some parts of it did not show the work in progress when the explosion occurred was "approaching" a place where an accumulation of explosive gases was likely, or that there was imminent danger therefrom, so as to require safety lamps under Rem. & Bal. Code, § 7400.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Anton Dollar against the Northwestern Improvement Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

C. H. Winders, of Seattle, for appellant. H. M. Ramey, Jr., of Seattle, for respondent.

MAIN, J. This is an action for damages for personal injuries. The respondent is a coal miner. The appellant is the operator of a coal mine at Ravensdale, Wash., known as mine No. 2. On April 25, 1911, at the hour of about 5:30 o'clock a. m., the respondent while at work in the mine, was injured by a minor gas explosion. His injury was painful but not permanent, and disabled him from work for a few weeks. The cause was tried before the court and a jury. At the conclusion of the respondent's evidence, the appellant challenged the legal sufficiency of the evidence and moved the court for a directed verdict. This being overruled, the ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

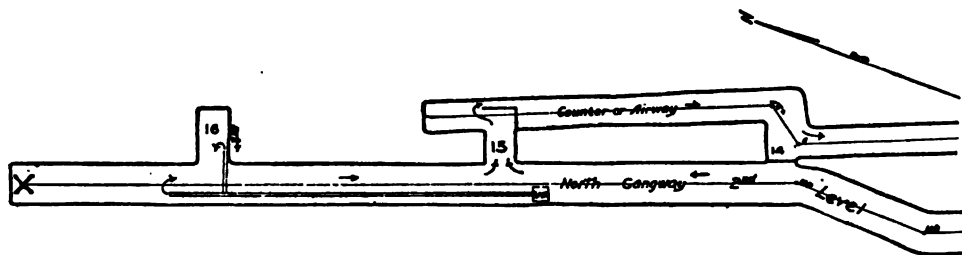
pellant introduced in evidence a diagram of the mine wherein the accident occurred, and rested, and again moved the court for a directed verdict, which motion being overruled, the case was submitted to the jury and a verdict returned for the respondent in the sum of \$550, upon which judgment was entered. Motion for judgment notwithstanding the verdict and a motion for new trial were made and overruled, from which the cause is brought here on appeal.

At the time of the accident, the level in mine No. 2 where the respondent was working was being developed. There was a gangway driven both north and south from the entry. The development work at the time was in extending the north gangway, driving an airway 50 feet above and parallel with it, and driving chutes connecting the gangway and the airway. This work was being carried on by the men working in three shifts; the first working from 7 a. m. to 3 p. m.; the second from 3 p. m. to 11 p. m.; and the third from 11 p. m. to 7 a. m. Two men on each shift were engaged in extending the gangway; one in extending the airway, and one the chute. The situation will be better understood by the examination of a diagram which was introduced in evidence and is set out herein.

chute back approximately six feet. At this time he left the face of the chute where he was working to go out into the gangway, and returned in from two to four minutes. Immediately upon his return, the explosion which caused the injury occurred. The respondent worked with an open light as did all the other men employed upon this work. There had been no gas at any time during the working of the three shifts. The air was good, and the first indication of the presence of gas was the explosion itself.

The respondent, in paragraphs 4, 5, and 6 of his complaint, as grounds of negligence on the part of the appellant, alleges: (1) Failure to provide a good and sufficient amount of ventilation; (2) that the air was not made to circulate through the shafts, levels, and working places of the mine; (3) failure to inspect on the day of the accident, or, if an inspection were made and gas discovered, failure to note that fact on the bulletin board at the mouth of the mine; and (4) failure to withdraw all workmen from the portion of the mine wherein the accident occurred.

In Rem. & Bal. Code, § 7381, it is provided that: "The owner, agent or operator of every coal mine, whether operated by shafts, slopes, or drifts, shall provide in every coal mine a good and sufficient amount of ven-



The respondent was working in chute 16. Two men were extending the gangway and were at the point indicated by the letter X upon the diagram. One was engaged in extending the airway. There was also a motorman, whose duty it was to drive the motor along the gangway. The air passed through the gangway until it reached the last open chute, and then through this chute into the airway, and through the airway out of the mine. The last chute being worked shown on the diagram as 16, as well as the extension of the gangway beyond the last open chute, was supplied with air by what is known as a "booster" fan, which is set in the gangway and picks up the main volume of air and throws the same into the last chute and to the end of the gangway.

The respondent was the only witness who testified as to the manner of the accident and the method of doing the development work. He went to work on the third shift on the night of April 24th, and worked in chute 16 from 11 p. m. until about 5:30 a. m., during which time he had driven this

tilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse, or mule employed in said mine, and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables, and working places of each mine and on the traveling roads to and from all such working places." It will be noticed that this section of the statute required: (1) That every coal mine shall have a good and sufficient ventilation; (2) the amount of air; and (3) that the air must be made to circulate. A careful reading of the record in this case demonstrates that there is no evidence supporting any of the above allegations of negligence in the complaint, or showing that the section of the statute above referred to had not been complied with, unless the answer of the respondent to a single question propounded to him by his counsel can be construed as evidence of negligence or of the neglect of duty imposed by the statute.



[1] On direct examination he testified, in effect, that, if there had been enough air, the gas would not have remained in the chute where he was working. This is not evidence of a fact, but is a mere conclusion, and does not even specify the amount of air which the witness would deem sufficient for the purpose. The amount of air necessary cannot be measured by the judgment of the witness, but must be determined by the requirements of the statute. We think this evidence is not sufficient to send the case to the jury upon any of the above allegations of negligence, or upon a failure to comply with the prescribed statutory duty.

Paragraph 7 of the respondent's complaint alleges: "That on said 25th day of April, 1911, plaintiff was working at a place in said level No. 2 at a point about 50 feet from the face thereof, and about 5 a. m. on the said date plaintiff had occasion to walk towards the face of said level, and, while so doing, the light carried by him ignited the gas collected in said level, causing an explosion and thereby inflicting upon the plaintiff the injuries hereinafter set forth. That on the day of said accident to plaintiff as aforesaid, upon going to work in said mine, plaintiff was not furnished with a safety lamp, and was advised by the defendant that the same was not necessary or required, and was informed by the defendant, through notices on said bulletin board, that said mine and the level on which he was to work were free from said gas. The plaintiff in no way contributed to the injuries sustained by reason of said accident." Rem. & Bal. Code, § 7400, provides: "In every working of a coal mine approaching any place where there is likely to be an accumulation of explosive gases, or in any working where there is imminent danger from explosive gases, no light, lamp, or fire other than a magnetic locked, air locked, or lead locked safety lamp shall be allowed or used, except by mine superintendents \* \* \* who may use such lamps as may be approved by the state mine inspector."

The appellant contends that, in paragraph 7 of the complaint, there is no allegation of negligence in the failure to require the use of a safety lamp, and that the allegation therein contained, referring to safety lamps, only goes to the effect of alleging that, on the day in question, the failure to furnish a safety lamp was an indication that the mine was not on that day gaseous. The complaint is not artfully drawn, but for the purposes of this decision we will assume, without deciding, that the allegation is sufficient. The question then arises, Did the defendant fail to furnish the plaintiff with a safety lamp as required by the statute? The measure of the appellant's duty is the statute. This court, in *Delaski v. Northwestern Improvement Co.*, 61 Wash. 255, 261, 112 Pac. 341, 344, said: "The provisions of

the statute measure the respondent's duty. The Legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence per se."

An inspection of the mine was made every morning before any of the men were permitted to enter it. If from this inspection it was discovered that the mine was gaseous, that fact would be noted on the bulletin board erected at the mouth of the mine. If the board was clear when the men went to work, it was in effect a declaration that the mine was free from gas. When the respondent entered the mine at the beginning of the third shift, on the night of April 24, 1911, the bulletin board was clear. As has already been stated, the men on all three shifts working in this level used open lights, and there was no indication of gases until the instant of the accident. The statute does not require the use of a safety lamp in all coal mines and at all events. But it does require the use of a safety lamp (1) in the working of every coal mine "approaching any place where there is likely to be an accumulation of explosive gases," or (2) in any working where there is imminent danger from explosive gases. There is no evidence in the record which shows that the development work then being prosecuted was approaching a place where there was likely to be an accumulation of explosive gases, or that there was imminent danger from explosive gases. But the respondent contends that the appellant admitted that this was a gaseous mine, and that this admission brings it within the statute.

[2] This contention is based upon a colloquy which took place during the trial between the counsel for the respective parties, while the respondent was under cross-examination. The appellant's counsel, being interrupted by counsel for the respondent, retorted in effect that it was a gaseous mine and gas was likely to come quickly in some parts of it. This retort, made in reply to a fortuitous interruption by opposing counsel, does not rise to the dignity of an admission.

[3] But, if it were assumed that it did, it still is qualified in such a way as to be of no avail to the respondent. The evidence in the case was therefore not sufficient to raise a question of fact to be presented to the jury. The motion for judgment, notwithstanding the verdict, should have been granted.

The case will be reversed and remanded, with direction to the superior court to enter a judgment for the appellant notwithstanding the verdict.

MOUNT, ELLIS, and MORRIS, JJ., concur.

**SILBON et ux. v. PACIFIC BREWING & MALTING CO.**

(Supreme Court of Washington. Jan. 29, 1913.)

**1. REFORMATION OF INSTRUMENTS (§ 17\*)—MISTAKE.**

Parties having attempted to put in writing an agreement actually entered into, but failed because of mistake of themselves or of the scrivener, the instrument may be reformed to express the true agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. § 17.\*]

**2. REFORMATION OF INSTRUMENTS (§ 31\*)—JURISDICTION.**

Reformation of an instrument for mistake may be had in any proceeding or action in a court having equitable jurisdiction, where a party to the agreement seeks to take advantage of the mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 118; Dec. Dig. § 31.\*]

**3. REFORMATION OF INSTRUMENTS (§ 23\*)—ESTOPPEL.**

A party is not estopped to have an instrument reformed for mistake, because, when it was presented to its agent for execution, he was somewhat negligent in failing to discover that it did not express the true agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.\*]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Gus Silbon and wife against the Pacific Brewing & Malting Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Geo. Saulsberry, of Seattle, for appellants. Burkey, O'Brien & Burkey, of Tacoma, for respondent.

**FULLERTON, J.** The appellants, who were plaintiffs below, brought this action against the respondent to recover the sum of \$420, alleged to be due under a certain written lease theretofore entered into between the parties. In the complaint it was alleged that the lease in question was entered into on March 15, 1911, and by its terms the appellants leased to the respondent certain premises owned by them, situated in the city of Tacoma, for a term of two years from and after April 1, 1911, at a monthly rental of \$160 per month payable in advance on the 1st day of each and every month during the term of the lease; the lease being further conditioned for the payment of \$100 as attorney's fees should the lessors or their agents institute proceedings in court to recover rents due thereunder. It was further alleged that the respondent entered into the possession of the property on April 1, 1911, and continued in possession thereafter under the lease, but failed and refused to pay rental for the first two months of the tenancy. The respondent in

its answer admitted the execution of the lease, but pleaded affirmatively that the same, by reason of a mutual mistake of the parties, did not express the actual agreement entered into between them, and asked that the lease be reformed so as to conform to such agreement, setting forth wherein the written lease did not conform to the lease actually entered into, and showing that under the lease as actually entered into there was nothing due to the appellants for the two months for which the appellants sought to recover. A reply to the answer was filed and a trial entered upon, wherein the respondent, over the objection of the appellants, was allowed to introduce evidence substantiating the allegations of its answer. At the conclusion of the trial, the court made findings in favor of the respondent and entered judgment reforming the lease, and denying to the appellants the right to recover.

[1, 2] The appellants first assign that the court erred in permitting the introduction of evidence tending to show a mutual mistake in the execution of the lease, contending that to do so was to permit the terms of a written instrument to be varied by a contemporaneous parol agreement. But it is among the acknowledged powers of the courts to reform written instruments under circumstances such as were shown here. Where there has been an agreement actually entered into which the parties have attempted to put in writing, but have failed because of a mistake either of themselves or of the scrivener, the courts having jurisdiction in matters of equitable cognizance have power to reform the instrument in such manner as to make it express the true agreement; and this in any action or proceeding where a party to the agreement seeks to take advantage of the mistake. True, the evidence that there was such a mistake must be clear and convincing before the jurisdiction will be exercised, a mere preponderance of the evidence not being sufficient, but there is no question, in this jurisdiction at least, that the power to reform the instrument exists. *Dennis v. Northern Pacific Ry. Co.*, 20 Wash. 320, 55 Pac. 210; *Preston v. Hill-Wilson Shingle Co.*, 50 Wash. 377, 97 Pac. 293; *Campbell v. Glazier*, 61 Wash. 520, 112 Pac. 490; *Rosenbaum v. Evans*, 63 Wash. 507, 115 Pac. 1054.

[3] It is next contended that the evidence is insufficient to justify the judgment entered by the trial court, but on this question also we think the record is without error. The respondent's agent who made the contract on behalf of the respondent testified to a completed agreement prior to the preparation of the writing, and showed wherein the writing which was prepared by the respondent failed to express the agreement. There was no contradiction of his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testimony on the main question, although there was evidence tending to show that the agent, when the written instrument was presented to him for execution, may have been somewhat negligent in failing to discover that it did not express the true agreement. But this alone is not now sufficient to estop the respondent from having the instrument reformed.

The judgment is affirmed.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

**SCHULTE v. BOULEVARD GARDENS  
LAND CO. (S. F. 5,833.)**

(Supreme Court of California. Jan. 9, 1913.)

**1. CORPORATIONS (§ 67\*)—STOCK—"CAPITAL STOCK."**

Civ. Code, § 309, prohibiting directors of corporations from dividing, withdrawing, or paying to stockholders any part of the capital stock, which means not the shares of which the nominal capital is composed, but the actual assets of the corporation, while applying in terms only to the directors, deprives the stockholders as well of the power to do the forbidden acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

**2. CORPORATIONS (§ 82\*)—STOCK—SALES OF CAPITAL STOCK.**

Despite Civ. Code, § 309, prohibiting directors of corporations from dividing, withdrawing, or paying to stockholders any part of the capital stock, an agreement by a corporation upon the sale of stock to redeem it at a fixed price at a future time is valid, when not injuriously affecting the rights of the corporation creditors; the agreement to redeem being part of the contract of sale and coming into existence at the same time the purchase price passed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

**3. CORPORATIONS (§ 82\*)—STOCK—SUBSCRIPTIONS.**

While stipulations limiting the apparent liability of subscribers to corporate stock are invalid as a fraud upon other subscribers, an agreement by the corporation, at the time of selling its stock, it being abundantly solvent, to repurchase its stock at a future time is not in itself such a fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Henry B. Schulte against the Boulevard Gardens Land Company. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions to overrule demurrer.

J. A. Elston, of Berkeley, and Geo. Clark, of San Francisco, for appellant. Keyes & Martin, of Berkeley, and Leon E. Martin, of San Francisco, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of defendant, entered upon an order sustaining, without leave to amend, a demurrer to the plaintiff's first amended complaint. The complaint contains 18 counts, but, by stipulation of the parties, only the first, the second, the third, the tenth, the eleventh, and the twelfth counts are included in the transcript; the omitted counts being, so far as concerns the legal questions here involved, precisely similar to one or another of those before us.

The first count, with amendments subsequently made thereto, alleges that on April 3, 1908, the defendant, a corporation organized under the laws of California, executed and delivered to plaintiff a written agreement, reading as follows: "Berkeley, Cal., April 2, 1908. This agreement to accompany Boulevard Gardens Certificate of Stock No. 165, issued to Henry B. Schulte under date of April 3, 1908. First. We, the undersigned, individually and severally, promise and agree that should there be at any time any assessment levied against above-described certificate of stock, we will pay the same. Second. We further promise and agree, on behalf of the Boulevard Gardens Land Company, that should the purchaser of said stock certificate at any time prior to the payment of dividends equaling the face value of said stock wish to sell the same, we will repurchase it at par value providing that we receive ninety (90) days' notice of such desire to sell; and should the stock above described be so repurchased by us under this agreement, we will pay to the holder thereof a sum equal to eight (8 pct.) per cent. net upon the face value thereof from the date of its purchase to the date of its sale to us. [Signed] George Schmidt, President. G. W. Skilling, Vice Pres. Edward Bonsall, Director. For the Boulevard Gardens Land Co. [Corporate Seal.]"

The certificate referred to in the agreement was a certificate, issued to plaintiff as owner, for 20 shares of the capital stock of the defendant corporation, of the par value of \$100 per share. It was issued and the agreement executed for the single and entire consideration of \$2,000, paid by plaintiff to defendant, and the certificate, with the written agreement, formed parts of a single transaction and an entire contract. No dividends were ever declared or paid. On December 3, 1909, plaintiff gave to defendant notice that he desired defendant, at or before the expiration of 90 days, to repurchase the shares as agreed, and offered to indorse and return the certificate. After the lapse of 90 days, to wit, on March 8, 1910, plaintiff repeated his demand and tender, and is still able and willing to comply with the terms of his tender. The defendant refused to pay, and has not paid, any part of the sum of \$2,000 agreed to be paid to plaintiff.

It is further alleged that, at the time the contract was made and ever since, the defendant owned and owns surplus profits exceeding, by over \$50,000, the sum of the corporate debts, together with the value of everything received by the defendant in exchange for its issued shares of stock. The defendant could comply with its contract without injury to any creditor or stockholder.

The second count relies upon the same contract. It omits the allegation of tender, but seeks to show that a tender would have been useless. Otherwise the count does not differ from the first. The third count contains substantially the same averments of fact as the first, but is framed with a view to demanding a return of the money paid, on the theory that the contract is illegal. The tenth count is based on a contract between the defendant and one D. N. Mitchell, in the following form: "Berkeley, Cal., Sept. 9, 1907. The Boulevard Gardens Land Company, Incorporated, hereby agrees to pay to D. N. Mitchell of Calistoga, Cal., at any time after one year (and not exceeding eighteen months) from the date hereof the sum of twelve hundred and fifty (\$1,250.00) dollars, together with interest at 6 per cent. from this date on \$1,000.00 for the return and surrender of ten (10) shares of Boulevard Gardens Stock today issued to him and recorded on the books of the company. The Boulevard Gardens Land Company, Inc. By George Schmidt, Pres. By G. W. Skillings, Vice Pres."

It will be observed that while Schulte's contract calls for the return only of the purchase price of the shares, with interest, the Mitchell agreement assumes to bind the defendant to pay a bonus of \$25 per share, if it be assumed—there is no direct allegation on this point—that the shares were brought from the company at par. The plaintiff claims as assignee of Mitchell's rights. In other respects, the averments of the tenth count are like those of the first. With like exceptions, the eleventh count corresponds to the second, and the twelfth to the third.

The demurrer went to each count. It was based on the ground of want of facts, and contained, as well, various specifications of uncertainty, ambiguity, and unintelligibility. We think none of the special assignments would have justified a sustaining of the demurrer without leave to amend, and we shall therefore confine our discussion, as counsel have done, to the consideration of the general ground of want of facts to constitute a cause of action.

[1] The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from

reducing or increasing the capital stock, except as provided in the section. The phrase "capital stock," as used in this section and in the section of the practice act from which the Code provision was drawn, has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital—i. e., assets—with which the corporation carries on its corporate business. *Martin v. Zellerbach*, 38 Cal. 309, 99 Am. Dec. 365; *S. F. & N. P. R. R. Co. v. Bee*, 48 Cal. 398; *Kohl v. Lillenthal*, 81 Cal. 385, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Tapscott v. Mex. Col., etc., Co.*, 153 Cal. 667, 96 Pac. 271; *Burne v. Lee*, 156 Cal. 222, 104 Pac. 438. Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. *Kohl v. Lillenthal*, supra; *Burne v. Lee*, supra.

[2] In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. *Cook on Corp.* (6th Ed.) § 311. But, in view of the Code provisions to which we have referred, it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw and pay to a stockholder a part of the "capital stock." *Bank v. Wickersham*, 99 Cal. 655, 661, 34 Pac. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (*Ralston v. Bank of California*, 112 Cal. 208, 213, 44 Pac. 476), but the general rule is, as above stated, that the purchase is unauthorized. Thus, this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder the right, upon 60 days' notice, to withdraw from the corporation and to receive, upon surrender of his stock, the amount paid therefor. *Vercontere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375.

In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to

be paid is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms. In *Ophir Cons. Mines Co. v. Brynteson*, 143 Fed. 829, 74 C. C. A. 625, the Circuit Court of Appeals for the Seventh Circuit, in upholding the right of recovery under a contract similar to those in the case at bar, used this language: "It is contended that the contract violates section 485, *Mills' Ann. St. Colo.*, which prohibits the use by corporations of any of their funds 'for the purchase of stock in their own company or corporation, except such as may be forfeited for the nonpayment of assessments thereon.' This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well-recognized class, known as a contract of 'sale or return,' as defined in *Sturm v. Boker*, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093, where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option, the contract of sale terminates, and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through the return of its unsold stock."

The great weight of authority is in accord with this view. Contracts of the kind under discussion have generally been sustained, and this, too, in jurisdictions in which corporations are not permitted to purchase their own stock. *Browne v. St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66; *Vent v. Duluth C. & S. Co.*, 64 Minn. 307, 67 N. W. 70; *Porter v. Plymouth G. M. Co.*, 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; *Sweeney v. United Underwriters Co. (S. D.)*, 137 N. W. 379; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582. See, also, 10 Cyc. 416; 2 Cl. & M. Pr. Corp. § 475; 1 Cook on Corp. (6th Ed.) §§ 83, 170. A similar ruling has been made in this state in *Dickinson v. Zublate Mining Co.*, 11 Cal. App. 656, 106 Pac. 123. The case of *Vercoutere v. Golden State L. Co.*, supra, is strongly relied on by respondent as establishing the contrary doctrine in California. But the case is readily distinguishable from the one at bar. There the plaintiff relied solely upon a by-law which assumed to authorize every subscriber and stockholder to withdraw from the corporation and, upon returning his stock, receive

what had been paid in. Obviously this, if upheld, would have made possible a complete destruction and dissolution of the corporation without compliance with the statutory requirements. As a by-law, the provision was clearly bad. But a very different case is presented where an individual sets up a contract whereby the corporation selling him stock agrees, as part of the consideration, to give him the option of returning the stock and receiving a payment therefor.

All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness.

[3] Nor does this case present the question of invalidity of secret stipulations limiting the apparent liability of certain subscribers. Such stipulations have been frequently denounced as a fraud upon other subscribers, as well as creditors of the corporation. 2 Cl. & M. Pr. Corp. § 467c. But the allegations of the complaint do not bring the case within the rule. No fact is alleged which would justify the inference that any fraudulent invasion of the rights of other stockholders (or, as already stated, creditors) had been attempted or would result.

Under the views stated, the complaint clearly states a cause of action on the agreement between Schulte and the defendant. This contract calls for the return of the purchase price, with interest. We cannot see that any different considerations apply to the Mitchell agreement. That instrument requires the corporation to pay \$1,250 on the return of shares of the par value of \$1,000. But if the parties had the right to agree, upon the original sale of the stock, that the purchaser should have the option to return the stock and receive a money payment, it can make no difference whether the amount to be so paid was equal to, or more or less than, the original price. In either case, the right to have the payment upon tender of the stock was reserved by the purchaser as a condition upon which he took his stock. The validity of the condition cannot depend upon the amount of the payment.

The judgment is reversed, with directions to the court below to overrule the demurrer, granting leave to the defendants to answer within a stated time.

We concur: MELVIN, J.; HENSHAW, J.; SHAW, J.

**NICHOLS v. BOULEVARD GARDENS LAND CO. (S. F. 5,834.)**

(Supreme Court of California. Jan. 9, 1913.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by E. E. Nichols against the Boulevard Gardens Land Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. A. Elston, of Berkeley, and Geo. Clark, of San Francisco, for appellant. Keyes &amp; Martin, of Berkeley, and Leon E. Martin, of San Francisco, for respondent.

**PER CURIAM.** This cause presents precisely the same questions as those considered in the opinion in *Schulte v. Boulevard Gardens Land Co.* (S. F. No. 5,833) 129 Pac. 582, filed this day. Upon the authority of that decision, the judgment herein is reversed.

**PRENTICE v. ERSKINE. (S. F. 5,877.)**

(Supreme Court of California. Jan. 6, 1913.)

**1. VENDOR AND PURCHASER (§ 119\*) — CONTRACTS OF PURCHASE—DEFECTS IN TITLE—RESCISSION.**

Though as a rule a defaulting vendee of land cannot complain that at a time prior to the date fixed by the contract for the delivery of a deed, the vendor was not in a position to convey full title to the land, where the defects in vendor's title arise from the existence of a public servitude, as a dedicated highway, the vendee can rescind at any time, because the vendor never could give a perfect title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212-214; Dec. Dig. § 119.\*]

**2. VENDOR AND PURCHASER (§ 102\*) — DEFAULT OF BOTH PARTIES—POSSESSION—RESCISSION.**

Where a vendee is in default as to payment, and the vendor is in default because he cannot give a perfect title on account of the existence of a highway over the land, the demanding by the vendor and the surrendering of possession by the vendee amount to a rescission of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175-177; Dec. Dig. § 102.\*]

**3. VENDOR AND PURCHASER (§ 187\*)—TAKING POSSESSION BY VENDOR—WAIVER OF PAYMENT.**

Where a vendor of land under a time contract takes back possession, he waives his right to further payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.\*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Hosea Prentice against Charles Erskine. Judgment for defendant, and plaintiff appeals. Affirmed.

M. K. Harris and L. B. Hayhurst, both of Fresno, for appellant. L. L. Cory, of Fresno, and F. W. Von Schrader and W. F. Christ, both of San Francisco, for respondent.

MELVIN, J. The plaintiff appeals from a judgment in favor of defendant, and from an

order denying said plaintiff's motion for a new trial. The parties to the action entered into a written agreement, whereby plaintiff covenanted to sell and defendant to buy certain real property for \$6,500. Of this the sum of \$500 was paid on the execution of the contract, and subsequently a mortgage on the property of \$1,000 was paid by defendant, and that amount was duly credited. Subsequent payments were to be made annually, and defendant also agreed to pay taxes and interest and to cultivate the land properly. Defendant entered into possession of the premises under the terms of the agreement immediately upon the execution thereof. According to the contract of sale, defendant's failure to comply with any of the terms thereof would relieve plaintiff from all obligations in law and equity to convey the property, and all payments made prior to such default were to be forfeited as liquidated damages. Defendant failed to pay the taxes and the first annual installment of \$1,000, with interest, and, upon written demand of the vendor, surrendered the premises to him. Plaintiff then sued to quiet his title. By his answer defendant asserted that the contract had been mutually abandoned and rescinded by the parties, and that plaintiff was himself in default under the agreement, because he was unable to convey clear title to the land in question owing to the existence of a perpetual right of way for a public road over said land, to an easement for an irrigating ditch across the property, and to the lien arising from a contract for the payment annually for water to be used on the premises. He asked for judgment for the \$1,500 which he had paid to plaintiff on account of the contract of sale with interest thereon, and for \$400, the value of the necessary improvements on the place made by him during his occupancy thereof. The court, although finding that defendant had failed to pay taxes, interest, and installments according to the terms of the contract, found also that plaintiff was in default, because, owing to the incumbrances on the land, he could not, either at the time of the making of the agreement or sale, or at the date of the commencement of this action, give a perfect title to the land. Judgment was given in favor of defendant for the \$1,500 which he had paid, with interest thereon. It was found by the court that defendant had expended \$400 for necessary improvements as alleged in his pleading, but that this amount was offset by the reasonable rental value of the land during his occupancy thereof. The judgment also provided for the cancellation of five promissory notes by defendant given in favor of plaintiff, each for \$1,000, payable in five equal annual sums, respectively, and evidencing the deferred payments set forth and described in the contract of sale. Appellant contends that in the matter of the as-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

serted rescission there is no essential difference between this case and *Oursler v. Thatcher*, 152 Cal. 740, 93 Pac. 1007. In that case, as in this, there was a default on the part of the vendees in the performance of the conditions of the contract. There, as here, upon demand the vendees surrendered possession of the premises. It was held that these facts, together with the commencement of an action to quiet the title of the vendors, did not constitute a rescission of the contract by the mutual consent of the parties, and the vendees were properly denied judgment on their cross-complaint for the money paid as a part of the purchase price prior to their default. Respondent denies the authority of that case because there was no question in it with reference to the sufficiency of the title of the vendors. He asserts that it has long been settled law in California that one may contract to sell real property and to deliver title at a future time who has no present interest in it; and, a fortiori, one who owns real property subject to certain incumbrances may enter into such an agreement. In this case, admittedly, Prentice did not own the land free from all incumbrances at the date of the agreement of sale, because that instrument by its very terms provided for the future payment of an existing mortgage, and Erskine obligated himself "to pay all water assessments on the water right covering said premises."

[1] In California it is the general rule that a defaulting vendee under an agreement of sale cannot complain because at a time prior to the maturity of the contract and the date fixed thereby for the delivery of a good and sufficient deed the vendor was not in a position to convey full title to the land. *Joyce v. Shafer*, 97 Cal. 336, 32 Pac. 320. See, also, *Backman v. Park*, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153, and authorities there cited. It is a harsh rule, and should not be unduly extended. If the only incumbrances upon the property were the easement for the irrigating ditch and the lien for the water tax, we might be constrained to hold, under the authorities, that the case would fall within the rule discussed above, but, as one of the defects in the vendor's title arose from the existence of a public servitude, we must conclude that plaintiff was himself in default, because that is the sort of cloud which in the nature of things he could not remove by any ordinary method of business negotiation. It would not be like a mortgage, for example, which might be extinguished by payment of the debt thereby secured, or like a lien for unpaid water rent which might be destroyed by settlement of the account. He could not either by adverse possession or by purchase take from the public the right to pass over the land on a dedicated highway. He was as completely helpless and hopeless of conveying a perfect title at any time as if the whole tract had been taken for use as a

public park. The vendee might have rescinded the contract at any time, even though the time for final payment had not arrived because the vendor, in the nature of things, never could offer a perfect title to him. While this case differs from *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, because in that case the vendee had the right to exercise his option at any time, and therefore the vendor was bound to be ready at all times during the life of the contract to convey an unclouded title, nevertheless the rule there announced is applicable, and the vendee was at all times entitled to rescind because there was no more chance to make vendor's title complete and flawless at the maturity of the contract than at any other time. In *Koshland v. Spring*, 116 Cal. 700, 48 Pac. 62, it was said: "Since defendants were in express terms obligated to make good title as a condition of the sale, we do not concede that actual knowledge by the purchasers of dedication to public use of the extensive street surface exhibited on the map—the tract being mainly or largely agricultural and to be sold as acreage—could be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. Sugden on Vendors, \*390; *Speakman v. Forepaugh*, 44 Pa. 363, 374. Compare *Devlin on Deeds*, §§ 911, 913 and cases cited. \* \* \* So here the reasonable construction of the contract is that defendants, the map before them, agree to make title to plaintiffs of unconveyed streets as well as lots, but it is found that there are at least grave doubts whether they have right to convey many of the streets; and the result is that they cannot enforce specific performance of the contract, and plaintiffs are entitled to return of their deposit." Vendee's right to rescission under such circumstances is upheld by such authorities as *Turner v. McDonald*, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1046; *Wilcox v. Lattin*, 93 Cal. 588, 29 Pac. 228; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787; *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928.

[2] The conduct of the parties, both being in default, the one demanding and the other surrendering the possession of the premises, amounted to a rescission of the contract.

[3] By taking back the possession of the property, plaintiff, of course, waived his right to insist upon further payments under the agreement of sale. Consequently the notes evidencing payments to be made in the future execution of that agreement were properly shorn by the court of their apparent efficacy.

No other specifications of alleged error require comment.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

**VAN BUSKIRK v. KUHN.** (L. A. 2,975.)  
(Supreme Court of California. Jan. 9, 1913.)

**1. LIMITATION OF ACTIONS (§ 2\*)—DEBT ARISING IN ANOTHER STATE.**

Where a Nebraska statute of limitations would bar an action on a debt contracted in that state, a suit to foreclose a mortgage given to secure the debt is barred in this state, under Code Civ. Proc. § 361, providing, with certain immaterial exceptions, that an action on a cause arising in another state cannot be maintained here after the lapse of such time as would bar it in the other state.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 4-8; Dec. Dig. § 2\*]

**2. EVIDENCE (§ 80\*)—DEBT ARISING IN ANOTHER STATE — PRESUMPTION OF FOREIGN STATUTE.**

Where, in an action to foreclose a mortgage given to secure a debt contracted in Nebraska, there was no evidence of the Nebraska law of limitations, it was presumed to be the same as Code Civ. Proc. § 339, subd. 1, which provides that an action on an oral agreement to repay money loaned must be brought within two years.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80\*]

**3. LIMITATION OF ACTIONS (§ 46\*)—ACCRUAL OF ACTION—PROMISE TO PAY WHEN ABLE.**

Limitations will not commence to run against a promise to pay "when able" until the debtor is able to pay, especially where he is in no way derelict in his efforts to acquire the means to pay.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 240-253; Dec. Dig. § 46\*]

**4. LIMITATION OF ACTIONS (§ 195\*)—ACCRUAL OF COSTS—PROMISE TO PAY WHEN ABLE—BURDEN OF PROOF.**

In an action on a promise to pay "when able," the burden was on defendant, in order to establish his plea of limitations, to prove an ability to pay the debt; limitations being an affirmative defense.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 711-716; Dec. Dig. § 195\*]

**5. CONTRACTS (§ 213\*) — PROMISE TO PAY WHEN ABLE—BURDEN OF PROOF.**

In an action on an oral promise to repay borrowed money "when able," the plaintiff must allege and prove the debtor's ability to pay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 957-979; Dec. Dig. § 213\*]

**6. APPEAL AND ERROR (§ 864\*)—MATTERS REVIEWABLE.**

Failure of the complaint and findings to support judgment is a defect reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864\*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by H. C. Van Buskirk against J. T. Kuhns, administrator. From judgment for plaintiff and denial of new trial, defendant appeals. Reversed.

Collier, Carnahan & Craig, of Riverside, for appellant. Purington & Adair, of Riverside, for respondent.

SLOSS, J. The defendant appeals from a judgment against him, and from an order denying his motion for a new trial.

The action was brought to foreclose a mortgage on land in Riverside county. It is alleged in the complaint that in November, 1894, the defendant's intestate, E. P. Reynolds, Jr., who was then indebted to plaintiff in the sum of \$3,000 for money loaned, borrowed of plaintiff the further sum of \$1,500, and promised to pay plaintiff the entire sum of \$4,500 "whenever he, the said E. P. Reynolds, Jr., should be able to do so." This transaction took place at Wymore, Gage county, Neb. At the same time and place, Reynolds executed and delivered to plaintiff an instrument, in form a bargain and sale deed of the property above mentioned, the instrument being given and accepted as a mortgage to secure the payment of said sum of \$4,500. With the exception of \$350, the debt is unpaid. Reynolds died in December, 1907, and the defendant was, by the superior court of Riverside county, appointed administrator of his estate. Recourse against any property, other than that mortgaged, is waived. The answer denies the making of the loan, and the execution of the mortgage. It also pleads the bar of the statute of limitations, specifying sections 361, 339 (subd. 1), and 337 (subds. 1 and 2) of the Code of Civil Procedure. The findings were in favor of the plaintiff, and judgment of foreclosure followed.

[1] The appellant's principal contention is that the evidence establishes that the action was barred by the statute of limitations, and particularly by section 361. Under that section, an action based upon a cause of action arising in another state cannot be maintained in this state after the lapse of time within which an action might have been maintained in the state in which the cause of action arose. There is an exception in favor of citizens of this state, but the plaintiff is not within the excepted class. If, then, at the date of the filing of the complaint herein, an action on the debt could not have been maintained in Nebraska, the state in which the cause of action arose, the suit to foreclose the mortgage must be held to be barred here. *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 Pac. 715, 21 Ann. Cas. 1279.

[2] There was no evidence of the Nebraska law with reference to limitation of actions, but, since, in the absence of proof, the law of a foreign jurisdiction is presumed to be the same as our own (*Hickman v. Alpaugh*, 21 Cal. 225; *Flood v. Dunphy*, 147 Cal. 95, 81 Pac. 315; *Lilly-Brackett Co. v. Sonnemann*, supra), the period within which an action might have been brought in Nebraska on the oral agreement to repay the money loaned must be taken to be two years. Code Civ.



Proc. § 339, subd. 1. On the propositions just stated there is no dispute between the parties. They advance opposing views, however, regarding the time when a cause of action on the debt accrued. The loan was made in November, 1894. Reynolds died in December, 1907, and this action was commenced in May, 1910. There was, accordingly, a lapse of 13 years after the making of the loan, until Reynolds' death, and over 15 years until the filing of the complaint. The appellant contends that, where a promisor agrees to make a payment "when able," his obligation is to pay within a reasonable time, and that the right to sue is barred at the expiration of such reasonable time. If the rule be as claimed, it will not be doubted that a delay of 15 years is *prima facie* long enough to permit a reasonable time within which to sue, together with two years thereafter, to elapse several times.

[3] But the authorities in this state seem to establish a different rule for construing a promise to pay "when able." They support the respondent's contention that such a promise is conditional, and that no cause of action accrues until the condition is performed; that is to say, until the debtor is able to pay. In *Curtis v. City of Sacramento*, 70 Cal. 412, 11 Pac. 748, the court said that: "If the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him." In *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42, the defendant, being indebted to plaintiff, wrote to plaintiff before action was barred, saying: "I will liquidate that note as soon as I can get the money. \* \* \* Will pay as soon as I can." It was held that plaintiff could not rely upon the statements as extending his time to sue upon the original obligation. His claim, said the court, was based upon a "substituted, conditional promise," and the proper action would have been one for the breach of such promise, "in which it would have been necessary for the plaintiff to allege the promise and show the condition broken after defendant's ability to perform." See, also, *Morehouse v. Morehouse*, 140 Cal. 88, 73 Pac. 738. It follows that, until the debtor becomes able to pay, the statute of limitations does not begin to run. The general current of authority is to this effect. 25 Cyc. 1350; 19 Am. & Eng. Enc. L. (2d Ed.) 193; *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383; *Richardson v. Bricker*, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; *Mattocks v. Chadwick*, 71 Me. 313; *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236; *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222. Nothing contrary to this view is decided in cases like *Williston v. Perkins*, 51 Cal. 554, or *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 Pac. 920, where the promise was to pay out of a fund to be realized in a certain way. It was held in these and similar cases

that there is an implied obligation to use reasonable diligence in performing the act upon which payment was contingent. In default of such diligence, payment becomes due without performance of the condition. But there is nothing in the facts before us to bring this case within the rule stated. It is not suggested that Reynolds was in any way derelict in his efforts to acquire the means to pay his debt.

[4] Since the statute of limitations is an affirmative defense, it became incumbent upon the defendant, in order to establish this plea, to show that Reynolds had the ability to pay his debt, and that, accordingly, a cause of action against him accrued more than the statutory time before the filing of the complaint. The evidence on the subject is rather meager, and we think the court below was justified in making a finding, implied in the finding that the action was not barred, that Reynolds had not had such ability.

[5] But, if the views above expressed are sound, the very fact that prevents the statute from running (i. e., the lack of ability, on Reynolds' part, to pay his debt) operates also to prevent the plaintiff from maintaining his action. The reason that the statute does not run is that the promise is conditional upon the debtor's ability to pay, and that a cause of action does not accrue until such ability exists. If the promise is conditional upon such ability, it is, as is said in *Rodgers v. Byers*, supra, incumbent upon the plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it is upon the plaintiff. *Bidwell v. Rogers*, 10 Allen (Mass.) 438; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Veasey v. Reeves*, 6 Ind. 406; *Halladay v. Weeks*, 127 Mich. 363, 86 N. W. 799, 89 Am. St. Rep. 478; *Parker v. Butterworth*, 46 N. J. Law, 244, 50 Am. Rep. 407. The complaint contains no allegation of such ability, and the court does not find it. There is therefore a want of averment and finding of facts establishing the existence of a cause of action. The plaintiff alleges a promise to pay in a certain event. He does not allege, and the court does not find, that the event upon which the obligation depends has occurred.

[6] Neither the complaint, therefore, nor the findings, support the judgment. This defect is one that may be reviewed on an appeal from the judgment.

The result of these views being that the judgment must be reversed, it is unnecessary to consider the further points made by the appellant.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

**STANDARD OIL CO. v. SLYE et al.**  
(S. F. 5,792.)

(Supreme Court of California. Jan. 4, 1913.)

**1. VENDOR AND PURCHASER (§ 231\*)—CONSTRUCTIVE NOTICE—RECORD.**

Record of a lease is not constructive notice, where title of the lessor is not recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.\*]

**2. LANDLORD AND TENANT (§ 79\*)—NOTICE—POSSESSION.**

A purchaser of a lease authorizing subleasing and the acquisition of an additional term for the subtenants is put on inquiry by notorious possession of persons holding under the lessee as to the terms on which the lessee had surrendered the land to them.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.\*]

**3. LANDLORD AND TENANT (§ 83\*)—"COVENANTS RUNNING WITH LAND"—RENEWAL OF LEASE.**

A covenant of a lease to renew it is one running with the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 263, 264, 266-278, 295; Dec. Dig. § 83.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1698-1703.]

**4. LANDLORD AND TENANT (§ 85½\*)—COVENANTS RUNNING WITH LAND—PRIVITY OF ESTATE.**

One by purchasing the interest of a lessee, and accepting rent from claimants under a lease made by such vendor, placed itself in privity of estate with them, so as to be bound by a covenant in their lease for renewal running with the land, though it also purchased the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 85½.\*]

**5. CORPORATIONS (§ 425\*)—ACCEPTANCE OF BENEFITS.**

A purchaser of a lease of a corporation, having collected rents of the corporation's sublessee, may not thereafter assert invalidity of the sublease, which the corporation treated as valid, because it was not ratified by the stockholders, as required by statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

In bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Standard Oil Company against Joseph Slye and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and L. L. Cory, of Fresno, for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and Frank H. Short, of Fresno, for respondents.

MELVIN, J. Appeal from a judgment against plaintiff, and from an order denying its motion for a new trial. The action was for the possession of 10 acres of land situated in the N. E. ¼ of section 28, township 19 S., range 15 E., M. D. B. M., in Fresno county, Cal. Plaintiff's title as owner in fee is undis-

puted. Defendant, however, claims the right to extract oil from the land until the 30th day of September, 1919, paying to plaintiff one-third of the gross product obtained. Defendant claims under a contract from a prior sublessee, the latter, in turn, holding under a lessee of plaintiff's grantor of the fee. All parties to the controversy deraigned title from the Hanford Oil Company, a corporation, which had owned all of section 28 above mentioned. On September 30, 1890, Hanford Oil Company leased to S. N. Griffith the N. E. ¼ of section 28 for a term commencing October 1, 1890, and ending September 30, 1909, the contract providing that Griffith was to form a corporation to assume his obligations under the lease. In accordance with the terms of said lease, Griffith organized the "28 Oil Company," and transferred his lease to that corporation. By the said lease the corporation was authorized and empowered to sublet the whole or any part of the land in subdivisions of not less than five acres. The lease also contained this paragraph: "Said corporation may and shall have the right, privilege, and option to demand and receive from the party of the first part at any time after the first day of October, 1907, and before the first day of October, A. D. 1908, a second lease and demise of all the land above described for an additional term of ten years, to commence at the expiration of the term hereby created, upon the same terms, conditions, stipulations and limitations, and for the uses and purposes herein made, agreed upon and set out." By paragraph 15 of the lease it was provided that under certain conditions the rights of the corporation should cease, but this paragraph also contained the following language: "Provided that if any part of the said land shall be in the actual possession and occupation of any person under and by virtue of any sublease executed in accordance to the provisions hereof, the term of such person under such sublease and his possession of said part of said land, and his right of possession thereof, shall not terminate, nor be at an end, or be in any manner affected by the foregoing provisions of this clause, numbered fifteen, and the term of such person under such sublease and his possession and right of possession of such part of said land shall immediately cease and determine, and such person shall lose all right to the possession of such part of said land, so held by him, upon failure or refusal by such person to keep any of the stipulations, agreements and covenants of the sublease by which he holds such part of said land, and the party of the first part shall thereupon be immediately entitled to the possession of all of said land so held by such person." On October 31, 1899, 28 Oil Company leased to Independence Oil Company the S. W. ¼ of the N. E. ¼ of section 28. This lease required, among other things, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

boring of a well by the Independence Oil Company each year of its term. The duration of the term and the option for a further term of 10 years were expressed in the leasing contract in substantially the same words as those employed in the original lease from Hanford Oil Company. This lease also contained language substantially identical with that of paragraph 15 of the original lease from Hanford Oil Company. It was evidently contemplated by both of these leases that the land should be developed at a certain rate per year, that the work of the sublessees should be counted as a part of the necessary development, and that the term of a sublessee was not to cease or determine by reason of any forfeiture by his immediate lessor. A lease was made by Independence Oil Company on July 18, 1902, to W. L. Harper. This is designated by those on both sides of this controversy as the "Harper lease." Defendant Slye appears as the last sublessee under the rights conveyed by the Harper lease. The first paragraph of this lease gave to Harper the exclusive right to drill for oil and to extract and remove the same and any other merchantable minerals existing on the 10 acres of land in question. By the second paragraph it was provided that two-thirds of the product from the land should be retained by Harper (the party of the second part). The fourth paragraph was in part as follows: "The term of this agreement shall be the unexpired term of the lease between the 28 Oil Company and the Independence Oil Company and the renewal thereof as therein provided. And said party of the second part hereby agrees that he and his assigns, in consideration of the foregoing covenants, of the party of the first part, will drill upon said land, and complete within the terms and conditions of the said lease of the 28 Oil Company to the Independence Oil Company one well at his own expense, on or before the first day of October, 1902, and at least one well each year thereafter as provided in said lease." It also contained this language: "This agreement is based upon and intended as a substitute for that certain application and resolution of June 23rd, 1902, between the Independence Oil Company of Coalinga and W. G. Griffith, said Griffith having assigned his right to drill on said ten acres of land of said company to the said W. L. Harper." W. G. Griffith's original application for a sublease (mentioned in the last quotation) recited as a condition of such sublease: "That one well was to be drilled by him on or before the first day of October, 1902, and a well each year thereafter for the period of the term of the Independence, to-wit, the unexpired term, and the renewal thereof." Standard Oil Company obtained a deed from Hanford Oil Company to the whole of section 28 on May 7, 1908. Previously Standard Oil Company had received assignments from successors of 28 Oil Company, including

one from Independence Oil Company, dated March 26, 1907, of its interest in the lease.

The court found that at the time plaintiff acquired title to the real property here involved said plaintiff knew that Slye's predecessors were in possession of the land extracting oil therefrom, "and had and claimed to have the exclusive right to drill upon said real property, hereinabove lastly described, and to extract oil, petroleum, and other merchantable minerals therefrom, under and pursuant to the terms of said agreement aforesaid, executed by said Independence Oil Company of Coalinga, said corporation, to said W. L. Harper, for and during the whole of said term, ending with the 30th day of September, 1919." It was also found that the Independence Oil Company bound itself to renew and continue the Harper lease for the additional period of 10 years, and that plaintiff took its assignment of the lease from the said Independence Oil Company subject to the contract with W. L. Harper, and bound by the obligation to renew the term of Harper or his assigns and to extend the same for 10 years, namely, to the 30th day of September 1919. The court found that Roberts and others who had acquired the Harper interest had spent large sums of money in developing the property which they would not have expended except under the assurance that they should hold the land for the long term.

Appellant's contentions are (1) that, when it purchased the interest of Independence Oil Company, it had no notice, actual or constructive, of the claim by respondent or his predecessors of a right to remain in possession of the land beyond September 30, 1909; (2) that any covenant by Independence Oil Company to demand a new lease for Harper's benefit could not bind Standard Oil Company as purchaser of the fee or of the leasehold interest of Independence Oil Company; (3) that Independence Oil Company could not grant a term beyond that acquired under its own actual lease, nor did it covenant to demand a new lease for Harper; and (4) that the Harper lease was void because not ratified by the stockholders of the grantor according to the law in force at the date of its execution.

[1, 2] It is conceded by respondent that the Harper lease was not of record, although one of the intermediate assignments thereof was recorded. This was the assignment of the lease from Mt. Pelee Oil Company to George D. Roberts; but, the parties to this assignment being strangers to the record title, the recording thereof gave no notice of the contents of the lease. *Garber v. Gianella*, 98 Cal. 529, 33 Pac. 458; *Bothin v. California Title Ins. Co.*, 153 Cal. 724, 96 Pac. 500. There was therefore no such constructive notice as would have been presumed from a recorded lease from the Independence Oil Company to Harper. Plaintiff, however,

was charged with actual notice of the occupancy of the 10-acre tract by Harper and his assigns, and it was also constructively apprised of the contents of the lease from Hanford Oil Company to S. N. Griffith and the recorded assignments thereof carrying with them the right to sublease the property wholly or in parts for the residue of the term and the renewal thereof. The sublessees under the Harper lease were notoriously in possession of the property. "The first well was brought in Christmas morning, 1902," said witness Condon, secretary of the Stockholders' Oil Company. George D. Roberts, president of that corporation, testified that he promptly served upon Hanford Oil Company and 28 Oil Company notices of the completion of this well as per contract, and demanded the unexpired term of their lease to the Independence Oil Company, plus the renewal. Shannon, upon whom Roberts says he served these notices, was the general manager of the 28 Oil Company when Roberts went upon the 10-acre strip. He knew all about the activity of Roberts, and knew long before the transfer was made to Standard Oil Company from 28 Oil Company that Roberts and his assigns asserted right to possession of the property until 1919. But appellant insists that while there may have been evidence of the fact that Standard Oil Company had notice of the right to the long term claimed under the Harper lease, before the purchase of the interests of Hanford and 28 Companies, no notice was given to it prior to its purchase of the lease of Independence Oil Company, and that it could not therefore be charged with notice of what that company had done. We think, however, that the notorious occupancy of the 10-acre tract by those holding under the Harper lease was in itself sufficient to put Standard Oil Company upon its inquiry. Knowing the power of the Independence Oil Company to sublease for the residue of 10 years and to acquire an additional 10 years for its subtenants by a mere demand, it was bound to inquire the terms under which Independence Oil Company had surrendered this land. The subsequent conduct of the plaintiff shows that it recognized the claims of those asserting rights under the Harper lease. Its authorized agents endeavored several times, within a few months subsequent to the purchase of the leasehold of Independence Oil Company, to acquire the rights of the claimants of the Harper interest, but failed to agree upon terms, not because of the asserted privilege of the latter to occupy the premises until 1919, but because of difference of opinion regarding the amount which would fairly compensate the owner of the sublease. Of course, such conduct does not operate as an estoppel against Standard Oil Company, but it does show that almost contemporaneously with the assignment from Independence Oil Company Standard Oil Company acted as a corporation having actual knowledge of the

terms of the Harper lease. The court's finding that the plaintiff bought the lease of Independence Oil Company with notice of the Harper lease was supported by the evidence.

[3, 4] Plaintiff insists that the covenant to renew the lease is a personal one not running with the land. In this behalf sections 1461 and 1462 of the Civil Code are cited. The former provides: "The only covenants which run with the land are those specified in this title, and those which are incidental thereto." And the latter is as follows: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Plaintiff's position is that such a covenant as the one here considered is not made for the benefit of the property, but, on the contrary, is an injurious limitation upon the lessor's power of repossession. Even if this position were correct, the plaintiff would be bound in conscience to fulfill the covenant. *Bryan v. Grosse*, 155 Cal. 135, 99 Pac. 499. But it was a covenant running with the land, and by purchasing the interest of the Independence Oil Company and accepting rent from the claimants under the Harper lease plaintiff placed itself in privity of estate with them. This covenant, running as it did with the land, was binding upon one holding in privity of estate with the assignee of the lessor. *Salisbury v. Shirley*, 66 Cal. 225, 5 Pac. 104. In the early case of *Laffan v. Naglee*, 9 Cal. 675, 70 Am. Dec. 878, this court held that a covenant to give the lessee a preference, in case the lessor should decide to sell the property, was a covenant running with the land. In the case of *Lyford v. North Pac. Coast R. R. Co.*, 92 Cal. 95, 28 Pac. 103, referring to the covenant there considered, the court used this language: "It is obvious that the agreement to continue to operate the railway is not a covenant which, under the Code, would run with the land. It is not a covenant for the direct benefit of the property—i. e., the estate granted—as required by section 1462 of the Civil Code." This interpretation of the section brings the covenant here under review directly within the meaning of the statute, because obviously a covenant for a renewal of a lease is for the direct benefit of the estate granted.

In *Taylor on Landlord and Tenant*, the rule is thus stated, at section 262: "The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion. So the grant of an additional term or of a right to purchase is, for many purposes, to be considered a continuation of the former lease; and, if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, it will inure to his assignees or executors without these being particularly named. Covenants running with

the land are divisible, and will bind the assignee of a part of the estate demised, in respect to the parcel assigned to him, as to repair, or to pay rent of the part occupied by him. (Where a covenant running with the land is divisible, if the entire estate in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel pro tanto; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone.)" One of the cases cited in this behalf by Taylor is *Piggott v. Mason*, 1 Paige 413, decided by Chancellor Walworth. This decision is frequently mentioned and followed in the opinions bearing on this subject. In it the original lessor covenanted with the lessee and his assigns to renew the lease at the expiration of the term upon a fair valuation by appraisers. Subleases were made by assignees of the original lessee's interest (which had been sold upon execution). In these subleases the sublessors covenanted that sublessees should have the renewal upon the same terms as those upon which they themselves should receive the new lease. The defendant in the action had become by purchase the owner of the reversion and all of the original lessor's interest, subject to the rights arising under the lease. It was held that a covenant of the lessor to renew the lease was one running with the land; the chancellor saying: "It is well settled, even at law, that the assignee may recover in his own name for a breach of such a covenant, if the breach was committed after the assignment. *Lemetti v. Anderson*, 6 Cow. (N. Y.) 302; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Grescot v. Green*, 1 Salk. 199. And it lies either for or against an assignee, although he is not named in the covenant. *Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 552. The assignee of a part of the premises may also recover pro tanto, if the covenant be in its nature divisible. *Touchstone*, 199; Co. Litt. 385a." Other cases holding that such covenants run with the land are *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Callan v. McDaniel*, 72 Ala. 105; *McDaniel v. Callan*, 75 Ala. 330; *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 234; *Cook v. Jones*, 96 Ky. 286, 28 S. W. 960 (a case holding that even where the original lessee after the sale of his leasehold interest agreed not to demand a renewal, that fact did not deprive the sublessee of his right to a renewal as to that part of the land included within his sublease); *Alford v. Jones* (Ky.) 30 S. W. 1013; *McClintock v. Joyner*, 77 Miss. 680, 27 South. 837, 73 Am. St. Rep. 541; *Robinson v. Perry*, 21 Ga. 186, 68 Am. Dec. 455; *Blount v. Connolly*, 110 Mo. App. 607, 85 S. W. 605; *Phelps v. Erhardt*, 5 N. Y. Supp. 540; <sup>1</sup> *Mitchell v.*

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 630.

*Young*, 80 Ark. 443, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 117 Am. St. Rep. 89, 10 Ann. Cas. 423 (citing with approval *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910); *Leominster Gaslight Co. v. Hillery*, 197 Mass. 268, 83 N. E. 870 (holding that the reversioner is bound, even without notice, by the contract to renew although the sublease is unrecorded). Other authorities in support of the rule that a transferee of the lessor's interest is bound by a stipulation contained in a sublease are *Connor v. Withers* (Ky.) 49 S. W. 310; *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278; *Robinson v. Beard*, 140 N. Y. 111, 35 N. E. 441; *Buttner v. Kasser* (App.) 127 Pac. 811, petition for rehearing denied by this court November 19, 1912. Respondent cites *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910, supra (a case discussed and approved in the very late case of *Buttner v. Kasser*, supra) as determinative of the questions here presented. In that case, as here, the plaintiff appeared as the owner of the fee and assignee of the lease. The court held that where a lessee, after subletting, assigns to the lessor, who collects from the sublessee the rent reserved in the sublease, the lessor comes in as assignee of the reversion and not as the owner of the fee; there being no merger of the term of the original lessee in the estate of his lessor. The court said of defendant: "Claiming the benefit of Dore's contract, he is estopped from denying that he has succeeded to his responsibilities." Dore was the assignee of the original lessee and the rights of plaintiff arose under a covenant in the sublease running with the land. The case is in point, and supports respondents' contention.

It is argued that a formal demand of a renewal of the lease was necessary, and that failing to make it defendant forfeited all right to a continuance of his term to 1919. It may be conceded that defendant might have exercised the right of Independence Oil Company to demand a renewal of the lease from its lessors after that corporation had parted with its interest in the lease; but by the terms of the sublease the owners of the Harper interest were not required to make any demand at all, and, as that duty devolved upon plaintiff as successor to the Independence Oil Company, it would have been idle to require Standard Oil Company as lessee to demand the extended term from itself as owner of the fee.

[5] Plaintiff insists that the original sublease from Independence Oil Company to Harper is not enforceable because not ratified by the stockholders of that company. At the time of the execution of that contract (July 18, 1902), a statute was in force which required such ratification. By this act it was provided as follows (Stats. 1897, p. 96): "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held

by such corporation, nor to purchase or obtain in any way (except by location) any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding." This statute, and its predecessor (Stats. 1880, p. 131), as explained by Mr. Justice Sloss in the opinion of this court in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 752, 110 Pac. 123, 137 Am. St. Rep. 165, has been given a less rigid and strict interpretation in the later cases than in the earlier ones. In that case formal ratification of the transaction involved was not found to be necessary where one of the participating directors owned more than two-thirds of the stock. While we would doubtless hold that, in the absence of some proof of actual ratification, the lease would be of no effect if the act were still in force, we are confronted with the fact that it was repealed in 1905 (Stats. 1905, p. 74). The Harper contract was treated as valid by Independence Oil Company up to March 26, 1907, and Standard Oil Company collected the full amount of royalties from Harper's successors from that time until near the close of the year 1909. Under clear principles of estoppel that corporation may not now assert the invalidity of a corporate act regular upon its face. The courts have almost uniformly sustained contracts which litigants who have profited thereby have later sought to avoid on the ground that such agreements were executed without proper authority. Such has been the ruling in the following cases: *Main v. Casserly*, 67 Cal. 128, 7 Pac. 426; *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, 34 Pac. 527; *Lawrence v. Johnson*, 131 Cal. 176, 68 Pac. 176; *Jones v. Evans*, 6 Cal. App. 90, 91 Pac. 532.

No other alleged errors require discussion.

The judgment and order from which plaintiff appeals are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

# JERSEY FARM CO. v. ATLANTA REALTY CO. (S. F. 5,872.)

(Supreme Court of California. Dec. 30, 1912.

On Rehearing, Jan. 29, 1913.)

## 1. WATERS AND WATER COURSES (§ 154\*)—NATURE OF PARTICULAR EASEMENT.

Civ. Code, § 801, provides that "the following burdens or servitudes on land may be attached to other lands as incidents or appurtenances, and are then called easements," naming 17 forms of easements, such as a right of pasture, etc., and section 1104 provides that a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to the use of other realty of grantor in the same manner as such property was obviously and permanently used by grantor for the benefit of such property at the time of the transfer. *Held*, that section 1104 was not limited in its application to the list of easements

enumerated in section 801, so that the purchaser of land takes it with all of the easements appertaining thereto at the time of the sale, whether enumerated in section 801 or not, and hence would take the right of going upon grantor's remaining lands for the purpose of maintaining a levee, and using the pumping plant thereon to pump out a drainage canal which drained all of the land before the conveyance; the drainage system being a complete scheme of which the levee and pumps were an essential part.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.\*]

## 2. EASEMENTS (§ 16\*)—CONVEYANCE OF LAND.

Deeds by a trustee of land conveyed to secure the payment of money under a trust deed authorizing trustor to demand reconveyance would convey any easements attached to the land conveyed if the trustor be treated as owner; the trustee's conveyance being as trustor's agent.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 43; Dec. Dig. § 16.\*]

## 3. EASEMENTS (§ 28\*)—EXTINGUISHMENT—"RELEASE."

"Release" is the appropriate word used for the extinguishment of an easement.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 76; Dec. Dig. § 28.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6058-6060; vol. 8, p. 7783.]

## 4. EASEMENTS (§ 27\*)—EXTINGUISHMENT—CONVEYANCE.

A deed by the owner of a dominant easement to the owner of the servient tenement extinguishes all easements held by the owner of the dominant easement in the land conveyed.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 75; Dec. Dig. § 27.\*]

### On Rehearing.

## 5. EVIDENCE (§§ 433, 434\*)—VALIDITY OF INSTRUMENT—PAROL EVIDENCE.

When an instrument is sought to be avoided for fraud or mistake in law or fact, evidence is admissible as to what grantor intended to do or convey.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1990-2004, 2005-2020; Dec. Dig. §§ 433, 434.\*]

Department 2. Appeal from Superior Court, Contra Costa County; R. D. Latimer, Judge.

Action by the Jersey Farm Company against the Atlanta Realty Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

J. C. Meyerstein and H. U. Brandenstein, both of San Francisco, and A. B. McKenzie, of Martinez, for appellant. A. L. Shinn, of San Francisco, and M. R. Jones, of Martinez, for respondent.

HENSHAW, J. This appeal is from an order granting a preliminary injunction restraining defendant and appellant from interfering with the repair and maintenance by plaintiff of a levee, and from interfering with the use and repair of a drainage canal and pumping plant, all situated upon the land of the appellant.

The controversy arises under the following facts: There is in the county of Contra Costa

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—38

a tract of land comprising over 3,900 acres which in the state of nature is overflowed by the waters of the San Joaquin river. This land unreclaimed, is valueless, reclaimed, is very valuable. Years ago it was reclaimed by its then owner, the reclamation consisting of the construction of a levee around the exterior boundaries of the tract and the excavation of drainage canals conducting the water to the lowest part of the tract where a pumping plant was erected, and the excess water pumped out of the canal and off the land. The levees, canals, ditches, and pumping plant were constructed, installed, and operated as a single indivisible system for reclaiming all of the land, and they are still indispensable for its use and cultivation. In 1907 Nathan Fisher was the owner of the land. He made a deed of trust to Archibald Kains, trustee for the benefit of Myra E. Wright, beneficiary, to secure the payment of a sum of money owing by Fisher to Wright. The deed of trust contained a provision empowering Nathan Fisher or his grantee to demand reconveyance of any portion of the tract in lots of not less than 50 acres on the payment of a certain specified sum of money per acre. Herman Bendel by mesne conveyances succeeded to the title and rights of Fisher and tendering the requisite amount of money demanded from the trustee a reconveyance of 50 acres. The 50 acres whose reconveyance was thus demanded was the lowest land of the tract. Upon it was established the pumping plant to which pumping plant by a main canal were conducted the surplus waters of the whole tract. The exterior protecting levee extended along the river frontage of this tract. The trustee refused to make the conveyance and Bendel brought suit to compel him to do so. A decree was given commanding the execution of the deed which the trustee thereupon executed. Subsequently Bendel conveyed this 50 acres to the defendant and appellant herein. Previous to the execution of the trustee's deed to Bendel the trustee had executed under the terms of his trust a deed of all of the rest of the tract to Myra E. Wright. To all the interest of Myra E. Wright in this land plaintiff has succeeded. Defendant refused plaintiff admission to its lands for the purpose of maintaining the outer levee upon the lands, of maintaining and using the drainage canal, and of maintaining and using the pumping plant to expel waters from the drainage canal. Plaintiff insisted upon its right to enter the land of appellant for these purposes. The injunction forbade defendant from interfering with plaintiff in the exercise of its asserted rights.

[1] Appellant's first proposition is that section 801 of the Civil Code enumerates all the burdens by way of servitudes which may be attached to land for the benefit of the dominant tenement and that the burdens imposed by the decree upon its land do not come under any of the classifications enumerated

in that section; that the only other section which can have reference to the matter is 1104 of the same Code which declares: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." This section, it is said, affords no ground for the relief awarded to respondent, for, it is argued, the easements contemplated by section 1104 are such, and such only as are classified and enumerated in section 801. This, however, we think to be an incorrect construction of the two sections. The ingenuity and foresight of the Legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land. By section 801 it enumerated some of them. By section 1104 it declared generally that, in the case of a transfer of real property other easements may spring into existence, easements which could not be enumerated for the very reason that they embrace every burden which by virtue of the manner of use has been imposed upon the portion of the estate not granted in favor of the portion granted. It is a direct recognition of the principle long established and fully recognized by this court (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69), that principle being that where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. It is this general principle which is given full recognition by section 1104, and its application is by no means limited to the list of servitudes and corresponding easements enumerated in section 801 of the Civil Code. It follows, therefore, that the character of the burden imposed upon the servient tenement is not controlling, that it is of no consequence whether that particular burden will fall into or can be forced into any of the seventeen subdivisions of section 801. If it be a burden obviously cast upon the land at the time of the segregation of the title, it remains a burden upon that land in favor of the other parcel, and it is an "easement" within the meaning of section 1104, even if it does not come within the limitations of section 801 because section 1104 itself designates it an easement. We have before us, then, one complete scheme of reclamation to which the surrounding levee was an essential part, the main drainage canal upon the 50 acres to which all the other drainage canals led another essential part, and finally, and

quite as indispensable, the pumping plant to eject the surplus waters. It would work the destruction of the whole plan to recognize the easement of any of these essentials and not of all. Nor, it may be added, is the right to use a pump under such circumstances a unique burden upon land in the history of the law. Similar cases may be found in *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094. It is a matter of indifference to the conclusion thus reached whether the trustee of the whole tract be considered as the absolute owner at the time of the transfers, or whether the successor in interest of Nathan Fisher, the trustor, be considered the owner. In the one case the trustee deeds all of the tract saving the 50 acres to Myra E. Wright and in favor of the land thus conveyed to her springs up the easement to use the remaining 50 acres for the indicated purposes. The later conveyance of the 50 acres would, of course, be subject to these easements.

[2] Precisely the same construction would obtain if Nathan Fisher or his grantee be treated as the owner of the whole tract at the time of the making of the deeds. The deeds by the trustee would then, in effect, be nothing more than deeds by an agent and the same legal result would follow.

Appellant further contends, however, that even if the easements claimed by plaintiff be found to have, or rather to have had, an existence, they were extinguished by the deed of Myra E. Wright, predecessor in interest of plaintiff. This contention rests upon the following facts: Myra E. Wright in July, 1909, through the trustee's deed, became the owner of all the tract excepting the 50 acres subsequently conveyed to Bendel. In that 50 acres after demand by Bendel of the trustee for a deed with tender of the money she had no interest other than what may be described for convenience as a mortgagee's interest. The decree awarding Bendel the 50 acres was made on the 24th day of November, 1909. It would appear that the court's decision had been indicated earlier than this date for the trustee's deed to Bendel was dated and acknowledged on November 22, 1909, and a quitclaim deed and release to Bendel from Myra E. Wright and her husband was given, which deed was dated and acknowledged on November 20, 1909.

[3, 4] Upon these facts appellant argues that the release of Myra E. Wright to plaintiff is to be construed by its terms and by its terms alone; that "release" is the appropriate word to be used for the extinguishment of an easement; that a deed by the owner of the dominant tenement to the owner of the servient tenement extinguishes easements; and that the inevitable result is that whatever burdens and servitudes existed upon the Bendel 50 acres were by the deliberate act of Myra E. Wright released and extinguished.

Over these general principles there can be no controversy. *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; 14 Cyc. 1191; *Jones on Easements*, § 845; *Devlin on Deeds* (2d Ed.) § 27. The court, however, received evidence of the circumstances under which the deed of quitclaim and release was executed, and from this evidence concluded, as it had the right to do (Code Civ. Proc. §§ 1860, 1861), that "release" was not employed in its technical sense for the extinguishment of the easements, but that the instrument of quitclaim and release was made only for the purpose of carrying into effect the provisions of the trustee's deed and of giving to Bendel simply the title which the trustee's deed justified him in demanding. The evidence upon this point is that the right to appeal from the court's decree existed in favor of Myra E. Wright, that her quitclaim deed preceded in date the deed of the trustee to Bendel, that there was no mention in the deed of easements or servitudes and no indication other than that contained in the use of the word "release" of any intent to extinguish the servitudes. There is positive testimony by the husband of Mrs. Wright who joined in the release that the sole purpose of it was to end the litigation to fortify the trustee's deed, and to give to Bendel just such title as he was entitled to take under the trustee's deed and no more, that a previous sale under the deed of trust had been made to Myra E. Wright, and the quitclaim was further designed to relieve the Bendel land from all question of the effect upon it of this previous sale.

For these reasons, the decree and the order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

#### On Rehearing.

PER CURIAM. The petition for rehearing is denied.

In answer to the proposition argued in the petition, that the effect of the court's decision is to permit declarations of the intent of the grantor in making the deed to control the language of that instrument, it is proper to point out that the hearing before the trial court was solely to determine whether or not a preliminary injunction should be granted. The language of this court was addressed solely to the case made in the trial court upon that hearing—a hearing which was had principally upon affidavits. The defendant having set up the quitclaim deed in its answer, it was open to plaintiff to meet and overcome its legal effect in any appropriate way. It did this by evidence tending to show that the quitclaim deed owed its existence to a mistake in law upon the part of the grantor, taken advantage of by the grantee.

[5] It is, of course, true that, where an instrument is sought to be avoided for fraud or for mistake in law or in fact, evidence is



admissible as to what the grantor intended to do or to convey (Civ. Code, § 1573, subd. 2). Therefore, what is decided upon this appeal is that enough was shown to have justified the court in granting the temporary injunction. Whether the reformation of the deed is required, whether, if required, it may be accomplished under the implied replication to defendant's answer, or whether a separate action seeking affirmative relief on this ground should be brought by plaintiff are one and all questions whose consideration pertain to the principal case when that case comes to be tried upon its merits and formal findings are made.

Therefore those questions are left until that time.

**BENSEN v. BENSEN.** (Civ. 1,008.)  
(District Court of Appeal, Third District, California. Nov. 29, 1912.)

**DIVORCE (§§ 231, 294\*)—AWARDING PERMANENT ALIMONY—CUSTODY OF CHILDREN.**

Under Civ. Code, §§ 136, 137, authorizing the court denying a divorce to provide for the maintenance by the husband of the wife and children of the marriage, and authorizing an action by the wife for permanent support of herself and children in case of the willful desertion by the husband, the court finding that neither husband nor wife was entitled to divorce could not award the custody of the children to the wife, nor award to her permanent alimony and counsel fees where it did not find facts justifying the inference that the best interests of the children demanded that their custody should be awarded to her, and where it did not find whether the parties were living together or separate, nor make any findings as to their financial condition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664, 777; Dec. Dig. §§ 231, 294.\*]

Appeal from Superior Court, Contra Costa County; H. C. Gesford, Judge.

Action by Gerda Bensen against Carl Bensen. From a judgment denying divorce, and awarding permanent alimony and counsel fees to the plaintiff, defendant appeals. Modified and affirmed.

Austin Lewis and R. M. Royce, both of San Francisco, for appellant. Harry E. Styles, of Redwood, for respondent.

**BURNETT, J.** This was a suit for divorce, plaintiff claiming it on the ground of cruelty, and defendant, in his cross-complaint, asking for a decree of divorce on the ground of desertion.

The court found as follows: "That the allegations and averments of plaintiff's complaint have not been proved; that the allegations and averments of defendant's cross-complaint have not been proved; that there are three children, issue of this marriage named, respectively, Alice, Berger, and Chester, and that it is for the best interests of said children that plaintiff have their cus-

tody. As a conclusion of law from the foregoing facts, the court finds that neither plaintiff nor defendant is entitled to a divorce herein; that plaintiff is entitled to the care and custody and control of said children and all of them; that said plaintiff is entitled to permanent alimony in the sum of \$20 per month beginning on the 1st day of July, 1911, for the care of said children; that said plaintiff is entitled to the sum of \$75 as and for counsel fees herein which shall be due and payable on the 1st day of July, 1911; that the community property or homestead shall remain as it is, it being understood that plaintiff shall collect and receive the rents and profits thereof until its future disposition by mutual agreement of the parties hereto, or otherwise; and it is hereby ordered that judgment be entered accordingly."

We think it is quite apparent that the findings of fact are utterly insufficient to support the judgment, except that portion of it which denies a divorce to each of the parties. No fact is found that would justify the inference that it is for the best interests of the children that their custody be awarded to the mother. Indeed, considering the general findings of fact in connection with the specific allegations of the complaint and cross-complaint, we have the conclusion of the court that both plaintiff and defendant are "fit" and also "not fit" persons to have the custody of said children. Likewise, it may be said that there is no necessity or justification shown for the provision in reference to the alimony, court fees, or homestead. In fact, we are left completely in the dark as to whether the parties are living together or separate, what their financial condition is, whether there is any community or separate property, whether a homestead exists or what may be the capacity or needs of either party. There is no sufficient reason disclosed, therefore, for the application of section 136 or 137 of the Civil Code. The decisions of our Supreme Court make this plain.

In *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. 842, it is held that: "In an action for a divorce the court has discretionary power, under section 136 of the Civil Code, although a divorce is denied, to require the husband to provide for the maintenance of the wife while she is living separate from him, when the circumstances of the case show that it would be impossible for them to live happily together." An examination of the opinion, however, shows that facts were found by the lower court upholding such conclusion. In *Hagle v. Hagle*, reported in 74 Cal. 608, 16 Pac. 518, it is held that: "The courts of California have no authority to grant a divorce a mensa et thoro, or to compel a husband to support his wife while she is living separate and apart from him against his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

will and consent, without any statutory ground for an absolute divorce or any statutory excuse for her absence from his home." In *Peyre v. Peyre*, 79 Cal. 336, 21 Pac. 838, the law is declared to be that: "Where a divorce is denied, permanent alimony cannot be granted the wife, under section 136 of the Civil Code, where no facts are either proved or found showing that the wife has a cause for divorce, or that the parties are not living together, or that permanent alimony is needed for her support and maintenance." In *Volkmar v. Volkmar*, 147 Cal. 175, 81 Pac. 413, it was held that: "In an action for a divorce brought by the husband, where the application is denied, and the court finds that the parties have lived separate and apart since a certain date and that the wife did not desert her husband, but there was neither averment in the answer nor finding that the husband deserted the wife or was at fault for the separation, the court cannot award a permanent maintenance or permanent alimony to the wife." The judgment there was modified by striking out the provision in reference to permanent alimony and as thus modified affirmed.

Following that case as a precedent, it is ordered that the judgment herein be and the same is modified by striking therefrom the following provision, viz.: "That plaintiff is entitled to the custody and control of the three minor children, issue of this marriage, and they and each of them are hereby awarded to plaintiff; that defendant pay permanent alimony to plaintiff in the sum of \$20 per month, beginning on the 1st day of July, 1911; that defendant pay to plaintiff on or before July 1, 1911, the sum of \$75, as and for counsel fees herein; that the community property or homestead remain as it now is, plaintiff to receive rents and profits until its future disposition by agreement of parties hereto or otherwise." And, as so modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**ROYAL INS. CO. OF LIVERPOOL, ENG., v.  
CALEDONIAN INS. CO. OF EDIN-  
BURGH, SCOTLAND. (Civ. 1,031.)**

(District Court of Appeal, First District, California. Dec. 4, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. INSURANCE (§ 684\*)—REINSURANCE—LIABILITY OF REINSURER.**

Where policies of insurance and reinsurance each contained a provision that if a building, or any part, should fall except as the result of fire, the insurance on the building or its contents should immediately cease, a provision in the reinsurance policy that it should be subject to the same risks, valuations, conditions, and adjustments as were or might be taken by the reinsured, and that the loss was payable pro rata with the reinsured, did not authorize the original insurer by adjusting a loss for which it was not liable because of the fall of a build-

ing to subject the reinsurer to its pro rata share of such loss.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1817; Dec. Dig. § 684.\*]

**2. CONTRACTS (§ 162\*)—CONSTRUCTION—GIVING EFFECT TO WHOLE INSTRUMENT.**

Every part of a contract must be given some effect, if possible, and apparently conflicting provisions must be reconciled if this can be done without doing actual violence to the language of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 744; Dec. Dig. § 162.\*]

**3. INSURANCE (§ 686\*)—REINSURANCE—ACTIONS—DEFENSES.**

In an action on a policy of reinsurance, an answer alleging a violation by the original insurer of a promise not to adjust any loss without notice to defendant, but not alleging any injury to defendant from such failure, was insufficient.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1823; Dec. Dig. § 686.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Royal Insurance Company of Liverpool, England, against the Caledonian Insurance Company of Edinburgh, Scotland. Judgment for plaintiff, and defendant appeals. Reversed.

T. O. Van Ness, of San Francisco, for appellant. James Alva Watt, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment rendered for plaintiff against defendant upon a policy of reinsurance against loss by fire.

[1] The original policy of insurance and the policy of reinsurance are attached to the complaint and made a part thereof. The risk was upon machinery, fixtures, and goods contained in a designated building. The original policy of insurance contains the following clause: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The reinsurance policy contains precisely the same clause and also the following: "This policy is subject to the same risks, valuations, conditions and adjustments as are or may be taken by the reinsured, and the loss, if any thereunder is payable pro rata with the reinsured and at the same time and place." It is substantially alleged in the complaint, among other things, that after the fire plaintiff adjusted and ascertained the amount of the loss sustained by the original insured at a certain amount, and the portion thereof payable by the plaintiff to the original insured, and that it paid the same. Plaintiff sought and obtained a judgment against the defendant for its pro rata amount based upon such adjustment. Defendant, among other things, pleaded as and for a separate defense that, before the occurrence of the fire, a material and substantial portion of said building had fallen from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a cause other than fire, and that said building had fallen within the meaning of the policies. Plaintiff interposed a general demurrer to this defense, which the court sustained, and it is this ruling which presents the principal point to be determined upon this appeal.

It is the contention of plaintiff that because of the pro rata clause defendant is liable for its proportion of the amount found to be due the original insured from plaintiff by its adjustment of such loss with the owner of the property, unless indeed that such adjustment shall have been fraudulently or collusively made to the injury of defendant. In other words, that plaintiff may, by its adjustment with the original insured, establish as against the reinsuring company the fact of its liability for a loss as well as the amount thereof, and this in plain disregard of the conditions of both the original policy and the policy of reinsurance that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." We cannot accede to the soundness of this view of the law. We have been cited to no case that goes so far. As was said in *Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253: "In any event, the liability of a reinsurer, like that of a party to any other contract, must depend upon the terms of his contract." By the terms of the contract in the case at bar, all insurance on the property covered by the policy of reinsurance was to immediately cease upon the falling of the building or any part thereof, except as the result of fire.

[2] It is a well-recognized rule that every part of a contract must be given some effect, if possible, and two apparently conflicting provisions of the same contract must be reconciled if such may be done without doing actual violence to the language of the contract. Just what is the precise meaning of the so-called pro rata clause may be in some doubt. We certainly do not think that under its somewhat vague and uncertain language there can justly be found any authority to the reinsured to charge the reinsuring company for a loss for which it in plain terms provided exemption. See *Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253; *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632; *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475. In discussing a claim made by a reinsurer that he was entitled to notice of abandonment as and for a total loss the Court of Kings Bench said: "So long as liability exists the mere fact of some honest mistake having occurred in fixing the exact amount of it will afford no excuse for not paying. He has promised 'to pay as may be paid thereon.'" *Western Assur. Co. of Toronto v. Poole*

[1903] 1 Kings Bench Div. 376. The court seemed to be of the opinion that the right of the reinsured to bind the reinsurer by any adjustment of the loss depended upon the existence of a liability for any loss. It has been held that, under a reinsurance policy containing the clause "to pay as may be paid," no adjustment or payment by the reinsured will put a liability upon the reinsurer for a loss for which, under the other provisions of his policy, he was not liable, or for which the original insurer was not in fact liable though he paid it. *Marten v. Steamship Owners Underwriters' Ass'n, Ltd.*, 9 Aspinalis (N. S.) 339; *Chippendale v. Holt*, 78 L. T. Rep. 472. These two cases are precisely in point, but are not cases in appellate courts. We do not think that the reinsured, under the pro rata clause, may, by adjusting and paying a loss, impose a liability upon the reinsurer for a loss not covered by either the original policy or the reinsuring policy, but expressly excepted therefrom. The court erred in sustaining the demurrer to the defense founded upon the fallen building clause. See *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579.

[3] Defendant also claims that the court erred in sustaining plaintiff's demurrer to that portion of the answer wherein defendant set up the alleged violation of a promise made by plaintiff not to adjust the loss without giving notice thereof to defendant. Without discussing this claim in detail, it is sufficient to say that we see no error in this ruling. No facts are pleaded which show that defendant was in any way injured by such failure to notify defendant of the adjustment. Especially must this be so if, as we have already held, defendant's liability for any loss is not concluded by such adjustment.

For the reasons above stated, the judgment must be reversed and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

McEWEN v. OCCIDENTAL LIFE INS. CO.  
(Civ. 1,170.)

(District Court of Appeal, Second District,  
California. Nov. 29, 1912.)

1. TRIAL (§ 189\*)—TAKING QUESTIONS FROM JURY—NONSUIT.

To justify a trial judge in taking the issues of fact from the jury, the evidence must be such that plaintiff's case finds no substantial support in it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

2. INSURANCE (§ 668\*)—ACTIONS ON POLICIES—QUESTION FOR JURY.

In an action on an accident policy, evidence held to present a question for the jury whether

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the death of the insured was occasioned through accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Rachel A. McEwen against the Occidental Life Insurance Company. From an order granting a new trial after judgment of nonsuit, defendant appeals. Affirmed.

Benjamin E. Page and L. T. Chamberlain, both of Los Angeles, for appellant. Murphy & Poplin, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action as the beneficiary under a policy of insurance against accident and death issued to her husband, Charles R. McEwen. This contract of insurance contained a conditional clause providing that the injuries which might result in the death of the insured, and for which the indemnity was agreed to be paid, should not be "intentionally self-inflicted," and should be "sustained by the insured while sane, and effected directly and independently of all other causes through external, violent and accidental means (suicide, sane or insane, not included)." Evidence was introduced at the trial showing that the insured, McEwen, died on the 21st day of February, 1910, after having been ill for some time; that on the day prior to his death he was alone in his room, and was heard to fall to the floor. Members of his family immediately went to him, and had him placed on his bed. He complained of pain in the back of his head, and it was noted that his neck and shoulder had been bruised, that they were black and blue, and a mark or cut was discovered on his arm. He complained of suffering pain in his neck and head. His death resulted shortly after he experienced this fall. At the conclusion of the evidence introduced on behalf of plaintiff, the trial judge made an order granting the motion of defendant for judgment of nonsuit, and thereafter, on the motion of plaintiff, reopened the case and granted a new trial. This appeal is taken by defendant from the latter order.

The grounds assigned by the plaintiff in her notice of motion for a new trial were sufficient to raise the question as to the sufficiency of the evidence to sustain the judgment of nonsuit.

[1] The rule is elementary and thoroughly settled that, in order to justify a trial judge in taking the issues of fact in suit away from a jury, the condition of evidence must be such that it may be said that plaintiff's case finds no substantial support in it. If there is any evidence at all of a substantial nature supporting the essential features of the cause of action alleged in the complaint,

then and in that case the motion for judgment of nonsuit should not be granted.

[2] In our opinion there was such evidence in this case tending to show that the death of plaintiff's husband was occasioned through accident, and it was for the jury to consider what weight should be given the facts and circumstances in proof in determining that issue. Had the trial court made its order for judgment of nonsuit at the conclusion of the introduction of all of the testimony and at that time taken the case from the jury, a different rule of review would be applied. We are of the opinion that the trial court erred in granting the motion for judgment of nonsuit, and that the order subsequently made setting aside that judgment and granting a new trial was necessary and appropriate to secure to plaintiff an opportunity of having her case adjudged upon the whole evidence.

The order granting a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

#### ROSE v. LELANDE, County Clerk. (Civ. 1,260.)

(District Court of Appeal, Second District, California. Dec. 3, 1912.)

##### 1. PLEADING (§ 129\*)—ADMISSIONS.

Facts alleged in a verified complaint, and not denied by the answer, are deemed admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 269; Dec. Dig. § 129.\*]

##### 2. CLERKS OF COURTS (§ 66\*)—POWERS—DETERMINATION OF SUFFICIENCY OF PLEADING.

The clerk of the superior court has no judicial power to pass on the sufficiency of an answer filed in due time, but the question of its sufficiency is for the court on motion for judgment on the pleadings or on motion to strike out the answer.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 98-100; Dec. Dig. § 66.\*]

##### 3. JUDGMENT (§ 106\*)—DEFAULT—ENTRY BY CLERK.

Where an answer is stricken from the files by the court, and the time for answering has expired, and there is no answer on file, the clerk is warranted in entering a default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.\*]

##### 4. JUDGMENT (§ 107\*)—DEFAULT—ENTRY BY CLERK.

The clerk of the superior court in entering a default acts ministerially, and he may not enter a default where his authority so to do depends on the determination of the sufficiency as to the substance or form of an answer filed in time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.\*]

Application by Ruth M. Rose for an alternative writ of mandate directed to H. J. Lelande, as county clerk and ex officio clerk of the superior court of Los Angeles county. Denied.

E. M. Barnes, of Los Angeles, for petitioner.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**SHAW, J.** This is an *ex parte* application for an alternative writ of mandate directed to H. J. Lelande, county clerk and *ex officio* clerk of the superior court of Los Angeles county, commanding him to enter the default of defendants in a certain action pending in said superior court, wherein petitioner is plaintiff and Adna R. Chaffee, sued as a member of the board of public works of the city of Los Angeles, and his official surety, alleged to be a corporation, are defendants, or show cause for his failure so to do.

[1] The petition shows that defendants, within due time, filed their answer to the complaint. Petitioner, however, contends that the purported answer is insufficient for the reason that it is not made to appear therein that Chaffee is a member of the board of public works, or that his codefendant is a corporation. The complaint wherein these facts are alleged is verified, and, since the answer does not deny them, they are deemed admitted.

[2, 3] Moreover, conceding the answer to be defective, irregular, or insufficient to constitute a defense, the clerk possesses no judicial power to pass thereon. The question as to the sufficiency of the answer was one for the court to determine upon a motion for judgment upon the pleadings, or motion to strike the purported answer from the files, upon the granting of which latter motion, there being no answer on file, and the time for pleading to the complaint having expired, the clerk would be warranted in entering a default.

[4] The clerk in entering a default acts ministerially, and in no case is he warranted in making such entry where his authority so to do depends upon a determination of the sufficiency, either as to the substance or form, of a document on file purporting to constitute an answer to the complaint.

The application is wholly without merit, and is therefore denied.

We concur: ALLEN, P. J.; JAMES, J.

**PEOPLE ex rel. DEL VALLE et al. v. BUTLER et al.** (Civ. 1255.)

(District Court of Appeal, Second District, California. Nov. 21, 1912.)

**1. ELECTIONS (§ 261\*)—COMPELLING CANVASS—JURISDICTION—APPELLATE COURT.**

The District Court of Appeal has power to direct a county board of canvassers to canvass election returns as required by statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 237; Dec. Dig. § 261.\*]

**2. MANDAMUS (§ 74\*)—GROUNDS—CANVASS OF ELECTION RETURNS.**

Where a county board of supervisors sitting as a board of canvassers fails to canvass election returns as required by statute, mandamus is the proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

**3. ELECTIONS (§ 250\*)—CERTIFYING RETURNS.**

Where a precinct board of election fails to certify returns within the time prescribed by Pol. Code, § 1174, such act of certifying, being purely ministerial, could subsequently be completed seasonably, provided the contents of the returns were in no way modified.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**4. ELECTIONS (§ 250\*)—VALIDITY OF RETURNS.**

Election returns from certain precincts were not invalidated because the number of votes received by each candidate was written in the certificate in figures instead of words, or because the names of the candidates did not appear in the certificate where they appeared on the same horizontal lines on the opposite page which contained the tally sheet.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**5. ELECTIONS (§ 259\*)—CANVASSING RETURNS—EXTRINSIC EVIDENCE.**

The board of supervisors acting as board of canvassers have no authority to take extrinsic evidence with reference to election returns.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

**6. ELECTIONS (§ 250\*)—TALLY SHEETS—CONTROLLING EFFECT.**

Where more than 100 tally marks appear on the tally sheets after the name of one candidate for presidential elector and few or none appear after the names of the other candidates in the same class, the number of tally marks opposite the name of each candidate must control with the board of canvassers, though the certificate of the board of election shows that each of such candidates has received a number of votes in excess of 100; the presumption being that the clerks of election have placed all the tally marks opposite the name of each candidate as his name was read, and it being the duty of the board of canvassers merely to compute, and not to construe, the effect and character of returns.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**7. STATUTES (§ 227\*)—"DIRECTORY ACTS."**

"Directory acts" are such as are not of the substance of the thing provided for.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2078, 2079.]

**8. STATUTES (§ 227\*)—CONSTRUCTION—MANDATORY ACTS.**

In construing a statute matters of substance are to be construed as mandatory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

**9. ELECTIONS (§ 241\*)—PREPARATION OF TALLY SHEETS—MANDATORY STATUTE.**

Pol. Code, § 1258, prescribing the duty of election clerks and the manner of placing tallies upon the tally sheets as the name is called aloud by the proper officer, is a mandatory provision.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 218; Dec. Dig. § 241.\*]

**10. ELECTIONS (§ 251\*)—EFFECT OF IRREGULARITY—OPENING RETURNS.**

While the breaking of sealed envelopes containing precinct election returns under the direction of the election board prior to the time set for the opening of the envelopes in public was violative of the statute, it was not such an irregularity as required the returns to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be entirely rejected by the board of canvassers.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 227; Dec. Dig. § 251.\*]

**11. ELECTIONS (§ 253\*)—EFFECT OF IRREGULARITY—CERTIFICATE.**

That the board of canvassers permitted a board of election to insert in their certificate the total number of votes received by candidates for presidential elector did not authorize rejection of the election returns which showed tally marks from which the canvassing board could determine the total vote received by each candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 229; Dec. Dig. § 253.\*]

**12. ELECTIONS (§ 259\*)—ALTERATION OF RETURNS.**

The county board of canvassers is unauthorized to change the tally list opposite the name of a candidate voted for, as shown by the tally sheet returned by the board of election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

Original application for mandamus by the People, on the relation of R. F. Del Valle and another, against Sydney A. Butler and others, constituting the board of supervisors of the county of Los Angeles, and H. J. Lelande, county clerk. Peremptory writ granted.

Jeff. P. Chandler, Joseph H. Call, Lynn Helm, Milton K. Young, Albert Lee Stephens, and Oscar Trippet, all of Los Angeles, for plaintiffs. J. D. Fredericks, Dist. Atty., Joseph Ford, Asst. Dist. Atty., J. W. Carrigan, and Louis W. Meyers, all of Los Angeles, for defendants.

**PER CURIAM.** This is an original proceeding in mandamus instituted by the petitioners, candidates for the office of presidential elector, through which they pray for an order of this court commanding the board of supervisors of Los Angeles county to canvass the returns at the recent election in the manner provided by law; it being claimed that said board is proceeding and threatening to make such canvass in a manner other than that provided by statute. Respondents have interposed a demurrer to the petition and application as amended, upon general grounds, and specifically on account of certain uncertainties claimed to exist.

[1, 2] We are satisfied that this court upon a proper showing possesses the jurisdictional authority to direct the board to perform a duty devolving upon it by law; that the mode and manner of canvassing election returns is provided by statute and when a showing is made that the duty so devolving upon the board of supervisors, sitting as a board of canvassers, is not being performed, or is being performed in a manner otherwise than that provided by law, mandamus is a proper remedy. We are further satisfied, upon an examination of the application and its amendments, that the allegations therein contained are sufficiently specific and certain to

present the matters and things sought to be interposed as a ground for the issuance of the writ. The demurrer is therefore overruled.

[3] Upon the return and hearing, it was developed that in certain election precincts the boards of election had not completed their duties in and about attaching their signatures to the certificate by section 1174 of the Political Code required to be attached to the lists; that the board of supervisors sitting as a canvassing board had permitted members of such election boards to complete the returns theretofore transmitted to the clerk of the county by attaching to the certificates the signatures of a majority of such election boards. We are of opinion that the duty of certifying such returns is purely a ministerial duty, and that duties of that character may be completed seasonably, even though the officers have neglected such duty at the time specified in the statute for its performance, such completion, however, not to include any modification or correction of the returns, or addition or additions thereto.

[4] It was further developed that in certain election precincts the boards of election had, in lieu of writing in longhand in the certificate the number of votes received by each candidate respectively, inserted the number of votes so received in figures. This we think is a substantial compliance with the statute, and in no sense invalidated the returns. In other precincts the returns submitted to this court by stipulation show that the tally sheets had printed therein in appropriate spaces the names of the various candidates, separated by horizontal lines extending uninterruptedly across the page designated for the tally list and across the opposite page upon which the certificate of the number of votes received by such candidate was printed. The officers intrusted with that duty neglected to insert in the certificate the names of the respective candidates, which, however, were sufficiently indicated by the name printed on the tally sheet within the horizontal lines above referred to, and this we think was a substantial compliance with the statute.

[5] While it appears that evidence was taken by introducing a number of witnesses, it was conceded that such action was without warrant of law, and constituted no ground for any action upon the part of the board in making said canvass, and any such testimony must be disregarded.

[6] The serious and chief question presented for our consideration is a determination as to whether the number of votes which appear to have been given for a candidate, as shown by the tally lists, shall prevail where the same is in conflict with the certificate declaring the result, or whether the board may in its discretion accept the tally lists in one instance and the certificate in another where

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the facts in their opinion justified such action. The Political Code, after specifying the duties of election boards preliminary to the count, provides by section 1257: "After the lists are thus signed, the board must proceed to open the ballots and count and ascertain the number of votes cast for each person voted for." Section 1258 provides that "each clerk must write down each office to be filled, and the name of each person marked in each ballot as voted for to fill such office, and keep the number of votes by tallies, as they are read aloud. Such tallies must be made with pen and ink, and immediately upon the completion of the tallies the clerks who respectively complete the same must draw two heavy lines in ink from the last tally-mark to the end of the line in which such tallies terminate, and also write the initials of the person making the last tally in such line." Section 1261 provides that "the board must before it adjourns inclose in a cover, and seal up and direct to the county clerk, the copy of the register upon which one of the judges marked the word 'voted' as the ballots were received, all certificates of registration received by it, one of the lists of the persons challenged, one copy of the list of voters, and one of the tally-lists and list attached thereto. \* \* \* The board must also immediately transmit unsealed to the county clerk a copy of the result of the votes cast at such polling-place, which copy must be signed by the members of the board, and which copy shall be open to the inspection of the public." Section 1263 provides that "the sealed packages containing the register, lists, papers, and ballots, must before the board adjourns be delivered to one of its number, to be determined by lot, unless otherwise agreed upon." Section 1264 provides that the member selected must without delay deliver such packages to the county clerk, nearest postmaster, or other persons designated. Section 1267 provides that these packages must be produced before the board of supervisors when it is in session for the purpose of canvassing the returns. The effect which is to be given these tally lists is influenced much by a determination of the question as to the mandatory or directory character of the provision of the statute requiring such lists to be kept.

[7] It is a well-recognized rule that directory acts are such as are not of the substance of the thing provided for.

[8] In construing a statute matters of substance are to be construed as mandatory.

[9] We are of opinion that section 1258, providing for the duty of clerks and the manner of placing tallies upon the tally sheet as the same are called aloud by the proper officer, is a mandatory provision, notwithstanding the fact that other provisions of that section with reference to the initials of the clerk and of the drawing of the lines have been held to be directory. These last provisions are obviously of form, and not of

substance, but that provision which requires the tallying of the vote as called aloud and the preservation of such tally is certainly to our minds matter of substance, and it is mandatory upon the election officers. We are further of opinion that the result of the election—that is to say, a determination of the number of votes cast for any particular candidate—must be determined from an inspection of these tally lists. While section 1174 provides for a certificate upon the part of a majority of the board which shall declare the number of votes cast for each candidate, such certificate, in legal effect, can be nothing less than a declaration of the result of the computation from the tally lists, and if such declaration upon its face is incorrect, or at variance with the tally lists, such certificate must yield in its importance to that of the tally list itself; not unlike the computation of a column of figures the declared total of which is obviously erroneous, and a question arises as to the accuracy of the addition. This can be determined from the aggregate of the figures appearing in the column constituting the total, and the total, if improperly computed, must yield to the corrected result. We are of opinion, therefore, that when the tally list is presented to the board of canvassers showing the same to have been kept, or purporting to have been kept, in the manner provided by section 1258, the number of votes properly computed from such tallies shall be taken and received as the vote for that individual at such an election, even though the board of election had declared a lesser or greater number than shown by such tally sheets. In this determination we are influenced by the well-reasoned case of *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, a decision by the Supreme Court of the state of Kansas. We have examined the statute there considered, and find it identical with our own. In discussing the question it was there said: "The preponderance of decisions under statute somewhat similar to ours, however, appears to uphold the view that the tally or enumeration of the votes in the poll books may be considered in verifying the returns, and that if a disparity exists between the footings and the tallies the latter should control"—citing *Dalton v. State*, 43 Ohio St. 652, 3 N. E. 685; *State v. Hill*, 20 Neb. 119, 29 N. W. 258; *People v. Ruyle*, 91 Ill. 525; *Simon v. Durham*, 10 Or. 52; *State v. Canvers*, 22 Iowa, 343; *Trueheart v. Addicks*, 2 Tex. 221. See, also, *Hughes v. Parker*, 63 Kan. 297, 65 Pac. 265.

The returns exhibited from one of the precincts showed that one of the candidates for presidential elector, as shown by the tally marks, received upwards of 100 votes, whereas another received, as shown by the tally marks, 5 or 6 votes, while in other cases no tally marks whatever were set opposite the names of other candidates. The certificate, however, showed that each of said candi-

dates had received a number of votes in excess of 100. In our opinion the proper rule in canvassing the vote from such precinct is to give to each candidate the number of votes shown by the tally marks opposite his name, without regard to what may be shown by the certificate declaring the aggregate number of votes received by him, and, where no tally marks whatever are placed upon the tally sheet opposite the name of the candidate, such candidate is entitled to no votes whatever from such precinct, notwithstanding the fact in the certified column he is declared to have received a certain number of votes. The clerks of election are officers and presumed to do their duty, and where they purport to keep the number of tallies by the marks in the manner provided by the statute, and purport to place such marks opposite the name of each candidate as his name is read aloud, it must be presumed that they did their duty and placed all of the tally marks opposite the names as they were called. Much was said as to the effect of this conclusion as tending to disfranchise electors. This cannot be the effect, for there is nothing before the board of canvassers which in any legal manner indicates that any one of the candidates received votes in excess of the number of tallies as shown by the tally marks set opposite their names, and for a canvassing board to undertake, upon a theory of inference, to say that it is only fair to conjecture that the others received an equal number of votes, would be to confer a power upon the board of canvassers not reposed in them by law, their duty being simply to compute and not to construe the effect and character of returns. *People v. Stewart*, 182 Cal. 283, 64 Pac. 285; sections 603, 604, *Payne's Law of Elections*.

To summarize, it is the opinion of this court:

(1) That the board of supervisors acting as a board of canvassers have no authority to take extrinsic evidence with reference to returns.

(2) It is not authorized to call in the precinct officers to alter, change, or correct the returns, but where the returns are complete, save and except the authentication thereof, the election board may be permitted to complete the same by adding their signatures thereto.

(3) It is not authorized to reject the tally lists and accept the result as declared in the certificate, if there be a variance between the two. Its duty is to reject the result as declared by the election board and accept the tally lists where there is a conflict between them.

(4) In estimating or counting the votes as shown by the tally lists each mark represents one vote and the marks, and not the number thereof in the squares, are to be accepted as indicating the votes cast, and it is immaterial in what squares such marks

may be placed. The total number of marks, rather than the squares, should control.

(5) Where there are tally sheets showing the number of votes cast for any candidate for presidential elector, such tallies indicate the number of votes received by him, and, where no tally marks are placed upon such tally sheet indicating that the candidate received any votes, he is entitled to no votes from such precinct.

[10] 6. The breaking of the sealed envelopes containing the precinct returns, under the direction of the board, prior to the time set for the opening thereof in public, was contrary to the provisions of the statute, but did not constitute such an irregularity as to require that the returns be entirely rejected.

[11] 7. In instances where the supervisors have permitted the board of election to insert in their certificate the total number of votes received by candidates, which action, in our opinion, is not warranted by the statute, nevertheless, the tallies appearing from which the canvassing board may determine the number, the total figures as subsequently supplied may be ignored, and no injuries could result therefrom, and the same would constitute no good cause for rejecting the return.

[12] 8. In no case is the board authorized to add, or permit any person to add, or deduct from, or in any manner erase, change, or modify, the tally list opposite the name of a candidate voted for, as shown by the tally sheets returned by the board of election.

A peremptory writ of mandate is ordered to be issued, directing the respondents to canvass the election returns in accordance with the conclusions set forth in this opinion.

PEOPLE ex rel. SILL v. MURPHY et al.

(Civ. 1,246.)

(District Court of Appeal, First District, California. Nov. 23, 1912.)

1. ELECTIONS (§ 259\*)—CANVASSING OF RETURNS—POWERS AND PROCEEDINGS OF CANVASSERS.

A canvassing board in making the abstract of the votes at an election should consider the entire returns, including the certificate of the election officers, the list of voters, and the tally list, and, in case of a discrepancy between the certificate and the tally list, must, after comparing them with the list of voters returned, decide which is correct, and make the abstract accordingly, and are not bound in every case of discrepancy to accept the tally list as conclusive.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

2. ELECTIONS (§ 261\*)—CANVASSING OF RETURNS.

While cases may occur where the court will direct a canvassing board, in case of a discrepancy, which particular part of the return should be considered as conclusive, they will not do so unless all the matters contained in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the return before the board are before the court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 237; Dec. Dig. § 261.\*]

### 3. MANDAMUS (§§ 7, 10\*) — NATURE AND SCOPE.

Relief by mandamus is largely in the discretion of the court, and will be allowed only to secure or protect a clear legal right, and never where its enforcement will work an injustice or accomplish a wrong.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 5, 37; Dec. Dig. §§ 7, 10.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4323-4330; vol. 8, pp. 7714, 7715.]

### 4. ELECTIONS (§ 259\*)—CANVASSING OF RETURNS—DUPLICATE RETURNS.

Where the tally list and certificate of the election officers of a precinct, after being duly returned to the county clerk, have in some manner been lost, the duplicate thereof, originally delivered to the inspector of elections, may be used by the canvassing board after the expiration of the six days, which the law requires them to wait for the production of the returns before proceeding to canvass the vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

### 5. EVIDENCE (§ 178\*)—SECONDARY EVIDENCE—LOST INSTRUMENTS.

Where the right of any person depends on the contents of a writing which is lost, destroyed, or cannot be found, its contents may be proved by secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

Mandamus by the People, on the relation of Stephen J. Sill, against D. J. Murphy and others, constituting the Board of Supervisors of Alameda County, and another. Alternative writ dismissed, and peremptory writ denied.

W. T. Kearney and Thos. E. Hayden, both of San Francisco, and R. B. Bell, of Berkeley, for petitioner. Wm. H. Donohue, of Pleasanton, Walter H. Burpee, and Wm. T. Setterwhite, both of Oakland, for respondents.

**PER CURIAM.** The petitioner in this proceeding was one of the Democratic candidates at the recent general election for the office of presidential elector. He complains of the means and method employed by the respondents, as the board of supervisors of Alameda county, in canvassing the election returns of the vote cast for presidential electors in three certain precincts known respectively as Oakland precincts Nos. 64, 77, and 103 of said Alameda county. He seeks by mandamus to compel the respondents to exclude from their calculations the certificate of the precinct officers as to the number of votes cast, and for whom cast, in precincts 64 and 103, and prays that respondents be commanded to confine their canvass of the votes cast for presidential electors in these particular precincts to the result alleged to be shown by the tally list, as kept and returned in each instance by the precinct officers. In this behalf it is alleged by the petitioner that there is an apparent conflict between the tally list and the certificate of the

election officers as to the number of votes cast in these two precincts for the several candidates for the office of presidential electors. Because of this alleged conflict in the returns, the petitioner insists that the tally list is the only return which can be properly considered and canvassed by the respondents.

With reference to precinct No. 77, it is the claim of the petitioner that the election officers of this precinct not only neglected to certify to respondents the result of the election, but also failed to return the tally sheet of the vote cast and counted in this particular precinct. It is further alleged by petitioner, and admitted by the return to the alternative writ heretofore issued, that, in the absence of the original returns from precinct No. 77, respondents are proceeding to canvass the vote cast in said precinct from and by means of the duplicate tally sheet which the law requires shall be certified to and authenticated by the election officers, and retained for a period of six months by the precinct officer known and designated as the "inspector." Since the oral argument upon this matter, which was upon demurrer to the petition so far as it relates to matters pertaining to the canvass in precincts Nos. 64 and 103, our attention has been called to and we have carefully considered the opinion rendered by the district court of appeal of the second district in the case of *People ex rel. Del Valle v. Butler*, 129 Pac. 600 (Civ. No. 1,255). From the opinion in that case we cannot determine what the petition disclosed there as to the condition of the returns that were considered in that case. We are not called upon therefore to discuss that case, or consider it as an authority here. Upon the demurrer to the petition before us, we are called upon simply to determine whether or not such petition justifies this court in giving to the petitioner the writ demanded.

[1] At the outset it is well to have a clear understanding of the duty and powers of the canvassing board. We believe the true rule to be as stated in 15 Oyc. 382, as follows: "It is the duty of the canvassing board in making the abstract of the votes of an election to consider the entire returns, to wit, the certificate of the election officers, the list of voters, and the tally list; and, where there is a discrepancy or conflict between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person or proposition, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct and make an abstract of the vote accordingly." *People v. Ruyle*, 91 Ill. 525, holds that both tally list and certificate may be considered—the tally list to be looked to where there is a doubt upon the face of the certificate, because of its informal character, as where the statement of the number of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

votes is set down below instead of above the signatures of the election officers. In *State v. McFadden*, 48 Neb. 669, 672, 674, 65 N. W. 800, 801, 802, a case of mandamus, there was a discrepancy between the tally list and the certificate. The court said: "While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. \* \* \* Where there is a discrepancy between the certificate of votes cast for any person for a particular office, and the tallies of the votes cast for him, the canvassers must determine from the entire returns which is correct. \* \* \* It therefore follows that it is the duty of the canvassing board, in making an abstract of the vote of an election, to consider the entire returns, to wit, the certificate of the election officers, the list of voters and the tally list, and, where there is a discrepancy between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct, and make an abstract of the vote accordingly. No arbitrary rule can be laid down. Upon such comparison the canvassers may be justified in counting the votes as shown by the tally list rather than the number stated in the certificate, and vice versa." We think the above is as complete a statement of the correct rule as can be found in any decision of any court of last resort. What follows in this opinion we believe to be a just application of the above rule.

It is not disputed here but that the board of canvassers had before them the full returns as to precincts Nos. 64 and 103 enumerated in section 1261 of the Political Code, including the poll list, tally list and the certificate of the result, signed as required by law by each of the election officers. This court has before it no such record. It has but a meager statement as to some isolated matters culled by petition from such record. We have found no case in the limited time at our disposal for the examination of the questions involved in this proceeding, where any court has ever assumed to give directions, by writ of mandate, to the canvassing board that any one matter in the return before them shall be conclusive as to the result of the election, unless a full showing as to the contents of the election returns had been in some appropriate way presented to the court. At the election just passed, four separate groups of candidates for presidential electors, representing four different political parties, were voted for. In such case the voters, in exercising their right of franchise, in fact are expressing their preference for president. As a consequence it seldom happens that any voter discriminates between the candidates in his party group.

The only matter presented to this court by the petition on file is the statement that there is a discrepancy between the number

of votes given to each member of the group of presidential electors as shown by the tally and as totaled by the certificates of the officers of election. There is absolutely nothing upon the face of the petition to show that the board of canvassers may not, by the use of all the election returns required by law to be delivered by the board of election to the county clerk, arrive at a correct tabulation of the votes to which each candidate for presidential elector is entitled and which should be credited to him. The meager statement in the petition before us does show that according to the tallies there was a difference between the votes counted for Mr. Wallace and his fellows in the same group of more than 100 votes, a difference that is improbable. It may be that the full returns before the canvassing board disclosed a like difference in the tallies for the first name in each group and the other names in such group, while the certificate of the election officers gave each candidate in any one group the vote as shown by the tallies for the first name in the group.

Having in mind the facts above adverted to as to the character of the office for which these candidates were aspiring, is it not a fair and reasonable conclusion that the returns as a whole justify the assumption that the election officers, as the count progressed, finding that the several names in each separate group were receiving the same votes, decided to tally against the first name as and for all in such group? This assumption will acquit the five election officers of having willfully and fraudulently made a false certificate as to the votes counted for each candidate, when they made such certificate giving to each name in each separate group the number of votes tallied against the first name only.

[2] As before stated, the petition before us does not disclose what is in the full returns; but the observations just made illustrate the danger of any court attempting to direct the canvassing board as to what particular part of the return shall be considered as conclusive as to the votes received by the several candidates, without a full statement in the petition for the writ of all matters contained in the returns before the canvassing board. Cases may occur where, upon a full return being made before the court, it may justly direct the canvassing board upon such a point. No such case is present in the one before us. The only facts before us as to precincts 64 and 103 are such as are stated in the petition and admitted by the demurrer. These facts make out no violation of a clear legal right.

[3] To quote from *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134: "The plaintiff seeks relief through an action of mandamus, which lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be grant-

ed when its enforcement would work an injustice or accomplish a wrong. *State v. Marston*, 6 Kan. 524; *Peters v. Board of State Canvassers*, 17 Kan. 365; *State v. Stevens*, 23 Kan. 456, 33 Am. Rep. 175; *People v. Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; High, Extr. Rem. § 40; 14 Am. & Eng. Enc. Law, 97." The petition as to the matters relating to precincts Nos. 64 and 103 does not come up to the requirements of the above rule, and for that reason the demurrer thereto should be sustained.

[4] As to precinct No. 77, it appears from respondents' answer and the evidence presented to this court in support thereof that although the tally list and certificate of the election officers as to the result of the election were duly returned to the county clerk, as required by the statute, they have since in some manner been lost, and after the most diligent search cannot be found. The duplicate of such papers, however, originally delivered to the inspector of elections is now in the possession of the board. It is the contention of petitioners that the respondents, although the tally list and certificate cannot be found, have no power to resort to other evidence to establish their contents. And in this connection great stress is laid upon language used by the court in *People v. Stewart*, 132 Cal. 283, 64 Pac. 285, to the effect that no such evidence can be resorted to by the canvassing board, and especially that the board had no right to resort to the duplicate list of voters, tally list, and list attached thereto, kept and retained by the inspector of said board of elections. But the language used by the court must be understood in the light of the facts of that case. In that case the board met on the first Monday after the election. No returns had been received from one precinct of the county, and the board, without waiting for the expiration of six days for the production of such returns, as plainly required by the law, proceeded to canvass the returns and declare the result. In doing so it sent for and used the duplicate list of voters, tally list, and list attached thereto retained under the law by the inspector. This it clearly at that time had no right to do. "It was forbidden to act, if the returns were not all in, until the lapse of six days."

In the present case what appeared to be the returns—that is to say, the packages from all the precincts—were before the board when it commenced to canvass. The six days have now expired; and, if the papers constituting the election returns cannot be found, no substantial or just reason appears why resort may not be had to the duplicate original of such papers which the law requires to be preserved, and which should be in the possession of the inspector. They are official documents, and are duplicates of the ones that should have been sent

to the county clerk—executed by the same officers and at the same time. It would seem that the primary and most important purpose of requiring a duplicate set of these records to be made and preserved was to meet just such a contingency as is presented in this case; in other words, to prevent a miscarriage as to the result of the election where the returns should, through either accident or design, be lost, destroyed, or misplaced. *State v. Nerland*, 7 S. C. 241.

[5] It is a principle of law, found in the common law, laid down in all the text-books, and carried into the statutes of this and of all other states, that where the right of any person depends upon the contents of a writing, and such writing is lost, destroyed or cannot be found, the contents of such writing may be proved by secondary evidence. In accord with this principle and rule of law, the election law of this state requires the board to wait a period of six days for the production of the missing returns before proceeding with the canvass. Upon the expiration of such period, the board must proceed with the canvass, and, if any return cannot be found, we have no doubt but that the duplicate thereof required by the law to be kept may be resorted to to establish the result of the vote. These views are in complete harmony with the views expressed by courts in other jurisdictions, and their adoption will result in effecting the principal object of the law concerning the canvassing of election returns, to wit, the ascertainment of the vote as actually given by the electors. To require the rejection of this safe evidence as to the contents of the lost or destroyed return would result in the disfranchisement of all the voters of a precinct for no fault of theirs. Such a result should not be countenanced if within the principles of law and justice it may be avoided.

Nothing actually decided in *People v. Stewart*, supra, is contrary to the views herein expressed. That the Supreme Court has not considered *People v. Stewart* authoritative as to all that is claimed for it by petitioners is evidenced by the record in the case of *Hosmer v. McGuire et al.* (S. F. No. 4,724, no opinion filed), where the court, upon petition of Hosmer, issued an alternative writ of mandate directed to the respondents, who were acting as a board of canvassers, commanding them to notify the members of certain precinct election boards to assemble at the office of respondents, and there permit them—said precinct officers—to complete their official duty by inserting in writing in the returned tally list a statement of the vote cast for each candidate in the several precincts.

The foregoing disposes of all of the questions of law involved in the pleadings and the admitted facts of the present case; and for the reasons stated it is ordered that the demurrer, so far as it relates to the matters

concerning precincts Nos. 64 and 103, be and it is sustained; and that the application for a peremptory writ of mandate be denied, and the alternative writ heretofore issued be dismissed.

LENNON, P. J.; HALL, J.; MURPHEY, J., pro. tem.

DEVLIN v. DONNELLY et al. (Civ. 1,041.)  
(District Court of Appeal, Third District, California. Dec. 3, 1912.)

1. ELECTIONS (§§ 259, 299\*)—RECOUNT—RETURNS—SUPERVISORS—POWERS.

Where a recount is sought in an action, as authorized by Pol. Code, § 1258, the court has authority to go behind the returns, examine the ballots, and correct the tally sheets so as to make them speak the truth, but the board of supervisors in canvassing the returns have no such power, and are only authorized to return the vote as shown by the tally lists.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235, 306, 307; Dec. Dig. §§ 259, 299.\*]

2. MANDAMUS (§§ 7, 10\*)—RIGHT TO WRIT—ISSUANCE.

Whether relief by mandamus shall be granted is a matter largely within the discretion of the court, the writ being allowed only to secure or protect a legal right, and not where its enforcement will work an injustice or accomplish a wrong.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 5, 37; Dec. Dig. §§ 7, 10.\*]

3. MANDAMUS (§ 74\*)—ELECTIONS—CANVASSING OF RETURNS—TALLY LISTS.

Where election officers in casting up the returns did not mark on the tally sheets opposite the name of each candidate a tally for each vote, as required by Pol. Code, § 1258, except that defendant did so mark the tally sheets opposite the name of the candidate at the head of each group of candidates, and in other cases entered the total number of votes cast for each candidate without keeping a tally of each vote, a defeated candidate was not entitled to mandamus to compel the board of supervisors to canvass the returns in cases where no tally marks are set opposite the name of the candidate, as though no votes had been deposited for such candidate in such precinct.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

Mandamus by Frank R. Devlin against J. H. Donnelly and others, members of the board of supervisors of Sacramento county. Writ denied.

Charles O. Busick and Clinton L. White, both of Sacramento, for petitioner. Hugh B. Bradford and J. O. Brown, Deputy Dist. Atty., both of Sacramento, for respondents.

CHIPMAN, P. J. At the election held on November 5, 1912, plaintiff was one of the candidates of the Progressive party for the office of presidential elector. He seeks by the writ of mandamus to have the vote canvassed in certain election precincts in Sacramento county. Among other grounds for issuing the writ it is alleged that the canvass of election precincts for presidential electors

"has proceeded sufficiently to show that there is a small margin as between the Republican party and Progressive party candidates on the one part and the Democratic candidates for electors on the other part, and the result of the election in Sacramento county for presidential electors, if lawful and regular canvass, will be controlling and decisive as to the result throughout the state as to which set of electors has been duly elected."

Without setting forth the averments of the petition, we understand from the facts admitted at the argument on the demurrer that the election officers did not mark on the tally sheets opposite each candidate's name a tally for each vote as called, except that they did so mark the tally sheets opposite the name of the candidate at the head of each group of candidates. In the other cases the election officers entered the total number of votes cast for each candidate, but did not keep a tally of each vote, as is required to be done by section 1258 of the Political Code. The contention is that, where the tally sheets fail to show any tallies or did not show a number of tallies corresponding with the number carried out as the total number of votes counted for the candidates, the board violated its duty in canvassing the vote in accordance with the total number so given in the certified returns. The result of the canvass of the returns thus made up was declared by the board of supervisors and entered on the records of such board. The clerk of the board, under section 1308 of the Political Code, made certified abstract of so much of the record as relates to the vote given for persons for electors for President and Vice President of the United States. Pursuant to section 1309 of the same Code, the clerk proceeded "to seal up such abstract, indorse it 'Presidential Election Returns,' and without delay transmit it to the Secretary of State by mail or as in the manner hereinafter prescribed." It is admitted, for the purpose of the hearing on the demurrer, that the required certificate is now in the hands of the Secretary of State, and that he has not yet certified the returns or the result of said election to the Governor.

We are asked by the writ of mandate to compel the board of supervisors to proceed to canvass the returns in accordance with the tally sheets, and that said board be directed not "to canvass any votes except as the same are shown by the tally marks on the tally sheets opposite the name of such candidate without regard to what may be shown by the certificate declaring the aggregate number of votes received by such candidate," and that, "where the returns show no tally marks whatever upon the tally sheets opposite the name of the candidate," the said board "be directed to canvass the returns the same as if such candidates are entitled to no votes whatsoever" from such precincts as are involved.

There is no averment in the petition that there was fraud or mistake in the result cer-

tified, nor is it shown that the certificate of the result entered upon the records of the board does not state the correct number of votes cast for and against each candidate. The contention is that it was the duty of the election officers to "keep the number of votes by tallies, as they are read aloud," as provided by section 1258, supra, and in every instance, where the election officers failed to follow this plain mandate of the statute, the aggregate vote certified by such officers should be wholly disregarded by the board of supervisors, and that such "candidates are entitled to no votes whatsoever."

[1] There are many and cogent reasons for holding that the election officers should strictly follow the directions given in section 1258; and in an action where a recount is sought under the provisions of the statute, the court may go behind the returns, examine the ballots and correct the tally sheets so as to make them speak the truth. But the board of supervisors have no such power in canvassing the returns. They have before them the lists attached to the tally lists, "containing the names of persons voted for and for what office, and the number of votes given for each candidate and such lists must be signed by the members of the election board and attested by the clerks. Section 1260, Pol. Code. The board of supervisors in canvassing the returns have only the ministerial duty to perform as directed by sections 1280 and 1281 and to cause the clerk to enter upon their records a statement of the vote thus canvassed as provided in section 1282. In the present case the board of supervisors had before it the certified returns of the vote for presidential electors which showed that petitioner and certain other candidates had received a certain number of votes in the precincts designated, but the tally sheets did not show tallies corresponding in number with the certified aggregate vote, in some cases there being no tallies whatever. The board in making its statement on its records accepted these totals as correctly showing the votes cast for candidates, and the clerk made a certified abstract accordingly and transmitted it to the secretary of state as required by section 1309. The question here is not whether the election officers performed their duties as required by law, nor is it whether, by the writ of mandate, the board of supervisors can be directed to correct the election returns, but the question is, Should the writ be used to compel the board of supervisors to make the canvass so that "where the returns show no tally marks whatever upon the tally sheets opposite the name of the candidate, the said board be directed to canvass the returns the same as if such candidates are entitled to no votes whatever"?

In the case recently decided by the District Court of Appeal for the Second district, entitled—*People, on the relation of Del Valle and Foy, v. Butler and others*, members of the board of supervisors of Los Angeles county,

129 Pac. 600, the writ was asked to compel the defendants then convened to so canvass the returns of the election for presidential electors (as we assume from what appears in the opinion of the court) that they shall be guided exclusively by the tallies as shown on the tally sheets, and, where there is a conflict between such tallies and the aggregate vote as certified on the election returns, the tally sheets must govern. In that case the board of supervisors were engaged in canvassing the returns and the court held that the writ would lie to compel the board, in making the canvass, to follow the tally sheets. We express no opinion upon the question whether the writ will lie where, on proper showing, it is seasonably sought to direct the board in the performance of its duty. Such is not the case here. The board of supervisors has completed its canvass and the result has been duly certified to the secretary of state. In the Los Angeles case the court followed the decision in *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, a decision by the Supreme Court of Kansas, and other cases cited, in which it was held: "That the tally or enumeration of the votes in the pollbooks may be considered in verifying the returns, and that if a disparity exists between the footing and the tallies the latter should control." In *People ex rel. Sill v. Murphy et al., Supervisors of Alameda County*, 129 Pac. 603, recently before the District Court of Appeal for the First district, that court considered the question. Of the Los Angeles decision it is said: "We cannot determine from the opinion what the petition disclosed as to the condition of the returns that were considered in that case. We are not called upon, therefore, to discuss that case, or consider it as an authority here." Speaking of that case and the absence of a statement of what the full returns might show, the court said: "Cases may occur where, upon a full return being before the court, it may justly direct the canvassing board upon such points." In the Alameda county case, as we infer from the opinion, the board of supervisors had completed the canvass of the precinct involved when the writ was asked, but the votes for the entire county had not been canvassed or a certified abstract sent to the secretary of state. Much the same facts as to the method adopted by the board in making the canvass existed as in the Los Angeles county case. Upon the question whether the board should, in making its canvass, be controlled by the tally sheets, the two decisions are not in harmony. The court, in the Alameda county case, cited *State v. McFadden*, 46 Neb. 669, 672, 674, 65 N. W. 801, 802, where there was a discrepancy between the tally list and the certificate, and the court said: "While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. \* \* \* Where there is a discrepancy be-

tween the certificate of votes cast for any person for a particular office and the tallies of the votes for him, the canvassers must determine from the entire returns which is correct. \* \* \* The canvassers, after comparing the certificate and tally list returned, must decide which is correct, and make an abstract of the votes accordingly. No arbitrary rule can be laid down. Upon such comparison the canvassers may be justified in counting the votes as shown by the tally list, rather than the number stated in the certificate, and vice versa." This was deemed by the judges in the Alameda county case to be "as complete a statement of the correct rule as can be found in any decision of any court of last resort." The rule similarly stated in '15 Cyc. 382, also met the approval of that court. This conflict of opinion becomes of importance in cases like the present one where the statute makes no provision for a recount. It is of less consequence in cases where the ballots may be resorted to by a disappointed candidate.

[2] Whatever, then, may be the true rule ultimately to be established in this state, there still remains the question whether we should allow the writ of mandamus to be resorted to under the circumstances of the present case. We said, in *Neto v. Conselho Amor Da Sociedade*, 18 Cal. App. 234, 122 Pac. 973, that the writ of mandate should not issue "for a vain and nugatory purpose." "It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury"—citing cases. From *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 82 Pac. 134, cited in both the Los Angeles county and Alameda county cases, recently decided by the District Courts of Appeal, the court, in the Alameda county case, quoted as follows: "The plaintiff seeks relief through an action of mandamus, which lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be granted where its enforcement would work an injustice or accomplish a wrong"—citing cases.

[3] We have here a case where the canvassers were confronted with the certificate of the election officers showing that certain presidential electors had received a stated number of votes. They also had before them the tally sheets which did not show tallies in corresponding numbers. The canvassers could readily discover from the tallies given the leading candidate among the electors, that they must either accept the certificate as to the total number of votes counted for the candidates, or do an apparent injustice to one or more of them. No suspicion of any incorrectness in the count thus certified was discoverable from the face of the returns and no incorrectness is now alleged. To grant the writ with the directions prayed for would, after much delay, result in a certified abstract to

the secretary of state different from that now in his hands; and, in all probability, it would be a certificate disfranchising all voters whose votes happened not to be shown in the tallies, and would bring about a result in direct contravention of a certified result, the correctness of which is not questioned and cannot be, in this action, otherwise than by an arbitrary pronouncement that the tally sheets alone shall govern. Then, too, which certified abstract would the secretary of state follow? He is not a party to the action. Should he refuse to be guided by the second certified abstract, it would be necessary to resort again to the writ. We are not willing, under the circumstances, to issue the writ where the inevitable consequences would work what we conceive would be an injustice; especially so where neither the good faith of the canvassers nor the correctness of their work is challenged. It may not be amiss to suggest what may easily be seen might happen should petitioner be granted the writ. Our judgment does not become final for 30 days and the unsuccessful party has 20 days thereafter in which to apply for a rehearing in the Supreme Court, which application would be granted or refused 10 days later. What delay would follow if granted cannot be determined. Furthermore, other actions may be brought to bring about like results in other counties and by this means the final returns to the Governor may be postponed to a date beyond the assembling of the electors on the "second Monday in January next following their election," as required by section 1315, Political Code. Indeed, it would be quite within the ingenuity of interested parties to hold back the final returns to a date beyond the meeting of the electoral college at Washington to declare the result of the election for President and Vice President.

It is true that, where there is a clear legal right, the courts will not ordinarily refuse to enforce it in disregard of possible consequences. But, where the right is not clear and the duty of the court imperative, the consequences to flow from granting the remedy may be considered. And this is especially true in determining whether the extraordinary writ of mandamus should issue. We do not think the right here claimed is by any means so clear as to deprive the court of its discretion in determining whether the writ should issue.

We feel justified in refusing the writ for the further reason that plaintiff may, if so minded, apply at once to the Supreme Court for relief, the only tribunal of the state with power to finally determine the true rule in this very important matter and to clear away the apparent conflict of decision in the district courts of appeal.

The demurrer is sustained and the writ denied.

We concur: BURNETT, J.; HART, J.

**DEVLIN v. WRIGHT et al.** (Civ. 1,042.)  
(District Court of Appeal, Third District, California. Dec. 8, 1912.)

Mandamus by Frank R. Devlin against Arthur H. Wright and others, members of the board of supervisors of San Joaquin county. Writ denied.

Charles O. Busick and Clinton L. White, both of Sacramento, for petitioner. Hugh B. Bradford and J. Q. Brown, Deputy Dist. Att'y., both of Sacramento, for respondents.

**CHIPMAN, P. J.** By stipulation in open court it was agreed that the decision in the case of Frank R. Devlin v. J. H. Donnelly et al. (No. 1,041) 129 Pac. 607, should be determinative of the decision in this case. On the authority of that case,  
The writ is denied.

**BAKERSFIELD & V. R. CO. v. FAIRBANKS, MORSE & CO.** (Civ. 1,217.)  
(District Court of Appeal, Second District, California. Nov. 27, 1912.)

**1. MONEY PAID (§ 8\*)—ALLEGATIONS OF COMPLAINT.**

A complaint alleged the purchase of a motor car from defendant, and that, upon being notified of its defective condition, defendant attempted to repair it, but failed, and then authorized plaintiff to purchase the necessary material and employ labor to repair it, and that plaintiff, "by authority of said defendant as hereinbefore stated, thereupon purchased material and employed skilled labor in an attempt to repair said car \* \* \* which labor and material amounted to the sum of \$841, which sum and amount defendant agreed to pay plaintiff, but it has not paid the same," though requested. *Held*, that the complaint stated a cause of action for money expended in repairing the car under defendant's authority and agreement to repay such money.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 24-26; Dec. Dig. § 8.\*]

**2. EVIDENCE (§ 265\*)—ADMISSIONS—ADMISSIONS OF COUNSEL.**

In an action for expenditures in repairing a motor car purchased from defendant and repaired on defendant's authority, a statement by plaintiff's counsel that he did not propose to rely on the warranty as a warranty, but was relying upon an express promise of defendant to pay the money, and also upon the quantum meruit, was not an admission that plaintiff abandoned all claims that the motor was not properly constructed, merely meaning that plaintiff would not rely wholly upon the warranty as to the condition of material and workmanship, and proof of breach, but also relied upon defendant's express promise to reimburse plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

**3. APPEAL AND ERROR (§ 231\*)—OBJECTIONS—STATEMENT OF GROUNDS.**

Where no cause of objection to the admission of evidence is stated in the record, error in its admission cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

Appeal from Superior Court, Ventura County; Robert M. Clark, Judge.

Action by the Bakersfield & Ventura Rail-

road Company against Fairbanks, Morse & Co. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Statsman & Statsman and George Greer, all of Los Angeles, for appellant. Charles F. Blackstock, of Oxnard, for respondent.

**JAMES, J.** Plaintiff purchased from defendant in the year 1909 a motor car for use on its street railway. Upon being put to the use for which it was purchased the motor soon became out of order, a number of its parts gave way while it was being so operated, and plaintiff complained to defendant that the motor car was defective in material and workmanship, and requested defendant to repair it. After some negotiation was had between the parties, plaintiff caused the repairs to be made upon the car, and by this action sought to recover the sum of \$841.55 paid out on that account. In its amended complaint the plaintiff first alleged that, upon being notified of the defective condition of the car, defendant attempted to repair it but failed, and that it then authorized plaintiff to purchase the necessary material and employ the necessary labor for the repair thereof so as to make the car conform to the purposes for which it was sold. It was then alleged: "That said plaintiff under and by authority of said defendant as hereinbefore stated, thereupon purchased material and employed skilled labor in an attempt to repair said car, engine and equipment thereof, all of which was done and performed in the county of Ventura, state of California, and which labor and material amounted to the sum of \$841.55, which sum and amount defendant agreed to pay to plaintiff, but that he has not paid the same nor any part thereof, although often requested so to do, and that the said sum of \$841.55 and the whole thereof is now due, owing and unpaid." In a second count contained in its complaint plaintiff alleged, after setting forth the circumstances of the sale of the motor car, that after it became in disrepair and its parts broken defendant was notified of the facts, whereupon defendant attempted to repair the car, but failed to put it in good condition, and that thereupon plaintiff purchased the necessary material, and employed the necessary labor in an attempt to make the car suitable for the purposes for which it was sold, which labor and material amounted to the sum of \$841.55, which sum was the reasonable value thereof. Allegations as to nonpayment and demand followed. In its answer defendant admitted that it had represented the car sold to have standard equipment, and that it was good, sound, and substantial and of the best material, and that the workmanship on the car and engine were of the highest and best

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mechanical construction. Upon trial being had, testimony was introduced on behalf of plaintiff. A motion for judgment of nonsuit was denied, and, defendant offering no evidence, judgment in favor of plaintiff for the sum of \$800 was entered. Motion for new trial was thereafter made and denied, and an appeal was then taken from the order denying the motion for a new trial and from the judgment.

[1] We cannot agree with the contention made on behalf of appellant that the complaint of plaintiff failed to state a cause of action. In the first count therein contained the character of the defects which the motor car developed after use were fully set forth, and these defects were such as to entitle plaintiff to damages, considering alone the representations admitted by the answer of defendant to have been made as to the kind and condition of the workmanship and material which had been employed in the manufacture of the car. Having first sufficiently alleged facts showing a breach of contract, plaintiff proceeded then to allege that defendant had attempted to repair the car and failed, and had then authorized plaintiff to purchase the necessary material and employ the necessary labor for the repair thereof, and that plaintiff did so purchase such material and labor at an expense of \$841.55, which amount it is alleged defendant agreed to pay. Construing these allegations together, we think that the cause of action stated was that defendant authorized plaintiff to purchase the necessary material and labor to repair the car, and that defendant's agreement was to pay whatever sum plaintiff necessarily incurred in that behalf. The following allegation, that the sum of \$841.55 was agreed to be paid by the defendant to plaintiff, we think, when read in connection with the allegations immediately preceding it, means nothing more than that defendant agreed to pay the expense necessarily incurred, and that the amount stated was the amount which plaintiff had been caused to pay as a necessary expense in repairing the car. If the amount charged and claimed as having been necessarily expended in causing the repairs to be made was excessive or unreasonable, that, as we view it, was a matter of defense which defendant was entitled to urge, and which it did urge, against the claim of plaintiff.

[2] We do not construe the language of counsel for plaintiff, when he said at the opening of the trial that he "did not now propose to rely upon the warranty as a warranty, but we are relying upon an express promise that these people made to pay this money, and also upon the quantum meruit," to mean that he abandoned all claim that the machine was not made of good material and under proper workmanship, for without there having been committed a breach of

contract in that regard, or at least a claim that such breach had been committed, there would have been no consideration upon which to rest defendant's alleged promise to pay for the repairs. It seems quite clear to us that this statement was intended only to mean that plaintiff would not rely wholly upon the warranty as to the condition of material and workmanship and proof of a breach thereof, but that it intended to show an express promise made by defendant to reimburse plaintiff, referable to the contention that material and workmanship on the car were deficient in kind and quality, as a consideration therefor. In other words, we cannot assume that plaintiff intended at the outset of the trial to stipulate itself out of court. In our opinion the proof was amply sufficient to sustain the allegations contained in the first alleged cause of action at least. All of the material testimony pertinent to the issues was furnished by a witness, Mr. Blackburn, and this testimony was offered and received without any objection being interposed thereto on the part of defendant.

[3] At one point in the examination of this witness the record contains the phrase, "Counsel for defendant objects," but no grounds are stated showing cause for the objection, and therefore it must be wholly disregarded.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

#### MARSTON v. WATSON. (Civ. 974.)

(District Court of Appeal, Third District, California. Nov. 29, 1912.)

#### 1. APPEAL AND ERROR (§ 1024\*)—DENIAL—CHANGE OF VENUE—FINDINGS—CONCLUSIVENESS.

The court on appeal from an order denying a change of venue on the ground of the nonresidence of defendant must accept as established the facts recited in the affidavits of plaintiff; and, if therefrom an inference can be drawn justifying the order, it must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3816-3823, 3836, 3837, 4020-4022, 4025-4028; Dec. Dig. § 1024.\*]

#### 2. DOMICILE (§ 1\*)—"RESIDENCE" DEFINED.

"Residence" defined by Pol. Code, § 52, as the place where one remains when not called elsewhere for special purposes, and to which he returns, indicates permanency of occupation as distinct from lodging or boarding or temporary occupation; and, where a person actually lives in a certain place with the intention of remaining there indefinitely, that place is his residence.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

#### 3. APPEAL AND ERROR (§ 1024\*) — REVIEW — DENIAL OF CHANGE OF VENUE.

The court on appeal will not disturb an order denying a change of venue on the ground of a nonresidence of defendant, where the affidavits of plaintiff show that at the time of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



making of the order and for four months prior thereto defendant kept house on a ranch in the county in which the action was brought; that at no time during the period did she live outside of the county; that she actually occupied the premises as her home during the period; that about two weeks prior to the commencement of the action she declared that she had leased the ranch from another, and that she had taken up her abode there; and that she was making her home there, and expected to develop the ranch.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3816-3823, 3836, 3837, 4020-4022, 4025-4028; Dec. Dig. § 1024.\*]

Appeal from Superior Court, Napa County; J. O. Prewett, Judge.

Action by G. W. Marston against Rowena Watson. From an order denying a motion for a change of venue, defendant appeals. Affirmed.

L. C. Pistolesi and O. F. Meldon, both of Sausalito, for appellant. E. S. Bell, of Napa, for respondent.

**BURNETT, J.** This is an appeal from an order denying a motion for a change of venue. The action was brought in Napa county, and defendant claimed to be a resident of Marin county, and the only question is whether there is any conflict in the evidence as to her residence.

[1] The matter was submitted upon affidavits, and it is not disputed that the rule in such case for the guidance of an appellate court is the same as where oral testimony is presented; and therefore we must accept as established the facts recited in the affidavits of the prevailing party, and, if therefrom a rational inference can be drawn in consonance with the order of the lower court we must affirm said order. *Bernou v. Bernou*, 15 Cal. App. 341, 114 Pac. 1000.

Three affidavits were filed on the part of plaintiff. In that of E. S. Bell it was stated that "he had been personally acquainted with the above named defendant for a period of ten or fifteen years; that about two weeks prior to the commencement of this action defendant visited the offices of this affiant in the city of Napa, and in the discussion of the matters of the issues involved in the above-entitled action informed this affiant that she had leased the ranch upon which she then lived from her mother, Sarah Watson; that she had taken up her abode on said ranch as her residence, and intended to give the running of the said ranch her personal attention; that she was making her home upon said ranch, and expected to develop said ranch and put it upon a paying basis; that, to affiant's knowledge, she had been on said ranch for a period of several months prior thereto, and ever since the said date of said conversation at affiant's offices defendant has been an actual bona fide resident of the county of Napa, state of California."

In his affidavit, G. W. Watson declared

that "he has known the defendant above named since the time of her birth; that he has been acquainted with her place of residence from her said birth up to the time of the making of this affidavit and does now depose and say: That she, at the time of the commencement of the above entitled action, was a resident of the county of Napa, and had been for a long time prior thereto, and is still at the present time a resident of the county of Napa; that she lived upon the adjoining premises to those occupied by this affiant, situate in Napa county, Cal., as her place of residence for a period of more than four months prior to the commencement of this action; and that said defendant actually occupied said premises as her home and place of abode during all the times herein mentioned."

G. W. Marston, the plaintiff, also deposed and said: "That for more than four months prior to the commencement of this action he was residing upon the ranch commonly known as the 'Ring Watson Ranch' situate in the county of Napa; that during all that time the defendant Rowena Watson was keeping house and residing upon said premises; that at no time during that period did Rowena Watson live outside of the county of Napa; that said defendant Rowena Watson up to said time and up to the time of the making of this affidavit has been actually a resident of the county of Napa, state of California."

It may be admitted that the declaration in said affidavits that defendant is a "resident" of said Napa county is a mere conclusion, and should be disregarded, but, nevertheless, sufficient facts are set out to justify the trial court in reaching the conclusion that defendant did actually reside in Napa county.

[2] "Residence," in the language of the Code (section 52, Pol. Code), is "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." In the Civil Code the term is used as synonymous with "domicile," section 129. Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. If a person actually "lives" in a certain place with the intention of remaining there indefinitely, that place must be said to be his residence. In other words, the abiding is *animo manendi* when residence is acquired.

[3] But as to the significance of the term there is no controversy, and we proceed to recapitulate the facts which must be taken as true in the determination of this appeal. At the time the order denying the motion was made, and for four months prior thereto, the defendant was keeping house upon the ranch known as the "Ring Watson Ranch" in Napa county; that at no time during said period did she "live" outside of Napa county; that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

she actually occupied said premises as her home and place of abode during said time, and that about two weeks prior to the commencement of the action she declared that she had leased the ranch from her mother, that she had taken up her abode there, and intended giving the running of the ranch her personal attention; that she was making her home there, and she expected to develop the ranch and put it upon a paying basis. Believing the foregoing, as we must assume he did, it would be not only a rational, but probably the only rational, conclusion that the trial judge could reach that defendant had established her home in Napa county and intended to remain there indefinitely; in other words, that she was a resident of Napa county.

The cases cited by appellant are so dissimilar to this in their facts that no specific notice of them is deemed necessary.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

#### McMANUS v. PATCH et al. (Civ. 979.)

(District Court of Appeal, Third District, California. Nov. 29, 1912.)

#### 1. VENDOR AND PURCHASER (§ 334\*)—RESCISSI- ON BY PURCHASER.

Where the vendee tendered the balance of the purchase price within the prescribed time and demanded a deed, upon vendor's failure to convey, vendee may, upon promptly rescinding, demand repayment of the part of the price paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 834.\*]

#### 2. VENDOR AND PURCHASER (§ 170\*)—PER- FORMANCE OF CONTRACT—TENDER OF PUR- CHASE PRICE—INFORMAL TENDER.

In absence of objection made at the time by a vendor as to the form or sufficiency of the tender of the price, any objection that the tender was informal was waived; Civ. Code, § 1501, providing that objections to the mode of an offer of performance which the creditor has an opportunity to state at the time, which could be then obviated by the offering party, are waived if not then stated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. § 170.\*]

#### 3. VENDOR AND PURCHASER (§ 144\*)—PARTIES —EXECUTION OF DEED—TIME.

Where a contract for the sale of land made time of the essence, a tender of the deed by vendor when an action was brought for his breach would not cure his default in refusing to execute a deed when the balance of the purchase price was tendered by vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271-275; Dec. Dig. § 144.\*]

#### 4. VENDOR AND PURCHASER (§ 339\*)—RESCIS- SION—PROOF OF PERFORMANCE.

Where vendor does not have title, or his title is defective at the time fixed for conveyance, the purchaser may treat the contract as rescinded, and recover the purchase price paid without proving performance on his part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by O. C. McManus against E. R. Patch and another. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Jamison & Wylie, of Alturas, for appellants. N. A. Cornish, of Alturas, for respondent.

BURNETT, J. By a written contract plaintiff agreed to purchase of defendants for the sum of \$800 a 10-acre tract of land in Modoc county. At the time of the execution of the agreement he paid them \$400 in cash, and it was provided in said contract that the entire purchase price with interest thereon at the rate of 8 per cent. per annum should be paid on or before one year from date, and, "if the sum of money herein mentioned shall be paid according to the agreement herein expressed, and time to be of the essence of this contract, then the said party of the first part agrees to make, execute and deliver unto the said party of the second part and to his heirs, executors and assigns, a good and sufficient warranty deed describing said premises." The theory of plaintiff, embodied in his complaint, is that before the expiration of the year he tendered to defendants the balance due and demanded a deed to the premises, but that they refused and neglected to make him a deed to the property, whereupon plaintiff promptly served upon appellants a written notice that he would not be further bound by the terms of the contract, that he rescinded the same, and he demanded of them the return of the \$400 paid by him as a part of the said purchase price, that they refused to return the money, but notified him that in due time they would make him a deed. The prayer of the complaint was, therefore, that plaintiff have judgment against the defendants for the said sum of \$400, with interest and costs. The findings cover all the material issues, and they and the judgment were in favor of plaintiff. There is some conflict in the evidence, but the testimony of plaintiff, in connection with the admissions of defendants as to the notice of rescission, is abundantly sufficient to legally support the court's conclusion. We quote a portion of said testimony as follows: "I paid Patch and King \$400 in cash when the contract was entered into, at the date of the contract. This \$400 nor any part thereof has never been returned to me. Since then I tendered them the balance due on the contract and demanded a deed. The tender was made in Lakeview, Or., on May 8, 1911. When I spoke to Mr. King about giving me the deed, he said, 'We cannot give you a deed until next October.' He did not give me any reason why he could not give me a deed. I did not stop to argue with him at all. I just walked out of his place

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of business. At the time I demanded the deed I had the money in my hand to pay the balance. At the time we made the contract the only information I had of the title to the tract of land was as follows: At the time of signing the contract Patch and King were both present, and I said to them, 'You fellows have an abstract and a good title to this land, have you? If you can make me a deed at any time I want it,' and Mr. Patch answered, 'Yes, sir.' At that time I knew nothing about the title to the land, or whether it was incumbered or not or any means of so knowing. This contract was made in Lakeview, Or."

[1] In the view that we must take of the record, therefore, we have the simple case of a contract of sale of real estate, the payment of a part of the purchase price by the vendee, the tender of the balance within the time prescribed and a demand for the deed, the default of the vendor by reason of his failure to make the deed, the prompt rescission of the contract and demand for repayment of the portion of the price paid and the refusal of the vendor to comply with this demand. The statement of these facts is sufficient to carry the conviction that plaintiff was entitled to the repayment of the said \$400.

[2] It is suggested that the tender of the money was informal, but it is sufficient to answer that no objection was made by appellants as to the form or sufficiency of the tender. It is well settled that such objection must be made at the time so as to afford the debtor an opportunity to obviate the objection. "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated." Section 1501, Civ. Code.

[3] It is clear that the tender of the deed at the time the action was brought could not cure the default of appellants, since time was of the essence of the contract. If their claim to demand the balance of the purchase price could thus be revived by the tender of a sufficient deed, the principle would not apply to the present case by reason of the burdens imposed upon the land in the terms of the deed to defendants by their grantor; in other words, by reason of their inability to convey a good title. Furthermore, it is not disputed that at the time of the contract of purchase and at the time demand was made by plaintiff for the deed defendants were not the owners of the land, and that, during all this time and at the time when the action was brought, the property was heavily incumbered by valid subsisting liens to the amount of over \$2,000.

[4] We may, therefore, apply to the case another principle, stated in 22 Encyclopedia of Pleading and Practice, 692, as follows:

"When there is no title, or a defective title in the grantor at the time fixed for the conveyance, the purchaser may treat the contract as rescinded and need not aver or offer to prove a performance of the contract on his part"—and in the case of *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737, as follows: "If the plaintiff could not obtain what he proposed to buy—I. e., title to the land—he had the right to refuse to buy and to recover back any money he may have deposited as security for the performance of his contract. \* \* \* In legal effect the consideration of such a contract fails; and a failure of the consideration ends the contract."

We think no further discussion is demanded as the legal principles involved are elementary and well settled. For a further elucidation of them, however, reference may be had to the following cases cited by respondent: *Frothingham et al. v. Jenkins et al.*, 1 Cal. 42, 52 Am. Dec. 286; *Dashaway Association v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Woodruff v. Semi-Tropic L. & W. Co.*, 87 Cal. 280, 25 Pac. 354.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**BUTTERFIELD v. HARRIS.** (Civ. 1,094.)  
(District Court of Appeal, Second District, California. Nov. 29, 1912.)

1. PATENTS (§ 215\*)—CONTRACTS FOR SALE—CONSTRUCTION.

Defendant contracted to transfer to a corporation theretofore organized all of his patent rights covering inventions by himself, and to sell to plaintiff one-fourth of the capital stock of the corporation in consideration of a sum named, a part to be paid by April 1, 1906, and the remainder by applying half of the dividends on the stock issued to plaintiff, the stock to which plaintiff was entitled to be deposited with a trustee to be held until April 1st, and then delivered upon payment according to the agreement, and further provided that, if plaintiff failed to make any payments due, the contract should be void, and the stock held in escrow delivered to defendant, together with the purchase money paid by plaintiff. Held, that the contract did not contemplate that plaintiff should have any interest in the patent rights except through the stock held by him, and, since defendant was the majority stockholder, he could, through the corporation, dispose of the patent rights.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.\*]

2. TRUSTS (§ 63½\*)—CONSTRUCTIVE TRUSTS.

Where property is held by one person for the benefit of another, equity will in a proper case impose a trust thereon, and award to the several parties the interest to which they are entitled.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98-100; Dec. Dig. § 63½.\*]

3. PATENTS (§ 215\*)—CONTRACTS—CONSTRUCTION.

Plaintiff executed an agreement with defendant, whereby defendant agreed to transfer to a corporation all of his patent rights, and sell plaintiff one-fourth of the capital stock in consideration of \$25,000, \$10,000 to be paid by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a certain date and the remainder by applying thereto one-half of the dividends declared, and the contract further provided as a part of the consideration that an indebtedness of defendant of \$9,162 should be paid to him by the corporation. *Held* that, in determining plaintiff's interest in the patents, such indebtedness should be considered, especially where the corporation had no assets other than the patent rights, since it was a charge against the stock.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 828; Dec. Dig. § 215.\*]

4. CORPORATIONS (§ 118\*)—SALE OF STOCK—PERFORMANCE BY BUYER.

One who agreed to pay a certain sum in consideration of the transfer of stock to her would be required to offer to pay the balance of such sum, if due, as a condition to obtaining the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 497, 498; Dec. Dig. § 118.\*]

5. CONTRACTS (§ 279\*)—PERFORMANCE OF CONTRACT.

Where a party to a contract of sale had repudiated his contract, the other party would be excused from himself performing as a condition to relief against such first party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1233-1248; Dec. Dig. § 279.\*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Rosalind O. Butterfield against Emily J. Harris, executrix of John T. Harris, substituted for John T. Harris. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain demurrer to complaint.

John D. Pope and Arthur L. Hawes, both of Los Angeles (S. Lawrence Miller, of counsel), for appellant. Valentine & Newby and Shirley C. Ward, all of Los Angeles, for respondent.

**JAMES, J.** Appeal from a judgment entered in favor of plaintiff and against defendant. The record on appeal consists of a judgment roll.

The substance of the facts set out in plaintiff's complaint is contained in the following narrative: Defendant John T. Harris was the inventor and owner of a certain device, process, and apparatus designed for purifying water and other liquids. Being without funds to secure patents to protect his invention and process, he solicited the plaintiff to advance to him money to meet his expenses in that direction, and prior to the 22d day of September, 1905, plaintiff had advanced to defendant about the sum of \$1,000. On the date last mentioned a written agreement was entered into between the parties by which it was provided that Harris was to transfer to a corporation called the Acme Holding Company, which had theretofore been duly organized, all his patent rights, and that he was to sell to plaintiff one-fourth of the capital stock of said corporation in consideration of the payment by her of the sum of \$25,000, \$10,000 of which amount was to be paid on or before April 1, 1906, and the remainder thereof, to wit,

\$15,000, was to be paid by applying one-half of the dividends which might be declared from time to time on the stock issued to plaintiff until said amount of \$15,000 was fully paid. The shares of stock to which plaintiff was to become entitled were to be deposited with a trustee to be held by him until April 1, 1906, and thereupon delivered to plaintiff, providing she had then made payment according to the terms of the agreement. It was further provided that in the event that she should fail to make the payments, or any of them, then the contract should be void, and the stock held in escrow be immediately delivered to Harris, together with all parts of the purchase money paid by plaintiff on account thereof. The contract contained the further condition as a part consideration therefor that an indebtedness of Harris in the sum of \$9,162 should be paid to him by the Acme Holding Company, together with all expenses for home and foreign patents which he might have incurred. It was alleged that plaintiff devoted much time, effort, and money in promoting and introducing the invention, process, and apparatus, and had paid to defendant between September 22, 1905, and July 1, 1907, more than the sum of \$10,000; that on February 15, 1907, defendant sent a written notification to plaintiff advising that, because of her failure to make payments under the contract as she had agreed to make at the time specified, the contract was void and subject to his willingness to reinstate it; that, notwithstanding this notification, defendant continued to solicit financial aid and assistance from plaintiff, and urged her to continue to devote her time and energies to the promotion of the enterprises in which defendant was engaged, and she did so continue her efforts and continued to pay money in satisfaction of the terms of the contract; that defendant at the time of the commencement of the action denied that plaintiff was entitled to any rights in his invention, or in any of the patents obtained by him protecting the same, and that, in violation of plaintiff's rights, he was engaged in attempting to sell, transfer, and dispose of the invention, discovery, process, and apparatus without consulting plaintiff and without obtaining her consent thereto; that defendant was wholly insolvent and had no means of responding in damages to any judgment that might be obtained against him, and that the value of the invention and discovery was incapable of being calculated in money, but that the same was of great value. Plaintiff's prayer was for a decree determining that defendant held title to the invention and process, together with all patents acquired by him, in trust for plaintiff as to an undivided one-fourth interest therein, and that the court decree that he execute, acknowledge, and deliver a transfer to her of said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

one-fourth interest. It is further set forth in the complaint that plaintiff was ready and willing, and that she offered to pay the unpaid balance of the \$25,000 of the purchase price of her alleged interest in the invention by paying one-half of the net proceeds derived from such interest until the whole of the balance was fully paid. There was a demurrer to the complaint, which being overruled, an answer was filed, and after a trial had the court made its findings, finding all of the facts in accordance with the complaint of plaintiff, except it was found that plaintiff had not paid the sum of \$10,000 on account of the purchase of the alleged one-quarter interest in the invention and process referred to, but had paid only the sum of \$6,000, and the trial court held that she was entitled to be awarded, and by the judgment there was awarded to her six-tenths of a one-quarter interest in the said patents and process. No account was taken by the trial judge, so far as the findings show, of the condition of the contract which required that there be paid to Harris by the Acme Holding Company the sum of \$9,162, and the interest in the patent rights and process was decreed to plaintiff wholly freed from any charge or deduction to be made on account of this indebtedness.

It is the contention of appellant that the complaint of plaintiff did not state sufficient facts to entitle her to the relief demanded; and, further, that, conceding that the complaint did show facts appropriate to the awarding of the character of relief for which she prayed, the judgment of the court was erroneous in that the matter of the indebtedness agreed to be paid by the Acme Holding Company to the defendant was wholly and improperly left out of the calculation of the trial judge when he made up his judgment.

[1] We think that in both of these contentions defendant is clearly right. The contract entered into between the parties was clear and unmistakable in its terms, and it did not contemplate in any event that any interest in the patent rights or process should become the property of plaintiff, except as such interest might be represented by shares of stock in the holding corporation. In this holding corporation Harris was to be the majority owner of stock, and consequently he thereby would control altogether the management of the business, and might, if he saw fit, do through the corporation the very thing that plaintiff complains he was about to do, to wit, dispose of and sell the patents and process. To be sure, it would be assumed that whatever return was made upon such sale would become of the assets of the corporation, which would give some value to the shares of stock to be held by plaintiff, but, as we have before stated, there would be no right in plaintiff to control the handling of the patents or the business incident thereto. The court by its decree attempted

to award to her a direct interest as a part owner in the patents and process, something which was not in contemplation of the parties under the terms of their contract.

[2] There is no question but that a court of equity, where it finds property in the hands of one person which is held in whole or in part for the benefit of another, will, under all proper circumstances, impose upon the relations so existing the character of a trust and decree interests to the several parties as they may appear, but the facts of this case, as we view them, do not authorize it to be classified with transactions which may be so dealt with. We do not doubt that plaintiff by establishing all of the facts alleged by her might have secured a decree requiring Harris to specifically perform the obligations which he had assumed toward her, but her complaint was not designed with a view to securing that character of relief. In the kind of an action last referred to the court might properly have compelled Harris to transfer his patents and process to the holding company, and cause stock to be issued to plaintiff according to the agreed terms of the contract.

[3, 4] Further, the findings do not support the judgment for two reasons: First, the indebtedness which was ascertained and stated in the contract of \$9,162, which was to be paid by the holding company to Harris, should have been taken into account in adjusting any interest in the patents and process that plaintiff was found to be entitled to. She alleged that the holding company had no assets, and was not to have any assets, except those which would be made up of the patent rights to be transferred by Harris to it, and therefore the burden of this indebtedness would be a direct charge against the stock of the corporation of which, had the agreement been carried out as contemplated, plaintiff would have held one-fourth. Second. It may further be noted that by the findings of the court plaintiff had only paid \$6,000 of the \$10,000 required to be paid in cash by her, and there was no finding that she had offered to make all of the payments required by her to be made as a condition to obtaining the amount of stock agreed to be transferred to her.

[5] While in a proper case, and where it appeared that the party against whom relief was sought had repudiated his contract and denied the existence of such a contract, the complaining party might be excused from full compliance or offer of compliance with the terms of the agreement by him to be performed as a condition to relief being awarded, the pleadings and findings here considered do not make out such a case.

The judgment is reversed, with direction to the trial court to sustain the demurrer of defendant as interposed to the amended complaint of plaintiff.

We concur: ALLEN, P. J.; SHAW, J.

**WILSON v. DURKEE.** (Civ. 1,171.)

(District Court of Appeal, Second District, California. Dec. 3, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. EVIDENCE (§ 80\*)—LAWS OF OTHER STATES—PRESUMPTIONS.**

The rule that the law of a sister state is presumed, in the absence of proof, to be the same as the law of the forum applies to statutory as well as the common law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

**2. JUDGMENT (§ 944\*)—JUDICIAL ACTS—CERTIFICATION—SUFFICIENCY.**

A certificate by the clerk of the court of a sister state, reciting that, on an inspection of the records of the court, the clerk finds an original record of a judgment, a copy of which is set out, shows that the judgment is of record, and in effect shows the entry of the judgment within Code Civ. Proc. §§ 664, 668, providing that a judgment is not effectual until entered in the judgment book, which the clerk must keep, and supports a judgment on the foreign judgment in an action thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. § 944.\*]

**3. JUDGMENT (§ 270\*)—"ENTRY OF JUDGMENT"—ACTS CONSTITUTING.**

The entry of a judgment, within Code Civ. Proc. §§ 664, 668, providing that a judgment is ineffectual until entered in the judgment book which the clerk of the court must keep, consists in the recording of it in the judgment book, and in a legal sense there can be no record of the judgment until so entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 501-508; Dec. Dig. § 270.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John J. Wilson, administrator of C. C. Ellis, deceased, against Daniel Durkee. From a judgment for plaintiff, defendant appeals. Affirmed.

E. W. Freeman, of Los Angeles, for appellant. G. P. Adams and McNutt & Hannon, all of Los Angeles, for respondent.

**SHAW, J.** This is an action based upon a judgment rendered in favor of plaintiff and against defendant by the Supreme Court of the state of Vermont. Judgment went for plaintiff, from which defendant appeals upon the judgment roll, accompanied by a bill of exceptions.

The existence of the judgment alleged in the complaint was by the answer denied. To prove the allegation, plaintiff offered in evidence an exemplified copy of a document purporting to constitute the record of the proceedings had in the courts of Vermont and the judgment herein sued upon.

[1] No evidence was offered tending to prove the laws of Vermont. In the absence of such proof, the laws of another state will be presumed to be the same as our own, and this rule applies to statutory as well as the common law. *Cavallaro v. Texas Ry. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

[2] Section 668 of the Code of Civil Procedure of California provides that "the clerk must keep, with the records of the court, a book to be called the 'judgment book,' in which judgments must be entered"; and section 664 of the same Code provides that "in no case is the judgment effectual for any purpose until so entered." The sole contention of appellant is that the exemplified copy of the record received in evidence was insufficient to justify the finding of the court that the judgment was duly made and given, as alleged in the complaint, for the reason that such copy of the record fails to show that the judgment was entered in accordance with the provisions of the Code above cited. The only question, therefore, presented for consideration is whether the exemplified copy of the record received in evidence sufficiently shows the entry of the judgment, which appears to have been rendered by the Supreme Court on an appeal prosecuted from the county court of Windsor county. That portion of the certificate and copy of the proceedings, which seems pertinent to this inquiry, is as follows: "Know ye, that having inspected the records and proceedings in the office of the clerk of our Supreme Court for the county of Windsor, we do there find remaining a certain original record of judgment, \* \* \* in an action brought by C. C. Ellis (plaintiff's intestate) v. Daniel Durkee, in the words and figures following, to wit: \* \* \* And at the term of the honorable Supreme Court aforesaid, to wit, on the day and year last aforesaid, said cause is duly entered in said Supreme Court, and the parties come by their respective attorneys, to be heard upon the exceptions of the defendant, as in his bill, now here remaining on file, fully and at large doth appear; whereupon, the parties having been fully heard, as well the plaintiff as the defendant, upon said judgment and exceptions, and mature deliberation being thereupon had, it is considered and adjudged by the court here that the judgment of the honorable county court in this cause be reversed, and that the said plaintiff, administrator, have and recover of the said defendant the sum of three thousand and three hundred and fifty dollars and sixty-six cents, with interest on said sum from the twenty-sixth day of June, A. D. 1906, being \$65.34, and costs in the court below, which costs have heretofore been taxed and allowed in said county court at the sum of thirty-six dollars and sixty cents, making in the whole the sum of three thousand four hundred and fifty-two dollars and sixty cents, damages and interest and costs, for which the said plaintiff, administrator, may have execution against the said defendant. A true record. Attest: Jay Reed Pember, Clerk."

Conceding that, in order to render the judgment effectual as an instrument upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which to base a suit, it must have been entered by the clerk of the court wherein it was given, in a book kept by him for that purpose, all as required by section 668, supra, nevertheless, since official duty is presumed to have been regularly performed (subdivision 15, § 1963, Code Civ. Proc.), it must be presumed, in the absence of evidence to the contrary, that the clerk did keep the book so required wherein to enter the judgments given by the court.

[3] The entry of a judgment consists in the recording of it in such book; hence, in a legal sense, there can be no record of a judgment until so entered. The statement made in the certificate by the clerk that, upon an inspection of the records of the court, he finds "a certain original record of judgment," a copy of which is set out, clearly shows that the judgment was of record; and, in the absence of evidence to the contrary, such fact must be accepted as true. It could not be true unless such entry of record was made in the judgment book. In our opinion, the showing that the judgment was recorded is in effect the same as a showing that the judgment was entered. When thus used, the terms have like meaning, and in either case imply that the judgment has been copied or transcribed in the judgment book, without which there could be no record of the judgment. The finding attacked is supported by the evidence.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

ROUSSEAU et al. v. COHN. (Civ. 1,111.)  
(District Court of Appeal, First District, California. Nov. 29, 1912.)

1. APPEAL AND ERROR (§ 731\*)—ASSIGNMENTS OF ERROR—SUFFICIENCIES.

A specification that the evidence is wholly insufficient to justify a judgment in favor of the plaintiff is not a compliance with Code Civ. Proc. § 648, requiring a specification of the particulars wherein the evidence is insufficient to justify the decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

2. CONTRACTS (§ 278\*)—ARCHITECTS—PERFORMANCE OF SERVICES—SUFFICIENCY.

Though a contract for the employment of architects stipulated that the plans and specifications were to be accepted by defendant in writing, and that the contractor procured by them was to be satisfactory to defendant, where the architects prepared plans and specifications and found a contractor who would construct it for less than the price agreed upon, the architects are entitled to recover a reasonable compensation for their services rendered and damages arising from a prevention of complete performance, where the specifications, though not accepted by defendant in writing, were satisfactory to him and were approved by him, and there is no evidence that the contractor procured was in any sense objectionable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207-1213; Dec. Dig. § 278.\*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles M. Rousseau and another, copartners, against Morris Cohn. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Schlesinger & Shaw, of San Francisco, for appellant. tum Suden & tum Suden, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment against the defendant and from an order denying his motion for a new trial in an action for services rendered by plaintiffs as architects.

[1] Defendant relies for a reversal of the judgment and order upon the insufficiency of the evidence. The only specification of such insufficiency is "that the evidence is wholly insufficient to justify a judgment in favor of the plaintiffs." We think, with the plaintiffs, that this is not a compliance with section 648, Code of Civil Procedure, requiring a specification of the particulars wherein the evidence is insufficient to justify the decision. *Matter of Baker*, 153 Cal. 537, 96 Pac. 12; *Meek v. S. Cal. Ry. Co.*, 7 Cal. App. 607, 95 Pac. 166; *Porter v. Counts*, 6 Cal. App. 551, 92 Pac. 655. But as defendant claims that there is an entire absence of evidence to support the finding assailed, in which event he asserts that a specification of particulars is unnecessary (*San Luis Water Co. v. Estrada*, 117 Cal. 168-184, 48 Pac. 1075), we have examined the evidence, and will therefore rest our decision upon the principal point in the case, without further noticing respondents' claim that the specification set forth above is entirely insufficient.

[2] Plaintiffs prepared plans and specifications for the construction of a building to be erected in San Francisco; a builder was found who would construct the building for less than \$14,000, and who furnished at once a satisfactory bond for the performance of his contract. As all these things were according to the terms of plaintiffs' contract with defendant, they were entitled—the defendant having refused to permit them to proceed further—to recover a reasonable compensation for services already rendered and the damages arising from a prevention of complete performance. It is true that the contract also stipulated that the plans and specifications were to be accepted by the defendant in writing, and that the contractor was to be satisfactory to defendant. But, while the plans and specifications were not accepted by the defendant in writing, the evidence introduced by plaintiffs shows that they were satisfactory to him and were approved by him; and this is doubtless true, for the defendant does not even now complain of the plans and specifications. While, as just

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stated, a provision of the contract was that the defendant was to be satisfied with the contractor, this did not give the defendant a right to reject a builder arbitrarily; and there is not a word of evidence in this record to show that this contractor was in any sense objectionable. His bid was just a little within the figure which the defendant agreed to pay for the erection of the building, and he provided a good bond for the faithful performance of that contract. In fact, according to the witnesses for the defendant, his only excuse for failing and refusing to permit the plaintiffs to perform their part of the contract was that he had heard some rumors that, if the plaintiffs were permitted to proceed with the work, the contract would be violated and the defendant involved in the annoyance and expense of litigation. In brief, there is evidence in the record to sustain the view that the defendant, without good reason, refused to permit the plaintiffs to complete their contract, which they were willing and able to do.

It follows that the judgment and order of the trial court should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; HALL, J.

# CUMMINGS et ux. v. NIELSON et al.

(Supreme Court of Utah. Dec. 4, 1912. On Application for Rehearing, Jan. 29, 1913.)

## 1. SPECIFIC PERFORMANCE (§§ 49, 51\*)—DEFEENSES—ENFORCEMENT INEQUITABLE.

Specific performance of the option part of an agreement by defendant to sell 14 shares of stock to plaintiffs, and also to give them an "option" on defendant's interest in an estate, or "refusal to purchase same at a price as low as any other bona fide offer for it," could not be resisted on the ground that the agreement was unfair as not limiting the time within which it should be exercised, no time limit being necessary under the agreement, or that it was unreasonable as entitling plaintiffs to purchase at the lowest price any one might offer in good faith, however inadequate; the contract merely requiring defendant to sell to plaintiffs at the lowest price at which they were willing to sell to others.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151, 153, 154; Dec. Dig. §§ 49, 51.\*]

## 2. CONTRACTS (§ 147\*)—CONSTRUCTION.

In ascertaining the intention of the parties to a contract, all the words must be given their ordinary effect, when considered in the light of the subject-matter and nature of the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

## 3. CONTRACTS (§ 168\*)—CONSTRUCTION—IMPLIED PROVISIONS.

That which is implied in a contract is as much a part thereof as its express provisions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.\*]

## 4. CONTRACTS (§ 154\*)—CONSTRUCTION—REASONABLE CONSTRUCTION.

Courts incline toward giving the language of a contract a reasonable construction, so as to avoid any absurdity, if possible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 735; Dec. Dig. § 154.\*]

## 5. VENDOR AND PURCHASER (§ 57\*)—CONSTRUCTION OF CONTRACT—OPTION CONTRACT.

Where an option to purchase land is silent as to the time for exercise of the option, the law implies that it shall be exercised within a reasonable time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.\*]

## 6. SPECIFIC PERFORMANCE (§§ 28-30\*)—CONTRACTS ENFORCEABLE—CERTAINTY.

Since equity regards that as certain which may be made certain, a contract giving plaintiffs the option or refusal to purchase defendant's interest in an estate named, at a price as low as any other bona fide offer, was not so uncertain as to description, price, and time within which the option must be accepted as to prevent specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-85; Dec. Dig. §§ 28-30.\*]

## 7. VENDOR AND PURCHASER (§ 18\*)—OPTION CONTRACTS—ACCEPTANCE.

The parties to an option agreement for the sale and purchase of land, by signing and delivering the agreement, thereby accepted its provisions and conditions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

## 8. SPECIFIC PERFORMANCE (§ 97\*)—CONDITIONS PRECEDENT—VENDOR OF LAND.

Since, under an agreement by defendants to give plaintiffs the refusal of land at a price as low as any other bona fide offer for it, a tender could not have been made until defendants informed plaintiffs that the land was for sale, or that they had an offer, if defendants sold the land without giving plaintiffs the refusal thereof, a tender by plaintiffs was not essential to suing for specific performance; plaintiffs' offer to pay the amount defendants received for the land being sufficient.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 288-298; Dec. Dig. § 97.\*]

## On Application for Rehearing.

## 9. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENTION OF PARTIES.

In construing a contract, the court's duty is, if possible, to ascertain and enforce the intention of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

## 10. SPECIFIC PERFORMANCE (§ 5\*)—CONTRACTS ENFORCEABLE—SALE OF LAND.

The inadequacy of the legal remedy to enforce a contract for the sale of land is assumed, as a matter of law, making specific performance proper in every case in absence of legal objection.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5-8; Dec. Dig. § 5.\*]

## 11. APPEAL AND ERROR (§ 832\*)—REHEARING—RIGHT.

While an application to the Supreme Court for a rehearing is a matter of right, yet, when it has decided all the material questions involved, a rehearing should not be applied for unless the court has overlooked a material fact, statute, or decision, or acted on an incorrect



principle of law, so as to clearly affect the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8215-8228; Dec. Dig. § 832.\*]

Appeal from District Court, Salt Lake County; Geo. C. Armstrong, Judge.

Action by Horace M. Cummings and wife against Christian Nielson and others. From a judgment for defendants, and an order denying a motion for new trial, plaintiffs appeal. Reversed and remanded, with directions to grant a new trial.

Moyle & Van Cott, of Salt Lake City, for appellants. Geo. B. Hancock and Jas. Ingbreetsen, both of Salt Lake City, for appellees.

FRICK, C. J. Appellants brought this action for specific performance of the agreement hereinafter set forth. After hearing appellants' evidence, the district court, upon motion of all the respondents, granted a nonsuit and entered judgment dismissing the action, from which this appeal is prosecuted.

The pleadings are very voluminous; but, in view of the course of the proceedings and the result reached in the district court, we do not deem it necessary to set them forth. Nor is it deemed necessary to refer at length to the evidence adduced at the trial. We shall, however, refer to such parts of the pleadings and evidence, in the course of the opinion, as we may deem necessary to afford a full understanding of the points decided. The material parts of the agreement declared on are as follows: "Salt Lake City, Utah, October 5, 1907. This agreement, made and entered into between Horace H. Cummings and Barbara M. Cummings, his wife, first part, and Christian Nielson and Sarah E. Nielson, his wife, second part, all of Salt Lake City, Salt Lake county, Utah, witnesseth: That the said second party hereby sells and conveys to the first party all their right, title and interest in the Cummings-Nielson Co. represented by 14 shares of the capital stock (one share of their original investment having been sold to James Nielson) *and also to give an option on all their or either of their interest in the estate of Julian Moses, deceased, or refusal to purchase the same at a price as low as any other bona fide offer for it or any portion of it*, for the sum of five hundred eighty (\$580.00) cash, the receipt of which is hereby acknowledged, and four hundred thirty (\$430.00) within six months from date hereof. The said second party shall also see that the ten shares of stock which is now held as security of certain payments to be made to Ruth Moses shall be liberated before the said second payment is made. In consideration of the transfer of stock and the fulfilling of the aforesaid covenants and conditions, the first party agrees to make the payments as aforesaid." (Italics ours.)

The agreement was signed by all the parties named therein. It was either admitted by respondents, or proved by appellants at the hearing, that the appellant B. M. Cummings and the respondent Sarah E. Nielson and one Esther B. Swain are sisters and children of the Julian Moses, deceased, named in the agreement aforesaid, and were the sole heirs of his estate, subject, however, to a life estate of one Ruth Ridge Moses, who was the surviving widow of said Julian Moses, deceased, and the mother of said three sisters; that the appellant Horace H. Cummings is the husband of the appellant B. M. Cummings, and the respondent Christian Nielson is the husband of the respondent Sarah E. Nielson; that on the 11th day of July, 1908, the respondents Christian and Sarah E. Nielson sold their interest in the estate of said Julian Moses, deceased, to Forest N. Stillman, and the other respondent was made a party merely as the wife of said Forest N. Stillman; that the Nielsons sold their said interest and conveyed the same by proper deed of conveyance to said Forest N. Stillman for the sum of \$3,000; that said sale was made without the knowledge or consent of appellants, and that said Stillman purchased with full knowledge of the agreement aforesaid and of appellants' rights; that appellants always were ready, willing, and able to pay, and, according to their testimony, are "now [at the time of trial] able, ready, and willing to pay into this court [district court], or to such person as this court may adjudge, the sum of \$3,000, or any larger sum that any other bona fide purchaser would have paid for this property at the time of the sale to Mr. Stillman on July 11, 1908." The property mentioned in the agreement as the estate of Julian Moses, deceased, was fully identified in the pleadings and by the evidence at the trial. It was also shown, through correspondence and conversations had between the parties to the contract, after the sale of the interest aforesaid, that all the parties to the agreement fully understood its meaning and general purport, and that the transaction between the Nielsons and Stillman was entered into, not because of the grounds now urged as hereinafter stated, but because the Nielsons insisted that the appellants did not want the property, or had waived their right to the same, or for some similar reason. When appellants had made proof of such matters as were denied and not admitted in the answers, all of the respondents made a motion for a nonsuit upon the following grounds: "(1) That the offer or option, as contained in Exhibit A introduced herein as the basis for this action, is unfair, unreasonable, and unconscionable. (2) That the same is uncertain as to description of property, as to price, and as to the time within which it may be accepted, and as to all other matters and elements. (3) That any offer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contained in said instrument, Exhibit A, has never been accepted by the plaintiffs or either of them, and for the further reason that there has not been a tender to comply with the terms thereof, or to pay any price thereunder. (4) The plaintiffs have not brought themselves within any of the equitable rules entitling them to the specific performance of the contract, if any, here in question." In granting the motion, the court said: "The motion will be sustained on the grounds set forth by defendants' attorneys in their motion for nonsuit and dismissal." It is thus made apparent upon what grounds the court granted the nonsuit. It is manifest that both the ruling and the motion are based entirely upon the language contained in the agreement, and not because of any evidence adduced, or for lack of evidence. We, therefore, need not discuss the evidence.

Taking up respondents' objections in the order stated in the motion for nonsuit, we first inquire, What, if anything, makes the agreement "unfair, unreasonable, and unconscionable," as contended for by counsel? Counsel, in referring to this point in their brief, say: "Appellants, according to the language used, are entitled to buy the property without any time limit being fixed either for the ascertainment of the price or for the purchase of the property at a price as low as any one else may in good faith offer for it. The offer is not to sell at the highest price offered in good faith by another person, but in fact the offer is to sell at the lowest price that might be offered in good faith by another person. In other words, if a person in good faith offered to buy the property from the Nielsons for one dollar at any time while the property existed, even though the Nielsons did not care to sell at that price, the appellants would be entitled, under the letter of this option, to come in and buy the property for that sum. This is highly unfair and inequitable."

It is quite apparent that whether counsel's contentions are sound or not hinges upon the meaning to be given to the language of the agreement which we have italicized. Giving the language found in the agreement its ordinary and usual meaning when applied to the subject-matter and nature of the agreement and apparent object or purpose of the parties, as must be done, what was their intention as the same is ascertained from the language found in the agreement? In our judgment it is quite clear that, in addition to the sale of the corporate stock mentioned in the agreement, it also contained an option in favor of appellants in which they were given the right or option to purchase certain interest in certain real estate.

[1] Counsel contend that it appears from the face of the agreement that it is unfair because it contains no limit of time within which the option should be exercised. This objection has no merit, because no time limit

was necessary under the terms of the agreement. The option was to become effective only in case the Nielsons desired to sell their interest in the land mentioned in the agreement. If they did not wish to sell, they were not bound to do so; but, if they did intend to sell, then under the agreement they bound themselves for a valuable consideration expressed therein to give the appellants the option, or, as it is expressed in the agreement, "refusal to purchase," the interest mentioned "at a price as low as any other bona fide offer for it." If the Nielsons desired to sell, they were thus required to give Mr. and Mrs. Cummings an opportunity to purchase—that is, the refusal to purchase the interest in the lands. This is too plain for cavil, because by the term "refusal to purchase" everybody knows what is meant, although the condition may not be fully expressed. What is meant thereby is that, if the owners of the interest in question desired to sell it, they must communicate that fact to the party holding the option to purchase, and thus give the latter an opportunity to purchase or to refuse to do so. If the latter refuses, he has fully exercised his option. If, however, he then expresses his willingness to purchase, the question of price arises. Counsel urge, and it seems the district court so held, that in this case the price mentioned in the contract is unreasonable because it means the lowest price that any one might offer for the property in good faith, although the amount offered was entirely out of proportion to the actual or market value of the property. This was obviously not the intention of the parties, nor is it necessarily the usual or natural meaning of the language used. While it is true that the language in that regard is not as apt as it might have been made, yet we think its meaning is reasonably clear and was well understood by all the parties to the agreement. In view that appellants were to have the right of refusing to purchase the property in case the Nielsons desired to sell, it became their duty to notify the appellants that they were ready to sell; and, if they had an offer for the property for which they were willing to and could sell, it also was their duty to make such offer known to appellants. If appellants then were offered the property, if they paid for it the lowest price for which the Nielsons were willing to sell it to another, then appellants had the right either to refuse to purchase it at that price or to purchase it for that price. In no other way could the right of the refusal to purchase, provided for in the agreement, be made effective.

[2] In determining the meaning that should be given to language used in an agreement in order to ascertain the intention of the parties, all the words or terms used must be given their ordinary and usual effect, when considered in the light of the subject-matter and

the nature of the agreement. In the agreement before us, no effect could be given to appellants' right of refusal to purchase, except as indicated above. In this connection we cannot agree with respondents' counsel that if the agreement is thus construed, something must be read into it which was not in the minds of the parties. The duty we have imposed upon the Nielsons is clearly implied from all the terms that are used in the agreement. The language used by Mr. Page, in discussing the rules applicable to the construction of contracts is applicable here. He says: "Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein." 2 Page on Contracts, § 1118.

[3] It is a cardinal rule of construction that that which is implied is always as much a part of any writing as that which is expressed. Nor can we agree with counsel that the term, "at a price as low as any other bona fide offer for it"—that is, for the property—should be given the meaning contended for by them, namely, that any offer, however low, if made in good faith and not for ulterior purposes, is binding on the Nielsons. Such a construction would, to our minds, not only be wholly unreasonable, but would lead to a clear absurdity.

[4] Courts will always incline towards giving language a reasonable construction, and will avoid, if possible, an absurdity if the language is susceptible of some other meaning. In this case the language used is not only susceptible of another meaning, but we think it is manifest that the natural and ordinary meaning of the terms employed, when applied to the subject-matter and nature of the contract, clearly mean what we have construed them to mean, and that such was the manifest intention of the parties. From what was said and done by the parties, as the same is gleaned from the pleadings and the evidence adduced at the hearing, the meaning we have given to the terms used was also the meaning the parties to the contract gave them.

Nor is the contention sound that the agreement is unfair because no time limit was fixed for the "ascertainment of the price" for the sale of the property. Here, again, no time limit was necessary, and no precise price could well have been fixed under the circumstances. The parties, however, provided a method by which the price could be fixed; and, unless and until the Nielsons were ready and willing to sell, it was quite unnecessary to fix a price; and, when they were ready and willing to sell, then all they were required to do was to sell to appellants for as low a price as they were willing to sell the property to any one else. There is nothing unfair or unjust about such a provision. If the property increased in value

after the contract was entered into, the Nielsons would obtain the benefit of the increase; and, if the value or price declined, they were not bound to sell at any price to appellants unless willing to sell to another. All the Nielsons were bound to do under the terms of the contract was to give the appellants a reasonable opportunity to exercise the option to purchase, for which they had paid a valuable consideration.

[5] Nor is the contention sound that the agreement is uncertain because no time is fixed within which appellants were required to exercise their option after the Nielsons apprised them of their willingness to sell for a stated price. In view that the contract is silent as to time, the law supplies the omission by compelling appellants to act within a reasonable time. What would be a reasonable time would ordinarily be a question of fact, under all the circumstances. That question is, however, not involved here, since the Nielsons did not give appellants any opportunity to purchase at any price or at any time.

[6] The second ground for nonsuit is clearly untenable. It is elementary that in equity that is certain which can be made certain. In case a certain farm or certain lands are mentioned by name merely in a contract, without giving a definite description, the farm or lands intended in the contract may always be shown by extrinsic, parol, or documentary evidence. For a concrete application of the doctrine, see *Easton v. Thatcher*, 7 Utah, 99, 25 Pac. 72. The other objection contained in the second ground for nonsuit has already been discussed in connection with counsel's argument we have heretofore set forth.

[7] The objection urged in the third ground for nonsuit, namely, that the offer contained in the agreement "has never been accepted" by appellants, is without merit. In signing and delivering the agreement, all the parties thereto clearly accepted all of its provisions and conditions. All that remained to be done after that was the execution of the agreement in accordance with its terms and conditions. Counsel are in error when they insist that the agreement in this case is a mere offer on the part of the Nielsons, which appellants were required to accept within a reasonable time, and which they have never manifested an intention to accept. The offer of the Nielsons to sell the property upon the conditions named in the agreement was accepted by the appellants when they signed the contract. As the time when the sale should be made, and the price for which the Nielsons were willing to sell, depended upon the latter's will, it became their duty to apprise appellants of their willingness to sell, and of the price they were willing to sell for and could obtain for the land in question. It was then the duty of appellants either to take the property or to refuse it; and, having done either, they would

have exercised their option, and the contract would thus have become mutually binding upon all the parties.

[8] The objection that no tender has been made clearly cannot prevail. Manifestly no tender could either have been made or contemplated until the Nielsons apprised the appellants that the land was for sale and that they had an offer or were willing to take a certain price for it. Under the facts of this case, however, they by their own acts, made a tender unnecessary, if not impossible; and hence they cannot now insist upon one as a condition precedent. The law never requires things that are unnecessary or that have been waived by the parties, either expressly or by clear implication. The offer in the pleadings to pay the amount for which the Nielsons sold the land to Stillman is quite sufficient under the circumstances. Moreover, the fact that the Nielsons were not only willing to sell, but have in fact sold the property in question for a specified sum, which sum appellants alleged and proved they were and are able, ready, and willing to pay, eliminates from this case all question of how the bona fides of the offer, or the price for which the Nielsons were bound to sell, was to be ascertained. That question, therefore, is of no further concern.

Finally, the fourth and last ground of objection, namely, that appellants have not "brought themselves within any of the equitable rules entitling them to a specific performance of the contract," is entirely too indefinite to require discussion. In our judgment, the contract in question, when fairly construed, is not vulnerable to the objections urged against it by the respondents. We also are of the opinion that appellants have made out a prima facie case and are entitled to a decree of specific performance of the contract, unless some facts are shown which overcome their prima facie case. The district court should therefore proceed to hear the defenses set up by respondents in their answers, and make findings of facts and conclusions of law upon all of the issues presented by the pleadings, and enter a judgment or decree in accordance therewith.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court, with directions to overrule the motion for nonsuit and to grant appellants a new trial, and to proceed with the case in accordance with the views herein expressed. Appellants to recover costs on appeal.

MCCARTY and STRAUP, JJ., concur.

#### On Application for Rehearing.

FRICK, J. Two of the respondents, namely, Christian and Sarah E. Nielson, have filed a petition for a rehearing in which they vigorously insist that the conclusion reached by us is erroneous. It is contended that we have erred in holding that the provisions in

the contract giving appellants the refusal to purchase the real estate therein named constitutes an option, for the alleged reason that the right conferred upon them by said provisions constituted a mere privilege of pre-emption or pre-emption right. Much time and space is devoted to a discussion of the technical meaning of the privilege of pre-emption and what rights are thereby conferred. It may be perfectly proper for counsel to invoke every technical rule, whether applicable or not, to absolve his client from the contractual obligations assumed by the latter. It is not the duty of a court, however, to yield to counsel's contentions in that regard, and to make a strained effort to find some flaw in a contract whereby a party may escape liability from performing a plain and unequivocal obligation which he voluntarily assumed, and for doing so has received and retains an adequate consideration. The parties to the contract in question manifestly did not have in mind the technical meaning or effect of a privilege of pre-emption, and did not use the language in their contract with the intent of having it construed with respect to that term. But, assuming that they had done so, the question for us to determine still would be, What did the parties mean and intend by using the language employed when applied to the subject-matter of the contract?

[9] The duty of every court is to give careful scrutiny to the language used by the parties, and in doing so to ascertain therefrom, if possible, the intention of the parties, and, when that is ascertained, to enforce such intention, if no legal obstacle is in the way. This is all the courts did, even in the cases cited by counsel, in which the doctrine of the privilege of pre-emption was really involved. That such was done is clearly pointed out in the principal case cited in support of the rehearing, namely, *Garcia v. Callender*, 53 Hun, 12, 5 N. Y. Supp. 934, affirmed under the same title in 125 N. Y. 307, 26 N. E. 283. Both the opinions rendered in that case, the one by the Supreme Court and the other by the Court of Appeals of New York, approve the rules of construction that we applied in the original opinion in determining the meaning of the contract in question. Moreover, those opinions make clear that, even though the privilege of pre-emption were involved here, yet the conclusion we have reached would still be the right one. For statements of when and how the right or privilege of pre-emption is or may be applied, see 6 Words and Phrases, pp. 5496, 5497, and further on in the same volume, pp. 5589, 5590. That our construction of the contract in question is sound is further demonstrated by the Supreme Court of Oklahoma in the case of *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 Pac. 403. It is further insisted that we erred seriously in holding that appellants have made out a

prima facie case for specific performance. The contract in question is one involving lands.

[10] The equitable rule that governs such contracts is well and tersely stated by the author of Pomeroy's Equity Jurisprudence, in volume 4, § 1402, where he says: "When land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established. Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable—when it possesses none of those features which, in ordinary language, influence the discretion of the court—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach." Where therefore, a contract is clearly established in which one of the parties bound himself to sell, or did sell, specific real property, a prima facie right to have such a contract specifically performed arises. If nothing is made to appear which could influence or invoke the discretion of a court of equity to justify its refusal to decree specific performance, a decree requiring the party to perform must follow, as a matter of course, as stated by Mr. Pomeroy. If, therefore, after the case at bar is fully presented to the district court, there arises some legal or equitable reason justifying the court in refusing specific performance, it may enter judgment accordingly. But neither the district court nor this court can in advance of a trial determine the equities in a particular case. What ordinarily are deemed sufficient reasons to invoke or influence the discretion of courts of equity in such cases is discussed by Mr. Pomeroy in the volume before referred to in section 1404 et seq. The rule laid down in the original opinion, therefore, is the correct one.

[11] We desire to add a word in conclusion respecting the numerous applications for rehearings in this court. To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we would have to devote a very

large portion of our time in answering counsel's contentions a second time; and, if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contentions should not prevail, but in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound. Our endeavor is to determine all cases correctly upon the law and the facts, and, if we fail in this, it is because we are incapable of arriving at just conclusions. As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any, aid to us. If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed, and, if it is meritorious, its form will in no case be scrutinized by this court.

There is no merit in the present petition, and it is therefore denied.

McCARTY, C. J., and STRAUP, J., concur.

NOTE.—Justice FRICK's first term of office expired on the first Monday in January. He was re-elected. Upon his taking office under the re-election, then Justice McCARTY became Chief Justice. This accounts for the first opinion in this case being written by "FRICK, C. J.," and concurred in by "McCARTY, J.," while the opinion on rehearing is written by "FRICK, J.," and concurred in by "McCARTY, C. J."

HERALD-REPUBLICAN PUB. CO. et al. v. LEWIS, District Judge.

(Supreme Court of Utah. Jan. 11, 1913.)

1. CONTEMPT (§ 9\*)—CRIMINAL "CONTEMPT"—AFFIDAVITS.

Affidavits charging that defendant newspaper, well knowing that certain publications were calculated to greatly prejudice and bias the minds of the drawn and summoned jurors and other persons against a defendant then on trial, caused copies containing such publications to be delivered to such veniremen and others, and that such publication did prejudice and bias many of them, making it difficult to obtain qualified jurors, showed contempt; an attempt to influence and interfere itself being contemptuous.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 15-18; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

2. CONTEMPT (§ 58\*) — CONSTRUCTIVE CONTEMPT—DENIAL UNDER OATH—STATUTES.

The old rule that a constructive criminal contempt was purged by a denial under oath is changed, and the matter is regulated by statute.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 169-175; Dec. Dig. § 58.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**8. CONTEMPT (§ 61\*)—CRIMINAL CONTEMPT—TRIAL—EVIDENCE.**

One charged with criminal contempt committed out of the presence of the court must be given a hearing and evidence be taken, unless his answer is or amounts to a plea of guilty, under Comp. Laws 1907, §§ 3360, 3366, and 3307, prescribing the proceedings in such cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188-194, 196; Dec. Dig. § 61.\*]

**4. CONTEMPT (§ 60\*)—INTENT—EVIDENCE.**

In a prosecution for criminal contempt for publishing matter which tended to interfere with judicial action, evidence that there was no intent to interfere, and that there was no harm done in fact, is admissible in mitigation of punishment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 183-187; Dec. Dig. § 60.\*]

**5. CONTEMPT (§ 9\*)—NEWSPAPERS—INTERFERING WITH JUDICIAL ACTION—"NEWS."**

Although a newspaper can publish anything that is said or done in the court while attempting to impanel a jury in a criminal action, it cannot go beyond this, and print facts and conclusions and evidence and a confession by an alleged confederate which would not be admissible on the trial, where such facts had been published fully at the time of the crime, without committing at least a technical contempt as interfering with judicial action; such matters not being news, which is fresh information concerning something that had recently taken place, recent report or account of an event, fresh tidings, or recent intelligence.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 15-18; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4791.]

**6. CONTEMPT (§ 61\*)—APPEAL—THEORY ON TRIAL.**

A judgment of conviction of contempt cannot be rendered on pleadings on the theory that intent, motive, and circumstances of a publication were wholly immaterial, and then be defended on the theory that the burden of proof to such matters was on the accused.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188-194, 196; Dec. Dig. § 61.\*]

**7. CONTEMPT (§ 60\*)—CRIMINAL CONTEMPT—INTENT—BURDEN OF PROOF.**

Where one is charged in an affidavit for contempt with intent to interfere with judicial action, the burden is on the state to show such intent.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188-187; Dec. Dig. § 60.\*]

**8. CONTEMPT (§ 63\*)—PLEADINGS.**

Where a newspaper charged with constructive criminal contempt by its answer shows that it is guilty of only a technical contempt without intent to interfere with judicial action, a judgment of conviction thereon that it was guilty "as charged in the affidavit," which charged wrongful intent and knowledge of harm, etc., was erroneous.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.\*]

**9. CONTEMPT (§ 63\*)—JUDGMENT—RECITALS—HEARING.**

The recital in a judgment that the accused "having stated that they had no legal reason to give why judgment should not be pronounced against them," etc., does not show that they were given an opportunity to be heard, the right which an accused has to be heard on the merits being before, not after, he is condemned.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.\*]

**10. CONTEMPT (§ 63\*)—JUDGMENT—RECITALS—WAIVER OF HEARING.**

A recital in a judgment of conviction for constructive contempt that "the matter is submitted upon its merits upon the affidavit and answers," etc., does not show a waiver of a trial or hearing; such submission having but invoked the action of the court to determine the sufficiency of the pleadings, but not to render a final judgment, unless no defense whatever was tendered, either by way of denial, excuse, or in mitigation, and unless what was tendered constituted a plea of guilty to the offense as charged.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.\*]

**11. CONTEMPT (§ 67\*)—CERTIORARI—APPEAL—REVIEW.**

Where the Supreme Court allows an application for certiorari to review a conviction for contempt to be filed at a time when an appeal might have been taken, the court will review the proceedings though Comp. Laws 1907, § 3630, allows a writ of certiorari where there is no appeal; it being the policy of the court to enlarge, rather than restrict, such remedy.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222; Dec. Dig. § 67.\*]

Certiorari by the Herald-Republican Publishing Company to T. D. Lewis, District Judge of Salt Lake County, to review a judgment of conviction of the Herald-Republican of contempt. Judgment annulled.

Beoth, Lee, Badger, Rich & Parke, of Salt Lake City (Joseph L. Lewinsohn, of Grand Forks, N. D., of counsel), for petitioners. F. O. Loofbourow, Dist. Atty., Van Cott, Allison & Riter, Jay H. Stockman, and Douglas B. Kimball, all of Salt Lake City, for respondent.

STRAUP, J. We are asked to review on certiorari a record of the district court involving proceedings wherein the plaintiffs, the petitioners, were adjudged guilty of contempt, and to annul the judgment of conviction.

James Hays, alias Thomas Riley, and Harry Thorne, were charged in the district court with the crime of murder, the killing of one Fassell. They had separate trials. Hays was tried first. The morning after the first day of the Hays trial, and on the 14th day of June, 1910, the Herald-Republican Publishing Company, engaged in publishing a newspaper at Salt Lake City, the place where such trial was had, published the following:

Hays Murder Case Called for Trial.

Second Panel Called and Judge Lewis Orders a Special Venire of Fifty.

One Juror is Accepted.

Defendant Gives His True Name as Thomas Riley.

James Hays, charged with murder in the first degree for the killing of George W. Fassell the night of March 16, was brought before Judge T. D. Lewis in the district court for trial yesterday morning. The first panel of eight jurors was examined and only one remained in the box at 5 o'clock when a second panel was called and sworn, and Judge Lewis ordered a special venire of 50 summoned for this morning.

Joseph M. Silver, a building contractor, was the only juror accepted by both sides after ex-

aminations which lasted all day. Six of the eight jurors examined testified that they had read of the robbery of the grocery store in Fourth South street, between Sixth and Seventh East streets, in the Herald-Republican.

James D. Pardee, appointed by the court as counsel for the prisoner, announced at the opening of court that Riley wished to give his true name as Thomas Riley, and, on order of the court, the alias of James Hays was changed. Riley sat beside his counsel all through the court sessions yesterday, displaying interest in the examination of the talesmen, and paying close attention to the questions and answers, although making comment to his counsel on rare occasions. He was not handcuffed, although Deputy Sheriffs Andrew Smith, Jr., and Richard Eddington took turns sitting beside him.

#### Implicated by Riley.

Riley is charged as being one of the three men who held up the grocery store at the time George W. Fassell was killed, but the state does not expect to show that he was the man who fired the fatal shot. Harry Thorne, who was arrested with Riley, has confessed that he fired the shot which killed Fassell, and this confession implicated Riley as the man who was with him at the time. Another man known as "Curly," who made up the trio of robbers, escaped, and to date has not been captured.

The confession of Thorne, which was made the day after the murder, will be prominent in the trial, this confession reading as follows:

"Salt Lake City, Utah, March 27, 1910.

"Confession of Harry Thorne of the Murder of G. W. Fassell on the Night of March 26, 1910.

"Hays and myself and a man named Curly, whom I had not met before, left the room about 7:30 p. m., intending to hold up the first place that looked good. We went into the store, which you say is Fassell's. Hays stood about half way along the counter, facing the butcher. We told them to hold up their hands. The butcher held his up high, but Fassell did not hold his up high enough, or fast enough, and as I was trying to get them together near the north end of the counter, the butcher ran through the back, and I put the gun against Fassell's side to hurry him up, and it went off. After shooting Fassell I took some money out of the cash register. Curly had taken some money before I got to it.

"The pencil sketch of the store signed by me is about correct. [Signed] Harry Thorne.

"Witnesses: S. M. Barlow, J. J. Roberts, H. F. Wilson, R. F. Golding, George Chase."

The murder of Fassell was the chief topic of conversation for many days, because of the general popularity of the young groceryman, who at the time of his death, was secretary of the Retail Merchants' Association and also prominent in the Phillips Congregational Church. He was engaged to marry Miss Bessie Worthen of 566 East Tenth South street, and had a wide circle of friends and acquaintances.

#### Arrested at the Angelus.

Riley and Thorne were arrested at the Angelus rooming house within a half hour after the murder by Detective George Sheets, Chase and Schultz and S. M. Barlow, chief of police. The detectives had been warned that the gang of criminals had come from Ogden to Salt Lake and were quartered at the rooming house, and earlier in the evening they had called there for the purpose of taking them in on general principles and getting them moved out of town on floaters.

Not finding their men, the detectives returned to the police station with the intention of arresting the gang later that night, and they had only reached the station when a telephone call

came, informing them of the holdup and murder. Then they retraced their steps and got their men.

Thereafter, when the Thorne case was called for trial, the Herald-Republican, the morning after the first day of that trial, and on June 29, 1910, published the following:

#### Six Jurors Sworn to Try H. Thorne.

Some Talesmen Refused in Riley Case Accepted in This One.

Harry Thorne, slayer of George W. Fassell, appeared for trial before Judge T. D. Lewis, in the district court yesterday, entering a plea of not guilty. Six jurors were obtained and sworn during the day and a special venire of fifty names was drawn with twenty-five returnable at 10 o'clock this morning and twenty-five returnable Thursday morning.

Several of the jurors sworn yesterday were men who were excused on peremptory challenges in the Thomas Riley case for the same offense last week and, in examining jurors, all of those who were excused for cause in the Riley case were excused from the Thorne case.

Thorne's appearance in court yesterday was in striking contrast with the appearance of Riley, who was convicted of the same crime last week, inasmuch as Thorne shows no marks of degeneracy or depravity in his face or appearance. The youth says he is only 17 years old and does not look to be more than 18 or 19. From his demeanor, it was apparent that he has slight realization of the enormity of his offense or of the fate which may await him. Yesterday he seemed more interested in anything that struck his fancy in the courtroom than in the selection of a jury.

In the course of the examination the state used one peremptory challenge and the defense used three.

#### Confession of Thorne.

When Thorne was arrested for the murder of Fassell he made the following confession. [Then follows a republication of the confession as set forth in the first publication.]

On June 23, 1910, the district court directed the district attorney to file an affidavit charging the Herald-Republican with contempt, based on the first publication. Upon the filing of such an affidavit, an order was made on the 29th of June requiring the Herald-Republican to appear and show cause why it should not be punished for contempt. On the 30th of June the court directed the district attorney to file another affidavit charging contempt, based on the second publication. Upon the filing of such an affidavit, the court on that day entered an order requiring the Herald-Republican, its general manager, its managing editor, its acting city editor, and its reporter to appear and show cause why they should not be punished for contempt, based on the second publication. Both orders were served on the 30th of June, the day after the second publication.

The affidavits are lengthy. The substance of them is: The murder was committed March 26, 1910. Shortly thereafter Hays and Thorne were arrested and accused. On the next day they confessed their "complicity in the crime of the charged murder," Thorne by a written confession signed by him, Hays

an oral confession reduced to writing, but not signed. These confessions, it is averred, were, when made, given to the press, and with other purported facts of the homicide were published the following day, March 28th, by all of the daily papers of Salt Lake City, including the Herald-Republican. On the 13th of June the Hays Case was called for trial, and the whole of that day consumed in impaneling a jury. It is averred that, by reason of the publications in March by all the newspapers, much difficulty was experienced in obtaining qualified jurors because of opinions of veniremen based on a reading of such publications; that on the first day of the Hays trial "out of a number examined" but one qualified juror was obtained; that on the first day of the Thorne trial "out of a number examined" six qualified jurors were obtained; and that in each case at the close of the first day's trial fifty additional jurors were drawn and summoned. Then it is averred that on the 14th of June the Herald-Republican published the first article referred to, "Hays Murder Case Called for Trial," and on the 29th of June, the morning after the first day of the Thorne trial, the second article, "Six Jurors Sworn to try H. Thorne." The publications in March by all of the papers, including the Herald-Republican, of course, are not complained of. Those made on June 14th and 29th by the Herald-Republican are complained of. Such portions of the publications as relate to the confession and the purported facts of the homicide and the arrest—the matters complained of—were but a résumé of what had already been published in detail and circulated by all the daily papers of Salt Lake City several months before. But it is further averred that the publications complained of "were calculated greatly to prejudice and bias the minds of the readers of said paper against the said defendant then on trial, and to make it much more difficult for said court to secure qualified trial jurors," and "did greatly prejudice and bias the minds of many persons throughout the county against the defendant, and did greatly prejudice and bias the minds of many persons who were prospective trial jurors in said case against said defendant, of whom many were regular subscribers of said paper;" that the accused "well knew" that such publications were calculated to prejudice, and would prejudice and bias the minds of such prospective jurors and others "against the defendant," and would render it difficult to secure qualified jurors for the trial; and that the accused, well knowing the charged harmful effect of such publications, "caused copies of the paper containing such publications to be delivered to and into the hands of a large number of said 50 additional drawn and summoned jurors before their attendance upon the court," and that by reason thereof many of them were disqualified, and the obtaining of qualified jurors render-

ed difficult. To these affidavits each of the accused filed verified answers, admitting all the publications referred to in the affidavits, including those complained of, and the relations of the accused thereto as alleged; denying all other allegations of the affidavits; averring that such publications were made as matters of news, and as publications of judicial proceedings, and not otherwise, and were not made nor intended to influence or interfere with judicial action or proceedings, and disclaiming any wrongful intent or motive by such publications or any intended harmful effect or wrongful purpose whatever. They further alleged that the court was without jurisdiction, on the ground that no contempt in law was charged, and that they, under privileges guaranteed by the Constitution, had the right to publish the matters complained of.

Upon the issues thus raised and presented, the court, without evidence or a trial, found and adjudged the accused guilty on the pleadings, on the affidavits of the district attorney and the verified answers of the accused. The judgment as to the first publication recites: "Whereupon the said matter is submitted to the court upon the affidavit filed herein and the admissions made in the answer of the said Herald-Republican Publishing Company, and the questions of law raised by the answer so filed, and the same is argued by H. E. Booth, Esq., as attorney for said Herald-Republican Publishing Company, and submitted without argument by F. C. Loofbourow, district attorney, for the state. Being so submitted, the court finds and adjudges that the said Herald-Republican Publishing Company, a corporation, is guilty of contempt as charged in the affidavit, and it is the judgment and sentence of this court that the said corporation be, and is hereby, fined in the sum of \$200." The judgment as to the second recites: "Whereupon the matter is submitted upon its merits upon the affidavit and answer heretofore filed and the amended affidavit of the district attorney and the arguments heretofore made; and being so submitted, and the court, being fully advised in the premises, now orders and adjudges that each of the accused is guilty of contempt as charged in the affidavit, \* \* \* and each of them being present in court, and accompanied by their attorney, H. E. Booth, Esq., and having stated that they had no legal reason to give why judgment should not be pronounced against them, it is the judgment of this court that the said Herald-Republican Publishing Company be, and is hereby, fined in the sum of \$200, that George E. Hale be, and he is hereby, fined in the sum of \$200, and to be imprisoned in the county jail for a period of 30 days, and that A. J. Brown, Paul Armstrong, and Carl R. Williams, and each of them, be, and they are hereby, fined in the sum of \$10."

Numerous grounds are urged for the annulment of the judgment. They may be



grouped: (1) Insufficiency of the affidavits to constitute contempt; (2) that, the charged constructive contempt being criminal, the "sworn answers" purging the contempt were conclusive; (3) that the publications were matters of news and publications of proceedings in court, which the accused had the right to publish; (4) that the publications were not per se contemptuous, and were not calculated, as was alleged, to influence or interfere with judicial action or proceedings, and that it was not shown that they, as was also alleged, in fact had such or any harmful effect; (5) and that the affidavits and answers presented triable issues, but the court found and adjudged the accused guilty without evidence or proof, without an investigation of the charges, and without a trial or a hearing.

[1] We need not consider these in detail. The gravamen of the charged contempt is that the accused, well knowing the publications were calculated to greatly prejudice and bias the minds of the drawn and summoned jurors and other persons against the defendant then on trial, caused copies of the paper containing such publications to be delivered to a large number of such jurors, and that such publications did, in fact, greatly prejudice and bias many of them against the defendant, and rendered it difficult to obtain qualified jurors. The charge is not that the publications, because of a distribution of the paper in the ordinary course of business fell into the hands, or were brought to the notice, of such veniremen and others, or that the accused ought to have anticipated that the publications might so fall into the hands or be brought to the notice of such persons; but that the accused, well knowing the charged harmful effect of such publications, "caused copies of the paper containing such publications to be delivered to" such veniremen and others. That implies that such publications were brought to the notice of such veniremen, not only as the natural and probable result of such publications and a distribution of the paper in the ordinary course of business, but also that actual and direct deliveries of such copies of the paper were made to such veniremen, and that the accused were the actors, the agents—the efficient cause—in making such actual and direct deliveries. And, while it is not directly averred that they did so to influence such veniremen or to influence or interfere with judicial action or proceedings, nevertheless such effect and purpose is sought as a legal conclusion to be attributed to such conduct. Of course, a delivery of a document or thing to a drawn and summoned juror to influence him or to influence or impede or interfere with judicial action or proceedings is contemptuous, though the document or thing so delivered produced no such effect. The attempt to influence and interfere is itself wrongful and contemptuous, though the wrongdoer did not accomplish

his purpose. Here it is not only averred that the accused published something tending to influence or interfere with judicial action or proceedings, but that they, well knowing the charged harmful effects of such publications, caused copies of the paper containing such publications to be delivered to veniremen, many of whom by reason thereof were greatly prejudiced and biased against the defendant and were disqualified, and the obtaining of jurors rendered difficult. We think the affidavit sufficient.

[2] Now, as to the second ground: The charged contempt is a constructive contempt and criminal. As to such contempts, the old rule in proceedings in law courts—not in equity—was that a denial on oath of the charged contempt, or by answers on oath to interrogatories submitted to the accused, purged the contempt, and entitled him to a discharge. But such is not now the general rule. In many jurisdictions the matter is regulated by statute. *U. S. v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 285; *In re Buckley*, 69 Cal. 1, 10 Pac. 60. It is here regulated by statute which presently will be noticed. So as to the second ground we also hold against the petitioners.

[3] The other alleged grounds may be considered together. And in this connection we think the last ground—rendering a judgment on pleadings adjudging the accused guilty of the charged contempt without evidence or proof or a hearing—presents the most serious question. Our statute (Comp. Laws 1907, § 3360) provides that, when a contempt is not committed in the immediate view and presence of the court or judge, an affidavit shall be presented to the court or judge "of the facts constituting the contempt." Upon that a warrant of attachment is issued "to bring the person charged to answer." By section 3366, it is provided that, "when the person arrested has been brought up or has appeared, the court or judge must proceed to investigate the charge, and *must hear any answer* which the person arrested may make to the same, and may examine witnesses for or against him." By section 3367, "upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding \$200, or he may be imprisoned not exceeding thirty days, or both."

The petitioners allege, and the allegations are not denied, but are supported by the record, that the court adjudged the accused guilty upon the affidavits and answers "without proof or evidence," without an investigation of the charge, and without a trial or a hearing. Though sufficient facts are alleged to constitute a constructive and criminal contempt and though the person charged therewith stands mute, still the court under the

statute may not treat such allegations as confessed, and upon them pronounce a judgment of conviction. The court nevertheless is required "to investigate the charge." It no doubt may, without proof or evidence, pronounce such a judgment if a plea of guilt or an answer equivalent thereto is entered. But the court here was not justified in regarding the answers as equivalent to such a plea. They put in issue about every allegation in the affidavits alleged, except the publications. If it were thought and held that these were the only material allegations, then were they smothered by pages of redundant and immaterial matter.

[4] With respect to the allegations of the delivery of copies of the paper containing such publications to veniemen, the accused's knowledge of the charged harmful effect and consequences of such publications, and the actual harmful effect thereof as charged, direct issues, of course, were raised. But the allegations that the publications were calculated to produce the charged effect and consequences were also denied. Were they, too, subject to denials? It is argued that they were not, for the reason that one may not be heard to deny the natural and probable consequences of acts voluntarily committed by him; and therefore, though the accused may be heard to deny that the publications in fact produced the charged injurious effect, nevertheless, they may not be heard to deny that they were calculated to produce such effect, unless an innuendo is necessary to show the meaning and application of the publications. And from this it further is argued that the court was justified in rendering judgment on the pleadings, on the theory that the publications complained of were in themselves as matter of law calculated to influence judicial action or to interfere with or obstruct judicial proceedings and therefore were contemptuous, and hence it is wholly immaterial whether they in fact had or had not such effect, or whether the published statements were true or false, or what the motive, intent, or circumstances were with which and under which the publications were made, and since the publications were admitted, and since the question of whether they were or were not so calculated to influence or interfere was one of law determinable on the face of the publications, no triable issue was raised. In support of this, the cases of *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682, 8 Ann. Cas. 761; *Territory v. Murray*, 7 Mont. 251, 15 Pac. 145, *Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572, *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430, *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141, 13 Ann. Cas. 501, are cited. The cases do not support the contention.

They are not cases where judgments were rendered on pleadings or confessions. In some of them the doctrine is announced that where the publication itself is calculated to influence, or impede, or interfere with, judicial action or proceedings, a showing that the publication in fact had no such effect, or that the publisher had no such intent, or was ignorant of such consequences or effect, or that the facts published were true, is no justification. But none of them as to a charged constructive criminal contempt hold a showing of such facts to be immaterial or impertinent. To the contrary, they hold that such and other facts to be material and proper to be shown, not, as some of the cases say, in justification or as a complete defense, but, as all of them hold, in mitigation and in relation to the punishment. The rule is familiar that one by a publication of false and defamatory matter may be held to respond in actual damages which either in law or in fact were the natural and probable consequences of the publication, though he may have intended no wrong, and even though he was ignorant of the natural and probable consequences of the publication. So in many other instances, both in civil and criminal cases, one is presumed or held to know and intend the natural and probable consequences of his voluntary acts, and, when called upon to answer for wrongs committed or injuries inflicted by him as the direct and natural result of such acts, the law forbids him to avoid responsibility by a showing that he did not in fact intend such or any harmful consequences, or that he even was ignorant of the probable and natural effect of such acts. But the doctrine generally is applied to cases where motive or intent is wholly immaterial. Where it is material, one may always deny wrongful, and show good, intent or motive. In view of the charged constructive criminal contempt, we think that is true here. A showing of good intent, or of ignorance of the harmful effect of a publication innocently made, may not in itself amount to justification, and may not be a complete defense; but in a charge of a criminal contempt we think such a showing nevertheless material, and may in some instances reduce the charged contempt to a mere technical contempt. Of course, some voluntarily committed acts may be so flagrant and scandalous as to admit of no explanation, or may in themselves show bad faith and willful and intentional wrongdoing to such an extent as to outweigh or entirely overcome all testimony adduced to show good faith and good intent, and may justify the court in disbelieving such testimony as against such flagrant and voluntary acts.

[5] Before a publication, innocently made in good faith and with good intent, may, as respects the influencing of or interfering with judicial action or proceedings, be

regarded as per se contemptuous, it must be of such character as naturally and necessarily to produce such effect. That it merely tends or is calculated to do so is not enough. It must naturally and necessarily have such effect. The authorities generally are to the effect that a publication concerning a cause or proceeding on trial made with the intent to have, or which necessarily must have, the effect of preventing litigants, or some of them, from having a fair trial, or of influencing or impeding, or interfering with, judicial action or proceedings or the administration of the law, is contemptuous. Notes to *Percival v. State*, 50 Am. St. Rep. 572. The publications here were not libelous nor scandalous; nor did they cast discredit upon or show disrespect to the court, judge, or another; nor did they contain anything of intimidation, dictation, or even of comment or criticism. Portions of the publications purport to be and were made concerning proceedings before the court, a case then on trial. The accused had the undoubted right to publish proceedings so had before the court. The proceedings, however, chiefly related to the impaneling of a jury in a criminal case. Things said and done in the court in respect of them the accused had the right to publish. They had the right to publish the fact that the case was called for trial, what the defendant was charged with as shown by the information or made to appear by the proceedings, his plea, by whom the defendant and the state were represented, the facts and happenings relating to the impaneling of the jury, and all other occurrences and happenings and things said or done in court pertaining to such proceedings and cause on trial. But they went beyond this. They published something which did not purport to be a part, and which was no part, of such proceedings. They published some of the evidence which was expected to be adduced, the written confession of Thorne signed by him and witnessed by a number of persons, statements as to the popularity and prominence of the deceased, warnings which detectives had received of "the gang of criminals" who had come from Ogden, and who were housed at "the Angelus" at Salt Lake, the circumstances of the arrest, and purported facts of the murder. With respect to these matters the publications do not purport to be news—fresh information concerning something that had recently taken place, recent report or account of an event, fresh tidings, recent intelligence (Webster, Standard Dict.)—nor do they purport to be a part of the proceedings, or of happenings or occurrences with respect to them. And in this age of keen newspaper rivalry the accused, no doubt, would rather go to jail than admit that the facts and information in the publications complained of concerning the murder committed, and the arrest made several months before and widely published were to them fresh information and tidings,

and recent intelligence. In stating some of the purported evidence statements were made, notably the Thorne confession, which, as to the Hays trial, was not even admissible evidence, and which could not properly be considered by the jury. The contention, therefore, that the accused in making the publications as to the particulars complained of were acting in the interests of the public and were exercising a freedom granted the press to publish news and proceedings of court is untenable; for the publications in such particulars do not even purport to be, and as in effect is averred were not in fact, publications of either news or of court proceedings. A newspaper and those connected with it may not, under the freedom granted the press, any more than another, obstruct, impede, influence, or interfere with judicial action or proceedings. It cannot be doubted that one would be guilty of contempt who should communicate with or deliver a writing to veniremen drawn and summoned as jurors on a case on trial, with the intent to have, or which naturally must have, the effect to influence such veniremen, by giving them information of the salient purported facts of the case, stating to them that the defendant on trial was a member of a "gang of criminals," and one of a trio who, in the commission of a robbery, had killed the deceased, a popular and prominent young man, that one of them had confessed, implicating all three, and giving to such veniremen a copy of the confession signed and witnessed. That such conduct naturally tends to pollute and obstruct the administration of the law cannot be questioned. Not that it is an affront to the court or judge, but because of its natural tendency to create a prejudice against a litigant, and to embarrass him in the prosecution of his cause or defense, by generating in the minds of the court or jury by whom the merits of the controversy, upon the law and the evidence adduced in open court, must be determined. With such conduct and such acts were the accused here charged. That they were journalists matters not, for they, no more than another, may commit such acts with impunity.

The portions of the publications complained of published under the circumstances averred of and concerning a cause then on trial and while a jury was being impaneled, and which were neither publications of news nor of proceedings of the cause, were, we think, calculated to influence judicial action or proceedings before the court. But that, in view of the charge and the denials and averments of the answers, was not the end of the investigation. The accused nevertheless were entitled to a trial, and to be heard on the questions of intent and motive and the circumstances under which the publications were made. And, though it be suggested that the burden in such particulars was on the accused, yet it also must be conceded

that a hearing for such purpose must be had and an opportunity afforded to make such defense.

[6] A judgment cannot be rendered on pleadings on the theory that intent, motive, and circumstances of the publication were wholly immaterial, and then defended on the theory that the burden of proof as to such matters was on the accused.

[7] The charge, however, being criminal, and the answers putting in issue at least many material allegations of the contempt as charged—certainly not confessing it—we think the prosecution had the burden, as in other criminal cases, to make out a *prima facie* case. And in view of the charge, as heretofore shown, such a case was not made by the mere admissions of the publications. But it matters not whether on the issues as raised the prosecution or the accused had the burden of proceeding or going forward with evidence, for the record shows that no hearing whatever was had, and that the court proceeded on the theory that as the publications were admitted, and since they in themselves were calculated to influence, or interfere with, judicial action or proceedings, they in law were contemptuous; hence all questions of intent or motive or circumstances under which the publications were made, and all other allegations denied by or averred in the answer were wholly immaterial, and therefore the court, without any investigation of the charge, without "hearing" the answers of the accused, and without a trial of any kind, rendered a judgment on the pleadings against the accused, and visited on two of them the maximum penalty of the law. In so doing we think the court was neither justified nor authorized.

Sections 3366 and 3367, heretofore referred to, are identical with sections 1217 and 1218 of the Code of Civil Procedure of California, except as to the penalty. In *Roe v. Superior Court*, 60 Cal. 93, the court said: "It is contended that according to the statute witnesses must be examined (C. C. P. § 1217), and the judgment must be on the answer and evidence (Id. § 1218). That is so, but it does not appear that this course was not pursued." Here it does appear that such a course was not pursued. In *Re Buckley*, 69 Cal. 1, 10 Pac. 69, that court again observed that at common law, if a party charged with contempt, not committed *facie curiæ*, cleared himself by his oath denying his guilt, he was by a court of law discharged, "but in this state the subject is regulated by statute as stated above. And of contempts not in the face of the court an issue is made up by answer, and witnesses are called and examined as in other causes. In other words, a trial is had as in other cases." The court in that case further held that "a proceeding to punish for an alleged contempt not committed in the presence of the court is criminal or quasi criminal in its nature, and,

before a conviction can be had therein, the guilt of the accused must be established by clear and satisfactory evidence. A mere preponderance of evidence is not enough." These views were reaffirmed by that court in *McClatchy v. Superior Court*, 110 Cal. 413, 51 Pac. 696, 39 L. R. A. 691. In that case one of the proprietors and the editor of a newspaper was ordered to show cause why he should not be punished for contempt for making certain publications, which, as alleged, constituted, among other things, "unlawful interferences with the proceedings of the court" in a pending cause on trial. There, as here, the publications were admitted. As there stated by the court: "The substantive defense was that the publications were in fact true, and not made with any wrongful intent," and "were not made for the purpose of interfering with the administration of justice." After the prosecution had put in its evidence, the accused offered to show "truth." This offer was excluded. Then he offered evidence "in support of the various subdivisions of his answer." This also was denied, "except to the extent to show that the publications were 'without malice.' This privilege was declined as of no avail, unless the petitioner was allowed to put in his entire defense." Said the appellate court: "The result of this action \* \* \* was in substance and effect to deprive the petitioner of the right to be heard in his defense. \* \* \* It had the effect to deprive him of a constitutional right," and that such a departure from recognized and established requirements of law "is as much an excess of jurisdiction as where there exists an inceptive lack of power." The court further observed: "Contempt of court is a specific criminal offense (citing cases) and a party charged therewith, although the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder or any other crime." In that case the court also held that the rulings complained of were reviewable on certiorari, and upon a review of the record annulled the judgment of conviction. The decision was not unanimous. The dissenting members took the view that the rulings were mere error and not reviewable on certiorari, and, further, that no error was committed by the refusal of the proffered evidence, on the theory that it was irrelevant to the issue. But the dissenting members in their opinion make this significant statement: Had the court "refused to receive any evidence on his behalf in defense of his charge, its judgment against him would have been unauthorized." The minority members held that "the court gave him permission to show that the publication was made without malice, and that he believed it to be true, and also that he believed that he had a right to

publish it, and to state his motive therefor," and to show the circumstances under which the publication was made. So what chiefly there divided the court on the merits was the question of whether the accused was given a trial and afforded an opportunity to make his defense; the majority members holding the negative, and the dissenting the affirmative, of the proposition.

[8] Here it is not pretended that any kind of a trial was had, and no claim made that any evidence whatever was taken, or that the court, in the language of the statute, "proceeded to investigate the charge" or to "hear" the answers of the accused, or that the court adjudged the accused guilty "upon the answer and evidence taken." To the contrary, the record shows that the court adjudged them guilty on the affidavits and the answers, not upon the "answer and evidence taken," and did so, too, notwithstanding the answers put in issue about every averment of the charged contempt, except the publications complained of. Contempts such as here were charged—wrongful acts not committed in *facie curiæ*, to influence or interfere with judicial action or proceedings—are criminal. Hence rules of pleading applicable to civil cases permitting judgment on the pleadings are not here applicable. The proceedings cannot be regarded as criminal for one purpose and civil for another. While the issues were made by the affidavits and the answers, yet the statute does not contemplate the rendition of a judgment on pleadings as in civil cases. The statute not only permits the accused to file an answer, but it in clear terms provides that the court "must hear any answer" which the accused may make to the charge; and nothing short of a plea of guilt, or its equivalent, will justify a judgment of conviction without evidence, and without an investigation of the charge.

From the recitals of the first judgment it appears that "the matter" with respect to the first publication "is submitted upon the affidavit and the admissions made in the answer." But from further recitals it also appears that the court did not find or adjudge the accused guilty merely of the acts or conduct so admitted. The recitals show that the court found and adjudged the accused "guilty of contempt as charged in the affidavit," not as admitted in the answer; found and adjudged the accused guilty of the acts and conduct as alleged in the affidavit, not as admitted by the answer.

What was the contempt charged? Not that the accused published something which was calculated to produce the charged injurious effect and consequences, the only allegations claimed to be admitted; but that they well knowing such charged injurious effect and consequences, caused copies of the paper containing such publications to be delivered to veniremen, by reason of which many of them were greatly prejudiced and

biased against the defendant on trial, and the obtaining of qualified jurors rendered difficult. And, as shown by the recitals of the second judgment, a final judgment of conviction was rendered against all of the accused, not on the admissions of the answers, but on the whole of the charge—"guilty of contempt as charged in the affidavit"—on the theory that the answers tendered no defense whatever to the charge or any part thereof. From these recitals it cannot be said that the court found or adjudged the accused guilty merely of acts and conduct expressly admitted or confessed. To the contrary, they, in effect, show that the accused were found and adjudged guilty of all the acts and conduct alleged in the affidavit. Whatever presumption might be indulged that the court adjudged the accused guilty only of such acts and conduct as were expressly admitted, yet, when the judgments are looked to, the presumption is dissipated, and the fact made to appear that the accused were found and adjudged guilty of contempt, not upon acts and conduct as expressly admitted, but "as charged in the affidavit." Of course, one charged with an offense may be convicted of a lesser necessarily included within the charge. But a conviction of the greater cannot be upheld on an admission or proof only of the lesser. If the court here was of the opinion that the publications were in themselves contemptuous, and not subject to explanation, and that motive, intent, purpose, and circumstances under which they were made were wholly immaterial and irrelevant to the issue, the judgment ought to have been founded on that, and not as was done on the contempt as charged in the affidavit. While findings as in civil cases are not required, yet a court ought, at least in effect, do what a jury in a criminal case is required to do when finding an accused guilty of a lesser offense included within the charge, to state in the verdict the offense of which he is so found guilty—here to state the acts and conduct of which the accused were adjudged guilty if it was attempted to adjudge them guilty of some only, and not of all the acts and conduct of the contempt as charged.

[9] Nor does the recital in the judgment that the accused "having stated that they had no legal reason to give why judgment should not be pronounced against them," etc., show that they were given an opportunity to be heard. Heard on what? "Legal reasons" why judgment should not be pronounced against them after they had been found guilty. The right which an accused has to be heard on merits is before, not after, he is condemned. Such recital cannot support a contention of a trial, or a hearing, or an investigation, or an opportunity to be heard.

[10] Neither does the recital that "the matter is submitted upon its merits upon the affidavit and the answers," etc., show a

waiver of a trial or a hearing, or a consent to render a final judgment in the cause on the pleadings and without a trial. In a proceeding like this, the legal effect of such a submission but invoked the action of the court to determine the sufficiency of the pleadings, the sufficiency of facts stated in the affidavit to constitute a contempt, and of the denials contained and facts stated in the answer to constitute a defense thereto, or in justification, or in mitigation thereof. Such a submission did not justify the court in rendering a final judgment in the cause and on the whole charge, unless no defense whatever was tendered, either by way of denials, or in justification, or excuse, or in mitigation, and unless what was tendered constituted a plea of guilty to the offense as charged.

[11] There is a further question not free from difficulty: Whether the rulings complained of, and here considered, are reviewable on certiorari, whether they relate to mere error not involving want or excess of jurisdiction, and whether the judgment complained of is appealable. Our Constitution provides that in criminal prosecutions the defendant shall have the right to appeal in all cases; our statute, to appeal from all final judgments of conviction. As has been seen, the charged constructive contempt is criminal requiring a trial as in all other cases. Because of the provisions of our Constitution and statute, I am rather inclined to the view that the judgment is appealable, and therefore not reviewable on certiorari; our statute (Comp. Laws 1907, § 3630) providing that the writ of certiorari may be granted "when there is no appeal," etc. But the case of Rohwer v. District Court, 125 Pac. 671, the latest expression of this court on the subject, is good and binding authority for a holding that the rulings are here reviewable on certiorari. While I dissented in that case, I nevertheless, now feel bound by the prevailing opinion until it be modified or overruled. And, as has been seen, the majority opinion is supported by the California court (*McClatchy v. Superior Court*, supra) and other courts under a policy to enlarge rather than to restrict the functions of the writ of certiorari. That, to a greater or less degree, has also been the policy of this court from an early day. *Gilbert v. Board*, 11 Utah, 378, 40 Pac. 264.

We therefore have reached the conclusion that the rulings complained of are reviewable on certiorari, and upon a review thereof the further conclusion, for the reasons heretofore stated, that the judgment complained of ought to be annulled and vacated. Such therefore is the order.

FRICK, J. (concurring). I concur with my Associate, Mr. Justice STRAUP, in the result reached by him. In view of the importance of the proceeding, I desire to state, as

briefly as possible, the reasons that impel me to concur with him. In my judgment all of the plaintiffs in this proceeding were prima facie guilty of at least a technical constructive contempt.

The authorities are almost, if not quite, unanimous that, if any act or conduct or any publication is "calculated to intimidate, influence, impede, embarrass, or obstruct the courts in the due administration of justice in matters pending before them," it constitutes a contempt of court. Moreover, it is also frequently stated in the cases that if any willful act or conduct, or any publication, has a tendency to prevent a fair trial, or tends to prejudice the public or jurors against an accused person on trial for an offense, or the tendency of which publication is to prejudice the rights of either party to a civil action, such act, conduct, or publication may be punished as for a contempt of court. In the following cases the doctrine contained in the foregoing statement is fully adopted: *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280; *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761; *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141, 13 Ann. Cas. 501; *Republica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155; *Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572; *In re Cheeseman*, 49 N. J. Law, 115-137, 6 Atl. 513, 60 Am. Rep. 596; *People v. Wilson & Shuman*, 64 Ill. 197-238, 16 Am. Rep. 528; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *State v. Circuit Court*, 97 Wis. 1, 72 N. W. 193, 83 L. R. A. 554, 65 Am. St. Rep. 93; *State v. Judge*, 45 La. Ann. 1250, 14 South. 310, 40 Am. St. Rep. 282; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *Matter of Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *Stuart v. The People*, 4 Ill. (3 Scam.) 395; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Burke v. State*, 47 Ind. 528; *Haskett v. State*, 51 Ind. 176; *Ex parte Wright*, 65 Ind. 504; *Percival v. State*, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *In re Moore*, 63 N. C. 397; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415; *State v. Edwards*, 15 S. D. 383, 89 N. W. 1011; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *State v. District Judge*, 37 Mont. 191, 95 Pac. 593, 15 Ann. Cas. 743; *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912; *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; *People v. Stapleton*, 18 Colo. 568, 83 Pac. 167, 23 L. R. A. 787; 2 Bishop, *Crim. Ev.* (7th Ed.) § 259. Bishop says: "Again, according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court tending to prejudice the public as to its merits and to corrupt and embarrass the administration of justice, \* \* \* may be visited as a contempt." In *State v. Circuit Court*,

supra, the Supreme Court of Wisconsin states the rule in the following language: "A criminal contempt at common law may be generally defined as any act which tends to obstruct the course of justice, or to prejudice the trial in any action or proceeding then pending in court." In *State v. Judge*, supra, 45 La. Ann. at page 1263, 14 South. at page 315, 40 Am. St. Rep. 282, the rule, as is stated by Mr. Wells on Jurisdiction, is adopted by the Louisiana court in the following language: "Where a publication being read by jurors in attendance on the courts would have a tendency to interfere with the proper and unbiased administration of the law in pending cases, it may be adjudged a contempt, and accordingly punished." In *Cheadle v. State*, supra, the Supreme Court of Indiana, speaking through Mr. Justice Niblack, states the rule thus: "It may be said generally that any willful act done to obstruct, interfere, or embarrass the proceedings of a court, or to corrupt or impede the due administration of justice, is a contempt of the authority of the court, against which such willful act is directed." In *State v. Edwards*, supra, the Supreme Court of South Dakota, in 15 S. D. 385, 89 N. W. 1012, in speaking of what constitutes constructive or indirect contempt, says: "Only such publications as are calculated to influence, intimidate, impede, embarrass, or obstruct courts in the due administration of justice in matters pending before them constitute indirect or constructive contempt."

In *Cooper v. People*, the Supreme Court of Colorado sums up the doctrine in the following language: "Parties have a constitutional right to have their causes tried fairly in court by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence or control judicial action? Days, and some times weeks, are spent in an endeavor to secure an impartial jury for the trial of a cause; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the minds of the jurors may not perchance be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor, a litigant, or those in sympathy with him should be permitted, through the medium of the press, by promises or threats, invective, sarcasm, or denunciation, to influence the result of the trial, all the care taken in the selection of a jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain."

In *State v. Frew*, supra, the Supreme Court of West Virginia adopts the general rule as the same is stated above, and in a most exhaustive opinion reviews a great number of cases upon the question of con-

structive contempts. The opinion in that case is very instructive.

In *Telegram Newspaper Co. v. Commonwealth*, supra, a case in which the circumstances in my opinion are parallel with those in the case at bar, the Supreme Judicial Court of Massachusetts states the rule as follows: "The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause." The court cites a number of the cases I have herein referred to. The foregoing doctrine is affirmed by the same court in another parallel case entitled *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761.

In *Hughes v. Territory*, 10 Ariz. 127, 85 Pac. 1060, 6 L. R. A. (N. S.) 574, it is said: "When it comes in any manner to the knowledge of the presiding justice of the court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause which is on trial before the court, the court of its own motion can institute proceedings for contempt."

The fact that the district court on motion for a new trial ruled and that this court, on appeal, affirmed the ruling that Riley had a fair trial, neither answers nor affects the question of contempt. It will not do to say that because a court, by making special efforts to secure a fair jury, and by devoting several additional days to the impaneling of a jury than otherwise would have been required, out of a population of about 140,000 the court is finally able to select jurors who are competent and qualified to sit in the case because the publications did not reach them and hence in no way affected them, or because there were a few who could satisfy the court that, although they read the statements, yet were not affected thereby, that no contempt had been committed. The question is not whether the act or acts complained of did in fact prevent a fair trial, but the question is whether they were of such a character that their natural tendency and effect was to embarrass, interfere with, or impede or obstruct the regular and orderly administration of law and justice. Can any one doubt that the natural tendency of the publication of the article twice, as was done, would be to interfere with or impede, and, in a measure at least, temporarily obstruct the due administration of the law? If the publications in question did not have such a tendency, then the publication and general circulation of any article of whatever kind or character in any newspaper must be deemed to be without any effect whatever. Nor is it a conclusive answer to the charge that what was done was done in good faith and

in the belief that the plaintiffs had a full and complete legal right to do what they were charged with doing. No doubt such an answer may be sufficient, as we shall see hereafter, to mitigate punishment, but it is not a complete justification of the contempt charged. If such an answer were conclusive, a newspaper could make it impossible to secure a fair and impartial jury, not only in the county where the crime is alleged to have been committed, but also in any county to which the case might be transferred upon a change of place of trial. Nor is it an answer to say that a newspaper has the absolute right to publish and circulate as news for the benefit of the public the proceedings of all courts. No doubt a newspaper may publish and circulate all the evidence as it is elicited in courts, and all that the attorneys say as well as what the court says during a trial. This, however, is publishing the proceedings as they occur. This is a right every one possesses, since our court proceedings must be free and open to all alike. If any one may go to hear the proceedings of courts, so he may publish what takes place in them from day to day. In publishing the proceedings, he may not, however, comment upon the evidence or draw his own inferences or make his own deductions therefrom and publish and circulate them with the evidence indiscriminately as news. Neither may he interview the witnesses and ascertain from them what their testimony will be and publish their statements just preceding, or pending, the trial of the case. If this were permitted, the weight and effect that should be given to testimony would no longer depend upon what that weight and effect shall be after a full and thorough cross-examination. Such a course would be intolerable, and in the end would not only result in denying one accused of crime his constitutional right to a fair trial by an impartial jury in the community that is not unduly prejudiced against him, but would also prevent civil cases from being fairly and impartially tried and determined. When a court, therefore, interferes with the press in publishing statements which upon their face are calculated to, and in all probability will, interfere with or impede or obstruct the due and orderly administration of justice, the interference by the courts is not to preserve their dignity, but it is to maintain their freedom from interference and their efficiency to administer the law to the end that they may dispense to all, without fear or favor, that impartial justice which is the guaranty of constitutional government. Courts, under our form of government, are but the agencies of the sovereign people, created for the purpose of dispensing justice, and to preserve and enforce the guaranteed rights which are the heritage of all. No one has a legal right to interfere with or impede or obstruct the courts in the discharge of their judicial functions. Every such inter-

ference must be an interference with the orderly administration of law. The claim advanced by some who are engaged in the business of gathering and disseminating news through the medium of the newspaper that they have a constitutional right to publish any matter of so-called news at any time and under all circumstances being subject only to actions for libel in case of the abuse of such supposed right is utterly fallacious, and, if permitted, would make a mere commercial enterprise the ultimate judge of what constitutes an interference with the aforesaid agencies, and whether it is best to interfere with their functions or not. The guaranty that every one who may be charged with an offense shall have a fair and impartial trial in the courts without outside interference or influence would become an empty sound. Newspaper publishers, nor any one else may not, therefore, do anything that will interfere, impede, or obstruct the administration of the law, and in case it is nevertheless done the offender, whoever he may be, must suffer the consequences. This, however, applies only while a cause is on trial or is pending in courts and before its final determination. When once finally determined any one may freely criticize every decision of any court, and in doing so is responsible only as in other instances of false or intemperate criticism. It would seem that if any one may fully and freely publish all of the proceedings of every court as they occur, and, after the case is determined, may freely criticize the result of all of the proceedings when based upon a correct statement of the facts, about all that is of any value to the public may be freely published. It must also be remembered that, where the criticisms or statements affect the judge personally, no contempt of court is ordinarily committed, unless the criticisms or statements are made to intimidate or embarrass the judge in a pending case, or are of such a nature as tend to or will embarrass the judge in discharging his judicial functions in future cases. If the latter is not the effect of what is published of and concerning the judge, the only remedy he has is to bring an action for libel the same as any one else and obtain redress, if he is entitled thereto, in that way. Newspaper publishers, like all laymen, too often proceed upon the theory that, when the courts interfere by contempt proceedings, it is to vindicate the personal dignity of the judge. Such proceedings, as we have seen, are not intended for such a purpose. Notwithstanding this, laymen very frequently misconceive and misunderstand the purpose of the law and courts in instituting such proceedings, and hence feel baffled, and their pride is wounded in case courts punish them for interfering with the administration of the law. The power to punish for contempt, within certain limits, is, and in the nature of things must be, inherent in every court worthy of the name. Such a power is



as necessary as the right to self-defense in the individual, and both rest upon the same principle, the right to defend oneself against undue interference. The power is one, however, that, like all powers, may be abused. Courts therefore with but few exceptions have been, and always should be, careful in exercising the power, so that a power which is most salutary may not become oppressive. They should, therefore, exercise great care and take ample time to carefully investigate every case of supposed interference or attempted interference with the administration of the law and punish only if such punishment is merited.

Where, as in the proceeding now under consideration, those who are accused of being in contempt promptly disclaim any disrespect for the court, disclaim all willful or intentional interference, and further claim that what was published or done was published and done in good faith, and in the belief that they had a legal right to do it, the court should inflict substantial punishment only after a full hearing, and after satisfactory proof that the claims put forth are false or simulated. I think that is clearly what our statute contemplates. While it is true, as I have already pointed out, that in this case the plaintiffs were all guilty of a technical contempt, yet the court punished them as for an intentional and willful contempt. This the court should not have done over their sworn denials and without hearing their personal statements in support of those denials. In contempt proceedings where, as here, the acts are admitted, but every wrongful intent is disclaimed and denied under oath, the principal thing to be ascertained is whether the claims of the accused in that regard are true. If they are, the court should not impose substantial fines or other punishment, but the fines should be nominal, or, perhaps, a mere reprimand would suffice to vindicate the law. When the court, under such circumstances, therefore, condemns without a hearing, it, in my judgment, exceeds its power or jurisdiction. Of course, a court is not compelled to believe the statements or explanations of the accused, but it is bound to hear them.

I desire to add in conclusion that at first I was very strongly of the opinion that we had no right to interfere with the judgment of the court, but, after more mature reflection, I feel constrained to yield to the views of my Associate and to those I have herein expressed.

I therefore concur with my Associate that for the reasons stated the judgment should be annulled, and the plaintiffs discharged.

MCCARTY, O. J. I concur in the order annulling and vacating the judgment of the lower court.

It is a well-settled, and I might add, a universally recognized, principle of law that

courts of record have the inherent power to punish for contempts. Courts without this power could not preserve order in judicial proceedings, nor could they enforce their orders, judgments, and decrees, and would therefore be courts in name only. In fact, without it our judicial system could not exist and retain any of its usefulness. This power has been so long conceded and so often exercised by the courts, both state and federal, of this country, that it would be a work of supererogation to cite the many cases in which it has been invoked and upheld. Attention, however, is invited to the following cases, in some of which will be found extensive reviews of the authorities and elaborate discussions of the subject in all its phases: *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Matter of Sturoc*, 48 N. H. 428, 97 Am. Dec. 626, and note; *State ex rel. v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *People v. Wilson et al.*, 64 Ill. 195, 16 Am. Rep. 528; *Cooper v. People ex rel. Wyatt*, 13 Colo. 387, 22 Pac. 790, 6 L. R. A. 430; *State v. Bee Publishing Co.*, 60 Neb. 282, 83 N. W. 204, 50 L. R. A. 195, 83 Am. St. Rep. 531; *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; 7 A. & E. Ency. Law, 30; 9 Cyc. 26. Contempts are either direct, such as are committed in the presence of the court, or constructive, consisting of acts done not in the presence of the court but at a distance, which tend to obstruct, prevent, or embarrass the administration of justice. 9 Cyc. 5, 6, and 19, and cases cited in the notes. Contempts consisting of publications are therefore constructive, and may be classified as follows: (1) Those which in no way reflect upon or tend to impeach the integrity of the court, and do not tend to intimidate witnesses or jurors, but which nevertheless are calculated to affect the result of an action or proceeding pending before the court; (2) those which purport to dictate to any one connected with the cause or proceeding as to what his action should be touching any matter under investigation, or which are designed or that tend to intimidate witnesses or jurors and are thereby calculated to prevent fair and impartial action; and (3) those concerning a pending cause, trial, or investigation which reflect upon and tend to discredit or degrade the court, counsel, parties, jurors, or witnesses. Neither of the publications in question contains any statement or matter that reflects upon or in any way tends to discredit the court or to bring it into disrepute, or that would tend to intimidate witnesses or jurors. Therefore, as stated by counsel for petitioners in their brief, "if the publications in the *Herald-Republican* amount to contempts of court, they belong to the class" first above enumerated. There is no statement, comment, or matter in either of the publications that shows, or tends to show, or that even indicates or sug-

gests, any effort or design on the part of petitioners, or any of them, to influence the action of the court or that of any witness or juror in the trial of the causes mentioned. The decisions cited by counsel for the district judge, defendant herein, with possibly three or four exceptions, belong to one or the other of the two classes of contempts last above mentioned. In nearly every case cited and relied on by counsel as an authority sustaining their theory of the case the alleged contempt consisted of defamatory publications which reflected upon and tended to discredit the court, or of publications that purported to dictate or suggest what the action of the court, or some party connected with the trial of the cause, should be, or that had a tendency to intimidate witnesses, jurors, or other parties connected with the matter under consideration. The cases referred to, some of which I have cited as illustrating the power of courts to punish for contempts of court, contain able and elaborate discussions of the freedom of the press and the scope of the jurisdiction of the court in contempt cases. Conceding, as I do, that they contain correct expositions of the law and were correctly decided, yet they nevertheless are not decisive of the proceeding at bar. Those cases are based on an entirely different state of facts from the case at bar.

Plaintiffs under oath have disclaimed in their answers to the affidavits charging contempt any intention to reflect upon the court, or to in any way obstruct, impede, or interfere with said causes then pending by the publication of the articles in question. And no evidence was introduced, nor was any offered, tending to show culpability on the part of the plaintiffs in this regard. Counsel for the lower court in their brief say: "In the present case it was neither a libel nor slander on the judge personally, on the court, the district attorney, the jury, or any of the court's officers to write the articles in question, or even to make extensive criticisms of the defendants in those cases." Counsel contend, however, that the tendency of the articles was to impede and interfere with the trial of the causes concerning which the articles were written and published by rendering persons who might read the articles unfit to act as jurors in said causes. This is the important, in fact, it is the controlling, question presented by these proceedings. If the articles tended to have this effect, the publication of them, under the circumstances, as admitted by the plaintiffs, was an unlawful interference with the trial of the cause to which the article referred. And this would be so, regardless of whether the articles were published and given to the public with good or bad intent. 9 Cyc. 21; *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141, 13 Ann. Cas. 501. Where an act is adjudged to be a contempt

of court, a disavowal by the contemner of any intent to commit a contempt does not necessarily purge him of the offense, but such disavowal may be considered by the court in rendering judgment as an extenuating circumstance. 9 Cyc. 25-26, and cases cited in note 37.

As stated, the decisive question here presented is, Did the publication of the articles in question by the Herald-Republican tend to interfere with and impede the trial of the causes to which they referred by disqualifying persons who might read them from serving as jurors in said causes? The district attorney alleges in his affidavit that on the day (March 27, 1910) the confessions of Riley and Thorne were obtained by the police officers they were given to representatives of the daily newspapers of Salt Lake City, and on the following day "each of said daily newspapers, including the Salt Lake Herald-Republican, in Salt Lake City, Utah, published the said confessions in full." On June 13, 1910, the case of *State v. Riley* was called for trial, and one juror was secured from the panel of jurors then in attendance for the trial of said cause. On the following morning the first of the publications complained of appeared in the Herald-Republican. The question regarding the effect the article had on the jurors who were called into the jury box in that case was carefully considered by this court in an opinion affirming the conviction of Riley for the murder of Fassell. *State v. Riley*, 126 Pac. 294. The question was raised in that case by a motion for a change of venue based on the publication of the article. This court, after setting forth the substance of the article, disposed of the question as follows: "The important question therefore is: Ought the court to have been satisfied from the showing made that the defendant could not obtain a fair and impartial trial in Salt Lake county? The court, in commenting and passing on the motion, said: 'I do not think there is any ground for a change of venue. The examination of the jurors did not disclose such feeling as would warrant a change of venue. \* \* \* Some of them were disqualified by reason of having read the paper; but none of them indicated any hostility to the defendant. \* \* \* There is no indication of public feeling in the examinations of the jurors, and the article in this morning's paper would not tend to arouse public feeling in the sense that it would be unsafe for the defendant to go to trial.' The views of the court thus expressed respecting the effect, if any, that the newspaper article had on the proceedings and the general state of public opinion in Salt Lake county towards the defendant, are fully supported by the record. Of all the jurors examined only seven, so far as shown by the record, read the article in question, and one of the seven was accepted and sworn to try the case. Another of the jurors who

had read the article was passed for cause by the prosecution and defense, and was challenged peremptorily by the state. In fact, after the second day of the trial, neither the prosecution nor the defense seemed to regard the article mentioned as an element or factor in the case. Some of the jurors were not even interrogated in reference to the article. And we think the examination of the jurors generally shows conclusively that the public sentiment in Salt Lake county towards the defendant was not such as would tend to prevent him from having a fair and impartial trial. The court at the time of the motion for a change of venue stated that if, upon further examination of the jurors, it should appear that the defendant was prejudiced by the publication of the newspaper article mentioned, leave would be granted the defendant to renew his motion for a change of venue. This the defendant did not do. He went to trial without further objection, and submitted the case to the jury without having exhausted his peremptory challenges. In fact, we think it clearly appears from the record that no greater difficulty was experienced in obtaining a jury than is usually met with in this class of cases. We are therefore of the opinion that the court did not err in denying the motion for a change of venue." The opinion also discloses that Riley in his affidavit filed in support of his motion for a change of venue, alleged that at the time the crime was committed for which he was on trial, and for several days thereafter "the public journals of Salt Lake City published full and detailed accounts of the tragedy alleged and of the parties concerned therein, alleged to have been the parties who perpetrated the alleged crime, \* \* \* and made such strong statements of the evidence and all matters \* \* \* connected therewith that public opinion formed very strongly against this defendant, and considerable excitement was created in the public mind at that time on account of the transaction as alleged in the newspapers, which excitement and public opinion ran so high that the county officials having this defendant in custody were compelled to remove him from the county jail to the Utah State Prison to prevent him being a victim of mob violence. \* \* \* [Reference is here made to the newspaper article mentioned, a copy of which is attached to the affidavit and made a part thereof.] That he has reason to believe, and does believe, that the said Herald-Republican has a large circulation and is extensively read throughout Salt Lake county, and that the article herein referred to and made a part hereof has and will mold public opinion as to render a fair and impartial trial impossible in Salt Lake county. Affiant further believes that, by reason of the sentiment heretofore created and revived and extended by the article hereto attached, justice cannot be had in Salt Lake county.

\* \* \* No counter affidavits were filed. The district attorney then contended, and the court ruled, that the publication of the article even when considered in connection with other "detailed accounts of the tragedy," theretofore published in "the public journals of Salt Lake City," did not prevent, or tend to prevent, Riley from having a fair trial by an impartial jury. This ruling was made on the same day, June 14, 1910, and immediately following the making of the order directing the district attorney to commence proceedings against the Herald-Republican for contempt of court. On June 23, 1910, the day on which Riley was convicted of the murder of Fassell, the district attorney made and filed the affidavit on which these proceedings are based. It is alleged in the affidavit "that said publication \* \* \* did greatly prejudice and bias the minds of many persons throughout said county against the defendant (Riley) so on trial, and did greatly prejudice and bias the minds of many persons who were prospective trial jurors in said cause against said defendant, so that it became and was very difficult to secure qualified trial jurors for the trial of said case; \* \* \* that many of said fifty prospective jurors [referring to 50 jurors brought into court on a special venire issued June 13, 1910] read said Thorne confession so published in said paper before their attendance upon court at 10 o'clock a. m. on said day, and the reading of said publication caused such a prejudice against said Hays (Riley) in the minds of many of said 50 jurors that by reason thereof they were not qualified to act as jurors in said case." After the filing of this affidavit by the district attorney, Riley moved the court for a new trial. The court denied the motion and sentenced Riley to be executed.

It seems that the district attorney and the trial court proceeded upon the theory that so far as Riley was concerned, who was on trial for his life, the publication of the article neither prejudiced nor tended to prejudice the cause, but for the purpose of proceeding against the Herald-Republican for contempt of court the publication of the article was calculated to prejudice, and in fact did "greatly prejudice," the cause. And in the judgment of the court it is recited that "the court finds and adjudges that the said Herald-Republican Publishing Company, a corporation, is guilty of contempt as charged in the affidavit." These two positions are antagonistic to, and at variance with, each other. If the article had the prejudicial effect on the community in Salt Lake county and on "the minds of many persons who were prospective jurors," etc., claimed for it in Riley's affidavit, and in the affidavit filed by the district attorney, and as found by the trial court in its judgment against the Herald-Republican, he, Riley, was entitled to a change of venue, and, not having obtained a change of the place of trial, he should have been

granted a new trial. But, as we have pointed out, the record in that case affirmatively shows that the publication did not have the pernicious effect claimed for it in the two affidavits mentioned and as found by the trial court in rendering judgment against the Herald-Republican. In fact, the record in that case tends to show that the article had no prejudicial effect whatever in the trial of the case. As stated by this court in the opinion affirming the judgment in that case: "After the second day of the trial, neither the prosecution nor the defense seemed to regard the article mentioned as an element or factor in the case. Some of the jurors were not even interrogated in reference to the article." And the trial court, by denying Riley a change of venue and overruling his motion for a new trial, in effect held that his rights were not prejudiced by the publication of the article. These rulings were sustained by this court in the opinion referred to, which correctly reflects the record as made by the lower court. It is therefore judicially determined both by the trial court and this court that the publication of the article did not prevent Riley from having a fair and impartial trial by an impartial jury.

The Herald-Republican in its answer "disclaims any intention whatever to reflect upon the court, or in any way show any disrespect therefor, or to in any way interfere, obstruct, or impede the proceedings of said cause (State v. Riley) then on trial in said court, by the publication of said article," and it further alleges that the article was published as an item of news. As hereinbefore observed, there is nothing in the article itself which indicates, or that justifies an inference, that it was published with intent to interfere with the trial or to in any way influence the action of any one connected with the trial of the cause. The article consists of a dispassionate recital, in a general way, of the facts and circumstances of the killing of Fassell, and the arrest of Riley and Thorne, together with Thorne's confession which had theretofore been published in the Salt Lake daily newspapers, including the Herald-Republican. We therefore have a case in which a party is cited into court, adjudged guilty of contempt of court for the publication of an article merely as an item of news, without any intention, so far as shown by the record, of interfering with the proceedings of the court, and which in no way reflected upon or showed any disrespect for the court, and did not, as shown by the record of the case to which it referred, interfere with or prejudice said case.

I have found no case, either state or federal, in which it is held that the publication of an article in a newspaper concerning a pending action, which is given to the public merely as an item of news, and which in no way reflects upon the court or its officers,

and does not purport or assume to dictate or suggest what the action of any one connected with the cause to which it refers should be, and which contains no statement or matter that would tend to intimidate any witness, juror, or other person connected with the action, and which both the trial and appellate court held did not prejudice the trial of the cause, and which the record of the cause to which the article referred affirmatively showed did not interfere with or impede the trial of the action, is contempt of court. True, the trial judge, at the time he overruled Riley's motion for a change of venue, remarked that "the examination of the jurors did not disclose such feeling as would warrant a change of venue. \* \* \* Some of them were disqualified by reason of having read the paper." The court evidently referred to former issues of the paper, because the record of the case then on trial, as incorporated in the opinion of this court, shows that at the time these remarks were made none of the jurors had been interrogated regarding the article in question. Counsel for the state, in their discussion of the case in their brief, say: "It is apparent that, when a court once finds in any case that published statements do not tend to embarrass the administration of the law or to prevent a fair trial on the merits of a case then pending, of course, the contempt charge must fall at once to the ground, because the whole foundation is taken from under the charge." As suggested, the trial court by denying Riley's motion for a change of venue in effect held that the article did not tend to prevent the defendant from having a fair trial, and later on, in overruling his motion for a new trial, in effect held that the article as a matter of fact had not prevented him from having a fair trial by an impartial jury. And the opinion of this court in that case clearly shows that the publication of the article did not interfere with or impede the trial of the case.

What I have said regarding the first article published and its effect upon the case to which it referred applies with equal or greater force to the second publication. The district attorney, in the second affidavit filed by him, recited that in the case of State v. Thorne six jurors were secured on the first day of the trial. Thus the rapidity with which jurors were secured to try the case, in view of the fact that Thorne's confession had been published at least once in all of the Salt Lake daily newspapers and twice in the Herald-Republican, tends to show, if it tends to show anything in regard to the point under consideration, that the article did not tend to interfere with or impede the trial of the cause.

I am clearly of the opinion that the admitted facts, and these are the only facts alleged that can be considered, do not show or tend to show that the plaintiffs, or either of them, were guilty of contempt of court.

and that the court in adjudging them guilty of contempt acted without jurisdiction, and that the judgment should be annulled and the plaintiffs discharged.

### SMITH v. SCHULTZ et al.

(Supreme Court of Idaho. Dec. 19, 1912. On Petition for Rehearing, Jan. 29, 1913.)

#### (Syllabus by the Court.)

#### 1. VENDOR AND PURCHASER (§ 189\*)—ESTOPPEL TO DENY TITLE OF VENDOR.

In an action to foreclose a vendor's lien on real estate, a third party, who has purchased the property from the original vendee and taken an absolute deed to the property and holds his title under such deed, cannot be heard to maintain that the original conveyance to such third party's vendor was a mortgage and not a deed, and that it did not pass title to the property. In other words, he cannot both claim under the deed and against the same deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 381-383; Dec. Dig. § 189.\*]

#### 2. VENDOR AND PURCHASER (§ 266\*)—REMEDIES OF VENDOR—LIEN—"WAIVER."

Where a person sells real estate to a married man and conveys the same by good and sufficient deed and takes as a part of the purchase price promissory notes executed by the vendee and the vendee's wife, *held*, that the signature of the wife to such notes does not constitute such security as will amount to a waiver of the vendor's lien within the provisions of section 3442 of the Revised Codes of this state.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 687, 713-750; Dec. Dig. § 266.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 7375-7381.]

#### 3. VENDOR AND PURCHASER (§ 265\*)—RIGHTS OF PARTIES—BONA FIDE PURCHASERS—NOTICE OF VENDOR'S LIEN.

Where the purchaser of real estate is notified at the time he purchases that the land has not been paid for in full, and the original owner of the land is at that time residing on the land, and he also notifies the purchaser that the full purchase price has not yet been paid, *held*, that such purchaser is chargeable with notice that the original vendor has a lien on the property for the balance of his purchase price and is chargeable with the duty of investigating and inquiring as to the amount due under such lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700-712; Dec. Dig. § 265.\*]

#### 4. VENDOR AND PURCHASER (§ 281\*)—REMEDIES OF VENDOR—FORECLOSURE OF LIEN—EVIDENCE.

Evidence in this case examined and *held* sufficient to support the findings and judgment that the purchaser of real estate had notice of the existence of a vendor's lien on the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 792-794; Dec. Dig. § 281.\*]

#### 5. VENDOR AND PURCHASER (§ 294\*)—FORECLOSURE OF VENDOR'S LIEN—AMOUNT OF RECOVERY—ATTORNEY'S FEE.

Evidence examined and *held* not sufficient to support the judgment for attorney's fees.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 830; Dec. Dig. § 294.\*]

#### (Additional Syllabus by Editorial Staff.)

#### 6. VENDOR AND PURCHASER (§ 265\*)—ENFORCEMENT OF VENDOR'S LIEN—AMOUNT OF RECOVERY.

That a purchaser of land has paid a mortgage, assumed as part of the price, does not entitle him, on foreclosure of the lien of the vendor of his vendor, to reimbursement of the amount so paid before satisfaction of the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700-712; Dec. Dig. § 265.\*]

Appeal from District Court, Lewis County; E. O. Steele, Judge.

Action by Theodore W. Smith against J. A. Schultz and others. From a judgment for plaintiff, defendant Bank of Nez Perce and another appeal. Modified and affirmed.

Eugene O'Neill, of Lewiston, for appellants. F. M. Fogg, of Nez Perce, for respondent.

**AILSHIE, J.** This action was instituted for the foreclosure of a vendor's lien on 490 acres of land. The amount alleged to be due was \$5,000 and interest evidenced by four promissory notes. Judgment was entered for the plaintiff, and defendant appealed.

The assignments of error are too numerous to be taken up in detail, and indeed, as we view them, they are all reducible to a few propositions which we shall group and treat briefly herein. It appears that J. A. Schultz, individually and as president and principal owner of the capital stock of the Farmers Store Company had some dealings with respondent, Theodore W. Smith, and advanced him money and finally took a deed to the land here in question as security for the amount due from Smith to the Farmers Store Company. The business ran along that way for some time, and finally they had a settlement and it was agreed that, in consideration of the amount due and the execution of the four promissory notes, aggregating \$5,000, Schultz should have the land, and that the deed which had previously been held as security should become an absolute conveyance and should be so regarded and treated. The notes were accordingly executed, and the business transactions, with reference to the sale of the land, were thereupon closed. In the meanwhile Smith seems to have been residing on the land at such times as he was in the county. On the other hand, he had been absent from the county a considerable portion of the time since the first transaction. About the same time Schultz, who had been in the employ of the bank of Nez Perce, became indebted to the bank, and also the Farmers Store Company, of which Schultz was president and principal owner, became likewise heavily indebted to the bank. In settling this indebtedness, Schultz deeded the land previously acquired from Smith to the bank, and the bank subsequently con-

veyed the land to the appellant O. M. Collins, who was president of the bank.

The following are the essential questions which are presented on this appeal, and the determination of which will be decisive of the case: First, does the fact that the conveyance from Smith to Schultz in the first place was intended as a mortgage defeat Smith's right to assert a vendor's lien and to foreclose the same? Second, does the fact that Schultz's wife signed the four notes representing the balance of the purchase price for the land constitute security and amount to a waiver of the vendor's lien? And, third, if Smith is entitled to assert a vendor's lien against the property, is there sufficient evidence in the record to show that Collins had either actual or constructive notice of Smith's lien at the time of his purchase from the bank, and had the bank either actual or constructive notice of the lien at the time of its purchase from Schultz? The answer to these questions will be determinative of the case and will cover all the material and essential assignments of error presented by appellants.

[1] Addressing our attention to the first question above suggested, it may be observed that there is no controversy or dispute, but that the conveyance, when first given by Smith to Schultz, was intended as security and, under the decisions of this court, was a mortgage. *Kelley v. Leachman*, 3 Idaho (Hasb.) 392, 29 Pac. 849; *Felland v. Vollmer M. & M. Co.*, 6 Idaho, 120, 53 Pac. 268; *Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115; *Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 485. The parties to this action, however, are confronted with a number of subsequent transactions which have become admitted facts in the case that necessarily change their relations to the original transaction. After the adjustment of the accounts between Smith and Schultz, an actual sale took place, and, while no new deed passed from Smith to Schultz, it is clear and apparent from the record that it was the agreement and understanding between them that the original deed should stand as an absolute deed of a fee-simple title from Smith to Schultz, and the deed on its face purported to convey a clear and fee-simple title. All their subsequent dealings were had upon the theory and basis that this did convey a clear and perfect title, and the notes were given by Schultz to Smith on that theory and understanding.

The author in 20 Am. & Eng. Ency. (2d Ed.) 942, says: "The voluntary surrender or cancellation of a defeasance or an instrument in the nature of one, as a general rule, renders the conveyance absolute and vests complete title in the grantee therein. Such a case is an exception to the maxim, 'Once a mortgage, always a mortgage.'" In *Green v. Butler*, 26 Cal. 596, the court, speaking of this same principle of law, said: "Where a deed and defeasance are in separate instru-

ments, thus constituting a mortgage, a purchase of the equity of redemption by the mortgagee from the mortgagor for its full value, and a surrender of the defeasance to the mortgagee to be canceled, and the retention of it by the mortgagee, is in law a cancellation of the defeasance, though not actually destroyed." To the same effect, see note to case of *Bradbury v. Davenport*, 55 Am. St. Rep. 105; *Gravlee v. Lamkin*, 120 Ala. 210, 24 South. 756.

There is still another and equally valid reason why appellants cannot now urge that the original conveyance from Smith to Schultz was a mortgage only. They are claiming their title through this same deed. The law is well established that "a party cannot be permitted to claim under and against the same deed." *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. Ed. 440; 11 Ency. of Law, 446. Of course, the deed, being absolute on its face, though intended as security, could have furnished a basis for innocent purchasers to acquire a valid title, but the title would not be valid if they had notice of the fact that the conveyance was only intended as security. If, on the other hand, they had no notice of the fact that it was intended as security only, and purchased on the theory that title was absolute, and at the same time had notice that the original vendor had a lien on the property for the balance of the purchase price, they would not be allowed to subsequently deny the absolute character of the conveyance in order to defeat the vendor's lien. They must adopt one theory and pursue that consistently and adhere to it as well when it proves detrimental to their interests as when it proves beneficial. It is clear to us that the appellants cannot urge at this time that the conveyance from Smith to Schultz was only a mortgage and did not pass a clear title.

[2] Passing to the second proposition, as to whether or not the fact that Mrs. Schultz signed these promissory notes with her husband for the balance of the purchase price of the land constitutes such security as amounts to a waiver of a vendor's lien, we find that discussed in a two-fold aspect. First, if this was purchased by Schultz, the husband, as appears to have been the case, then, under the decisions of this court, the wife did not become responsible on the note. *Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497. Under the statutes of this state and the decisions of this court, "A married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or benefit or for the use or benefit of her separate estate, or in connection with the control and management thereof or in carrying on or conducting business therewith," unless the contract and obligation is made so as to create a lien or incumbrance on her separate estate or some portion thereof as security for the payment of the debt. In this case it would appear

that the property purchased did not become the separate property of the wife, and that it was not purchased for her separate use or benefit nor inured to the benefit of her separate estate. Her signature to the note would not therefore constitute security within the meaning of the provisions of the statute. Section 3442, Rev. Codes. See, also, *Feltom v. Smith*, 84 Ind. 485; *Gravlee v. Lamkin*, 120 Ala. 210, 24 South. 756; *Vermont Loan & Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893. If, however, as suggested on the other hand, this property became community property and therefore a kind of partnership property between the husband and wife, then the wife's signature to the note would not constitute security within the contemplation of the statute, but would merely be evidence of the community indebtedness or the signature of one of the purchasers, in which event it would not constitute security within the purview of the statute.

[3, 4] The next and important question presented is the sufficiency of the evidence to show that the appellants here had either actual or constructive notice of the respondent's lien as a vendor of the property. On this question the evidence is very conflicting, but a court could not say there is no substantial evidence to support the contention that appellants had notice of this lien. Schultz testified positively that he notified Collins before the sale that he still owed \$5,000. Smith also testified that he told Collins prior to the latter's purchase of the property that he had not been paid in full for the land. Collins does not deny that Schultz advised him that he was still owing something on this land, but says he passed it by lightly as a matter not concerning him. There is also evidence in the record tending to show that Smith was living on the land immediately prior to Collins' purchase of the same, and that, when Collins went to look over the place, he saw Smith on the land and talked with him. The evidence on the question of notice is certainly not satisfactory, but that is not at all strange. On a question of this kind, and in a case of this character, it is to be expected that there would be a sharp conflict in the evidence as to whether the purchaser had notice of the vendor's lien. It is such cases that get into court. Where there is no conflict in the evidence, there is seldom any litigation. Our examination of the evidence on this point has served to convince us that we would not be justified in holding it insufficient to support the findings that the appellants had notice of respondent's lien.

[5] Another question has been urged on this appeal which deserves some consideration. At the time of the purchase of this land by Schultz, and his sale to the bank and the subsequent sale by the bank to Collins, there was an outstanding mortgage against the property aggregating about \$2,200.

This obligation was assumed by Schultz as a part of the purchase price. Since that time Collins has paid the mortgage, and it is now claimed by him that, if respondent is to be given a vendor's lien for the balance of the purchase price, Collins should first be reimbursed for the amount he has paid out on this mortgage. The trial court did not take this view of the case, but, on the contrary, gave respondent a decree of foreclosure for the balance of the purchase price as represented by the purchase price notes above considered. We think the judgment of the trial court was entirely correct. The \$2,200 mortgage was assumed as a part of the purchase price, and Schultz agreed to pay that to the mortgagee. Collins became the purchaser of the land and holds the title to the same, and, when respondent's lien is satisfied, it will only complete the full payment of the purchase price to the original vendor, Smith. On the other hand, if for any reason the land should not bring at foreclosure sale enough to pay the mortgage and respondent's lien, it would result in denying respondent the full purchase price for his land to the extent of whatever deficiency might result from such sale. Respondent is clearly entitled to have his lien satisfied if the land will sell for that sum at foreclosure sale.

[5] Finally it is argued by the appellants that the trial court erred in allowing respondent judgment for attorney's fee in the sum of \$600 on foreclosure of this lien. This contention is made under specification No. 12 of insufficiency of the evidence to support the judgment, and is based upon the specific ground "that there is no evidence in the record showing that the plaintiff had paid, or agreed to pay, his attorney any sum whatever for the foreclosure of said mortgage, or that he was to receive any compensation therefor." Two witnesses were produced and testified on the question of attorney's fee and were cross-examined by counsel for appellants. No question was raised in the lower court as to the sufficiency of the evidence in this respect, and an examination of the evidence convinces the writer that it is sufficient to support the judgment for attorney's fee. No question is raised in this case by appellant as to the right of respondent under the law to recover an attorney's fee in a case of this kind. The question is rather presented here upon the theory that the law supports such a fee, but that sufficient evidence has not been presented to justify its allowance.

In the opinion of the writer, the judgment should be affirmed as to the attorney's fee, but the majority of the court are of the opinion that it should be disallowed, and that the judgment should be modified to that extent. We conclude, therefore, that the judgment should in all respects be affirmed, except as to attorney's fee allowed by the lower court,

and be modified to the extent of disallowing such fee.

Judgment in all respects affirmed, except as to the attorney's fee, and modified in that respect so as to disallow the attorney's fee. Respondent will pay the costs for his own brief, and all other costs of this appeal will be taxed against the appellants.

SULLIVAN, J., concurs.

STEWART, C. J. (concurring specially). I concur in all that is said in the foregoing opinion, except that portion which deals with the question of attorney's fees. It will be observed from the record in this case that this is an action to foreclose an equitable lien. There is no statute in this state which allows attorney's fees in a case of this kind; neither was there a contract entered into by the parties involved which provided for the payment of an attorney's fee upon foreclosure of said lien, or to pay an attorney's fee under any circumstances.

Justice AILSHIE sets forth the evidence introduced upon the trial with reference to the attorney fees and holds that such evidence, in his opinion, entitled the plaintiff to recover an attorney's fee. I am of the opinion that the evidence is sufficient to justify the allowance of an attorney's fee, provided there was a law which allowed such attorney's fees or a contract made providing for the payment of attorney's fees. There being no statute in this state which allows such fees, and no contract having been made, no fees can be allowed in this case, notwithstanding the evidence that was given. The attorney's fees cannot be recovered because there is no law authorizing the same, and not because of the insufficiency of the evidence.

#### On Petition for Rehearing.

AILSHIE, C. J. A petition for rehearing has been filed in this case, which deals alone with the question of attorney fee. The court held in the original opinion that the respondent, Smith, was not entitled to recover an attorney fee on the foreclosure of his vendor's lien as against Collins and the bank. It is contended, however, in the petition that the attorney fee ought to stand as against the maker of the note, Schultz. Schultz did not appeal, and so the judgment as against him was in no way disturbed or modified by the opinion in this case. It was not intended that it should be disturbed in any respect. The judgment as to Schultz will stand as originally entered in the district court, and the attorney fee will be disallowed only as to Collins and the bank of Nez Perce.

With the foregoing correction and directions, the petition will be denied.

SULLIVAN and STEWART, JJ., concur.

FEIL v. CITY OF COEUR D'ALENE et al.  
(Supreme Court of Idaho. Sept. 21, 1912. On Rehearing, Feb. 5, 1913.)

#### (Syllabus by the Court.)

#### 1. CITY INDEBTEDNESS—LIMITATION—STATUTES.

Section 3, art. 8, of the state Constitution provides that: "No \* \* \* city \* \* \* shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding, in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose," etc.

#### 2. MUNICIPAL CORPORATIONS (§ 864\*)—CITY INDEBTEDNESS—"LIABILITY"—LIMITATION—WATERWORKS—BONDS.

Where the city of Coeur d'Alene was indebted up to the maximum debt limitation, and while so indebted the council passed, and the mayor approved, an ordinance authorizing and directing the proper officers to purchase a water system and pay therefor the sum of \$180,000, and issue the bonds of the city for the same, payable in 20 years, with interest thereon at 6 per cent., and provided in such ordinance that the city should not be liable, in any manner or form, for the payment of such bonds, except that it bound and obligated itself to maintain water rates high enough to collect an annual income from the water consumers to pay all the running expenses of the waterworks system, and to raise a sufficient fund thereby to pay interest at 6 per cent. and the entire principal within the period of 20 years, and at the same time covenanted and agreed not to sell or encumber any of the property purchased, until full payment should be made therefor, *held*, that such ordinance and contract, if carried out, would create a liability in violation of the provisions of section 3, art. 8, of the state Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4111-4116.]

#### 3. MUNICIPAL CORPORATIONS (§ 863\*)—FISCAL MANAGEMENT—INDEBTEDNESS—LIMITATIONS—"LIABILITY."

The word "liability," as used in section 3, art. 8, of the Constitution, is to be read, construed, and accepted in the usual and ordinary sense in which that term is commonly employed, and, when so used, means and signifies the state of being bound or obligated in law or justice to do, pay, or make good something.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 864\*)—FISCAL MANAGEMENT—INCOME AND REVENUE—ANTICIPATION.

Under the provisions of section 3, art. 8, of the state Constitution, a city may anticipate both the income and revenue provided for it for such year, and incur debts or liabilities against the city which can be met and discharged out of the aggregate income and revenue for that year; but the city has no right to anticipate, set aside, and hypothecate either the income or revenue of the city, or any part thereof, for a special purpose, for a period of 20 years in advance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]



**5. WATERS AND WATER COURSES (§ 203\*)—  
PUBLIC WATER SUPPLY—RATES—REGULATION.**

When a city acquires its own water system, and engages in selling and distributing water to its inhabitants and charging rates therefor, it becomes subject to the same duties and obligations and responsibilities of an individual or private corporation, running and operating a like business, and is subject to have the rates charged, regulated, and fixed, in the same manner prescribed by law for the fixing of water rates generally.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**6. WATERS AND WATER COURSES (§ 203\*)—  
MUNICIPAL WATER SUPPLY—RATES—UNREASONABLENESS.**

A water rate, sufficiently high to pay all running expenses and improvements and repairs of the system and 6 per cent. on the entire value of the plant and the purchase price thereof, in the period of 20 years, would be unreasonable, and it would be beyond the power and authority of the city to contract in advance to maintain water rentals at such a rate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

Stewart, C. J., dissenting.

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Suit by Charles Fell against the City of Cœur d'Alene and others to enjoin the issuance and sale of certain municipal coupon bonds and declare a city ordinance therefor invalid. Judgment for defendants, and plaintiff appeals. Reversed.

In the month of June, 1912, the city council of the city of Cœur d'Alene passed, and the mayor approved, the following ordinance numbered 380:

"An ordinance providing for the purchase, by the city of Cœur d'Alene, of the water works system now owned by the Consumers Company, Limited, in the city of Cœur d'Alene, together with all pipes, conduits, reservoirs, pumps, water rights, franchises, and all other property of every description connected with or appurtenant to said water system either within or without the city of Cœur d'Alene, and providing for the issuance of water bonds in the amount of \$180,000.00 to be delivered to Eggleston & Company in payment for said water works, said bonds to be payable out of and chargeable solely to the receipts of said water works, and repealing all ordinances and parts of ordinances in conflict with this ordinance.

"Whereas, it is desirable that the city of Cœur d'Alene acquire and operate a water works plant for the purpose of supplying its inhabitants with a sufficient supply of water for domestic purposes, and furnishing fire protection, and for the better care of its streets and sewers, and

"Whereas, the Consumers Company, Ltd., owns and operates a water plant in the city of Cœur d'Alene, under franchise granted by the city, and said Eggleston & Company have

offered to procure and sell said plant, with its appurtenances, to the city of Cœur d'Alene for the sum of \$180,000.00, taking in payment the city's bonds payable out of and chargeable solely to the receipts derived from said water works plant.

"Now, therefore, be it ordained by the mayor and council of the city of Cœur d'Alene:

"Section 1. That the mayor and city council be, and they are hereby authorized to enter into a contract with the said Eggleston & Company for the purchase of said water plant with all of the appurtenances and franchises held by said Consumers Company, Limited, upon the terms and conditions herein specified.

"Sec. 2. That there be issued the bonds of the city of Cœur d'Alene in the aggregate amount of \$180,000.00, consisting of 180 bonds of \$1,000.00 each, being numbered from 1 to 180, both inclusive, and dated June 1, 1912, bearing interest at 6% per annum, interest payable semi-annually on the 1st day of June and December, upon presentation and surrender of interest coupons to be annexed to said bonds, both principal and interest to be paid in gold coin of the United States of the present standard of weight and fineness, at the fiscal agency of the state of Idaho in New York City, solely from the fund to be created from the revenues of the water works to be purchased hereunder as hereinafter provided. The said bonds shall mature as follows:

\$ 5,000 due June 1, 1913, being bonds numbered 1, to 5, inclusive.  
5,000 due June 1, 1914, being bonds numbered 6 to 10, inclusive.  
5,000 due June 1, 1915, being bonds numbered 11 to 15, inclusive.  
5,000 due June 1, 1916, being bonds numbered 16 to 20, inclusive.  
5,000 due June 1, 1917, being bonds numbered 21 to 25, inclusive.  
8,000 due June 1, 1918, being bonds numbered 26 to 33, inclusive.  
8,000 due June 1, 1919, being bonds numbered 34 to 41 inclusive.  
8,000 due June 1, 1920, being bonds numbered 42 to 49, inclusive.  
8,000 due June 1, 1921, being bonds numbered 50 to 57, inclusive.  
8,000 due June 1, 1922, being bonds numbered 58 to 65, inclusive.  
11,000 due June 1, 1923, being bonds numbered 66 to 76, inclusive.  
11,000 due June 1, 1924, being bonds numbered 77 to 87, inclusive.  
11,000 due June 1, 1925, being bonds numbered 88 to 98, inclusive.  
11,000 due June 1, 1926, being bonds numbered 99 to 109, inclusive.  
11,000 due June 1, 1927, being bonds numbered 110 to 120, inclusive.  
12,000 due June 1, 1928, being bonds numbered 121 to 132, inclusive.  
12,000 due June 1, 1929, being bonds numbered 133 to 144, inclusive.  
12,000 due June 1, 1930, being bonds numbered 145 to 156, inclusive.  
12,000 due June 1, 1931, being bonds numbered 157 to 168, inclusive.  
12,000 due June 1, 1932, being bonds numbered 169 to 180, inclusive.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Sec. 3. That said bonds and coupons shall be substantially as follows:

"United States of America, State of Idaho,  
City of Coeur d'Alene.

Water Bond.

"No. \_\_\_\_\_, \$1,000.

"Know all men by these presents that the city of Coeur d'Alene, in the county of Kootenai, state of Idaho, for value received, hereby promises to pay the bearer on the 1st day of June, \_\_\_\_\_, the principal sum of \$1,000.00, with interest thereon at 6% per annum, payable semi-annually on the 1st day of June and December in each year, upon the presentation and surrender of the annexed interest coupons as they respectively mature. Both principal and interest of this bond are payable in gold coin of the United States at the present standard of weight and fineness at the fiscal agency of the state of Idaho, in the city of New York.

"This bond and the interest thereon are payable solely from the fund created by ordinance No. \_\_\_\_\_ passed \_\_\_\_\_, providing for the monthly payment into the said fund from the revenues of said water works system, of the sum sufficient to pay principal and interest of the series of bonds of which this is one, as the same shall become due, and the city of Coeur d'Alene hereby covenants and agrees with the holders of this bond, and with each and every person who may become a holder thereof, that it will pay into said fund monthly from said revenues, a sum sufficient to pay such principal and interest at maturity, and will keep and perform all the covenants of said ordinance, including its covenant against disposal of said water system or of any substantial part thereof unless provision shall be made for the payment of said series of bonds and interest, and its covenant that it will not reduce the water rate so that the revenue of said system shall be insufficient to pay all operating expenses and other charges, and the payments required by said ordinance, and its covenant to increase such rates whenever necessary in order to provide for the full payments stipulated in said ordinance.

"This bond is one of a series of 180 bonds of like amount and date, aggregating \$180,000, issued for the purpose of acquiring the water works system with its appurtenances owned by the Consumers Company, Limited, and are issued in strict compliance with the Constitution and laws of the state of Idaho, and the charter of the city of Coeur d'Alene.

"It is hereby certified that all acts, conditions and things required by the laws and Constitution of the state of Idaho to be done precedent to and in the issuance of this bond, have duly happened, been done and performed.

"In witness whereof, said city of Coeur d'Alene has caused this bond to be signed

by its mayor and sealed with its corporate seal, attested by its clerk, and countersigned by its city treasurer, and the coupons hereto annexed to be signed with the lithographed signatures of said city treasurer as of June 1, 1912.

"\_\_\_\_\_, Mayor.

"Attest: \_\_\_\_\_, City Clerk.

"Countersigned: \_\_\_\_\_, City Treasurer.

"Coupon.

"No. \_\_\_\_\_,

"On \_\_\_\_\_, 19\_\_\_\_.

"The City of Coeur d'Alene, Idaho, will pay to the bearer, at the fiscal agency of the state of Idaho, in New York City, the sum of thirty dollars in gold coin of the United States of the present standard and fineness solely from a fund created from the revenues of the water works system of said city, as provided in, and for the semiannual interest on its water bond dated June 1, 1912, and numbered \_\_\_\_\_.

"\_\_\_\_\_, City Treasurer."

"Sec. 4. That the said bonds shall be signed by the mayor and sealed with the seal of the city, and attested by the clerk, countersigned by the city treasurer, each coupon attached thereto shall be signed with the lithographed signature of the city treasurer.

"Sec. 5. That upon the execution and delivery to the city of Coeur d'Alene of a proper conveyance of said water works system, free and clear of all liens and incumbrances, said bonds shall be delivered to said Eggleston & Company at par, and accrued interest in full payment for said water works system.

"Sec. 6. That there is hereby created a special fund to be known as 'principal and interest on water works purchase funds,' into which fund there shall be set aside and paid on the 20th day of the month next succeeding the date of the acquisition of said water works by the city, and on the 20th day of each month thereafter, until all of said bonds and the interest thereon shall have been paid, a sum equal to one-twelfth of the principal and interest on said bonds payable during the year ending on the 1st day of June following, which amount, in the judgment of the mayor and the city council, will be available over and above the cost of the operation and maintenance of the said system. The said fund shall be used solely for the purpose of the payment of the principal and interest on the bonds herein authorized as the same fall due, without preference or priority of one bond over another by reason of maturity, priority of issuance or otherwise.

"Sec. 7. The city of Coeur d'Alene covenants and agrees with the said holder or holders, as aforesaid, that at no time, until all of said bonds and the interest thereon shall have been paid, will it reduce the rates demanded by it for water delivered to consum-

ers, so that the gross revenues of said system, after subtracting the cost of operation and maintenance and the amounts required for the payment of other charges against the revenues, shall be insufficient to make the payment into said fund herein above required and ordained, and that if at any time the gross revenues of said water works system shall not be sufficient to pay said costs of operating and maintenance, and the amounts required for the payment of such charges, including the charge hereinabove created in favor of the bonds authorized, it will increase its rate to consumers to such figure as will be sufficient to provide for the payment of all such costs and charges.

"Sec. 8. It is covenanted and agreed by the city of Coeur d'Alene, in order to preserve the priority of the fund hereby created as a charge against the water revenue derived from said water works system, that the city will not create or permit to be created, so long as any of said bonds shall be outstanding and unpaid, any indebtedness of any kind or character which shall be a charge or lien upon the revenues of said water works system.

"Sec. 9. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed."

Charles Fell, the appellant herein, thereupon commenced an action against the city of Coeur d'Alene and the officers thereof, including the mayor and council, praying for a decree declaring the ordinance invalid and void as conflicting with the state Constitution, § 3, art. 8, and asking an injunction perpetually restraining the city authorities from issuing and selling the bonds provided for in the ordinance. After a hearing, the district court denied the plaintiff any relief, and he thereupon appealed.

One J. L. Robinson also commenced and prosecuted a like action praying the same relief, and a like judgment was entered in his case, from which he has appealed. Both cases are here, and, as the same questions are involved in both appeals, both appeals will be disposed of by this opinion.

Whitla & Nelson and McFarland & McFarland, all of Coeur d'Alene, for appellant. James V. Hawkins, City Atty., and John P. Gray, both of Coeur d'Alene, for respondents.

AILSHIE, J. (after stating the facts as above). It is alleged by the complaint, and for the purposes of this action is admitted, that the city of Coeur d'Alene was, at the time of the passage of ordinance No. 380, indebted in the sum of \$116,000, and that this indebtedness was and is in excess of the debt limitation prescribed by the Constitution and statutes for cities of the class to which the city of Coeur d'Alene belongs. The decisive question to be determined upon this appeal is whether or not the bonds of the city of Coeur d'Alene in the sum of

\$180,000, the issuance of which is authorized by ordinance No. 380, are in violation of or in conflict with section 3, art. 8, of the state Constitution.

[1] That section reads as follows: "No county, city, town, township, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

Section 6, art. 8, of the Constitution of the state of Washington, as adopted in 1889, provided, among other things, that "no county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county \* \* \* without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose," etc. Volume 7, Thorpe's American Charters and Constitutions, p. 3990.

[2] In the case of *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888, the Supreme Court of Washington was confronted with a very similar state of facts, and held that, under the provisions of their Constitution, § 6, art. 8, no indebtedness was incurred by such a transaction, and that the ordinance of the city of Spokane did not violate the provisions of the Constitution. The court divided on that question; three justices sustaining the validity of the ordinance, and two dissenting therefrom. The opinion is brief, and the vital part of it is as follows: "For the purposes of this case, it must be conceded that said waterworks will, in addition to supplying the money for the creation of such fund, as provided for in said ordinance, pay all the expenses incident to their operation, and for that reason the creation of such special fund can occasion no liability upon the part of the city to make any payment out of its general funds. This being so, we are of the opinion that neither the ordinance, the contract, nor the obligations to be issued by the city in pursuance thereof do or will constitute a debt of the city, within the constitutional definition. The

only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiaries under the contract. The general credit of the city is in no manner pledged, except for the performance of its duty in the creation of such special fund." Since this decision was announced by the Supreme Court of Washington in 1895, a number of very similar cases have arisen throughout the various states, and the opinions of the courts, adhering to this view, have invariably referred back to the Winston Case and relied upon it as an authority; and so, by citing that case and the various cases from other states that have followed the doctrine of that case, a line of authorities has been built up within the last 15 years which tend to support the contention made by the respondent in this case, and to sustain the validity of the ordinance here in question.

In 1902 the Supreme Court of Iowa in *Swanson v. Ottumwa*, 118 Iowa, 161, 91 N. W. 1043, 59 L. R. A. 620, followed and approved the doctrine of the Winston Case and other similar cases, and held that a special tax levy running for a series of years, for the purpose of paying for a municipal water system, was not in violation of the provisions of section 3, art. 11, of their state Constitution, which provides as follows: "No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." Volume 2, *Thorpe's American Charters and Constitutions*, p. 1154. The *Swanson* Case was based upon the specious reasoning that, where an obligation is incurred in anticipation of revenues yet to be collected, which are to go into a special fund pledged to the payment of such obligation, no debt is incurred, although those revenues are to be collected for a long series of years in the future. "Moneys, the receipt of which is thus assured," says the court, "are regarded as for all practical purposes already in the treasury, and contracts made upon the faith thereof are treated as cash transactions. No deficiency is created, and therefore no debt. In other words, so long as any particular fund has cash in the treasury, or taxes which can be legally anticipated for its benefit, no appropriation thereof, within the limits of such actual and prospective revenue, will have the effect to create an indebtedness." We are aware that such a holding has frequently been made, and correctly so, too, we think, where the obligation or liability incurred anticipates the revenues already provided for for that year, and where the revenues of the current year will meet and liquidate the obligation. *Stein v.*

*Morrison*, 9 Idaho, 426, 75 Pac. 246. Our Constitution specifically prohibits anticipating the income or revenue for more than the current year. But the Iowa court clearly carried this principle to the limit, and far beyond what other courts had done, when it held that the same principle is applicable where the revenues have been anticipated for 22 years in advance, and a sum of money has been raised for present expenditure to the aggregate sum of the anticipated revenue to be collected through such a series of years.

The case of *Swanson v. Ottumwa* was decided October 25, 1902. At the time the opinion in that case was filed, the same question was pending in the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, and on the 26th of November, 1902, only 30 days subsequent to the filing of the opinion in the *Swanson* Case, the Circuit Court of Appeals filed its opinion, reaching a contrary conclusion, and in course of that opinion Judge Lochren took occasion to criticize the opinion of the Supreme Court in *Swanson v. Ottumwa*, and among other things said: "We have examined carefully the opinion in *Swanson v. Ottumwa* and the cases which are supposed to give support to its conclusions. It will not be profitable to review in detail the reasoning employed to reach the result arrived at. To our minds it is not persuasive, and we decline to be guided by it. Its citations exhibit the unceasing attempts in that state and some others to nullify and evade wholesome constitutional limitations upon the power of municipalities to create indebtedness, and thus place intolerable burdens on the taxpayers; and its reasoning but adopts the ingenious, but obviously untenable, arguments by which such attempts have ever been supported. In the case of *Swanson v. Ottumwa*, the Supreme Court of Iowa holds, in accord with the contention of the appellant in this case, that the city of Ottumwa, though already indebted beyond the constitutional limit, may now borrow \$400,000 to construct waterworks by the issue and sale of its negotiable, interest-bearing bonds to that amount, to be paid by taxation on the taxable property of the city, collectible year by year for fifty years; and that the city will not thereby create any indebtedness if, at or before the issuing of such bonds, it levies, once for all, this continuous yearly tax, and bargains with the bondholders that the bonds are to be paid only from the fund which shall be produced or accumulated from the proceeds of this continuous yearly tax, with a vague possibility of re-enforcement from a surplus of water rentals over and above the cost of operating, maintaining, and extending the waterworks."

And again, in considering the terms, pro-

visions, and, requirements of the ordinance of the city of Ottumwa, Judge Lochren said: "Said ordinances further provide that no part of the cost of said waterworks, or any of the bonds issued therefor, shall ever be paid out of the general funds of said city, or out of any fund or the proceeds of any tax other than the property and funds specifically named, and that such provision and limitation shall be recited in the bonds; and hence it is argued that the transaction will not create any indebtedness on the part of the city, but that the money borrowed by the city from the purchasers of the bonds will be only an anticipation by the city, for its present use, of specific revenues which it has provided for, to accrue in the future. This contention of the appellant is based upon a palpable jugglery of phrases, and cannot be maintained. If it can, the constitutional provision above quoted, which prohibits any municipality from becoming indebted beyond the specified limit 'in any manner or for any purpose,' is delusive, and of no avail to protect taxpayers."

After giving some very apt illustrations of the practical application of the doctrine contended for, the court said: "If this may be done to build waterworks, the city may go on, and in the same way borrow and issue its bonds for an equal amount to build public buildings, and for another equal amount to construct a system of sewers, and for another equal amount to construct modern schoolhouses, and an unlimited amount as bonus to some railroad, taking care, in each case, to levy once for all a sufficient annual tax to meet the maturing bonds; and though the property of the taxpayers may be thus practically confiscated by being loaded down with taxes beyond any income which the property can produce, and for periods beyond any expectation of life which the taxpayers can indulge in, still those taxpayers, while groaning under such special levies fixed upon them and extending hopelessly into the future, will have the happiness and satisfaction of knowing that they live in a city which has no municipal indebtedness large enough to cause uneasiness."

In the note to the case of Ottumwa v. Water Supply Co., at page 604 of 59 L. R. A., the annotator says: "Swanson v. Ottumwa well illustrates the result, when the effort on the part of the courts to encourage municipal improvement, in the face of constitutional restrictions, is carried to its logical conclusion. Stripped of subterfuges, that decision permits a municipality, which is already indebted beyond the constitutional limit, to impose an additional indebtedness of \$400,000 upon its taxpayers by making a distinction between the taxpayers in their organized capacity and the same persons as individuals. This may be a valid distinction when applied to business corporations, but

it hardly seems to be so with respect to municipal corporations."

In 1903 a kindred question arose in the case of Brockenbrough v. Board of Water Commissioners, 134 N. C. 1, 46 S. E. 28, and the Supreme Court of North Carolina was called upon to determine the validity of certain statutes of that state, when construed in the light of the provisions of their state Constitution, as embodied in section 7, art. 7, thereof. The court concluded that no indebtedness was incurred in violation of the Constitution. The North Carolina Constitution there under consideration reads as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Volume 5, Thorpe's American Charters and Constitutions, p. 2837.

In Connor v. City of Marshfield, 128 Wis. 280, 107 N. W. 639, the Supreme Court of Wisconsin approved the doctrine announced in the Winston Case, and cited with approval a number of cases that have held to the same rule.

The foregoing are the leading authorities supporting the contention made by the city in support of its ordinance No. 380, and they will suffice to show the views taken by the courts of states having somewhat similar constitutional provisions to those found in our own Constitution. A contrary view was taken by the Supreme Court of Illinois in City of Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861, in construing section 12, art. 9, of the Illinois Constitution. Vol. 2, Thorpe's American Charters and Constitutions, p. 1037. The Illinois Constitution provides, *inter alia*, as follows: "No \* \* \* city \* \* \* shall be allowed to become indebted in any manner, or for any purpose, to an amount, excluding existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein," etc. An analysis and comparison of the constitutional provisions above quoted will at once disclose, however, that none of them were so sweeping and prohibitive in their terms as section 3, art. 8, of our Constitution, above quoted. We shall not take the time or space here to draw the comparison and analyze the differences existing between those constitutional provisions and our own, but will rather content ourselves with a brief analysis of our own constitutional provision and point out what seems to us the peculiar and decisive provisions of our own Constitution which should be held as conclusive in this case.

Our Constitution was framed and adopted in 1889, and prior to the rendition of any of the decisions above referred to, and before such a doctrine had been generally promul-

gated. Notwithstanding these facts, the framers of our Constitution employed more sweeping and prohibitive language in framing section 3 of article 8, and pronounced a more positive prohibition against excessive indebtedness, than is to be found in any other Constitution to which our attention has been directed. It says: "No. \* \* \* city \* \* \* shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof," etc. The Constitution not only prohibits incurring any indebtedness, but it also prohibits incurring any liability "in any manner or for any purpose," exceeding the yearly income and revenue. In this connection, it should also be observed that it not merely prohibits incurring any indebtedness or liability exceeding the revenue of the current year, but it also prohibits incurring any indebtedness or liability exceeding the income and revenue provided for such year. When the framers of the Constitution were drafting this provision, they engaged in some discussion over the language used, and certain members attempted to strike out the words "income and revenue provided for it," and insert instead thereof the words "usual and necessary expenses." This attempt was defeated, and, in course of the debate, attention was called to the fact that the word "income" was used in order that the provision might cover all sources and kinds of income or revenue, and that this word had particular reference to such sources of income as licenses and income, other than that derived from regular taxation. An attempt was also made to except certain expenses from the operation of this section, and that effort was likewise defeated. See *Proceedings Constitutional Convention*, vol. 1, pp. 590, 593.

The courts, to whose decisions we have above referred, have indulged in various subtleties and refinements of reasoning to show that no debt or indebtedness is incurred where a municipality buys certain property, and specifically provides that no liability shall be incurred on the part of the city, but that the property shall be paid for out of a special fund to be raised from the income and revenue from such property. The reasoning, however, of those cases utterly fails when applied to our Constitution, for the reason that none of those cases deals with the word "liability," which is used in our Constitution, and which is a much more sweeping and comprehensive term than the word "indebtedness"; nor are the words "in any manner or for any purpose" given any special attention by the courts in the foregoing cases. The framers of our Constitution were not content to say that no city shall incur any indebtedness "in any manner or for any purpose," but they rather preferred to say that no city shall incur any indebtedness or lia-

bility in any manner, or for any purpose. It must be clear to the ordinary mind, on reading this language, that the framers of the Constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

[3] Bouvier, in his *Law Dictionary*, defines the word "liability" as follows: "Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice." And, in support of the foregoing definition, he cites the following authorities: *McElfresh v. Kirkendall*, 36 Iowa, 226; *Wood v. Currey*, 57 Cal. 209; and *Joslin v. New Jersey Car Spring Co.*, 36 N. J. Law, 145. Anderson, in his *Law Dictionary*, defines the word "liability" as follows: "The state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." The latest edition of the *Standard Dictionary* defines "liability" as "the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden." The Supreme Court of California, in *Pillar v. Southern Pacific R. Co.*, 52 Cal. 42, approved the foregoing definition from Bouvier.

Now let us turn to the provision of the ordinance in this case and ascertain, if we can, what the city proposes to do by its ordinance No. 380. In the first place, the title says that it is "an ordinance providing for the purchase by the city of Cœur d'Alene of the waterworks system now owned by the Consumers Company, Limited, in the city of Cœur d'Alene, together with all pipes," etc. Section 1 provides that "the mayor and city council be, and they are hereby authorized to enter into a contract with the said Eggleston & Co. for the purchase of said water plant, with all appurtenances," etc. Now the question arises, Who is going to purchase this? and the answer is inevitable that it is the city that is going to purchase it. But it is said that the city is not going to pay for it; that somebody else is going to pay for it. If the city has any right to obligate any one other than the city to pay for this water system, then the contention made, that there is no city obligation, may be true. But, when we turn to the Constitution, we find that it does not merely prohibit the city from incurring any municipal indebtedness or liability, but it prohibits it incurring any indebtedness or liability. Now, if the city has the power to obligate the water consumers to pay for this system, or to obligate any specific property to pay for it, or any particular class of citizens to pay for it, then it is prohibited as much by section 3, art. 8, of the Constitution, from incurring such in-

debtedness or liability as if it were a city indebtedness or liability, because the Constitution says it "shall not incur any indebtedness or liability" exceeding a certain limitation, without at the same time levying an annual tax to meet such obligation and submitting the question to a vote of the people.

Passing now to the further provisions of the ordinance, we find that section 2 provides that there shall "be issued the bonds of the city of Coeur d'Alene, in the aggregate amount of \$180,000," bearing interest at 6 per cent. per annum. Now the question is, Whose bonds are these? Are they city bonds, or are they the bonds of some unknown and undetermined water consumers, who may and will change from month to month? But we find further that these bonds will run for the period of 20 years. Section 3 provides the form of the bond. Among other things, it says: "Know all men by these presents, that the city of Coeur d'Alene, in the county of Kootenai, state of Idaho, for value received, hereby promises to pay the bearer on the first day of June, —, the principal sum of \$1,000, with interest thereon at 6% per annum," etc. The bond further provides: "This bond and the interest thereon are payable solely from the fund created by ordinance No. 380, passed —, providing for the monthly payment into the said fund from the revenues of said waterworks system, of the sum sufficient to pay principal and interest of the series of bonds of which this is one, as the same shall become due, and the city of Coeur d'Alene hereby covenants and agrees with the holders of this bond, and with each and every person who may become the holder thereof, that it will pay into said fund monthly from said revenues, a sum sufficient to pay such principal and interest at maturity, and will keep and perform all the covenants of said ordinance, including its covenant, against disposal of said water system or of any substantial part thereof, unless provision shall be made for the payment of said series of bonds and interest, and its covenant that it will not reduce the water rate so that the revenue of said system shall be insufficient to pay all operating expenses and other charges, and the payments required by said ordinance, and its covenant to increase such rates, whenever necessary, in order to provide for the full payments stipulated in said ordinance."

Now, suppose it be admitted that no indebtedness is incurred by this ordinance, is there not clearly a "liability" incurred within the clear and unmistakable meaning of that word, as defined by the foregoing authorities? Does the city not pledge itself to so conduct this water system and charge and collect revenues therefrom, sufficient to pay the principal and interest on this obligation, and that it will pay such revenue into this special fund, created for the purpose, and that it will not only do this, but that,

if the rates now charged are insufficient to raise such revenue, it will raise the rates, however high they may be, until they are sufficient to meet this obligation and liability and discharge the same? If the debt is not the city's debt, does the city not become surety or guarantor for the payment of the debt? Is not there some legal liability created by the provisions of this ordinance? When the city agreed to purchase this water system, it certainly was intended that somebody should pay for the system. It was not a gift, and certainly it was not the intention of the city to defraud the vendors out of this property. The vendors expect to receive payment from somebody, and the city expects that somebody will pay for this, and it obligates itself to raise a revenue, from this property, sufficient to pay the debt, with interest within the period of 20 years. Not only this, but it covenants with the vendor that it will not sell or dispose of the property or in any way encumber it until this debt is paid. This clearly implies, and was evidently intended to be understood, that the vendors of the property should retain a vendor's lien on the property, under the statute, for the payment of the purchase price. This, too, is a liability. Suppose, now, after purchasing this property, another city council hereafter to be elected should decline to comply with the promises, agreements, and covenants of this ordinance. If the ordinance is legal and valid, would not the courts intervene to compel the city authorities to comply with the provisions and terms of this ordinance, and to take such steps as might be necessary to raise the required revenue to meet these obligations, and would the courts not also restrain and enjoin the city from encumbering or disposing of the property until such time as these obligations are discharged? But the obligation which the city assumes to maintain the present water rates, or, if necessary, raise them sufficiently to raise the required amount of money, is clearly *ultra vires* and an obligation which the city could not perform or discharge.

[5] It is admitted by counsel that the moment the city purchases this water system and begins to operate it and sells water to water consumers, and charges rates therefor, it will be subject to the same rules and regulations under the Constitution and statute for fixing reasonable rates as are applicable to individuals and private corporations, and this is clearly the law. *Farnham on Waters and Water Rights*, § 162; *Eaton v. City of Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Twitchell v. City of Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. Rep. 1027. Then they would be confronted with the provisions of sections 1, 2, and 6, of article 15, of the state Constitution, requiring water rates to be reasonable, and that those rates shall be established and fixed in the manner pre-

scribed by the Legislature. The city would have no more right than an individual or private corporation to charge unreasonable or excessive rates to its inhabitants, nor would it have the right to fix these rates itself.

[8] In this case, we are notified in the very first instance by this ordinance that the city proposes, within a period of 20 years, to raise from the water consumers of Coeur d'Alene city, by water rates, a sufficient sum to pay for all running expenses, all repairs, and improvements, and the purchase price for this entire system, and interest thereon at 6 per cent. per annum. In the meanwhile, the city must have water for municipal purposes, such as fire protection and flushing sewers, washing streets, and general municipal purposes. The city is going to either make its inhabitants and water consumers pay by excessive rates for this municipal purpose, so that water for city purposes may be free, or else the city is itself going to pay rates into this fund, which goes to meet the running expenses and pay the purchase price. In the face of all these things, the vendor of the property will come in and take its property back after large sums have been paid, if the city should fail or refuse to continue the payments, or its inhabitants should cease to patronize the water system, and pay sufficient rates to meet this continuing obligation and liability.

Courts have frequently passed upon the question as to what are reasonable water rates and the rate of interest which a water company is entitled to net on its investment. We know of no case anywhere that has ever held that a rate of interest would be reasonable which is sufficiently high that it will enable the owner of the property to pay running expenses, keep up repairs, pay interest at 6 per cent. on the total investment, and also at the same time pay the principal sum invested within a period of 20 years. This would mean to pay all operating expenses and repairs and repayment to the purchaser within 20 years of the entire principal, and 120 per cent. net profit in that period of time. This statement of itself shows that it is impossible for the city to keep within the provisions of the Constitution and statute in charging reasonable rates, and still comply with its ordinance No. 380 in raising sufficient revenue from this water system to pay the debt within the term of the ordinance.

The city proposes, by this ordinance No. 380, to purchase a water system and to become the owner thereof. It proposes, on the other hand, to make those who use water from this water system—the purchasers of water—pay for the waterworks system. The persons who are to pay for the system, however, will not be the owners when final payment is made. The property of the municipality is not taxed, and no specific property is pledged. The citizens, as a whole, or as

a class, are not taxed. So far as the municipality is concerned, it is to either have the free use of the water for municipal purposes, or else it must levy a tax sufficient to raise revenue to pay its proportion into this fund. It certainly is not going to pay itself for the use of its own property, nor can it levy a tax for the purpose of paying into the city treasury rentals for the use of municipal property. If it contributes anything to this fund, it will necessarily have to levy a tax annually, for the purpose of raising sufficient revenue to pay its proportionate share or reasonable rate in contributing to this common fund that is to be used to purchase this property. At this juncture, however, the city will be confronted with another serious problem. When it engages in public ownership of a water system, and sells water and charges rates to individual consumers, the receipts from this source will at once become an income under the provisions of section 3, art. 8, of the Constitution, which it is forbidden to pledge or hypothecate for more than the current year, and yet it is hypothecating that income for 20 years. In other words, it purchases a property which, in the ordinary course of business, would produce a revenue or income to the city. As soon as these rentals are collected, they will belong to the city, and the fund, whether it be a general or a "special fund," will belong to the city and be city or municipal property.

As said by the Supreme Court of Illinois in *City of Joliet v. Alexander*, 194 Ill. 464, 62 N. E. 863: "It does not make any difference that the certificates (bonds) are payable out of the special fund, if the city is the owner of the fund. All its obligations are payable out of some particular fund. \* \* \* The section of the Constitution limiting indebtedness provides that, at the time of incurring any indebtedness, the city shall provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due, and to pay and discharge the principal within 20 years from the time of contracting the debt, and every indebtedness is payable from some particular fund."

[4] After it owns that property, the receipts from water rents would clearly be an income or revenue within the purview and meaning of the Constitution; but, in advance of the purchase, it undertakes to appropriate and hypothecate that income for a period of 20 years, so that it may not be an income after the purchase is made. This is mere jugglery with words. This revenue will be no less an income after this transaction is consummated than it would have been had the city bought and paid for the property at the time. If this method can be pursued for purchasing a waterworks system, the same method could be pursued in purchasing an electric light and power plant, and a similar method might be adopted for the purchase of a telephone system within the mu-



nicipality, and so, also, a street railway, and there will be no limit, either to the power of purchase and acquisition, or to the power of the city council to incur indebtedness upon the prospective consumers or patrons, as the case may be. The consumer, not the taxpayer, may well sigh at the mere statement of the possibilities of such a proposition, carried to its natural conclusion, and lose himself in contemplating the cost of water, light, telephone, and transportation, when the consumer alone is paying for those public utilities.

Most subtle and dangerous of all is the method pursued for raising the revenue to meet the obligation. This is to fall, not upon the property of the municipality or the property owner, but on the consumer—the man who rents a house and must necessarily have water for domestic use. He must pay rates so high that the net income from such rate will enable the city in 20 years to pay for the entire system, and in the meanwhile operate it and keep it in repair. In the meanwhile, the property owners have had the protection which a water system affords against fire and in improved sanitation, and at the same time the taxable property of the city, and the property owner has been allowed to escape taxation for this purpose. Such a proposition is clearly repugnant to the Constitution, and at the same time shocks the sense of justice and municipal honesty and integrity. But the Constitution says that, before such an indebtedness is incurred which exceeds the income and revenue for the current year, it must be submitted to a vote of the people and be authorized by two-thirds of the qualified electors. The allegations of the complaint in this case demonstrate the wisdom and importance of that provision and qualification contained in the Constitution. It is alleged here, and for the purposes of this case is admitted, that about two years ago the question of purchasing this system for \$134,000 was submitted to a vote of the people, and was by the electors rejected. After this expression of the will of the people, the city council determines, by ordinance No. 380, to adopt the present method of purchasing this system without consulting the people or submitting the question to their vote, and to pay \$180,000 for the same property, or an advance of \$46,000 over the proposition rejected by the votes of the city.

Finally it has been urged by counsel for the city that the principle involved in this method of purchase has been in substance approved by this court in *McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348, and *Blackwell v. Cœur d'Alene*, 13 Idaho, 357, 90 Pac. 353, wherein this court approved the statute authorizing the levy of special assessments upon the property to be benefited in sewer districts for the purposes of building sewers. Courts have generally upheld statutes and city charters authorizing the crea-

tion of improvement and sewer districts and the levying of assessments on abutting property for the purpose of paying for the same. To our minds, the assessment and improvement district law is a very different thing from the problem with which we are here confronted. There the property assessed receives a direct and special benefit, and the property receiving that benefit is assessed for the payment thereof. *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861. The assessment in such case is not made against some uncertain, indefinite, and unidentified person, who may from time to time occupy the premises abutting upon the improvement, and we apprehend that, if such a method were pursued in order to pay for a sewer system, it would meet with the prompt disapproval of the courts. In those cases, however, the bondholder is given a lien on the property benefited, and may foreclose that lien without the intervention of the city. *Blackwell v. Village of Cœur d'Alene*, 13 Idaho, 357, 90 Pac. 353. The similarity between the two classes of cases is certainly very slight, and the rule of special assessments should not, and in our judgment cannot, be applied in a case of this kind. *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861.

This particular question has never before been passed upon in this state, and we have therefore felt it our duty to closely examine and construe our own Constitution rather than follow blindly and complacently the decisions of the courts of other states. To us the Constitution seems plain and clear, and it is our duty to follow its mandates. If it is to be amended, the amendment should come from the people in the constitutional manner, and not by way of judicial construction. Courts should declare the meaning and intent of the Constitution, and enjoin its observance as far as is possible; but it is no part of the duty of a court to declare or attempt to enforce what it thinks the Constitution ought to be, if in fact it says something else.

We conclude that ordinance No. 380 of the city of Cœur d'Alene is repugnant to section 3, art. 8, of the Constitution, and that the bond issue proposed by that ordinance would create a "liability" against the city.

The judgment is reversed, and the cause is remanded, with direction to grant a perpetual injunction as prayed for by the complaint. Costs awarded in favor of appellant.

SULLIVAN, J., concurs.

STEWART, C. J. (dissenting). I cannot agree with the conclusion of the majority opinion that ordinance No. 380 creates any indebtedness upon Cœur d'Alene city, within the meaning of section 3, art. 8, of the Constitution. Neither do I agree with the conclusion announced in the majority opinion

that the reasoning of the Supreme Court of Washington in *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888, the Supreme Court of Iowa in *Swanson v. Ottumwa*, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620, the Supreme Court of North Carolina in *Brockenbrough v. Board of Water Commissioners*, 134 N. C. 1, 46 S. E. 28, and the Supreme Court of Wisconsin in *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639, is not in accord with the language of the Constitutions of the respective states. These cases, in my judgment, were dealing with constitutional provisions identical in meaning with the Constitution of this state, and correctly state the intent of the makers of the Constitution in each state, where such questions have been decided. They are the only cases where courts have been called upon to pass upon the constitutionality of a transaction entered into by a municipality through its ordinances, similar to that involved in this action, except the case of *Ottumwa v. City Water Supply Co.*, 119 Fed. 815, 56 C. C. A. 219, 59 L. R. A. 607. This decision was by the Circuit Court of Appeals of the Eighth Circuit, and, in my judgment, should not be accepted as authority in this state rather than the decision of the highest court of each of said states, where such questions have been directly passed upon. The federal court imagines conditions which, in its opinion, would create a possible indebtedness; but, in my opinion, they have no application to the probabilities arising under such conditions.

There is nothing in ordinance No. 380 which in any way provides for a municipal indebtedness or liability in excess of the constitutional inhibition. No tax is assessed against the property within the municipality, and the city has in no way promised to pay from the general fund of the city, or out of any tax levied by the city in any one year, or any number of years; but, on the contrary, it is clearly provided that payment is to be made only and wholly from the income of the water system arising from the fund accruing for the use of water, and that such fund shall be applied to the maintenance of the system and the payment of the purchase price, and with permission for the city to regulate the water rates at such sum as to raise such fund. This method of paying for the waterworks is neither a debt nor a liability; the obligation that the city undertakes is that it will collect and turn over to the bondholders, out of the income from a charge for water, the amount due under the contract.

In the Washington case, the court of that state construed section 6, art. 8, of the state Constitution, in which this language is used: "No county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per cent. of the taxable property in such county

\* \* \* without the assent of three-fifths of the voters therein." It will be seen by this provision of the Constitution that the court was considering the question of incurring an indebtedness.

In the Iowa case of *Swanson v. Ottumwa*, the Supreme Court of Iowa was construing the following language: "No city, county, or other political or municipal corporation shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding 5 per cent. of the value of taxable property," etc.—and from this language it clearly appears that the court in that state, in the above-cited case, was dealing solely with the question of incurring an indebtedness.

In the North Carolina case, the Supreme Court of that state was construing the following language: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied nor collected by any officer of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified electors therein." It clearly appears that the court was dealing with the question of indebtedness.

The same may be said of the case of *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639, and the cases cited therein. The question the court was passing upon in these cases was whether a municipal indebtedness was created by the action of the municipality, and whether the city became bound by any promise to pay a debt by reason of the transaction made. So, in the opinions disapproved in the majority opinion, the courts were dealing solely with the question of indebtedness, and with the question as to whether or not, by such transactions, the municipalities were assuming liabilities in the performance of acts and obligations of the municipality, which in no way amounted to a municipal indebtedness. Comparing the Constitutions of the states referred to in the foregoing opinions, it will be observed that none of such Constitutions contained the exact language found in the Constitution of this state. This section of the Constitution, in its prohibition, not only is against the incurring of any indebtedness, but it is also an inhibition against the creation of any liability, in any manner or for any purpose, without a vote of the electors.

The Constitution provides that: "No \* \* \* city \* \* \* shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund

for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void. \* \* \*

While the majority opinion seems to hold that the "incurring of an indebtedness" and the "creation of a liability in any manner" have a different meaning, as used in this provision of the Constitution, yet, when the entire section is taken together, it will be seen that the inhibition of an indebtedness, as provided in the section, is in the incurring of an "indebtedness" or "liability," without a vote of two-thirds of the qualified electors, and that, "before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund." Thus the inhibition applies both to the incurring of an indebtedness and the creation of a liability, in the sense that both the indebtedness and liability is the making of an obligation which requires the raising of revenue by taxation by the municipality upon the property of the municipality for the payment of the same. The section, taken as a whole, shows clearly that the words "indebtedness" and "liability" are used in the same sense, in so far as the prohibition applies, and there is, in my opinion, no justification for the contention that a liability is any different from an indebtedness, or any more comprehensive, or has any different meaning, as used in the section in the application of the inhibition contained in the section.

Section 2315 of the Revised Codes, which provides that every city or town incorporated under the laws of the state shall have power and authority to issue municipal bonds, not to exceed at any time in the aggregate 15 per cent. of the real estate value of said city, "to provide for the construction and maintenance of necessary waterworks and supplying the same with water," has relation only to municipal bonds that are a charge against the city, and has no application whatever to bonds issued for the purpose of, and in accordance with, the provisions of ordinance No. 380; neither does it apply to bonds issued by a city for special improvements, or to any bonds that are payable out of a special fund created by special payments, or payable out of a special fund created out of the receipts of waterworks, purchased under a contract that the same shall be paid for from the receipts received by the city from the use of the water from such system. This section of the statute has reference to a general indebtedness of the city, and was intended to carry into effect section 3, art. 8, of the Constitution. *McGilveray v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348; *Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353. The fact that the ordinance provides that the city may have

the power, "if at any time the gross revenues of said waterworks system shall not be sufficient to pay said cost of operating and maintenance, and the amounts required for the payment of such charges, including the charge hereinabove created in favor of the bonds authorized, it will increase its rate to consumers to such figure as will be sufficient to provide the payment of all such costs and charges," can in no way affect or annul the laws of the state granting to a city the power to regulate the water rates within a municipality at a reasonable rate, and the purchaser of such bonds is advised of that fact when said bonds are purchased, and, in accepting the bonds, accepts them with the knowledge that, under the laws under which such bonds have been issued, such bonds are to be paid only from the revenue derived from the system, and that the rates fixed by the city are required to be reasonable.

Just what is a reasonable rate depends primarily upon the cost of production; and a fair rate thereon being recognized as the operating expenses, maintenance, and depreciation, all of which are legitimate expenses, and which the system must bear, whether the ownership be in the municipality or a private corporation or individual, and the bond purchaser accepts such bonds at his peril, and has full knowledge that the law requires that the rates to be charged for water are to be reasonable, and if the bonds are issued to an excessive amount, and the revenue derived from the water rentals fixed at a reasonable rate is insufficient to meet the payments, the bondholder assumes such liability, and not the city. So there is no indebtedness or other liability which the city will incur, which in any way would require the raising of any funds for the purpose of making any payments by reason of the transaction entered into by the authority of said ordinance. The fact that the city of Coeur d'Alene is to become the owner of said water system, and agrees to fix the rates to be charged for the use of water from the system, and to pay the same, upon the bonded indebtedness, out of a fund arising from the revenue received for the service of water, is not an indebtedness or obligation which adds to or requires the raising of revenue from assessment upon the property of the municipality during each year, or for any number of years, or at all, and the general credit of the city is in no way pledged, except the duty to create the fund, and does not bring the transaction involved in this case within the inhibition provided by section 3, art. 8, of the Constitution.

For these reasons I dissent from the majority opinion, both in the theory and reasoning of the opinion, and in the conclusion.

On Rehearing.

AILSHIE, C. J. Upon petition of respondent, a rehearing was granted in this case,

and the whole question has again received oral argument.

Two propositions have been dwelt upon by counsel at considerable length: First, that the original opinion of this court is contrary to the weight of American authority; and, second, that it runs counter to the interest of the people of the municipality. With reference to the first proposition, it may be suggested that the decisions relied on by respondent are not all in point, for the reason that they rest on constitutional provisions differing materially from ours. We pointed out, in the original opinion, what to our minds should be controlling, and the reasons for our holding, as well as our views of the intent and purpose of the framers of our Constitution. We are still fully persuaded that the ordinance here in question is an evasion of the provisions of the Constitution, and that to sustain it would be running counter to the intent and purpose of the framers of the Constitution and the people of the state, when they adopted that instrument. It can serve no useful purpose for us to enter upon a further discussion of those provisions here. The Legislature is now in session; and if the construction this court has placed upon section 3 of article 8 of our state Constitution does not meet with the approval of the representatives of the people in the lawmaking branch of the state government, or if for any reason they think it proper to submit the question to a vote of the people, they may do so at once and get an expression of the people themselves as to whether the Constitution should be so amended as to cover and include a case such as the one here presented.

As to the contention that this construction runs counter to the interests of the people of the municipality, it is not out of place to again call attention to the fact that the question of purchasing this water system was once submitted to the people of Coeur d'Alene city and was by them voted down. It hardly seems to us that the people themselves, after voting against the purchase of this water system, are now willing that the city council should make the same purchase at an additional price of some \$40,000, without in any manner submitting the question to those who must pay the bill. If the people interested in this matter, and upon whom the burden of paying the purchase price must fall, are to have the right to express their views on the matter, it is just as important that they express such views in the one instance as in the other.

We find no reason for changing or modifying the opinion of the court as originally announced in this case. The original opinion will stand as the judgment of the court.

SULLIVAN, J., concurs. STEWART, J., dissents.

# WAINSCOTT v. STATE

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

(Syllabus by the Court.)

## 1. LARCENY (§ 55\*)—EVIDENCE.

In a prosecution for larceny of live stock, the circumstantial evidence is held sufficient to support the verdict and judgment, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.\*]

## 2. CRIMINAL LAW (§§ 558, 742, 743\*)—TRIAL—WEIGHT OF EVIDENCE.

The credibility of the testimony of the defendant and witnesses testifying in his behalf is the exclusive province of the jury to determine, and, although such testimony may be uncontradicted and not directly impeached, when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true, the jury may give it such weight as they deem proper, even to the extent of wholly disregarding the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1250, 1719-1721, 1722; Dec. Dig. §§ 558, 742, 743.\*]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Jack Waincott was convicted of larceny, and brings error. Affirmed.

F. E. Riddle, of Chickasha, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (R. E. Gish, of Oklahoma City, of counsel), for the State.

DOYLE, J. The plaintiff in error was convicted of the crime of grand larceny, and sentenced to imprisonment in the penitentiary for a period of one year and a day. An appeal was properly perfected.

Three assignments of error relied upon for a reversal of the judgment are, in effect, that the evidence is insufficient to sustain the verdict and judgment, and that the court erred in the giving and refusing of certain instructions to the jury. The information is in the ordinary form, charging the larceny of 16 head of hogs, of the value of \$160, in Grady county, on or about the 19th day of December, 1910.

[1] The evidence upon which the defendant was convicted was of an entirely circumstantial nature. From the evidence it appears that the firm of Anderson & Girard had in their possession a large number of hogs in their lots near Ninnekah, Grady county, and about 10 miles northeast of where the defendant resided; that on the night of the 19th of December, 16 head were stolen; that 4 of these were red Duroc Jersey hogs that were snooted, and one of them had part of the nose hanging to one side in a peculiar manner. The stolen hogs were traced from the point where a portion of the fence inclosing the pens had been taken down to a bridge about two miles west, where the tracks show-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed that a wagon had been backed up under it, evidently for the purpose of loading the hogs. At this point the hog tracks and the tracks of men driving them stopped and the track of the wagon went south from the bridge, about two miles, where it was lost. Thursday following the Monday night, when the hogs were stolen, Hodge Bailey, a deputy sheriff, and Oscar Dryden, who were searching for the missing hogs, found two red hogs in the pen of the defendant, the description of which corresponded in every particular with the description of two of the stolen hogs. When Anderson, one of the owners, with the witnesses Dryden, Bailey, and Lintz, went on Saturday to the defendant's pen, these two hogs were missing. They then made search for the missing hogs, and, following the tracks of a hack which led from the defendant's pen through a field to a point about half a mile below in the timber, they found the entrails of three hogs buried, and the place covered over with leaves. A little of the hide which had not been removed corresponded with the color of the missing hogs seen in the defendant's pen Thursday by Dryden and Bailey.

On behalf of the defendant Willis Rider, his father-in-law, and George Rider, his brother-in-law, testified that they were with the defendant at his hogpens December 22d, and there saw two red hogs that George Rider had sold to the defendant a few weeks before. The defendant testified on his own behalf that he had bought two hogs from his brother-in-law, George Rider; that several of his hogs were snooted; that he did not know anything about the hack tracks from his pen to where the entrails were buried, nor did he know anything about any hogs having been killed there; that he saw from his house somebody looking into his hogpens on Thursday, and heard that day about the hogs being stolen a few days before from Anderson & Girard. The defendant also introduced evidence tending to support an alibi. Walter Moore testified that on December 19th he went to Chickasha with the defendant, that they drove from there to the defendant's home where they arrived about 10 o'clock p. m., and that he stayed there that night. Jim Hahn testified that he was working for the defendant at that time, and that he returned home on the night of December 19th from Chickasha; that Walter Moore was with him, and stayed there that night.

We think that it was clearly a question of fact for the jury to say whether the red hogs found by Dryden and Bailey in the defendant's pen were the property of Anderson & Girard, or of the defendant. On the following Saturday these two red hogs were gone from the defendant's pen, and no explanation of their disappearance is made. Under these circumstances, the jury were justified in connecting their disappearance with the finding of the entrails buried and concealed

on the premises of the defendant. Where the evidence is circumstantial, and the circumstances are such as to reasonably justify an inference of guilt, the weight and value of such testimony are exclusively for the jury. It is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. Otherwise the weight of circumstantial evidence, and the inference to be drawn from it in almost every case, would finally be determined by the appellate court. We think a verdict of a jury based upon circumstantial evidence comes to us as any other verdict, and, unless we can say that the inference of guilt drawn from the evidence was wholly unwarranted, we cannot interfere.

It is also argued by the learned counsel that the testimony of the defendant and the witnesses testifying in his behalf in support of the alibi and explanatory of the incriminating circumstances is uncontradicted and unimpeached, and for this reason he assumes that the jury should have believed their testimony.

[2] The credibility of the testimony of the defendant and the witnesses testifying in his behalf is the exclusive province of the jury to determine, and, although such testimony may be uncontradicted and not directly impeached, when there are facts and circumstances admitted and proven tending to lessen the probability that such testimony is true, the jury may give it such weight as they deem proper, even to the extent of wholly disregarding the same. The rule as stated in Cyc. is as follows: "The jury are not bound to believe testimony because it is uncontradicted and not directly impeached. The jury may consider the inherent improbabilities of the statements of the witness, and they may be of such a character as to justify them in disregarding his testimony, although uncontradicted by direct testimony. He may be contradicted by the facts that he states as completely as by adverse testimony, and there may be so many omissions and improbabilities in his evidence as to discredit his whole story." 12 Cyc. 486. The instruction objected to, given with reference to circumstantial evidence, is as follows: "Evidence has been offered in this case of a circumstantial nature; that is, circumstantial evidence. You are instructed that the law recognizes circumstantial evidence, and that the same is competent for your consideration, and when such evidence is full and complete is oftentimes as persuasive as direct and positive evidence. But in this connection you are instructed that it is not sufficient that the circumstances merely tend to show or point to the guilt of the defendant, but, to sustain a conviction upon circumstantial evidence, the evidence must be so full, complete, and persuasive as to exclude every reasonable hypothesis other than that of the guilt of the defendant. But when such cir-

circumstances are full and complete, and convinces your mind of defendant's guilt beyond a reasonable doubt, then such evidence is sufficient to warrant a conviction." It is contended that this instruction tells the jury that evidence has been offered in the case of a circumstantial nature, when the court should have told the jury that the state relied solely upon circumstantial evidence for a conviction, and that the court erred in refusing to give the following instruction requested by the defendant: "Gentlemen of the jury, you are instructed that in this case the state relies upon circumstantial evidence for a conviction; and, while such evidence is legal and competent, yet, before you can convict the defendant, the circumstances must not only point to the guilt of the defendant, but the circumstances must be so full, complete, and convincing as to exclude every other reasonable hypothesis other than that of the guilt of the defendant, and, if you have a reasonable doubt as to whether such circumstances are sufficient, you will acquit the defendant. Refused and exception allowed. Frank M. Bailey, Judge." The modification of the instruction objected to as made in the instruction requested was not material, and, while the instruction requested may be in better form, the refusal of the court to give it does not constitute reversible error.

There being no reversible error, the judgment of the district court of Grady county is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

### BURNS v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 25, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§§ 1098, 1104\*)—APPEAL AND ERROR—RECORD—INDEX.

A case-made or transcript of the record must contain a correct index, and, if lawyers are not more careful in this respect in the future, this court will be forced to adopt a rule to dismiss appeals, where such index is not incorporated in the case-made or transcript of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865, 2776, 2885, 2886; Dec. Dig. §§ 1098, 1104.\*]

#### 2. CRIMINAL LAW (§ 854\*)—TRIAL—SEPARATION OF JURORS.

(a) Under section 6851, Comp. Laws 1909, it is discretionary with the trial court to permit the jury to separate before the case is finally submitted to them.

(b) For circumstances not requiring the reversal of a conviction because of the separation of the jury before the case was finally submitted to them, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.\*]

#### 3. CRIMINAL LAW (§§ 423, 424\*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS—HARMLESS ERROR.

(a) Declarations and conduct of a co-conspirator made and done after a conspiracy has terminated, and not in the presence of the defendant, are not admissible in evidence against him.

(b) Where a conspiracy is entered into by two or more persons to do any unlawful act or to accomplish any unlawful purpose, the persons who engage therein are responsible for all that is said or done in pursuance of such conspiracy by any of their co-conspirators until the purpose for which the conspiracy was entered into has been fully accomplished.

(c) The responsibility of co-conspirators for the language or conduct of those acting with them is not confined to the accomplishment of the common purpose for which the conspiracy was entered into, but extends to and includes all declarations made and collateral acts done incident to and growing out of the common design when spoken or done by a co-conspirator as against all of his co-conspirators.

(b) For language and conduct of a former wife of a prosecuting witness which was admissible in evidence against a defendant who was on trial for assault with intent to kill, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001, 1002-1010; Dec. Dig. §§ 423, 424.\*]

#### 4. CRIMINAL LAW (§ 1144\*)—APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

Unless the record affirmatively shows the absence of a defendant during his trial, the question that he was not present at such trial cannot be raised for the first time upon appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

(Additional Syllabus by Editorial Staff.)

#### 5. CRIMINAL LAW (§ 1169\*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for assault with intent to kill, any error in the admission of testimony of the prosecuting witness was not ground for reversal, where, on defendant's own testimony, the jury could not have done otherwise than convict him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

Appeal from District Court, Murray County; R. McMillan, Judge.

S. L. Burns was convicted of assault with intent to kill, and his punishment assessed at confinement in the penitentiary for five years, and he appeals. Affirmed.

L. H. Mayes testified for the state: That prior to March, 1910, he had resided with his wife, Fannie Mayes, at Hennepin, Garvin county, Okl. That they had two children, aged six and eight years, respectively, both of whom were girls. That prior to March, 1909, witness and his family had lived in the house of defendant at Hennepin. That defendant boarded with witness' family. That witness was a blacksmith by occupation, and was running a blacksmith shop in Hennepin. That in March, 1909, witness became satisfied that it was best for him to move his family out of the house of defend-

ant. He therefore built a house of his own. That after witness moved out of the house of defendant defendant was anxious to continue to board with witness, but witness did not want him about his home any longer. Witness' home was something like a quarter of a mile from the house of defendant. That on the 5th day of March, 1910, the wife of witness came to his shop and had a talk with him, and left the shop, and went to Mrs. Gilbert's, saying that she was going to take some garden seed to Mrs. Gilbert. After the wife of witness had left the shop about an hour and a half, defendant came running by the shop close to witness. At this time witness was working on a buggy which was sitting in front of the shop. Just before defendant passed the shop of witness, witness saw his wife going in the direction of the office of defendant. Witness saw his wife go to Mrs. Stevens, and saw a little girl of Mr. Foster's come out and talk to his wife. They then walked off away, and the little girl went to the residence of defendant. Witness saw defendant get on his horse and start in a northwest direction, the same direction the wife of witness had gone, and go through a lane and turn into a gate and into a field which his wife had entered. That they then went out of sight. That witness then started over there, but, before doing so, he borrowed a gun of a man named Jones. Witness then went in the direction which he had seen his wife and the defendant go. After witness had gone about a mile, he came to a creek, and, seeing that no horse had crossed there recently, he started back, and went up the bottom of the creek about 60 yards, and came to an open place, when the defendant shot at him. Witness did not see the defendant until he had fired two shots. The first shot hit witness in the hip. The result of this shot is that witness has been crippled ever since. After defendant had fired at witness, witness turned and looked in the direction from which the shots came. He then saw his wife going out from between two big logs where the defendant was. She had her clothes up on the right hand side. She was moving pretty fast. The smoke of the two shots enabled witness to locate the defendant. He was shooting from behind a log, and witness could only see his head and hands and his gun up over the log. That he was going by where his wife and the defendant were when the defendant first began shooting at him, and he would not have seen them had it not been for the shots fired by defendant. After witness saw the defendant he shot at him twice. Witness then went out to the edge of the bottom and met Mr. Wilbern and Mr. Higgins. About this time the defendant rode out of the bottom north of witness. The defendant was then about 60 yards from witness. Defendant pulled his pistol out from under his pants. Witness rode back down to where the shooting had taken place. He

saw his wife there. She was looking around as though she was hunting for something. Witness had a life insurance policy in the Woodmen of the World for \$1,000 payable to his wife. On Thursday evening before witness was shot on the following Saturday, when he went back home, he found his wife lying across the bed. She called witness to her, and asked him if he had had his life insurance policy changed. He replied that he had not. She then requested witness to borrow a six-shooter, and let her have it and go with her over to Dr. Burns' office, saying she was going to kill the defendant. She said Dr. Burns had mistreated her, and she was going to kill him. Witness requested her to tell what Dr. Burns had done, that he would attend to him himself, but his wife insisted upon witness getting a gun and going with her to Dr. Burns' office, that she wanted to kill him herself, but she declined to tell witness how Dr. Burns had mistreated her or anything of the kind. When witness saw his wife down at the place where the shooting occurred, about 30 minutes after the shooting, she said to him, "Are you shot?" Witness replied, "I am," and turned around and showed her where he was shot. Witness said to her, "He missed his shot—he didn't hit me where he aimed to." She replied, "If we had got you to his office the other evening, we wouldn't have made any mistake." That his wife did not return home after the shooting. That on Tuesday morning before the shooting witness went to the stove in the kitchen, and found his wife with a pocket-book in her hand. This pocketbook contained three or four papers doubled up with medicine in them, and she told witness she was going to poison herself and the two children. She also told witness that, if there was ever any more trouble over Dr. Burns, she would kill herself and the children. She said it was strychnine. That she got it at a drug store. That a friend in town gave it to her. She afterwards admitted the medicine had been given to her by the defendant, but did not tell him for what purpose he had given it to her. Witness did not see his wife after the shooting until he saw her at court in Pauls Valley the following September, when a divorce suit between them was tried. That they were divorced. That witness had the children, and since the divorce his wife had married defendant.

Earl Higgins testified for the state: That he was acquainted with the defendant in 1910. That witness was looking for cattle in the bottom, and saw Mayes walking through the bottom with a gun on his arm when the shooting occurred. That defendant fired the first shot. That defendant was located in a tree top. That the wife of Mayes was with defendant. That, when defendant shot at Mayes, Mrs. Mayes ran off a little piece. That the defendant fired three shots at the witness Mayes, and Mayes shot twice at the

defendant. That the defendant then ran. That after the shooting was over Mayes went back down to the place where the shooting had occurred, and talked a little bit with his wife. Witness was present. Mrs. Mayes asked her husband if he was shot. He replied that he was, but that Burns had made a misshot. Mrs. Mayes then said: "If you had come to the office the other evening, he wouldn't have made any misshot." Mayes then told his wife not to come back home any more.

W. M. Jones testified for the state: That he was deputy sheriff of Garvin county. That he remembered the occasion of the shooting of Mayes by defendant. That witness arrested defendant for the shooting. That defendant said, "I hate to give up to you," but that he decided there had been enough shooting, and it was bad enough the way it was. Defendant asked witness if Mayes was shot. Witness replied that he was. Defendant asked if witness thought Mayes was going to die. Witness replied he did not think he would. That defendant said that, when he first saw witness Mayes, Mayes had his gun thrown up. That he, defendant, was too quick for him. That he shot, but really did not know who shot first. That he expected he got the first shot in. He did not know how many shots were fired by him, but that Mayes had shot three times. He said that Mayes' wife had a headache, and he had stopped to give her some headache tablets. Witness also testified that Mrs. Mayes was with defendant when he arrested him. That when arrested defendant had two Winchesters and a six-shooter.

Jonah Foster testified for the defendant: That he resided at Hennepin and had lived there for a number of years. That he was now serving a jail sentence for violating the prohibitory liquor law. That he was acquainted with the defendant and knows Bob Mayes. That witness heard Bob Mayes say once he was going to kill Dr. Burns. That witness communicated this threat to the defendant. On cross-examination this witness testified that he did not have any regular occupation; that Bob Mayes had been the means of witness' prosecution for violating the prohibitory liquor law.

Charles Burns testified: That he was a brother of defendant. That on Wednesday following the shooting he visited the place where the shooting occurred. Witness described the scene of the shooting, but did not testify to any fact which materially affects this case.

William Springer testified for the state: That he was a farmer by occupation. That he was acquainted with defendant. That he knows Bob Mayes. That some time in 1909 Bob Mayes had a conversation with witness about defendant. He said at one time he came very near killing Dr. Burns over his wife, but he investigated and found there

were false reports on them. That witness communicated these statements to the defendant.

M. W. Jackson testified for the defendant: That he was a farmer by occupation. Witness heard the witness Mayes make the same statement as testified to by the witness Springer.

W. M. Lindsey testified for appellant that he lived near Hennepin; that he was acquainted with the defendant; that the defendant went to his house on the morning of the trouble to see a sick child.

A. L. Napier testified for appellant: That he was a miner by occupation. That he was acquainted with the defendant and knew Bob Mayes. That some time before the shooting he heard some parties brand Mayes as a coward for not killing Dr. Burns. Witness informed defendant of this.

Sam Carnes testified for appellant: That he carried the United States mails from Davis to Homer; that witness had heard of trouble between Bob Mayes and Dr. Burns.

J. H. Pearson testified for appellant: That he heard about the shooting between Bob Mayes and defendant. That he saw defendant after the shooting was over. He was on horseback and going in a trot. He saw Bob Mayes crossing the field before the shooting. Mayes was running and had a long gun with him. That in five minutes afterwards witness heard the shooting.

Jack Wilbern testified for the defendant: That he was a cattle dealer. That he knew both the defendant and Bob Mayes. That he had seen the place where the shooting occurred. That he heard the shots fired. Witness described the place of the shooting. Witness saw Bob Mayes and Higgins with Mrs. Mayes shortly after the shooting, but did not hear what passed between them.

J. C. Potts testified for the defendant: That some time prior to the shooting he had a conversation with Bob Mayes about the defendant. He heard Bob Mayes say that defendant had done him an injury, and that he had once carried him off to kill him. That witness informed defendant of what Bob Mayes had said.

Will Lanham testified for defendant: That he was stockraiser, remembers the shooting between Bob Mayes and the defendant. That witness heard the shooting. That he was some 400 or 500 yards off. That witness went in the direction of the shooting and saw Bob Mayes.

Mary Walker testified for the defendant: That she remembers the trouble between Bob Mayes and the defendant. She heard the shooting. That she was a Chichasaw freedman. That she saw Bob Mayes go off into the timber, and in a few minutes she heard the shooting. That soon after the shooting she saw the defendant traveling pretty fast on horseback going from the place where the shooting occurred.



Appellant testified in his own behalf: That he was 35 years of age and a physician. That he resided at Hennepin. That some time in 1908 Bob Mayes and his family rented the house of appellant, and appellant boarded with him. That this continued until May, 1909. That defendant's relations with Mr. and Mrs. Mayes were pleasant. That at one time Bob Mayes had charged defendant with being in bed with his wife. That after Mayes had had a house of his own built Bob Mayes requested defendant to come to his house. That defendant did so, and Mayes told the defendant he had been informed that he was criminally intimate with his wife, and defendant denied it, and told him there was nothing to it. That defendant was frequently warned to be on his guard against Bob Mayes, as Bob would kill him about his wife. That on the morning of the difficulty witness left town, taking with him his medicine case and pistol. That his purpose was to visit a patient. That he had not seen Mrs. Mayes that morning. Witness was on horseback. That, when he came to the place where the shooting occurred, he saw Mrs. Mayes. She was standing near a tree top, Mrs. Mayes called to defendant and he rode to where she was. She asked him for some headache tablets. Witness took his saddlebags out, and placed the medicine in an envelope. Witness was sitting on a log and Mrs. Mayes was standing by him. She sat down on a limb about 12 inches from the ground. The defendant and Mrs. Mayes were together about five minutes. Witness then testified as follows: "Q. Tell the conversation that you had with her? A. Well, she told me that she wanted the headache tablets. While I got them out, I says, 'What are you doing over here?' And she says, 'I came over to Gilbert's to plant some garden.' And I says, 'What do you want to plant with him for? He never raised enough for them;' and she said, 'Bob said he never did see any one raise cabbage and tomatoes like he did.' I says, 'What was Bob mad about this morning?' And she says, 'He was in the best of humor when he sent me over here.' And I says, 'He was awfully mad when I saw him,' and I told her I was going to Lindseysmith's, and I says, 'I have got to hurry;' and about that time she looked over her shoulder. She was facing a little bit south of west, facing me, and she looked over her shoulder and said, 'My God, there is Bob Mayes with a gun.' And she jumped up. Q. How was you facing at that time? A. I was facing north. Q. Like this was the tree? You was on the north side and she was here? A. Yes, sir. Q. Which way did she look? A. She looked over her left shoulder. Q. What direction? A. Looked south. Q. What was it she said? A. She says, 'My God, there is Bob Mayes with a gun,' and I says, 'Get out of the way.' And I pushed my saddlebag off with one hand and whirled around. I couldn't

say which way I turned, but as I turned I drew my gun, and I was shooting in this position. The log was about my head. Q. As soon as you got in position to shoot with your pistol, what did you see? A. As soon as she said that, I looked over my shoulder, and I saw him with his gun raised, pointed our way. Q. Show us how he had the gun? A. It was this way; about like that. Q. And what did you do? A. I drew my gun and began firing. Q. How quickly? A. As quickly as I could. Q. Why did you shoot? A. Because I thought my life was in danger. Q. Did he shoot? A. He did. Q. Who shot first? A. I couldn't say. The shots were too near together. Q. How many times did you shoot? A. I shot three times. Q. Who did you shoot at? A. I shot at L. H. Mayes. Q. Did you know at that time whether you hit him or not? A. I did not. Q. Did he make any outcry or say anything? A. No, sir. Q. How many shots did he shoot at you? A. He shot two shots at me and one at his wife."

Appellant testified on cross-examination that after the difficulty between Mr. and Mrs. Mayes he had married Mrs. Mayes, and she was now his wife. The above is a fair abstract of the material portions of the testimony in the case.

E. G. Mitchell, of Harrison, Ark., and Carr & Field, of Pauls Valley, for appellant. Smith C. Matson, Asst. Atty. Gen. (J. S. Estes, of Oklahoma City, of counsel), for the State.

FURMAN, J. (after stating the facts as above). [1] First. The transcript of the record in this case contains about 300 pages, yet there is no index attached to it. It is the duty of counsel for an appellant to see that a correct and complete index is attached to every transcript of the record or case-made. This court is already flooded with work, and it is the duty of counsel in preparing their records and briefs to so arrange them that the court can without delay turn to the page of the transcript upon which counsel relies in support of an assignment of error. The names of all of the witnesses and the pages upon which their testimony appears, and of every material step in the case, should appear in this index. If the lawyers of this state do not take more care in this matter, we will be compelled to make a rule dismissing appeals where the transcript of the record is not properly prepared.

[2] Second. The third ground relied upon in support of a motion for a new trial is as follows: "That there was misconduct on the part of the jury after the same was duly impaneled and sworn to try the case, and by reason of this alleged misconduct a fair and due consideration and impartial verdict in said cause was prevented; said misconduct consisting of the permitting a number of the jurors on said panel to separate from the rest of the panel, and to absent them-

selves from the room in which the said jury was supposed to be kept by the bailiff, and also in the bailiff permitting a number of said jurors after said jury was impaneled to try said cause, in conversing and talking with various persons outside of the hearing of said bailiff, and outside of the room in which said jury was supposed to be kept, all of which was prejudicial to the rights of the defendant, and prevented a fair and impartial consideration of said cause, as provided by law. In support of said misconduct of said jury said defendant hereto attaches the affidavit of Chas. E. Burns, duly subscribed and sworn to." The ground for a new trial is supported by the affidavit of Chas. E. Burns, to the effect that on Friday and Saturday, the 14th and 15th days of April, 1911, when this trial was in progress, affiant was registered and stopping at the Holland Hotel in the town of Sulphur; that on Friday evening a jury of 12 men in charge of a bailiff came to said hotel, and were taken to the hotel office in the front part of said building, at the north end of said hall, in a room opening into said hall; that the bailiff in charge of said jury permitted said jurors to converse indiscriminately with various persons in and about said hotel office, and to get out of his hearing, and to separate from the remainder of said jury in said hotel office, and to wander down the hall to the washbasin, and to the small toilet room at the north end of the hall, and remain out of the hearing of said bailiff and various places along said hall for some 10 or 15 minutes before they were taken into the dining room for their supper; that after supper a number of said jurors used the telephone and talked to persons whose names were unknown to affiant. The record in this case shows that the trial began on Friday, the 14th day of April, 1911. The instructions to the jury were filed on Monday, the 17th. The instructions must be read to the jury before the case could be submitted to them. It therefore affirmatively appears from the record that the matters complained of occurred prior to the submission of the case to the jury. In the cases cited by appellant decided by this court where reversals were entered because of the separation of the jury, the matters complained of all occurred after the case had been submitted to the jury, and they had begun their deliberations. Where the separation of a jury takes place prior to the submission of a case to the jury, an entirely different question is presented.

This matter was discussed fully in the case of *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac. 658, 24 L. R. A. (N. S.) 776, by Judge Doyle, and the question now presented was decided contrary to the contention of appellant. In that case this court said: "It is not claimed in the case at bar that there was a separation of the jurors after the final submission of the cause or after the jury

retired to consider their verdict. The question in this case requires only a construction of section 5512, Wilson's Rev. & Ann. St. 1903, which provides: 'The jurors sworn to try an indictment, may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves on any subject connected with the trial, and to return them into the court at the next meeting thereof.' Under this provision the segregation of the jury in felony cases, before the cause is finally submitted, is left to the discretion of the trial court, yet we believe that in the exercise of sound judicial discretion the trial court in a capital case should not refuse a request from either party to place the jury in charge of sworn officers during the progress of the trial. The legal presumption is that jurors perform their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during the adjournment of a trial, the jurors were permitted to separate. The defendant must affirmatively show that by reason thereof he was denied a fair and impartial trial, or that his substantial rights were prejudiced thereby. Construing a statute identical in its language, the Supreme Court of California in the case of *People v. Chaves*, 122 Cal. 134, 54 Pac. 596, say: 'While the jury was being impaneled, and during the progress of the trial, the court took a recess several times, and at each of such times, after properly admonishing the jurors, permitted them to separate, without the consent of defendant or his counsel. No objection to the separation was made; but it is now claimed for appellant that it was error for the court to permit the jurors to separate, and that section 1121 of the Penal Code, which authorized the court in its discretion to permit the separations, is unconstitutional because it is inconsistent with that provision of the Constitution which declares that: "The right of a trial by jury shall be secured to all, and remain inviolate." Article 1, par. 7. The section of the Code referred to is not unconstitutional. It in no way violates or interferes with the right that every one has to a fair trial by jury. The matter rested in the discretion of the court, and, as no abuse of that discretion appears, its action was justified and proper.' The Supreme Court of Arkansas, in a capital case (*Hamilton v. State*, 62 Ark. 548, 36 S. W. 1054), said: 'It is said that the court, against the objection of the defendant, permitted the jurors to separate before the case was finally submitted to them. This also was a matter within the discretion of the court. San. & H. Dig. par. 2236. But in *Johnson*

v. State, 32 Ark. 309, it was remarked by this court that "such discretion should be exercised, especially in trials for felony, with the utmost caution." The great interest usually taken by the public in trials for offenses punishable by death, and the danger that either the state or defendant may suffer prejudice from such separation of the jurors, make it, in our opinion, rarely prudent for a court to permit such separation in trials for capital offenses, when either the counsel for the state or defendant objects. It is not always easy in such a case to ascertain the influences to which a separation has subjected the jurors. For this reason, as the defendant objected to the separation of the jurors, we believe that it would have been better to have kept them together; but as the statute leaves this matter to the discretion of the circuit court, and as there is nothing to show that the defendant was prejudiced by the separation, the exception must be overruled, and a new trial on that ground refused.' The Supreme Court of Oregon, in the case of *State v. Shaffer*, 23 Or. 557, 32 Pac. 546, said: 'The next objection is that the court allowed the jury to separate during the trial of the defendant. This is a matter within the discretion of the court, who may permit the jury to separate pending the trial upon properly admonishing them touching their duties. It is expressly provided by our Code that the jury may be kept together, in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; but in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion therein until the case is finally submitted to them. Section 198, Hill's Code; *Stephens v. People*, 19 N. Y. 549.' The Supreme Court of Kansas, in the case of *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050, said: 'No error was committed by the court in permitting the jury to separate. The court in a criminal prosecution for murder in the first degree, as well as in other cases, may permit a separation of the jury after instructions are given, and before the arguments of counsel are fully completed, and, indeed, at any time before the jury are allowed to retire under the charge of their bailiff for final deliberation upon their verdict.' The Supreme Court of Minnesota, in the case of *State v. Nelson*, 91 Minn. 143, 97 N. W. 652, said: 'At the opening of the trial defendants requested, in view of the alleged public feeling at Owatonna, the place of holding the trial, that the jury be kept in charge of the sheriff, and not permitted to separate. The court denied the request, and this order, also, is assigned as error. The question has frequently been before us and we have uniformly held that it is a matter purely dis-

cretionary with the trial court whether to confine the jury or permit them to separate during the trial. No reason is presented in the record in this case to justify us in holding that the court abused its discretion. *State v. Bilansky*, 3 Minn. 246 (Gil. 169); *State v. Ryan*, 13 Minn. 370 (Gil. 343).' The rule to be deduced from these cases is that, where a statute in plain and unambiguous terms confers a discretionary power upon the court as to whether or not the jury shall be permitted to separate during the trial of a capital case, the fact that the court permitted the jury to separate, without objection on the part of the defendant, is not ground for a new trial. An appellate court is authorized to say that the trial court erred in a matter of this kind only when it affirmatively appears from the record that there was such an abuse of discretion as denied the defendant a fair and impartial trial; but where the defendant by affirmative proof shows that, by reason of such separation of the jury, his substantial rights were prejudiced, a new trial should be granted. This provision of our statute is an ample safeguard over the purity of jury trials. The clear intention of the lawmaking power is that the mere separation of the jury during the numerous and necessary adjournments incidental to a criminal trial should not result in delaying or defeating the ends of justice, when there is not the slightest presumption or probability or even possibility of injustice to the defendant. In this case, when viewed in the light of the record, the criticism of the counsel for defendant has no merit. It clearly appears that the defendant suffered no injury by reason of the separation of the jury. While we must at all times guard the rights of the accused, we must not be so technical in procedure as to set aside fair and impartial trials upon mere shadows, thus bringing the administration of criminal justice into endless delay and public derision."

We think that *Armstrong's Case* is decisive of this question. We therefore hold that the matters stated in the motion for a new trial and in the supporting affidavit with reference to the separation of the jury did not constitute any legal ground for setting aside the verdict.

Third. The next assignment of error relied upon by counsel for appellant is as follows: "Error of the court in permitting the testimony of the prosecuting witness concerning conversations between him and his wife, Fannie Mayes, in the absence of the defendant, and in permitting the state to show a number of transactions long after the alleged assault, including the arrest of the defendant in Pauls Valley more than six months after the shooting for the crime of adultery, all of which testimony was highly prejudicial to the defendant."

[5] There are two views to take of this case. Concede for the sake of argument that

the trial court erred in admitting the testimony complained of, was this error of such a character that it would necessarily result in a reversal of this conviction? We think not. Why? Because upon appellant's own testimony an honest and intelligent jury, having a due regard for their oaths, could not have done otherwise than convict him. In the light of the admitted facts of this case appellant had deprived himself of the right of self-defense. It was an insult to the intelligence of the jury to ask them to believe that appellant and Mrs. Mayes met by chance on the morning of the difficulty, and the appellant's only purpose was to administer to her some tablets to relieve her headache, and that he was engaged in this commendable enterprise at the time when he was surprised by Bob Mayes. Doctors do not administer headache tablets to their female patients lying down with them in the woods between two logs. If they had been sitting up, as appellant first testified, they would have been seen by Bob Mayes, and would have seen him before the shooting began, and appellant would not have been lying behind the log when the first shot was fired. Appellant in describing the fight said: "As I turned I drew my gun, and I was shooting in this position, the log was about my head." If appellant was not lying behind that log with Mrs. Mayes, what was he lying there for, and how did it happen that the log was about his head? His testimony on this subject is a libel on common sense and human nature. It is absolutely plain that appellant was engaged in an unlawful invasion of the marital rights of Bob Mayes. Appellant was armed with a pistol. According to the witness Higgins appellant fired the first shot. This appellant does not deny. If appellant was sitting on the log, as he first claimed, with his medicine case in his hands, and his back toward the witness Mayes, and Mayes was coming toward him with a gun in his hands, how was it possible for appellant to dispose of his medicine case, draw his pistol, lie down behind the log, and fire the first shot? No impartial, sane, and honest jury could ever be induced to believe such a statement as this. The plain and simple truth is that, being interrupted in the commission of an unlawful act by one who had the right to make such interruption, appellant began the fight, and fired the first shot. He could not under any view of the case claim that he shot in self-defense. He could not have been injured by the testimony complained of, for it was clearly the duty of the jury to convict him without regard to such testimony. His own testimony amounted to a plea of guilty. Even if it be conceded that the trial court did err in admitting the evidence complained of, the error was immaterial and harmless. This case illustrates the debasing and depraving effects of illicit love. Both sacred and profane history furnish many examples showing that illicit love

is a most powerful motive for and fruitful source of assassination. The blackest pages in English history grew out of the illicit loves of Henry the Eighth. The case of David and Uriah's wife shows to what treachery and degradation illicit love will reduce those who permit it to find lodgment in their hearts, and to pollute their lives. Pure love is the cause of all self-sacrifice, and the mainspring of all that is noble among the achievements of men. It is like fire taken from off the altar of Heaven. It purifies, ennobles, and lifts men up, and makes them nearer to and more like their God. It is indeed the emotion that sums all bliss; the springhead of all felicity; the silken down of happiness complete; the sparkling cream of all times blessedness; the center to which all human beings gravitate; the emblem of God.

It has been well said:

"Who happy and not eloquent of love?  
Who pure and as it is true,  
Not a temple where its glory ever dwells,  
Where burn its fires and beams its perfect eye?"

Illicit love is exactly the reverse of all this. The imagination cannot conceive and language cannot describe the blackness and despair, the degradation, shame, misery, suffering, and woe which it brings to the innocent as well as to the guilty. It is like fire taken from the very furnace of hell. It burns up, consumes, and destroys all that is pure and noble in the hearts of men and women. It sinks them beneath the level of brutes. It involves them in unutterable infamy in this world, and prepares them only for perdition in the life beyond the grave. When we reflect upon the cause which prompted appellant to attempt to assassinate Bob Mayes, we find that his conduct is in strict harmony with the motive from which it sprang. It is the duty of this court to decide all questions submitted to it in the light of the moral atmosphere in which they are surrounded, and never to permit the law to become a cloak of protection for men who trample upon the sacred rights of others, and bid open defiance to decency and the best interests of society.

[3] We will now take another view of this matter. When the case was submitted, the introduction of this evidence was the principle question discussed, and able and eloquent arguments were made in behalf of appellant. The evidence complained of was admitted by the trial court upon the theory that a conspiracy existed between the appellant and Mrs. Mayes, and that the testimony objected to all related to what occurred in pursuance of this conspiracy. We agree to the proposition that declarations and conduct of a co-conspirator made and done after a conspiracy has terminated and not in the presence of a defendant are not admissible as evidence against him. See *Wells v. State*, 5 Okl. Cr. 22, 113 Pac. 210. But the law is equally well settled that,

where a conspiracy is entered into by two or more persons to do any unlawful act or accomplish any unlawful purpose, the persons who engage therein are responsible for all that is said or done in pursuance of such conspiracy by any of their co-conspirators until the purpose for which the conspiracy was entered into has been fully accomplished, and that the responsibility of co-conspirators is not confined to the accomplishment of the common purpose for which a conspiracy is entered into, but extends to and includes all declarations made and collateral acts done incident to and growing out of the common design, when spoken or done by a co-conspirator as against all of his co-conspirators. For a full discussion of this question and citation of authorities, see *James Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300.

It cannot be denied that the testimony in this case shows that improper relations existed between appellant and the wife of Bob Mayes, and that they were colluding and conspiring together for the purpose of having illicit sexual intercourse with each other, and that the shooting for which appellant has been convicted was a mere incident to this conspiracy, which was not fully consummated until after Mrs. Mayes and Bob Mayes were divorced and appellant had married the former wife of Bob Mayes. This being true, everything said or done by Mrs. Mayes, whether in the presence of appellant or not, prior to the consummation of this conspiracy and in pursuance thereof which throws any light upon this transaction is just as binding upon appellant as if said or done by him. If a white-winged angel had come down from Heaven and testified against appellant, it could not have been more conclusively established than appears from this record that appellant is guilty of a double crime. He not only tried to assassinate a human being, but by debauching Mrs. Mayes he robbed Bob Mayes of his wife, and worse than orphaned two little innocent girls, and thereby wrecked and ruined the respectability, peace, and happiness of a home. A country is nothing except an aggregation of homes. No country can rise superior to the standard of its homes, and no home can exist without the absolute purity of the wife and mother. Our wasted fortunes may be restored, our burned houses may be rebuilt, but who can repair the moral desolation of a ruined home caused by the debauchery of a wife, and mother? What greater crime could be committed, not only against Bob Mayes, but also against society? Eternity alone will be able to reveal the enormity and far-reaching results of this crime. The conduct of which appellant has been found guilty should not for one moment be condoned by any court or jury, and a conviction in such a case, when supported by the evidence, as is done in this case, should not

be set aside except for the most grave and serious reasons. This is not a case of harmless error, but it is a case where no error at all was committed and the action of the trial court in receiving the evidence complained of is commended and sustained.

[4] Fourth. Counsel for appellant contend in their brief and oral argument that the judgment should be set aside because the records of the court do not affirmatively show the presence of the defendant during the trial. The record does show that the defendant entered a plea of not guilty; that he was present when the state's witnesses were examined; that he testified in his own behalf, and was present when the sentence of the court was pronounced. It affirmatively appears from the motion for a new trial that appellant was present during the trial of this case, and that he requested the court to send the jury to inspect the place where the shooting occurred, and that he took numerous exceptions to the introduction of evidence and the instructions of the court as given to the jury. Upon the authority of *Sam Wood v. State*, 4 Okl. Cr. 436, 112 Pac. 11, this record would sustain this conviction, even though it should be held that the record must affirmatively show the presence of the defendant during his trial. To hold that this case should be reversed on account of the question now raised would be a very severe reflection upon counsel for appellant. It would be based upon the presumption that they were so negligent or so ignorant as to allow their client to be tried for a felony during his absence. We cannot presume anything of the kind, because this court has actual knowledge of the fact that counsel for appellant are among the ablest and most zealous lawyers in the state, and that they have taken care of every right of their client. If appellant was not present during the trial in the court below, why was this objection not presented then? Why was it not embodied in the motion for a new trial, and why, when the appellant was called upon to state his reasons, if any he had, why sentence should not be pronounced upon him, was the objection not made that the trial had taken place during his absence? Every presumption of law must be indulged in favor of the regularity of proceedings of a court of record and of the ability and fidelity of counsel for a defendant in the failure of the record to affirmatively show the absence of appellant. We therefore cannot assume, as counsel now claim we should do, that appellant was not present during his trial. Of course, if the record affirmatively showed that he was not present during the trial, we would be forced to set aside this judgment, but there is nothing in the record upon which such a presumption can be based. Since the decision in the *Sam Wood Case* we have investigated this question more fully, and we are now satisfied that an appellant should not be heard to

complain for the first time in this court that he was not present during the trial of his case in the lower court, unless this fact affirmatively appears from the record. We fully indorse the views expressed by the Supreme Court of Nebraska in *Dodge v. People*, 4 Neb. 220. That court said: "It is claimed that the record does not show that the prisoner was present in court during the trial, nor at the time sentence was pronounced. It appears from the record that the prisoner was duly arraigned and plead not guilty, that he was present during the time the jury were being impaneled, that after the evidence was closed he filed instructions with the clerk and excepted to the instructions given by the court on its own motion, but the record is silent as to whether the prisoner was present in court or not at the time the jury returned their verdict. The rule is well settled that in all cases of felony the prisoner must be present in court during the trial, and at the time the verdict is received, and no valid judgment can be predicated on a verdict received in the absence of the prisoner. At common law the finding of the jury of the guilt of the accused was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits on the motion of the accused, even where the verdict was clearly against the weight of the evidence. *Hilliard on New Trials*, 114; *Queen v. Bertrand*, 1 P. C. 520; *The King v. Fowler*, 4 Barn. & Ald. 275; 1 Ch., C. L., 653. Neither was prisoner allowed a counsel upon his trial on the general issue in any capital crime, unless some point of law arose proper to be discussed. 4 *Blackstone*, Com. 355. To guard against this provision of the common law, the Constitution of the United States provides that in all criminal prosecutions the accused shall have the assistance of counsel for his defense. Nor must it be forgotten that among the variety of actions that men are liable to commit 160 were declared to be felonies without benefit of clergy, the punishment of which was death. 4 *Blackstone*, 19. Therefore the utmost caution was required in capital trials in favor of life, and, if an irregularity materially affecting the trial occurred to the injury of the accused, the court usually represented such matter to the crown, and a pardon was granted. *Commonwealth v. Green*, 17 Mass. 534. Now, however, in the court of Queen's Bench, when the record is before that court and it appears that evidence has been improperly admitted, or the jury have been misdirected, a new trial may be granted in cases of felony (*Rex v. Scaife*, 2 Don., C. C., 281; 17 Q. B., 238), and a person accused of crime is allowed the assistance of counsel to conduct his defense. In this country the almost uniform practice has been to extend to criminal cases, so far as the revision of verdicts is concerned, substantially the same principles which

have been established in civil cases; and by statute in this state, after a verdict of guilty, a defendant may move for a new trial on any or all of the grounds therein set forth. And it is his duty, in such a case, to bring before the court by his motion all the reasons which are known to exist for setting aside the verdict, and granting a new trial. There is no reason why the same rule in that respect should not apply in criminal as in civil cases. In this case, in the 23 grounds assigned in the motion for a new trial there is no allegation that the prisoner was not present in court. The only irregularity complained of in the proceedings of the court is in overruling the motion of the prisoner to quash the indictment. The presumption is that the court performed its duty, and that the prisoner was in court at the time the verdict of the jury was received. In the case of *Beale v. Commonwealth*, 25 Pa. 18, the court held: "We are not to expect too much from the record of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general but not a particular detail of all that occurs before them. If we must insist on finding every fact fully recorded before a citizen can be punished for an offense against the laws, we should destroy public justice, and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly." And in *Rhodes v. State*, 23 Ind. 24, the court held: "In this case the prisoner is shown by the record to have been present in court at the commencement of the trial. The record is silent as to where he was at the return of the verdict. We presume he was in court." See, also, *Brown v. State*, 13 Ark. 100. The same doctrine was announced in the case of *Folden v. State*, 13 Neb. 332, 14 N. W. 414, as follows: "And, lastly, it is urged that the record fails to show affirmatively that the prisoner was present in court when the jury brought in their verdict. This point was not made in the motion for a new trial, and therefore, even if it could otherwise be regarded as fatal to the judgment, it is too late to raise it now. *Dodge v. People*, 4 Neb. 220. The record, however, does show that the prisoner was duly arraigned, and pleaded to the indictment; that he was present at the impaneling of the jury who tried him, and gave his own testimony as a witness before them. With these facts it would be altogether unreasonable to presume from the mere silence of the record on that point that he was absent when the verdict was received by the court. Where the record once shows the presence of the prisoner at his trial, it will be presumed to have continued to the end, unless the contrary is affirmatively shown. The presumption is, rather, that the trial court did its duty than that it did not. We see no error in the record that calls for a

new trial, and the judgment must be affirmed." We could fill a volume in citing cases of other courts to the same effect, but these opinions are based upon reason and justice, and therefore further discussion is unnecessary. So far as the case of *Humphrey v. State*, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972, is in conflict with the views herein expressed, that case is modified and overruled. We admire the zeal and ability with which counsel for appellant have presented his case in this court. They have certainly done everything in behalf of their client that ingenuity could suggest and ability could enforce. We sympathize deeply with them on account of the difficulties which confront them. They must fail in this cause simply because human ability cannot accomplish the impossible. The offense of which their client is guilty is one which strikes at the very foundation of society, and which does more to pollute the fountains of social purity than any class of cases that come before the courts. While it is true that courts should not discriminate in their administration of law as to individuals, yet there are cases where the character and make-up of a defendant, taken with his conduct and acts and his ability and capacity to know right from wrong, shows him to be entitled to a less charitable consideration at hands of the courts than ought to be extended to ordinary individuals. We think that such is the case now before us, and that the verdict and judgment rendered in this case are altogether legal, just, and righteous. It is sometimes said that a fallen woman is the most depraved of created beings, but we think that the man who is responsible for her fall is much the worse demon of the two. Such characters can expect no sympathy or leniency at the hands of this court.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

#### BOND v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

(Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION (§§ 125, 132\*)—ELECTION BETWEEN COUNTS—DUPPLICITY.

(a) Under an indictment containing two or more counts, each based upon the same act and charging the same offense, it is not error for the trial court to refuse to require the state to elect upon which count in the indictment it will put the defendant upon trial.

(b) For an indictment charging the offense of bribery which is held not to be bad upon the ground of duplicity, see opinion.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400, 425-447, 449-453; Dec. Dig. §§ 125, 132.\*]

#### 2. CRIMINAL LAW (§§ 422, 423, 1169\*)—EVIDENCE—ACTS OF CONSPIRATORS—WRIT OF ERROR—HARMLESS ERROR.

(a) Where persons enter into a conspiracy or general plan to bribe officers and thereby secure immunity from prosecution for violations of law, all said and done in pursuance of this conspiracy or general plan by any of the co-conspirators and which tends to throw light upon a specific charge of bribery made against one of the co-conspirators is admissible in evidence.

(b) Any fact or circumstance which has probative value as to a conspiracy or the purpose for which it was formed and anything that was done in pursuance thereof is admissible against a co-conspirator as though said and done by himself, when the defendant is on trial for a specific offense included in such conspiracy or general plan.

(c) If, upon a review of the entire record, the guilt of the accused is conclusively established, and there is no reason to believe that an intelligent and honest jury would or could have arrived at a different verdict, a conviction will not be set aside upon the ground of the admission of illegal testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 984-988, 989-1001, 3088, 3120, 3137-3143; Dec. Dig. §§ 422, 423, 1169.\*]

#### 3. CRIMINAL LAW (§§ 656, 1166½\*)—TRIAL—PROVINCE OF COURT AND JURY—CORRECTION OF ERRORS.

(a) Courts should carefully abstain from expressing any opinion in the presence of the jury as to the weight, effect, or credibility of the testimony; and, where the evidence presents any issue upon which a verdict of acquittal might be reached, such expression of the trial court will be reversible error.

(b) Where the trial court in the presence of the jury inadvertently expresses an opinion as to the weight or effect of any testimony, and upon objection being made promptly withdraws the improper remarks and instructs the jury not to consider them, this will ordinarily cure the error committed.

(c) For remarks made by the trial court in the presence of the jury as to the effect of certain evidence which were promptly withdrawn, and which in the light of the entire record did not constitute reversible error, see opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1524-1533, 3114-3123; Dec. Dig. §§ 656, 1166½.\*]

Appeal from District Court, Pottawatomie County; J. B. A. Robertson, Judge.

Ben Bond was convicted of bribery of officers of the law, and his punishment assessed at confinement in the penitentiary for five years, and he appeals. Affirmed.

Freeling & Hood, of Shawnee, for appellant. Charles West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. The transcript of the record in this case contains over 1,000 pages, and the briefs in the case for both parties contain about 300 pages, every word of which has been read and re-read and carefully considered by this court. If we were to attempt to make anything like a fair abridgment of the testimony, and to discuss and decide all of the various questions presented, our opinion would fill an entire volume of our reports. Every step in this case was bit-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terly contested by able, learned, and experienced lawyers, and the entire field of legal learning has been appealed to to sustain the contentions of counsel for appellant. We do not question the right of counsel to reserve an exception to every ruling of the court that they may deem erroneous and prejudicial, but, when a record shows that an exception was taken to everything done by the court, it naturally suggests the inference that counsel did not have very much confidence in any exception reserved, and were depending rather upon the number than upon the weight of the objections made. We hardly think that immaterial errors in mere matters of form which did not affect the substantial merits of the cause, in the absence of a disposition on the part of the trial judge to be unfair, should secure the reversal of a conviction upon the doctrine of cumulative error, because in lengthy and hotly contested cases a greater or lesser number of immaterial errors will necessarily get into a record.

We have endeavored as best we can to select from the great number of alleged errors presented those which are material to the proper determination of this case.

[1] First. Counsel in their brief say: "We think the court erred in admitting evidence upon the part of the defendant in error, prejudicial to the rights of the plaintiff in error, and also in refusing to require the state to elect upon which count in the indictment it would put the defendant upon trial." The indictment in this case charges, in substance, that Ben Bond did on the 15th day of January, 1909, give a bribe, to wit, \$250, to William N. Maben, a judicial officer, and to V. R. Biggers, county attorney of Pottawatomie county, and to E. D. Reasor, county judge of said county, and to W. F. Sims, chief of police of the city of Shawnee, said county and state, with the felonious intent of the said Bond to influence the acts, opinions, decisions, and judgments of them, the said above-named officers, in their official capacity, to wit: The question of whether B. O. Johnson should be arrested, prosecuted, tried, sentenced and punished as by law required for a violation of any of the provisions of the Constitution or the laws of the state of Oklahoma relating to the sale of intoxicating liquors. The indictment contains six counts. In the first count the defendant is charged with bribing all of the officers named, and in the remaining five counts the defendant is charged with bribing, for the same purpose, and at the same time, each of the above-named officers, separately. Section 6609, Comp. Laws 1909, is as follows: "The indictment must charge but one offense, but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses the accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment and

the accused may be convicted of either offense, and the court or jury trying the cause may find all or either of the persons guilty of either of the offenses charged, and the same offense may be set forth in different forms or degrees under different counts; and where the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count." We think that the different counts in the indictment all charge one and the same offense, and are based upon the same transaction, and that they were inserted in the indictment merely for the purpose of avoiding the possibility of a variance between the allegations and the evidence. See *Williams v. United States*, 17 Okl. 33, 87 Pac. 647; *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57; *De Graff v. State*, 2 Okl. Cr. 519, 103 Pac. 538. The trial court therefore did not err in refusing to require the state to elect upon which count in the indictment it would put the defendant upon trial.

[2] Second. Upon the trial of this cause the court admitted a great deal of testimony with reference to a number of different transactions upon the ground that they tended to show a conspiracy or general plan, of which the offense charged constituted a part and with which the defendant was connected, the purpose of which conspiracy being to corrupt officers, and secure immunity from prosecution for violations of the prohibitory and gambling laws of the state. In the case of *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264, appellant was convicted of embezzlement. Upon the trial of that cause the court instructed the jury as follows: "(5) You are instructed that testimony has been submitted to you by the court as competent for your consideration tending to show various other embezzlements of sums of money, other than as charged in the indictment, and that false entries thereof were made and committed by the defendant, and in this matter you are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant did embezzle such sums and make such false entries and fraudulently appropriate such sums of money to his own use as therein mentioned, then, in such case, said evidence is only to be considered by you as bearing upon the fact whether or not the defendant embezzled and fraudulently appropriated the specific amount alleged in the indictment, and at the time alleged in the indictment, and as tending to show the intent, if any, of the defendant in the commission of the offense alleged against him, and for this or such purpose alone you will consider such evidence of other offenses. And in this connection you are told that although you may believe that such other offenses were committed by the defendant, but you should have a reasonable doubt that he committed the specific offense alleged against him in the indictment, then it would be your duty to acquit him. Otherwise you should



convict him." In discussing this instruction this court said: "The only possible objection that can be offered to these instructions is that paragraph 5, with reference to other similar offenses, might have been broader, and the jury might have been instructed that if they found from the testimony, beyond a reasonable doubt, that the other similar offenses testified to had been committed, and that they constituted parts of a plan or system of the defendant of embezzlement, to the very act of taking at issue, then the jury might consider the testimony as to these similar offenses for the purpose of assisting them in determining as to whether the defendant did take the money which he was charged in the indictment with having taken, and also to show the intent with which the act was committed. See 1 Wigmore on Evidence, § 329, p. 417; 11 Ency. of Evidence, pp. 805, 806. But the failure to include this view of the law in paragraph 5 of the instructions was beneficial to the appellant, and he therefore cannot be heard to complain at this omission. With the view above suggested incorporated in paragraph 5, the instructions given would be above criticism."

For a discussion of the question of the responsibility of co-conspirators for all that is done and said in pursuance of a common design, and also all that is done and said in any collateral undertaking incident to such common design, see *James Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300; *S. L. Burns v. State*, 129 Pac. 657, decided at the present term of the court. For an exhaustive brief supporting the views expressed in the above cases, see annotations to the case of *People v. Lawrence*, 68 L. R. A. 193. The admissibility of such evidence is for the court alone. The weight to be attached to the testimony is a question for the jury. The state is necessarily confronted with great difficulty in establishing prosecutions of this kind, because conspiracies are always secret and are discovered with great difficulty. Therefore any evidence which tends to establish a conspiracy should be submitted to the jury. Conspiracies of this kind are necessarily proven largely by circumstantial evidence, and any circumstance should be admitted in evidence which in the slightest degree tends to prove such conspiracy. In *State v. Dulaney*, 87 Ark. 17, 112 S. W. 158, 15 Ann. Cas. 192, the defendant was indicted for bribery. The state offered evidence of other similar offenses, but the court refused to admit the testimony, and the defendant was acquitted. The state appealed. In discussing this question the Supreme Court of Arkansas said: "The principle of evidence that offenses or acts similar to the one charged may be competent for the purpose of showing knowledge, intent, or design is as thoroughly established as the general proposition that other crimes or offenses cannot be shown in evidence against a defendant charg-

ed with a particular crime. While the principle is usually spoken of as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts which are from their nature competent as showing knowledge, intent, or design, although they may be crimes, which is admitted. In other words, the fact that evidence shows the defendant was guilty of another crime does not prevent it being admissible when otherwise it would be competent on the issue under trial. *Higgins v. State*, 157 Ind. 57, 60 N. E. 685; 1 Wigmore on Evidence, § 300. This court has applied the principle under discussion in *Howard v. State*, 72 Ark. 586, 82 S. W. 196; *Johnson v. State*, 75 Ark. 427, 88 S. W. 905; *Woodward v. State*, 84 Ark. 119, 104 S. W. 1109. The Court of Appeals in New York stated the principle as follows: 'Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.' And in discussing the fourth ground above enumerated, it says: 'Fourth. As to a common plan or scheme, it sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.' *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Mr. Wigmore, in speaking of the admissibility of such evidence in charges of bribery, says: 'On a charge of bribery, any of the three general principles—knowledge, intent, and design—may come in to play. To show knowledge of the nature of the transactions, a former transaction of the court may serve, as indicating an understanding of the particular transaction. To show intent, another transaction of the sort may serve to negative good faith. To show a general design a former attempt towards the same general end may be significant.' 1 Wigmore on Evidence, § 343. In the notes to this section may be found a review of the authorities; and it is found that they are not uniform in sustaining the principles announced by Mr. Wigmore, and he indulges in some caustic criticism of the courts that take views opposite to his statement of the

correct principle. The best thought on the subject seems to be with Mr. Wigmore, and is found applied in the following bribery cases: *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; *Higgins v. State*, 157 Ind. 57, 60 N. E. 685; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123. The last case is especially pertinent here. Schnettler was on trial charged with accepting a bribe when a member of the House of Delegates in the city of St. Louis, in regard to a certain bill authorizing a corporation to construct, maintain, and operate a street railway business on certain streets and other public places in said city. Evidence was adduced to show that a 'combine,' as it was called, was formed by members of the House of Delegates to corruptly control legislation. Over the objection of the defendant, the state was permitted to prove that the defendant had received \$2,500 as a bribe to induce him to cast his official vote in favor of a bill previously pending before the House of Delegates affecting the lighting of the public streets of St. Louis—a separate and distinct measure from the one concerning which he was charged with bribery. The court said: 'The authorities all hold that as a general rule the state cannot prove against a defendant the commission of offenses other than the one charged and for which he is upon trial; but an exception exists with respect to this rule where the collateral crime is brought into a common system, a system of mutually dependent crimes, or is linked to the crime under trial as to show that it is part of the same scheme or understanding, or in some way have some logical connection with the crime charged.' Applying the above-announced principle to the facts of the case, the court then said: 'It appears from the evidence that about the time of the organization of the House of Delegates a combination was entered into between various members of that body, including the defendant, for the purpose of controlling legislation by the members of the combine demanding and receiving money consideration for the passage or defeat of certain bills which might be brought before them, to be paid by the individuals, corporations, or parties interested therein, and that defendant did, in fact, receive the sum of \$2,500 on account of his vote on the lighting deal. This arrangement was not only with respect to the lighting deal in which he received \$2,500 for his vote, but it applied to all other matters of a similar character which might come before the House of Delegates, and was therefore part of the same scheme, or arrangement, and logically connected with the charge in the information, hence formed an exception to the general rule, and the facts in respect thereto were admissible in evidence for the purpose of showing that the crime charged was within the scope of the purpose of which the conspirators were banded together, and to explain and corroborate other testimony which bore directly upon the commis-

sion of the crime charged.' The bill mentioned in this indictment was before the committee of which defendant was chairman. The evidence offered tended to prove that all bills affecting corporations which were referred to the committee of which he was chairman should be looked after by him in the interest of his corrupt general agreement with Cox, where Cox was interested, and that Cox was interested in this bill, while it is not offered to be shown that Dulaney knew Cox was interested in this particular bill, yet the bill was of that character that was covered by his general agreement with Cox, and it was a part of the same scheme and arrangement, and logically connected with the matters covered in his general agreement. A perusal of the evidence in the case shows that, had the state's witnesses been believed, the jury would have been authorized to convict; and, on the other hand, had the defendant's witnesses been believed, the defendant was fully exonerated of the charge against him, and the jury warranted in believing the charge against him an effort to ruin him by his personal and political enemies. In view of such state of the evidence, it was manifestly important that proper corroborating evidence of either side be not excluded. The evidence offered was admissible for the purpose of showing that the crime charged was within the scope of the purpose for which it was alleged the defendant and Cox had conspired, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged, which testimony might be meaningless unless pointedly explained by this general corrupt agreement to which it was alleged this defendant was a party. It is therefore the opinion of the court that the circuit court erred in not admitting the offered evidence."

We could quote authorities indefinitely to the same effect; but as this court has repeatedly announced the same doctrine, a further discussion of this question is unnecessary. If the evidence in this record is worthy of credence, it reveals an appalling and almost incredible condition of official corruption existing at that time in Pottawatomie county. In the absence of any showing that the jury was influenced by improper motives in arriving at their verdict, the credibility of the witnesses was for the jury alone. Much of the evidence was positive and direct. Some of it was only remotely connected with the charge under investigation, but we cannot say it did not tend to establish a conspiracy to corrupt the officers of Pottawatomie county, and thereby secure immunity from prosecutions for violating the prohibitory and gambling laws of the state, and that it did not tend to show that the offense of which appellant was convicted constituted a part of such conspiracy. While the court may have erred as to the introduction of

some of this testimony, yet, upon the entire record, the guilt of appellant is so conclusively established that we feel it would be a miscarriage of justice to set this verdict aside upon the ground that it was not proven that appellant was not connected with some of the transactions in evidence.

[3] Third. Counsel complain of remarks made by the trial judge in the presence of the jury. When John Rogers, a state's witness, was on the stand, and was being examined by the Attorney General as to a certain transaction, the record shows that the following took place:

"Mr. Freeling: I am going to renew the request to connect the defendant with this in some way—this and the September transaction. I would like to have it connected with Mr. Bond; absolutely nothing to connect it, and admittedly so.

"The Court: The same order on this proposition—there will be no use—connect it with the September meeting—

"Mr. West: The defendant is already connected with the September meeting.

"The Court: I understand he is connected, but I understood you were going to continue this matter with this witness.

"Mr. West: I am going to show how this habeas corpus matter operated.

"Mr. Freeling: Does it make any difference how this operated?

"The Court: No, sir; it is only collateral to the general plan.

"Mr. Freeling: We object to any further testimony on this line until the defendant is connected with it.

"The Court: I am satisfied as I said a while ago that he has been connected with it as a part of this general plan.

"Mr. Freeling: Note our exception to the language of the court.

"The Court: Gentlemen of the jury, you will disregard the statement of the court made a while ago with reference to anything of the connection of this defendant with any transaction at any time and any place. It is not the province of the court to act in performing the duties of the jurors, and you will disabuse your mind entirely of it, and must not take into consideration anything I said at that time concerning this defendant or his connection with any transaction whatever. These are matters for you to determine, and you will not consider at all in any way or in any manner that statement, and that part of the language of the court with reference to that matter will be stricken from the record and from the jury."

It was unfortunate that the trial judge expressed an opinion as to whether or not the evidence established the fact that the defendant was connected with the transaction in question. This was a question for the jury alone. It is true that there must have been some evidence showing a general plan and connecting the defendant with the particular transaction before such evidence would be

admissible. Of this question the court was the judge, and the fact that the court overruled the objection to this evidence might have created the impression upon the minds of the jury that there was at least some evidence in the record connecting the defendant with it. But this is a matter of which the defendant cannot complain, because it would arise every time the court overruled the objection to the admission of such testimony. In fact, it would be an unavoidable incident in the administration of justice, but the trial court should always be careful to avoid anything like an expression of an opinion in the presence of the jury as to the weight, effect, or credibility of any testimony. We know that it is exceedingly difficult in ruling upon testimony to always avoid expressing the views of the court with reference to the testimony objected to, and that improper remarks will sometimes be made by the ablest, and most impartial trial judge which are afterwards regretted. This is illustrated by the instructions which the court gave the jury as soon as the trial judge had had time to think of what he had said. The jury was positively instructed to disregard the statements made by the court, and the different duties of the court and jury were clearly stated. The remarks of the court were withdrawn and stricken from the consideration of the jury. We think under the circumstances this cured the error complained of.

In the case of *Richards et al. v. Commonwealth* (Ky.) 67 S. W. 818, one of the grounds for reversal of that case was that the court had made a remark with reference to the evidence. The Court of Appeals of Kentucky, in passing upon the alleged ground for reversal, said: "Another ground of complaint is that upon the trial of the case the presiding judge, in the presence of the jury, said to the commonwealth's attorney, 'I think you have proven enough against Snow already.' Upon objection being made, the judge at once instructed the jury to pay no attention to his remark to the commonwealth's attorney. The remark was very improper, but in view of the fact that the judge immediately cautioned the jury to pay no attention to it, and the additional fact that the testimony in the case establishes the guilt of appellants beyond all peradventure, it was not such prejudicial error as would justify a reversal of the case." In the case of *State v. Gatlin*, 170 Mo. 354, 70 S. W. 885, one of the alleged grounds for reversing the case was that the court remarked in the presence of the jury that a conspiracy was shown to exist. The court disposed of the contention of the defendant very promptly by the use of this language: "Indeed, in this connection, the inadvertent remark of the trial judge in passing upon defendant's objection to Bozarth's testimony that there was evidence of a conspiracy was promptly remedied by his telling the jury he was simply passing upon the objection and

not to pay any attention to what he said as to the evidence. This explanation to the jury left the defendant no ground for complaint." See, also, *Smith v. State*, 107 Ala. 139, 18 South. 306; *Bone v. State*, 86 Ga. 106, 12 S. E. 205; *State v. Stephen Jacobs*, 106 N. C. 695, 10 S. E. 1031; *Carthaus et al. v. State*, 78 Wis. 560, 47 N. W. 629; *State v. Burwell*, 52 Kan. 686, 35 Pac. 780; *Cone v. Smyth*, 3 Kan. App. 607, 45 Pac. 247; *State v. Crawford*, 39 S. O. 843, 17 S. E. 799; *Ward v. State*, 85 Ark. 179, 107 S. W. 677; *Dailey v. State* (Tex. Cr. App.) 55 S. W. 821; *State v. Coleman*, 17 S. D. 594, 98 N. W. 175; *State v. Walker*, 50 La. Ann. 420, 23 South. 967.

Even if the fact that the trial court did withdraw from the consideration of the jury the objectionable remarks complained of did not have the effect of curing the error committed, we would hesitate long before reversing this conviction on this account alone. If there was any reason to believe that the jury would or might have reached a verdict favorable to the defendant upon the testimony, then such remarks, if permitted to stand, would constitute reversible error. But, where it is manifest from the record that the jury have reached the only possible conclusion which intelligent men could arrive at, we do not believe a verdict should be set aside for any except the most grave and serious grounds. We have carefully read and re-read and considered all of the testimony in this case, and, taken as a whole, it conclusively points to the guilt of appellant. In the case of *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264, this court said: "Where the evidence in a case is clear as to the guilt of the accused, and there is no reason to believe that upon a second trial an intelligent and honest jury could arrive at any other verdict than that of the guilt of the accused, the judgment of the lower court will not be set aside for anything less than fundamental errors." This is the settled policy of this court, and we believe is necessary for the administration of justice in Oklahoma. In addition to the conclusive character of the testimony in the case, there is another consideration which should not be overlooked. The offense of which appellant has been convicted strikes at the very foundation of the administration of justice in Oklahoma. As long as the courts are honest, fair, and courageous, liberty and justice can be protected and enforced, but if the courts become cowardly and corrupt, or if the confidence of the people is destroyed or shaken in the fairness, justice, courage, and integrity of the courts, government becomes a farce, and it is impossible to conceive or describe the demoralization which would result in social conditions among the people. The offense of which appellant has been proven guilty is in the same class with perjury, and is sec-

ond in infamy only to offenses against the chastity of woman, and when it is proven that a defendant is guilty of an attempt to bribe or of bribing and corrupting a judge of a court, or the officers or jury thereof, he should not be permitted to escape upon any light and trivial grounds. In this case it is absolutely clear that the county attorney was corrupted by means of the conspiracy of which the act of which appellant was convicted constituted a part.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

### SMITH v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

Appeal from District Court, Wagoner County; R. C. Allen, Judge.

Green Smith was convicted of grand larceny, and his punishment assessed at five years' confinement in the penitentiary, and he appeals. Affirmed.

Brown & Stewart, of Muskogee, for appellant. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

FURMAN, J. From an inspection of this record we are of the opinion that the appeal was taken for delay only.

The state's evidence is direct and positive as to the guilt of appellant. Neither appellant nor his codefendant testified. The evidence introduced by appellant did not make out a defense. The credibility of the state's witnesses is a question for the jury alone. There is nothing in this record to indicate that the jury were influenced by improper motives in arriving at their verdict. We think all the evidence introduced under the previous rulings of this court was competent, and that the trial was regular. See *Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 800, *Burns v. State*, 129 Pac. 657, and *Ben Bond v. State*, 129 Pac. 666, decided at the present term. The judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

### GILBERT v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 25, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 680\*)—GOOD CHARACTER—EVIDENCE—ADMISSIBILITY.

In a trial for murder, it is error for the trial court to hold that evidence of good character is not admissible until after a defendant has testified, or until after there was some show of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1610, 1613; Dec. Dig. § 680.\*]

#### 2. WITNESSES (§ 372\*)—CROSS-EXAMINATION—BIAS—FRIENDSHIP.

It is competent of cross-examination to prove by a witness any fact which tends to show bias, prejudice, friendship, or enmity, or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the relationship of the witness to one of the parties to the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

### 3. CONSTITUTIONAL LAW (§ 321\*)—APPEAL—HARMLESS ERROR.

A fair trial when charged with crime is the birthright of every citizen of Oklahoma, it matters not how poor and humble a defendant may be, and, if this is denied him, the fact that no unfairness was intended by the trial court will not cure the error committed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 950, 952-955; Dec. Dig. § 321.\*]

On motion for rehearing. Denied.  
For former opinion, see 128 Pac. 1100.

FURMAN, J. It is contended that the original opinion filed in this cause is not supported by the recitals in the record.

W. B. Neff testified as a witness for the state. His examination in chief appears on pages 35, 36, and 37 of the case-made. The record then discloses that the following took place: "Mr. Prulett: I desire to ask the witness some questions which will be out of order, but I do it to save time, and to save bringing the witness back." The witness was then asked if he was acquainted with the defendant. The answer being in the affirmative, the witness was asked the further question: "Q. Are you acquainted with her general reputation for being a peaceable, quiet, law-abiding, hard-working, honest citizen in this community? Mr. Moss: Objected to as incompetent, irrelevant, and immaterial, no proper foundation laid for the introduction of such testimony, and improper cross-examination." If the matter had ended here, then the question for decision would have been as to whether or not new matter of this sort can be brought out on cross-examination. The ancient rule was that this could not be done, but the English and Canadian courts and many of the courts of the American states now hold that, where a witness is placed on the stand to prove any fact, he may be cross-examined by the opposing side as to the entire case. See *Rogers v. State*, 8 Okl. Cr. —, 127 Pac. 365. It is not necessary, however, to discuss and decide this question now because a further examination of the record will show that the objection that it was not proper cross-examination was waived, and that an entirely new objection was interposed and sustained by the court.

The record on this subject is as follows:

"Mr. Prulett: Do they object on the ground that it is out of order?

"Mr. Moss: That evidence is not admissible, and never is admissible until the defendant has testified—until there is some show of self-defense.

"Mr. Prulett: We except to the remarks of counsel, the prosecuting attorney, that that evidence is never competent unless the defendant testifies, and we now ask the

court to instruct the jury that that remark is prejudicial to the rights of the defendant, and should not be considered by them. If your honor please, who ever heard tell of a lawyer saying that a defendant on trial for murder could not place before twelve triers her reputation for being a peaceable, law-abiding citizen when she is charged with murder.

"Mr. Moss: You hear it now from me.

"Mr. Prulett: And, if you will find one decision, I will leave the courtroom, and turn the case over to you, if you will find one single decision that will support that rule, that the defendant must testify to make that evidence competent. But I say as a lawyer that testimony as to good reputation is always competent. The law books say that it is one of the most precious assets a citizen has when charged with crime. I am shocked at the idea of counsel claiming to represent the county of Oklahoma saying that testimony would not be competent. If he objects to it that at this time it is not competent, because out of order and not proper cross-examination, I agree with him, but I am offering it out of order to save time so we can get through with this case to-day. That is the only purpose.

"Mr. Hooker: The only object that testimony of—

"The court: Proceed. The motion is overruled.

"Mr. Prulett: Exceptions. If the court please, I don't want the court to commit error, but, if I can't in 15 minutes show your honor where it is reversible error for a prosecuting attorney to make a statement of that kind, I will apologize to the court.

"The Court: We will take it up when we reach it.

"Mr. Prulett: We will never reach it again by me. We will let it stand. What do you do with the objection?

"The Court: They have both been ruled on. The objection was sustained, and the motion overruled."

To all of which counsel for appellant reserved exceptions.

This is a verbatim copy of the case-made as approved by Mr. Moss, the assistant county attorney, and solemnly certified to by the trial judge, duly attested by the seal of his court. So it is seen that the record not only sustains all that was said in the original opinion touching this matter, but that it also shows further prejudicial error. We should have discussed this matter fully in the original opinion, but we have so many cases on hand which must be disposed of that we omit unnecessary discussion as far as possible. Mr. Wigmore lays it down as a rule to which the law recognizes no exception, that the good character of a defendant is always admissible in evidence in his behalf. See 1 Wigmore on Evidence, § 55. This court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has repeatedly reversed convictions because evidence of good character was not received in the trial court, and has always held that such evidence was essentially relevant. See *Le Roy Dickinson v. State*, 3 Okl. Cr. 155, 104 Pac. 923; *Frank Friel v. State*, 6 Okl. Cr. 532, 119 Pac. 1124.

[1] We have never seen an authority sustaining the ruling complained of. The effect of this ruling was to inform the jury that evidence of good character would not be admissible and could not be considered until the defendant had testified, or until there was some show of self-defense. This is not, and has never been, the law. To say that legal evidence should not be received in the trial of a criminal case until the defendant has testified violates the spirit and the letter of our statute, which provides that in a criminal case, if the defendant does not elect to testify, this circumstance shall not be referred to during the trial, and that it shall not raise any presumption of guilt against him. We are unable to understand the reasoning which sustains this ruling. It certainly has no foundation in the just and fair laws of Oklahoma.

It is claimed that the error of the trial court was cured because one witness was permitted to testify as to her good character. But this was after appellant had been practically forced by this ruling to testify in her own behalf. There are two reasons why this does not cure the error previously committed: First, because the effect of this was to limit the testimony of good character to one witness. As was said in the original opinion, a party charged with crime has the right to prove any material fact by a reasonable number of witnesses. The second reason is because the error in the ruling of the trial court had created in the minds of the jury a false standard by which this question should be decided, and had, in effect, told the jury that evidence of character could not be considered by them unless the defendant should first testify, or unless the jury should also find that there was evidence of self-defense.

[2] Upon a re-examination of this case, we find that on cross-examination appellant attempted to show that one of the principal witnesses for the state was a member of a fraternal secret society of which deceased had been a member. This was not permitted by the trial judge upon the ground that such evidence was immaterial, irrelevant, and incompetent. The law is that anything which tends to show bias, prejudice, friendship, or enmity, or the relationship of a witness to one of the parties to a case, is material, and may be inquired into on cross-examination for the purpose of affecting the weight to be given the testimony of such witness. See *Newton Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278. The weight to be given testimony

is a question exclusively for the jury, but its admissibility is a question of law for the court. The trial court erred in not allowing appellant to question this witness upon this subject.

[3] A fair trial, when charged with crime, is the birthright of every citizen of Oklahoma. It matters not how poor and humble the defendant may be or how numerous and influential those who are interested in the prosecution. We express no opinion as to the guilt or innocence of appellant. But it is manifest from the record that by the ruling of the trial court appellant was not allowed to introduce before the jury material and competent evidence which could and should have been considered by them in passing upon her guilt or innocence, and that appellant was practically forced by the trial court to take the stand as a witness in her own defense. We do not believe that any unfairness was intended, but we are dealing with results, and not with intentions.

The application for a rehearing is not well taken, and is denied.

ARMSTRONG, P. J., and DOYLE, J., concur.

#### NICHOLS et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 21, 1913.)

#### (Syllabus by the Court.)

#### 1. INTOXICATING LIQUORS (§ 279\*)—INJUNCTION—CONTEMPT—PROCEEDINGS TO PUNISH—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The provisions of the prohibition enforcement act (section 14, c. 70, Sess. Laws 1911) that "all places where persons congregate or resort for the purpose of drinking any such liquor, are hereby declared to be public nuisances," and that "the Attorney General, county attorney, or any officer charged with the enforcement of any of the provisions of this act, of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding shall be punished, as for contempt, by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment"—is a constitutional exercise of legislative authority under section 25 of the Bill of Rights (33 Williams), providing "the Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt," and is not in conflict with the constitutional provision, "the county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and exclusive jurisdiction in all misdemeanor cases of which the justices of the peace have not jurisdiction." Article 7, § 12 (197 Williams).

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 414; Dec. Dig. § 279.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—43

**2. INTOXICATING LIQUORS (§ 279\*) — CONTEMPT (§§ 40, 45, 54\*)—CRIMINAL LAW (§§ 573, 627, 635, 641, 662\*)—WITNESSES (§ 2\*) — JURY (§ 21\*) — PROCEEDINGS TO PUNISH CONTEMPT—CONSTITUTIONAL GUARANTIES.**

It is a criminal contempt to violate or disobey out of the presence of the court or judge sitting as such any order of injunction or restraint made or rendered by any court under this provision of the prohibition enforcement act. The court, not having any personal knowledge of the facts, cannot proceed, except by an accusation in writing under oath, specifically charging the facts constituting the violation. By the filing of this affidavit and the issuance of attachment or rule to show cause, a criminal action is commenced, and the accused is entitled to all the constitutional guaranties in criminal prosecutions secured by the Bill of Rights. Article 2, § 20 (28 Williams).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 414; Dec. Dig. § 279;\* Contempt, Cent. Dig. §§ 122-124, 131, 132, 143-149; Dec. Dig. §§ 40, 45, 54;\* Criminal Law, Cent. Dig. §§ 1292, 1399-1408, 1412, 1452, 1496-1505, 1538-1548; Dec. Dig. §§ 573, 627, 635, 641, 662;\* Witnesses, Cent. Dig. §§ 2-4; Dec. Dig. § 2;\* Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.\*]

**3. JURY (§ 21\*)—RIGHT TO TRIAL BY JURY—PROCEEDINGS FOR CONTEMPT.**

On the trial of persons charged with contempt in violating or disobeying the terms of an injunction granted under the provisions of the prohibition enforcement act (section 14, c. 70, Sess. Laws 1911), the constitutional right of the accused to a trial by jury is secured by the proviso to section 25, article 2 of the Bill of Rights providing: "That any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or rendered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused."

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.\*]

**4. CONTEMPT (§ 40\*)—PROCEEDINGS TO PUNISH—NATURE AND FORM—"CRIMINAL CONTEMPT."**

Contempts which are prosecuted to preserve the power and vindicate the dignity of the court, and punish the offender, are criminal contempts, and the proceedings for punishment should conform as near as possible to proceedings in criminal cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 122-124; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1747, 1748.]

Appeal from District Court, Wagoner County; R. C. Allen, Judge.

C. M. Nichols and another were convicted of contempt, and appeal. Reversed and remanded.

Kistler & Haskell, of Muskogee, for plaintiffs in error. The Attorney General, for the State.

DOYLE, J. The plaintiffs in error were by proper proceedings under the statute enjoined and restrained from keeping, maintaining, operating, carrying on, or permitting to be kept, maintained, carried on, or operated, in and upon certain described premises or at or in any other place in Wagoner county any

place for selling unlawfully or keeping for sale intoxicating liquors. Upon affidavit of the county attorney of Wagoner county charging them with contempt of court in violating the terms of the injunction, an order of attachment was issued to the sheriff, and they were immediately arrested and brought before the court, whereupon they filed their verified answer, denying in detail the truth of the alleged facts set forth in the affidavit of the county attorney as constituting the charge of contempt against them. The court announced that he would forthwith proceed to hear the case on oral evidence. Whereupon counsel for plaintiffs in error demanded a trial by jury, which demand was then and there denied by the court, and exception allowed, and the trial proceeded. Upon the hearing in these proceedings, the court found that plaintiffs in error had violated the injunction by selling intoxicating liquors, and were in contempt of court and subject to punishment therefor, and adjudged that C. M. Nichols pay a fine of \$500 and undergo confinement in the county jail for a term of six months, and, in default of the payment of said fine, that he be further confined until said fine is satisfied as provided by law, and adjudged that Carrie Nichols pay a fine of \$100 and undergo confinement in the county jail for a term of 60 days, and, in default of the payment of said fine, that she be further confined until said fine is satisfied as provided by law. From these judgments an appeal was properly perfected.

[1] It is only necessary for this court to determine whether the district court erred in overruling the demand of plaintiffs in error for trial by jury of the question of their guilt or innocence of said alleged contempt. Article 2, § 25, Bill of Rights (33 Williams), provides: "The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or rendered by any court or judge of the state, shall, before penalty or punishment is imposed, be entitled to a trial by a jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given." Section 14, c. 70, Session Laws 1911, of the prohibition enforcement act, in part, provides: "All places where persons congregate or resort for the purpose of drinking any such liquor, are hereby declared to be public nuisances," and that "The Attorney General, county attorney, or any officer charged with the enforcement of any of the provisions of this act, of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding shall be punished, as for contempt, by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment."

[4] The proceeding in this case was criminal, not remedial. Criminal contempts are prosecuted to preserve the power and vindicate the dignity of the courts, and to punish the offender. By the county attorney filing the affidavit and the issuance of attachment thereon a criminal action was commenced. It has been suggested that a violation of the statute constitutes a misdemeanor of which county courts have exclusive jurisdiction. The suggestion is without merit. The statute is a proper exercise of the power granted by section 25 of the Bill of Rights, in words as follows: "The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt."

[2] The power to fine and imprison for contempt is a necessary attribute of a court. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power to enforce its orders, judgments, or decrees would be a disgrace to the laws which created it. Such a condition could but result in the degradation of courts, and to make them truly subjects of contempt. It is a criminal contempt to violate or disobey, out of the presence of the court or judge sitting as such, the terms of any order of injunction, made or rendered by any court or judge under this provision of the prohibition enforcement act. The court not having any personal knowledge of the facts, cannot proceed, except by an accusation in writing under oath, specifically charging the facts constituting the violation. By the filing of this affidavit and the issuance of attachment or rule to show cause, a criminal action is commenced and the accused is entitled to all the constitutional guaranties in criminal prosecutions, as provided by section 20 of the Bill of Rights (28 Williams) as follows: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against

him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel. \* \* \*

[3] Unquestionably the court erred in denying the demand of the defendants for a trial by jury. For this reason the judgments of conviction are reversed, and the cause remanded to be proceeded with in accordance with the views herein expressed.

. ARMSTRONG, P. J., and FURMAN, J., concur.

# METCALF v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 8, 1913.)

(Syllabus by the Court.)

## 1. PERJURY (§ 34\*)—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for perjury, the falsity of the defendant's evidence may be established by circumstantial evidence, but the facts constituting such circumstantial evidence must be directly and positively sworn to by at least one credible witness, supported by corroborating evidence, and, taken as a whole, must be of such a conclusive character as to exclude every other reasonable hypothesis, except that of the defendant's guilt.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 125-132; Dec. Dig. § 84.\*]

## 2. PERJURY (§ 11\*)—EVIDENCE—ADMISSIBILITY.

In order to constitute perjury, it is not necessary that the false evidence given is material to the main issue in a trial. It is sufficient if it is material to any proper matter of inquiry and is calculated and intended to prop or bolster the testimony of a witness on some material point, or to support or attack the credibility of such a witness. For sufficient circumstantial evidence to sustain a prosecution for perjury, see opinion.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-64; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5306-5310; vol. 8, p. 7751.]

## 3. INTOXICATING LIQUORS (§ 139\*)—POSSESSION WITH INTENT TO SELL.

In prosecutions for illegal possession of intoxicating liquors for the purpose of violating the prohibitory liquor law, it is not necessary to prove that the defendant actually owned the liquors in question. Proof that the defendant was in possession of such liquors, with the intention of violating the prohibitory liquor law, will sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.\*]

## 4. ENFORCEMENT OF CRIMINAL LAWS.

It is the duty of prosecuting attorneys and trial judges to be prompt and vigilant in seeing that persons who commit perjury in courts of this state are speedily brought to justice.

Application by R. A. Metcalf for a writ of habeas corpus. Writ discharged.

The nature of the question involved requires a full statement of the case, for there are few, if any, more important matters than the suppression of perjury in the courts of this state. Relator was prosecuted before

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Hon. A. L. Squire, county judge of Ellis county, sitting as a committing magistrate, upon the following complaint:

"Before me, A. L. Squire, ex officio committing magistrate and county judge in and for said county and state, personally appeared Frank E. Ransdell, who, being duly sworn, says that on or about the 13th day of March, in the year of our Lord one thousand nine hundred and eleven (1911), at and within the county of Ellis and state of Oklahoma, one R. A. Metcalf, late of the county and state aforesaid, did then and there commit the crime of perjury in the manner and form as follows, to wit: That the said R. A. Metcalf in the county of Ellis, state of Oklahoma, on the 13th day of March, 1911, in the county court of Ellis county, Oklahoma, sitting at Gage, Oklahoma, in said county, the said court being otherwise called the Gage division of the county court of said Ellis county, the honorable A. L. Squire, the regularly elected, qualified, and acting judge for said court, then and there presiding and acting, wherein the case of State of Oklahoma v. R. A. Metcalf, charged with the unlawful possession of intoxicating liquors, being No. 9 on said court docket, was then and there being tried and heard before the court aforesaid and a jury, which had been duly selected to try said cause, and the said R. A. Metcalf was then and there produced as a witness in said cause on behalf of the defense, and was then and there duly sworn to testify truly in said case by A. L. Squire, the judge aforesaid, who was then and there duly authorized and empowered to administer oaths in such cases, and to administer said oath in that case, in manner and form as was then and there done as aforesaid. That then and there the following became material questions in said case, to wit: Whether the said R. A. Metcalf, defendant in said case, owned, had, or was in possession of any whisky or beer in a place known as the 'Yellow Front Restaurant' on the east side of Main street in the town of Gage, Oklahoma, at any time from the 1st day of August, 1910, to the 13th day of March, 1911, and particularly on the 15th day of September, 1910; and whether the said R. A. Metcalf ever had control, owned, or had the management of the said Yellow Front Restaurant or had any interest in the said restaurant or run the same as an employé or otherwise; and whether the said R. A. Metcalf worked around, at, or in said restaurant, or ever received any compensation for working or clerking in said restaurant at any time, and more particularly from August 1, 1910, to March 13, 1911; and whether the said R. A. Metcalf had any knowledge of and concerning a certain partition in the wall or walls of the building known as the Yellow Front Restaurant, or had any knowledge of secret place or places in said wall or walls in which could be secreted beer and whisky or other intoxicating liquors, which, with certain beer

and whisky contained in said walls and partitions and secret place, was discovered by G. M. Rader, sheriff of Ellis county, Oklahoma, and other persons, in a search made of said building on or about September 15, 1910, at any time before the same was so discovered on September 15, 1910; and whether the said R. A. Metcalf, at any time prior to the finding of said beer and whisky on said September 15, 1910, by said sheriff, had any knowledge of beer and whisky having been secreted in said walls and partitions of said walls and building or been kept in said walls and partitions of said building; and whether the said R. A. Metcalf knew of any one getting whisky or beer so secreted from said place and out of said walls and partitions at any time from on or about August 1, 1910, to March 13, 1911, or at any time; and whether the said R. A. Metcalf had any knowledge of whisky or beer being secreted or kept or owned in said room or rooms, or any of them, of said building or in said building known as the Yellow Front Restaurant, or had any knowledge of any one going back of the partition running north and south through said building to get whisky or beer at any time; and whether the said R. A. Metcalf, Ed Hickman, Joe Siddens, or James Johnson, or any or either of them owned, managed, controlled, or run said restaurant during the period of time from on or about August 1, 1910, to March 13, 1911, or during any part of said time; and whether the said R. A. Metcalf ever was paid anything for working in and around said restaurant during said period of time last mentioned, by Ed Hickman or any other person, or ever received any money coming to said restaurant from sales or in the regular course of trade; and whether at the time of said search of said building by the said sheriff G. M. Rader, after the said sheriff Rader had handed the said R. A. Metcalf the search warrant, the said Metcalf handed the said search warrant back to the said Rader or to one Daniel Rees; and whether the said R. A. Metcalf sold whisky to one John Quillen on or about September 10, 1910; and whether the said R. A. Metcalf sold to said John Quillen one pint of whisky on or about August 17, 1910; and whether the said R. A. Metcalf at any time herein mentioned had had liquor shipped to or consigned to places in Texas, and then brought back to Gage, Oklahoma; and whether a certain United States Revenue License as a retail liquor dealer, otherwise called a government stamp for the period of time from on or about August, 1910, to July 1, 1911, was obtained by the said R. A. Metcalf, and the tax for the same paid by the said R. A. Metcalf, because the said R. A. Metcalf had been instructed to or advised by the United States Revenue Collector or revenue man, for the district of which Oklahoma is or was a part, to take out said license or stamp and pay said tax; and whether the said license or stamp was

used by said R. A. Metcalf in the business of a retail liquor dealer or not; and whether certain liquor, to wit, a cask of whisky, 24 bottles, and a barrel of beer containing 72 quarts, which were received by said R. A. Metcalf, on or a short time after the month of June, 1910, was ordered by the said Metcalf for his own personal use, or for the purpose of selling, bartering, giving away, or otherwise furnishing the same in violation of law.

"That then and there, being a witness as aforesaid, the said R. A. Metcalf did knowingly, willfully, corruptly, feloniously, and falsely testify, depose, and say, in substance and effect, that he (the said R. A. Metcalf) never owned at any time any whisky or beer or had any whisky or beer in the said Yellow Front Restaurant, in the town of Gage, and that the whisky and beer in said restaurant, or any portion of it, which was in the said restaurant on the 15th day of September, 1910, at the time the same was searched by the said sheriff of Ellis county, did not belong to him, the said R. A. Metcalf, and that the said R. A. Metcalf, before the time of the said search of said building on September 15, 1910, had no knowledge of any whisky or beer being in said restaurant at any time; that he had not at any time owned or controlled or managed or been employed at the said Yellow Front Restaurant as clerk or otherwise, and had never had any interest there at any time or any interest in said restaurant and business at any time, and that he (the said R. A. Metcalf) had never received any compensation for working there at any time from Ed Hickman or any other person, and never took the money coming to said restaurant in the course of business, and that he never at any time had a key to said building; that he (the said R. A. Metcalf), before the said restaurant was searched by said sheriff on or about September 15, 1910, did not know of the existence of a partition in the wall or walls of said building or its rooms, which made a secret place difficult of detection, in which liquor could be secreted, and had no knowledge that any whisky or beer was secreted in said partition and walls of said building and rooms, prior to the time the same was searched on September 15, 1910, and had never known of any one going back of the partition running north and south across said building to get whisky or beer from said secret place in the walls and partition of said building, which was so discovered by the said sheriff of Ellis county aforesaid mentioned on or about September 15, 1910, before the same was discovered by said sheriff, and that he (the said R. A. Metcalf), at all times prior and up to the time of the discovery of said whisky and beer in the walls and partitions of said building as aforesaid, had no knowledge of any whisky or beer being in said secret place in the

walls and partitions of said building, or in the room of said restaurant where the said liquor was so discovered by said sheriff, or in any other part of said room in which said liquor was so discovered, or in said restaurant; that at the time said restaurant was searched as aforesaid, and immediately after the said sheriff handed the search warrant to said R. A. Metcalf, he (the said R. A. Metcalf) handed it back to said sheriff or to one Daniel Rees; that James Johnson and Joe Siddens were the only persons who ever worked in said restaurant; that the said R. A. Metcalf did not sell whisky to one John Quillen on or about September 10, 1910, and that he (Metcalf) did not sell one pint of whisky to said John Quillen on or about August 17, 1910; that he (the said Metcalf) never had intoxicating liquors shipped or consigned to him to places in the state of Texas, and after the same was delivered there brought to Gage, Oklahoma; that a United States retail liquor dealer's license or stamp, which was held by said Metcalf from the period of time from August, 1910, to July 1, 1911, was obtained by him from the United States Collector or Deputy Collector of Internal Revenue, who had advised and instructed him to obtain the same, and that the said license or stamp was not used by said Metcalf as a retail liquor dealer, and that all the liquor ever received or owned by the said R. A. Metcalf was a cask of whisky of 24 bottles and a barrel of beer of 72 quarts, both of which were ordered by the said R. A. Metcalf in the month of June, 1910, for his own personal use, and was used by said R. A. Metcalf personally and was not sold, bartered, given away, or otherwise furnished or illegally disposed of in any way, which said false testimony is more fully shown by the questions then and there asked of said R. A. Metcalf when so testifying as said witness, and the answers then and there given to said questions, by said defendant R. A. Metcalf, which questions and answers are as follows:

"The following questions were asked and answers given: 'Q. I will get you to state whether you ever owned any whisky or beer in the Yellow Front Restaurant in the town of Gage, Oklahoma. A. No, sir. Q. I will get you to state whether or not you ever had control or the management of the Yellow Front Restaurant in the town of Gage. A. No, sir; only loafed around there. Q. Have any interest there? A. No, sir. Q. Neither as an employé or otherwise? A. No, sir.'

"And the following questions were asked and answers given: 'Q. State whether or not if any portion of the whisky or beer that was in that building at that time belonged to you. A. Didn't own nothing. Q. How came you to be in there at that time? A. Asleep.'

"And the following questions were asked

and answers given: 'Q. Had any business until you took charge of the city hotel? A. No, sir.'

"And the following questions were asked and answers given: 'Q. Had any business of any kind during this time? A. No, sir. Q. You didn't have any liquor in this restaurant that was searched? A. No, sir.'

"And the following questions were asked and answers given: 'Q. You work around that Yellow Front Restaurant and did not receive any compensation? A. No, sir. Q. Ever help in the business? A. Helped Joe Siddens make chille, and once in a while I would get some one a cigar. Q. Ever receive any compensation for working there? A. No, sir; I think the fact I was in there most every day.'

"The following questions were asked and answers given: 'Q. You there all day? A. No, sir. Q. Generally opened up in the morning? A. Never had a key. Q. Never had a key? A. Don't believe I ever did.'

"And the following questions were asked and answers given: 'Q. Yet you never run the place at all? A. No, sir. Q. You would be the clerk in there sometimes until night? A. No, sir. Q. Help them some? A. No, sir. Q. Never clerked in there? A. No, sir. Q. Jimmy Johnson and Joe Siddens were the only ones working in there? A. Yes, sir. Q. Certain? A. Yes, sir. Q. Sometimes be the only one in front? A. I think not.'

"And the following questions were asked and answers given: 'Q. See anybody come back of the partition running north and south? A. No, sir.'

"And the following questions were asked and answers given: 'Q. Didn't know anything about the partition being in the wall? A. No, sir. Q. Never heard of it? A. Not until they raided it. Q. Never knew of any one getting anything out of there? A. No, sir. Q. Not Jimmy Johnson? A. No, sir. Q. Joe Siddens? A. No, sir. Q. Ed Hickman? A. No, sir. Q. Never knew whisky or beer was in there? A. No, sir. Q. Never knew that beer and whisky was in that room? A. No, sir.'

"And the following questions were asked and answers given: 'Q. Any one pay you anything for working around there? A. I might have waited on some one once in awhile. Q. Never received any money? A. No, sir. Q. Never got any money from Ed Hickman? A. No, sir. Q. Never had been employed by Ed Hickman? A. No, sir.'

"And the following questions were asked and answers given: 'Q. Mr. Rader hand you the search warrant? A. Yes, sir. Q. What did you say? A. I said "Search," and handed it back. Q. You never told him that you owned it or any such remark? A. No, sir.'

"And the following questions were asked and answers given: 'Q. Are you positive that you gave this search warrant back to Rader? A. My remembrance is that I hand-

ed it to Rader or Rees one. Q. Didn't Mr. Rader say that he wanted to search your place when he went in there? A. He said he had a search warrant; I didn't understand just what he said; he handed me a search warrant, and I handed it to the one or the other of them.'

"And the following questions were asked and answers given: 'Q. Mr. Metcalf, you testified that you were around that restaurant considerable; now I will get you to state who you think was running the restaurant. A. I think Ed Hickman owned it. Q. But who do you think run it? A. I suppose Joe Siddens and Jimmy Johnson run it. Q. Which one was controlling it, Joe Siddens or Jimmy Johnson? A. Both working there. Q. They were running it? A. They were running it and working there. Q. Thought Ed Hickman owned it? A. Yes, sir.'

"And the following questions were asked and answers given: 'Q. Ed Hickman ever make arrangements with you to work around there? A. No, sir.'

"And the following questions were asked and answers given: 'Q. For what purpose did you order this liquor? A. To drink. Q. Own personal use? A. Yes, sir. Q. Whisky and beer for your own personal use to be used by you in the town of Gage, Oklahoma? A. Yes, sir.'

"And the following questions were asked and answers given: 'Q. I will get you to state whether or not these two shipments you have named is the only two you had shipped to you at the town of Gage? A. Only two in my life. Q. Shipped for your own personal use? A. Yes, sir.'

"And the following questions were asked and answers given: 'Q. Tell the circumstance of that license being issued. A. Took the license out after having this shipment shipped. Q. Why? A. The revenue man instructed me to. Q. On account of having it shipped to you? A. Yes, sir; I was running the Arcade hotel; they got an injunction against it; some one was using whisky there, I don't know who.'

"And the following questions were asked and answers given: 'Q. You took it out on account of the revenue man telling you about this? A. Yes, sir; he told me it might be better for me to take out a license on account of these shipments; I only used it for my own personal use though. Q. That is the only reason that you took it out? A. Yes, sir.'

"And the following questions were asked and answers given: 'Q. I will ask you if you did not on or about the 10th day of September, 1910, sell John Quillen whisky? A. No, sir. Q. Do you swear that you didn't sell him whisky? A. Yes, sir. Q. If he swore to that, it is a falsehood? A. Yes, sir; first time I ever knew John Quillen was when Mark Bishop run a foot race. Q. Never knew him then? A. I knew his face first time I ever seen him around here. Q. I will ask

you if you didn't sell John Quillen, on the 17th day of August, one pint of whisky? A. No, sir. Q. I will ask you if you didn't induce John Quillen to leave in order that he might not be a witness in this cause? A. No, sir. Q. Never asked him to leave? A. No, sir.

"And the following questions were asked and answers given: 'Q. Isn't it a fact that you had liquor shipped over to Texas points and had it shipped over here? A. No, sir. Q. How much whisky was it that you had shipped in? A. 24 bottles. Q. Drink all that yourself? A. Yes, sir.'

"In all which particulars the testimony, statements, and declarations so testified and deposed unto by the said R. A. Metcalf were then and there material matter in and to said case of State of Oklahoma v. R. A. Metcalf, charged with the unlawful possession of intoxicating liquors, as aforesaid, instituted, begun, and heard as aforesaid, and were then and there not true, but false, and were then and there by said R. A. Metcalf not believed to be true, but were then and there by said R. A. Metcalf believed to be false, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state.

"Wherefore he prays that a warrant may issue for the arrest of the said R. A. Metcalf that he may be dealt with according to law.

"Frank E. Ransdell.

"Sworn to and subscribed before me this 2d day of August, A. D. 1911.

"[Seal.] C. H. Holmes, Clerk County Court."

Leedy & Anderson, of Arnett, for relator. Smith O. Matson, Asst. Atty. Gen., and Frank E. Ransdell, Co. Atty., for the State.

FURMAN, J. (after stating the facts as above). In the trial of the case, in which it is alleged that relator committed perjury, he was charged with unlawfully having possession of intoxicating liquors found in the "Yellow Front Restaurant" in the town of Gage, Okla., with the intention of violating the provisions of the prohibitory liquor law. The state relies upon the first eight predicates of the complaint, and particularly upon the second and third predicates, which are as follows: "Whether the said R. A. Metcalf ever had control of or had the management of the said restaurant, or had any interest in the said restaurant, or run the same as an employé or otherwise; and whether the said R. A. Metcalf worked around, at, or in said restaurant."

That part of the testimony of the relator, Metcalf, given in the first trial, and which is applicable to these last two-mentioned predicates, is as follows: "Q. I will get you to state whether or not you ever had control or the management of the Yellow Front Restaurant in the town of Gage. A. No, sir; only lived around there. Q. Had any interest there? A. No, sir. Q. Neither as an em-

ployé or otherwise? A. No, sir. Q. State whether or not if any portion of the whisky or beer that was in that building at that time belonged to you. A. Didn't own anything. Q. How came you to be in there at that time? A. Asleep. Q. Had no business until you took charge of the city hotel? A. No, sir. Q. You worked around that Yellow Front Restaurant and did not receive any compensation? A. No, sir. Q. You there all day? A. No, sir. Q. Generally opened up in the morning? A. Never had a key. Q. Yet you never run the place at all? A. No, sir. Q. You would be the clerk in there sometimes until night? A. No, sir. Q. Helped them some? A. No, sir. Q. Never clerked in there? A. No, sir. Q. Jimmy Johnson and Joe Siddens were the only ones working in there? A. Yes, sir. Q. Certain? A. Yes, sir."

It will be noticed that the relator testified positively that he never clerked in the restaurant, and that he was not the owner of the restaurant; that he was not an employé there, and was not connected with the restaurant as an employé or otherwise.

The direct and positive proof which the state has of the fact that relator was clerking in the restaurant, and was running and operating the restaurant, is the positive testimony of the witness Daniel Rees, who testified, in direct terms, that he watched the relator every night for a month, and that he was the person clerking and waiting on the customers on the side of the restaurant where the drinks were sold, and was the only one clerking there. What more positive proof can be, that a man is working in or clerking in a place of business, than that he sells the goods and receives the money for them and is the only one who does sell the goods and receive the money for them? Rees is corroborated by the witness Holmes, who testified to selling relator the fixtures and restaurant supplies that went into the restaurant; by the witness O. P. Lippencott, who testified to selling the relator restaurant supplies at about the time the restaurant was first opened up; by the witness W. B. Barnes, who testified to selling the relator meat for the restaurant and collecting the pay for the same from the relator on about 20 different occasions; by the witness L. E. Barker, who testified to delivering ice to the restaurant and being paid for the same by the relator; by the witness Wm. McDonald, who testified that the relator Metcalf paid the electric light bills; also by the witness C. A. Greene, who testified that the relator paid to him electric light bills for the restaurant; by the testimony of all the last-mentioned witnesses that they saw the relator around the restaurant from time to time, and going in and out of the restaurant as though it were his; also by the evidence of the witness G. M. Rader that, when he went to search the place on the 15th day of September, 1910, and presented the search war-

rant to the relator and told him that he had a search warrant for his place, relator told him to go ahead and search, or something to that effect; also by the statement of the relator to the party searching the restaurant that "people would get drunk and come into our place, and we get the blame for it."

What better proof can be given that a man is clerking in or employed in, or is the owner of, a place, than that he furnishes the place in the first place, waits on customers continuously while the business is being run, pays the bills, such as electric light bills and water bills, and is continually seen around the place, and speaks of the place as being "my place" or "our place"? Under this testimony, relator was clearly connected with and responsible for the intoxicating liquors found in the restaurant with which he was so connected. Therefore his testimony upon the first trial was material to the issue, and, if false, constituted perjury.

[1, 2] If the state produced evidence sufficient to support any one material predicate of perjury set out in the information, relator should not be discharged. *Hereford v. People*, 197 Ill. 222, 64 N. E. 310; *Bradford v. State*, 134 Ala. 141, 32 South. 742; *Adellberger v. State* (Tex. Cr. App.) 39 S. W. 103; *State v. Anderson*, 35 Utah, 496, 101 Pac. 385. It is not required that one witness swear to all the facts necessary to disclose the falsity of defendant's testimony. It is sufficient if the state has proved all the necessary facts by the direct and positive testimony of witnesses, and has supported the same by other corroborative evidence. *People v. Green*, 54 Cal. 592. In this case, however, the witness Daniel Rees gives enough direct and positive testimony which, if corroborated by other circumstances, is sufficient to sustain the finding of the committing magistrate; but that part of the evidence of the other witnesses, to the fact of their seeing the relator clerking there and paying the bills and performing the acts of an owner or an employé, is direct and positive evidence, as contemplated by the rule, because one of the material questions, in the trial of the case in which the relator is accused of committing perjury, was as to whether relator owned or was running or operating the restaurant. There is no more technical court than that of Texas, yet that court holds that "the falsity of defendant's statement can be established by circumstantial evidence; but the facts constituting such circumstantial evidence must be directly and positively sworn to by at least one credible witness, supported by corroborating evidence." See *Plumber v. State*, 35 Tex. Cr. R. 202, 33 S. W. 228; *Beach v. State*, 32 Tex. Cr. R. 240, 22 S. W. 976; *Franklin v. State*, 38 Tex. Cr. R. 346, 43 S. W. 85.

In *Plumber v. State*, supra, the court lays down the correct rule as follows: "The statute (Code Criminal Procedure, art. 746) requires that the falsity of a statement be es-

tablished by the testimony of two credible witnesses, or by one credible witness strongly corroborated. We hold that the falsity of a statement can be established by the circumstantial evidence; that this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. If in all criminal cases the guilt of the accused can be established by circumstantial evidence, why cannot the falsity of a statement in a perjury case be established by the same character of evidence? The difference between other cases and perjury is this: While one witness may be sufficient to establish the guilt of the accused in other cases, the law requires two credible witnesses, or one credible witness strongly corroborated. It is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses." The evidence in this case is sufficiently direct and positive to sustain a conviction. *State v. Marsh*, 73 Vt. 176, 50 Atl. 861.

Perjury may be committed by willfully swearing falsely to material circumstances which tend to prove or disprove the main fact immediately in issue. *Commonwealth v. Grant*, 116 Mass. 17; *People v. Barry*, 63 Cal. 62; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Wakefield*, 73 Mo. 549, and cases cited; *State v. Lavelley*, 9 Mo. 834; *Studdard v. Linville*, 10 N. C. 474; *Smith v. State*, 91 Ark. 200, 120 S. W. 985; *United States v. Shinn* (C. C.) 14 Fed. 447; *State v. Miller*, 26 R. I. 282, 58 Atl. 882, 3 Ann. Cas. 943; *State v. Swafford*, 98 Iowa, 362, 67 N. W. 284; *Rahm v. State*, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *State v. Moran*, 216 Mo. 550, 115 S. W. 1126.

In *State v. Miller*, supra, the Supreme Court of Rhode Island, quoting *Rahm v. State*, supra, lays down the correct rule: "We think it may be laid down as the rule that any testimony, which is relevant in the trial of a given case, is so far material to the issue as to render a witness, who knowingly and willfully falsifies in giving it, guilty of the crime of perjury."

And in *State v. Lavelley*, supra, the court says: "It is not necessary that the evidence given is material to the main issue; it is sufficient if it is material to any proper matter of inquiry."

And in *Studdard v. Linville*, supra, the court, in substance, says that, if the testimony given is of any collateral matter, and which collateral matter is material to the main issue, then the witness who falsifies is guilty of perjury.

In *United States v. Shinn*, supra, the court, in speaking of the materiality of testimony upon which perjury may be predicated, says: "But when the superfluous or collateral matter is calculated and intended to prop and bolster the testimony of the witness on some material point, as by clothing it with circumstances which add to its probability or

strengthen the credibility of the witness, the case is otherwise."

In *State v. Moran*, supra, the court says: "It does not follow, because the matter testified to is not especially concerning the acts of the defendant in the commission of the offense, that such matter might not be made a subject upon which a charge of perjury might be predicated, if such matter is material. It is but common knowledge that it frequently occurs in the trial of causes that inquiries are made of witnesses touching matters which do not directly concern the commission of the acts which constitute the offense, yet such inquiries and answers may be material and highly important to the end that the triers of the fact may properly and intelligently weigh the testimony in the case."

In the case of *Coleman v. State*, 6 Okl. Cr. 252, 118 Pac. 594, this court said: "It is not necessary that the matter sworn to be directly and immediately material in order to constitute the offense of perjury. It is sufficient if it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material from the testimony of a witness thereto. This is sufficient, and makes the testimony material. It has therefore been held that perjury may be assigned upon false statements affecting a collateral issue as to the credibility of a witness; this being material to the main issue. This was directly passed upon by the Supreme Court of Kansas in the case of *State v. Park*, 57 Kan. 432, 46 Pac. 713. The Supreme Court of that state there laid down the true rule as follows: 'To constitute perjury, the false statements must be material to the subject under consideration, or such as would tend to influence the determination of the issues to be decided. The question whether the defendant had been previously prosecuted and punished for committing grand larceny in Missouri, although in a certain sense collateral to the question on trial, can hardly be treated as immaterial. In the trial wherein false statements are alleged to have been made, Park voluntarily became a witness in his own behalf, and he was therefore subject to the same rules on cross-examination as any other witness. He having assumed the position of a witness, it was competent for the state, upon cross-examination, to test his veracity and credibility. It is well settled in this state that a defendant may be asked questions disclosing his past life and conduct; and the state may even go to the extent of inquiring if he has ever been convicted of the same offense as that for which he is upon trial. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *State v. Wells*, 54 Kan. 161, 37 Pac. 1006. Not only was the statement of the witness therefore competent, but it had an important bearing upon the credit to be given to his whole testimony;

and it is generally held to be perjury to swear falsely to anything affecting the credibility of the witness himself or the credibility of another witness in the case. In *Wood v. People*, 59 N. Y. 117, it is held that "it is not necessary that the false statement tends directly to prove the issue in order to sustain an indictment for perjury. If circumstantially material, or if it tends to support and give credit to the witness in respect to the main fact, it is perjury." The Texas Court of Appeals has held that perjury may be predicated on a false answer of a witness that he has never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue. *Williams v. State*, 28 Tex. App. 301, 12 S. W. 1103. See, also, *United States v. Landsberg* (C. C.) 23 Fed. 585; *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; 2 *Bishop's New Crim. Law*, § 1032; *Clark's Crim. Law of Canada*, 389; *Tiffany's Crim. Law*, 850.' The degree of materiality is of no importance. Any false statement made by a witness, which detracts from or adds weight and force to testimony as to matters that are directly material, thereby becomes material itself and may constitute perjury. Section 195, 3 *Greenleaf on Evl.*, is as follows: 'As to the materiality of the matter to which the prisoner testified, it must appear either to have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages, or to induce the judge or jury to give readier credit to the substantial part of the evidence. But the degree of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be but circumstantial. Thus falsehood in the statement of collateral matter, not of substance, such as the day in an action of trespass, or the kind of stuff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness himself, or of some other witness in the case. And therefore every question upon the cross-examination of a witness is said to be material. In the answer to a bill in equity, matters not responsive to the bill may be material. But where the bill prays discovery of a parol agreement, which is void by the statute of frauds, and which is denied in the answer, this distinction has been taken: That, where the statute is pleaded or expressly claimed as a bar, the denial of the fact is immaterial, and therefore no perjury; but that where the statute is not set up, but the agreement is incidentally charged, as, for example, in a bill of relief, the fact is material, and perjury may be assigned upon the denial.'"

Counsel for relator contends that the only material question in the cause tried for illegal possession of intoxicating liquors in

the county court of Ellis county, where the relator gave his testimony for which he is being prosecuted, is the question of whether or not he owned the liquor, and that the question of whether or not the relator was employed in, or worked about, the restaurant, and sold goods and collected for the same, and furnished up the restaurant and paid the bills after the restaurant was being operated, is wholly immaterial.

[3] We find no provision of the Oklahoma statutes which requires the state to prove, in a prosecution for illegal possession of intoxicating liquors, that the defendant is the owner of the liquor. The main question and issue in the trial of the cause, where this relator gave his testimony for which he is being prosecuted, was whether or not he was in possession of the liquor. The facts disclosed by the evidence are that, at the time the restaurant was raided by the sheriff of Ellis county and his deputies, the relator was in the room where the liquor was concealed, and was the only one in the room; that relator had taken out a United States license authorizing him to conduct the business of a retail liquor dealer; that he had just gotten up out of bed, which was in the room; that he was handed a search warrant and was told that they wanted to search his premises, and he replied to go ahead and search. At this time he was standing over close to where the liquor was afterwards discovered to be secreted in the walls of the building; but, after making the search, he made his escape and did not return for two days, and finally returned with the man Ed Hickman, whom the relator tried to show, in the trial for illegal possession of liquor, was the keeper of the restaurant.

In the trial of the case for illegal possession of intoxicating liquors, the relator denied that he owned the restaurant or the liquor in the restaurant; that he had anything to do with the restaurant as an employé or otherwise; or that he clerked in the restaurant. The transcript of the evidence, given by the relator in his trial for the illegal possession of the liquors, will show that nearly all of this evidence was brought out by his attorney in his direct examination. No doubt his attorney thought that this evidence was material as to whether or not the relator was in possession of the liquor; and in this respect we agree with his counsel that nothing can be more material as to the question of whether or not a man is in possession of liquor found in the building than the fact that he was working there. It is true that the relator weakened in his cross-examination upon his statement that he never clerked in the restaurant, or was connected with it, by stating that he once in awhile would get somebody a cigar, and was in the restaurant perhaps once every day; but he maintained stoutly, throughout his testimony to the declarations made in his direct examination mentioned above, that he

did not clerk there and was not employed there, and was not the owner of the restaurant, and was not connected with it as an employé or otherwise, and never had any interest in the restaurant as an employé or otherwise.

The first predicate in the compliant is whether the said R. A. Metcalf, relator in this case, owned, had, or was in possession of any whisky or beer in the place known as the "Yellow Front Restaurant" on the east side of Main street in the town of Gage, Okl., at any time from the 1st day of August, 1910, to the 13th day of March, 1911, and particularly on the 15th day of September, 1910.

Has the state offered sufficient direct and positive testimony of the relator's possession of this liquor? The evidence is positive that relator worked in the restaurant either as owner or employé. If he had no guilty connection with this liquor, why had he gone to the expense of taking out a United States internal revenue license as a retail liquor dealer? The evidence is that he spoke of the restaurant as being "our" restaurant, and that, when he was told that the officers had a search warrant for his restaurant, he said, "Go ahead and search," and that, at this time of the search by the officers, he was in the room where the liquor was stored, standing over close to it, and was the only one there, and that he ran off as soon as the liquor was found, and could not be found by the officers for two days.

It is true that the state has not proven that he had a lease on the building, and has not shown how the liquor came to be so secreted, or where it came from. But what better proof can you have of possession than that a man is actually in charge of a place and is there, and that he has been running and operating a place for a month previous to that time; that he sold goods there every night for a month, when he was being watched, and was the only one who sold liquors, and that he was seen by the witness watching him; that on all of the occasions he would go back behind the partition, where the liquor was secreted, so that he would only have to take two steps from the door, where he would be seen leaving the front room, to where the liquor was found secreted in the walls; that he bought the fixtures and supplies used in furnishing up the restaurant; that he paid the bills there for meat, for electric lights, and for ice, and was the only one who ever paid any bills, with the exception of about one or two bills paid by the other parties working there. There could be no more direct and positive evidence that he was the one in charge of the restaurant than that we have offered in this case; and, if the restaurant was his, he is presumed to be in possession of all the goods in the restaurant, including the liquors. Especially is this true since the relator has paid the tax as a United States

retail liquor dealer. We therefore hold that the third predicate of the complaint is supported by an abundance of legal and competent evidence, and that the first eight predicates of the complaint are also supported by sufficient evidence to justify the committing magistrate in binding the relator to the district court.

[4] In the light of this testimony, the action of the examining court, in committing relator for trial in the district court, is approved and commended. If all of the prosecuting attorneys and trial judges in Oklahoma will follow the example set by the officers of Ellis county in this case, perjury will soon be as dangerous as it is odious, and will become a lost art in Oklahoma—a consummation most devoutly to be wished for. We should have decided this case long since, but we are simply overwhelmed with cases demanding immediate attention; and as this is the first time the question has been submitted to us as to the condition under which a prosecution for perjury can be sustained upon circumstantial evidence only, and as counsel for relator has filed an exceedingly able and ingenuous brief, to avoid the possibility of making a mistake and rendering a decision which would have to be abandoned, we thought it best to take ample time and render such an opinion as will be a precedent for the future. When the case was first submitted on oral argument we were impressed with the idea that possibly a mistake had been made; but upon a careful examination and re-examination of the record, and after considering and weighing all of the authorities and getting at what we regard as the very truth of the matter, we find that the action of the officers of Ellis county was in all respects right and proper. A critical examination of the authorities cited in this opinion will show that they each and all sustain the conclusion at which we have arrived. Having deliberately weighed the questions involved in this case, and having arrived at a satisfactory conclusion, we will make short work of such cases as this in the future.

The writ of habeas corpus is discharged, and the relator is remanded to the custody of the sheriff of Ellis county, to be dealt with as the law directs.

ARMSTRONG, P. J., and DOYLE, J., concur.

#### GREEN v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 365\*)—EVIDENCE OF OTHER CRIMES—ADMISSIBILITY.

As a general proposition, testimony tending to disclose that a person on trial has committed

any other crime than the one charged in the information, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the one charged, is inadmissible. But this rule is not applicable when the acts disclosed by such testimony are a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 865.\*]

#### 2. CRIMINAL LAW (§ 1182\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

When the testimony in the record clearly establishes the commission by the accused of the offense for which he was tried, and that every material error disclosed by the proceedings from their incipency were in his favor, an appeal to this court for reversal of such conviction is useless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Error from District Court, Tillman County; J. T. Johnson, Judge.

Dearl Green was convicted of assault, and brings error. Affirmed.

F. H. Hurst, S. D. Tant, and H. P. McGuire, all of Frederick, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and H. A. King, Sp. Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Dearl Green, was tried in the district court of Tillman county on a charge of having feloniously assaulted R. L. McCarty with intent to do him great bodily harm and injury. The trial resulted in his conviction and the imposition of a sentence of one year in the state penitentiary.

It appears from the testimony introduced at the trial that there had been some bad feeling between the prosecuting witness McCarty and the accused, Green, dating back for a period of two years. The accused had been out of the state practically all of this time, but came back, and on the 18th day of May, 1910, was attending a picnic in his neighborhood in Tillman county, and the prosecuting witness was also at the same picnic. In the afternoon the accused discovered the prosecuting witness walking in the direction of where he was sitting in his buggy preparing to leave the grounds. In the buggy was his brother, John Green, and Mrs. Green, his wife. When the prosecuting witness had approached within 40 or 50 feet of where accused was sitting, John Green spoke to the accused, directing that he shoot the prosecuting witness, and the accused immediately opened fire. At the first shot the prosecuting witness fell and attempted to crawl away from the scene, and while he was endeavoring to get away, with his back toward the accused, other shots were fired. A neighbor and kinsman of the prosecuting witness named Wildman walked up about this time, and John Green advised his brother to shoot him also, and he immediately, according to all the testimony except that of the accused, fired a shot at Wildman, who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was backing away from the scene with his hands up, telling the accused not to shoot him. As soon as the shots were fired, the accused ran away from the scene and went back to Texas. He was later arrested near Vernon and brought back to Tillman county for trial.

There are a number of assignments of error brought, all of which are based on technical grounds. The first assignment is based upon the admission of testimony relative to the shot fired at Wildman.

[1] As a general proposition, the state cannot prove against the accused on trial any crime other than the one charged in the information, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the one charged. There is no contention in this case that the proof as to the shot fired at Wildman was intended as a foundation for a separate punishment. The complaint is based upon the grounds that it was highly prejudicial and calculated to inflame the minds of the jury and influence their verdict in favor of conviction. But this shooting was almost simultaneous with the shooting at the prosecuting witness, and was admissible as a part of the *res gestæ*. All the proof shows that the shots were fired practically without any cessation. The only criticism we find justifiable in this connection is that the accused was not prosecuted for shooting at McCarty and Wildman, and his brother, John Green, jointly charged with him. If the assault upon Wildman was an independent act and not connected with the assault upon McCarty, he would have been guilty of two offenses and subject to separate punishments. We are unable to conclude that he was injured by reason of the fact that this proof was permitted to go to the jury, under the facts disclosed by the record. If, as contended by his counsel, accused was charged with shooting at McCarty, and the proof showed that he shot at both McCarty and Wildman, in all probability he escaped a double conviction; and the error was in his favor rather than to his prejudice. The proof nowhere indicates that there had been any assault, by word or action, by the prosecuting witness upon the accused; that the shooting was a reckless, uncalled-for attempt upon his part to kill the prosecuting witness without justification or mitigation, and he was exceedingly fortunate in two respects: First, in that he was prosecuted for felonious assault with a dangerous weapon, instead of assault with intent to kill; and, second, that his punishment was fixed at one year instead of five.

The only other assignment of error is based upon the instructions of the court, which instructions are not above criticism, but which, taken as a whole, fairly present the law, and are as favorable to the accused as he was entitled to receive.

[2] This is one of many cases that occur

in this state, wherein a foolish boy, armed with a pistol, possessed of cowardice and fear, without warrant of law, attempted to kill his neighbor. Such persons are entitled to a fair trial, and when they have had one a conviction will not be reversed by this court, in the absence of substantial prejudicial error—error from which a reasonable man could legitimately conclude that the jury probably reached an erroneous conclusion by reason of such error. In this case the county attorney and court were exceedingly lenient. The jury did its duty in finding the verdict. The court fixed the punishment at one year. If there is any just ground for complaint, it is upon the part of the people, and not upon the part of the accused. Crimes of this kind are not to be tolerated in a civilized country, and a reckless "pistol toter," and persons seeking an opportunity to commit offenses of this kind, had just as well understand that Oklahoma is not a healthy place in which to engage in such escapades.

The judgment is in all things affirmed.

DOYLE and FURMAN, JJ., concur.

#### GOURLEY v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION (§§ 71, 133, 161\*) — INFORMATION — AMENDMENT — OBJECTIONS.

(a) An objection to the sufficiency of an information should be made by proper motion or demurrer before plea, but, when it is clear that the facts stated in the complaint do not constitute a public offense, an objection to the introduction of testimony on that ground is sufficient to raise the issue.

(b) An information should be sufficiently definite to disclose jurisdictional facts, and, when the court's attention is called to the fact that it is not, the county attorney should be directed to make proper amendment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194, 454-468, 516-523; Dec. Dig. §§ 71, 133, 161.\*]

#### 2. HIGHWAYS (§ 151\*)—REPAIR—ROAD WORK—OFFENSES—RIGHT TO PROSECUTE.

(a) Section 7854, Compiled Laws 1909, do not preclude the county attorney from prosecuting violations of the road law in any township in the county.

(b) The purpose of this provision is to enable the road overseer to institute such prosecution in the township in which his road district is situated without the consent of the county attorney, and in no way abridges the right of the county attorney to use the road overseer as a prosecuting witness for violations of the road law in any other township in his county if he so desires.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 407-416; Dec. Dig. § 151.\*]

#### 3. HIGHWAYS (§ 151\*)—ROAD WORK—PERSONS SUBJECT.

Under the provision of section 17, c. 32, Session Laws 1909, all persons subject to road

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

duty in this state are required to either work four days or pay five dollars, or furnish a substitute acceptable to the road overseer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 407-416; Dec. Dig. § 151.\*]

Appeal from Oklahoma County Court; John W. Hayson, Judge.

Austin R. Gourley was convicted of violating the penal provision of the Road Law, and he appeals. Reversed and remanded.

S. A. Horton, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., for the State.

ARMSTRONG, P. J. This is an appeal by Austin R. Gourley from a judgment of the county court of Oklahoma county imposing upon him a fine of \$15 for failing and refusing to work the public roads of Greeley township, Oklahoma county, as required by law.

[1] The complaint upon which the prosecution is based is as follows: "In the name and by the authority of the state of Oklahoma, T. I. Canady, of lawful age, being first duly sworn, on his oath deposes, and says: That in the county of Oklahoma, and state of Oklahoma, and on the ——— day of November, 1910, the above-named defendant, Austin R. Gourley, did then and there unlawfully and wrongfully neglect and refuse to perform road duty in Greeley township, Oklahoma county, Okl., on the 14th, 15th, 16th, 17th days of November, 1910, after having been notified as provided by law, and affiant further states that said Austin R. Gourley is a male person over 21 years of age and less than 50 years of age, and has resided 30 days in this state, who is capable of performing labor on public highways, and said defendant is not a county charge, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma. T. I. Canady. Subscribed and sworn to before me this 28th day of January, 1911. J. J. Beal, Justice of the Peace. I have examined the facts in this case and recommend that a warrant do issue. Sam Hooker, County Attorney Oklahoma County, by William H. Zwick, Deputy County Attorney." The objection to the introduction of testimony on the ground that the facts stated in the complaint did not constitute a public offense should have been sustained, and the county attorney permitted to amend the complaint. The complaint nowhere alleges that the accused was a resident of Greeley township, nor does it allege he was a resident of the road district over which T. I. Canady had supervision and subject to duty in said district. It merely alleges that he refused to work the road in Greeley township, Oklahoma county, and that he had been a resident of Oklahoma 30 days, but where he resided, and where he was subject to road duty, no one from the complaint could determine. The proof on the part of the state nowhere

discloses these facts, and, even if the proof did, the complaint should clearly indicate when, where, and in what manner the offense charged was committed.

[2] Counsel for accused urge in their brief that the justice of the peace of Oklahoma township had no jurisdiction to hear and determine this cause by reason of the fact that section 7854, Compiled Laws 1909, makes it the duty of the road overseer to file complaint before some justice of the peace of his township, and contend that, by reason of such provision, this prosecution could only have been had in the township wherein the offense was committed. We cannot agree with this contention. The purpose of that provision is evidently to enable the road overseer to institute the prosecution in his township at the expense of the state without the approval of the county attorney. This provision does not preclude a prosecution by the county attorney in any other township of the county. It would, however, preclude a road overseer from instituting a prosecution in any other township in which his road district is located at the expense of the state without the approval of the county attorney.

[3] Again, it is contended that the accused was not subject under the law to the payment of \$5 in lieu of the four days' work provided for in section 17, c. 32, Session Laws 1909, but would only be required to pay \$4 under the provision of section 7859, Compiled Laws 1909. This contention is without merit. It is clear to our mind that a person who is subject to road duty is required to either work four days or pay \$5, or furnish a satisfactory substitute.

Again, counsel urge that the provision of the law under which this conviction was had is unconstitutional by reason of the fact that the title to the bill as enacted by the Legislature did not specifically state, among other things, that it provided a penalty for violation of this provision. This contention is also without merit.

The judgment is reversed and the cause remanded to the trial court, with direction to grant permission to amend the complaint, and award a new trial in harmony with the views herein expressed.

DOYLE and FURMAN, JJ., concur.

#### RYAN v. STATE

(Criminal Court of Appeals of Oklahoma.  
Feb. 8, 1913.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1130\*)—APPEAL—BRIEFS—CITATION OF AUTHORITIES.

Where decisions of the Supreme Court of Oklahoma or of this court are relied upon, the brief should cite the page and volume of the state reports upon which such decisions can be found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970, 3205; Dec. Dig. § 1130.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. CRIMINAL LAW (§ 1088\*)—RECORD—ARRAIGNMENT.

The failure of the record to show arraignment and plea does not constitute a fatal defect, where the record shows that the defendant, without objection, announced ready, and that the case was fairly tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746-2751, 2757, 2766, 2782-2802, 2899; Dec. Dig. § 1088.\*]

## 3. HOMICIDE (§ 203\*)—EVIDENCE—"DYING DECLARATIONS"—PRELIMINARY PROOF.

(a) Where the proof shows that the deceased was shot in the stomach between 5 and 6 o'clock p. m. and died that night, and that immediately after being shot he fell down and was unable to get up again, and that he stated to persons who saw him soon after he was shot that he was a dead man and could not live, that he was going to die, such proof sufficiently shows that the deceased apprehended the certainty and imminence of his impending death, and is in itself a sufficient predicate for the admission of his statements of the circumstances of the homicide as "dying declarations."

(b) Where a person mortally wounded and without hope of recovery, under a solemn conviction of impending death, makes several statements at different times of material facts concerning the circumstances of the homicide, all of said statements are admissible in evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

## 4. HOMICIDE (§ 309\*)—CRIMINAL LAW (§ 1175\*)—MANSLAUGHTER—DUTY TO CHARGE.

(a) It is always the duty of the trial court to instruct on the law of manslaughter if there is any reasonable evidence that the alleged crime might have been done under circumstances that would reduce the crime from murder to manslaughter.

(b) This court will not reverse a conviction for manslaughter, where this issue has been submitted to the jury by the trial court, upon the ground that, in its judgment, the defendant should have been convicted of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309; Criminal Law, Cent. Dig. §§ 3179-3182; Dec. Dig. § 1175.\*]

## 5. CRIMINAL LAW (§§ 814, 829\*)—REQUESTED CHARGE—APPLICABILITY TO EVIDENCE.

It is not error for the trial court to refuse to submit a special instruction, although it may be a correct statement of the law, where such instruction is not applicable to the evidence, or where the law governing the question presented has already been correctly stated to the jury in the general instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987, 2011; Dec. Dig. §§ 814, 829.\*]

## 6. CRIMINAL LAW (§ 1056\*)—APPEAL—WRIT OF ERROR—REVIEW—INSTRUCTIONS—EXCEPTIONS.

In the absence of exceptions to instructions given, they will only be examined for fundamental errors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

## 7. CRIMINAL LAW (§ 954\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—APPLICATION—REQUISITES.

A motion for a new trial upon the ground of newly discovered evidence is fatally defective, where it does not state fully the circumstances which make it appear that such evidence, as a matter of fact, was newly discovered and could

not have been discovered earlier by the exercise of proper diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

(Additional Syllabus by Editorial Staff.)

## 8. CRIMINAL LAW (§ 1163\*)—APPEAL—"INJURY."

The term "injury," used to describe an error for which a reversal may be had, means an error which affects the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3615-3617.]

Appeal from District Court, Coal County; A. T. West, Judge.

Ed Ryan was convicted of manslaughter in the first degree, and his punishment was assessed at confinement in the penitentiary for eight years, and he appeals. Affirmed.

Appellant, Ed Ryan, and the deceased, George Smith, were neighbors engaged in the occupation of mining, and lived in the vicinity of Coalgate, in Coal county, Okl. This homicide was alleged to have been committed on or about the 2d day of January, 1910; and it appears from the record that prior to the commission thereof the appellant and the deceased had had some trouble, and there existed, perhaps on the part of both of them, certain ill will and bad feeling toward the other. This had manifested itself on various occasions, as testified to by witnesses; some witnesses for the defendant testifying as to alleged threats which amounted to nothing more than the application of epithets by the deceased towards the defendant, by which he called him vile names, etc. On the day of the killing, which was Sunday, it appears that both the deceased and the defendant had been to the town of Coalgate, and had been drinking some on that date. The defendant went home an hour or so earlier than the deceased, and says that during that time he was engaged in carrying water to his house from the well of a neighbor by the name of Committie. The Committie well was located northwest of the defendant's house about 300 yards, and in going to this well it was necessary for the defendant to cross the highway that led from the town of Coalgate to the deceased's house; the evidence showing that the deceased lived about a quarter of a mile further north on this road than the defendant. The killing occurred in this public highway, and there were no witnesses to the transaction except the defendant and the deceased.

The first people upon the scene testified that the deceased was lying on the ground from five to ten steps north and east of the gap in the fence surrounding the Committie land, and on the path towards the well, and that the defendant was standing in the public highway some eight or ten steps south of the deceased. The witnesses for the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant testified that there was a knife in the road a foot and a half or two feet from the right hand of the deceased, and that this knife was open. Some of the witnesses for the state testified that when they got up to where the deceased was that the deceased told them that Mrs. Ryan, the wife of the defendant, had taken his knife out of his pocket. The testimony in this case is conflicting. The deceased said that the defendant waylaid him and shot him down while he was unarmed and was making no attempt to attack him. The defendant claims that he shot him in his necessary self-defense from an attack then being made upon him by the deceased with an open knife.

George Trice, of Coalgate, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

**FURMAN, J.** (after stating the facts as above). [1] First. Counsel for appellant has filed a lengthy brief in this cause, in which he has cited a number of the decisions of this court, but he has not cited the volume and page upon which these decisions will be found in the published reports of this court. We have no objection to counsel citing the *Pacific Reporter*, but where any decisions of the Supreme Court of Oklahoma or of this court are relied upon the brief should cite the page and volume of the state reports upon which the case can be found. This will greatly expedite our work. We trust that the lawyers of Oklahoma will comply with this request in the future.

[2] Second. Counsel contend that the judgment should be reversed in this cause because a plea was not entered to the indictment until after the jury had been impaneled and sworn to try the case. The record discloses that on the 5th day of April, 1910, defendant was duly arraigned and given 24 hours in which to plead, and that thereafter, on the 11th day of April, 1910, the case was regularly called for trial, and that the defendant appeared in person and by his attorneys and announced ready for trial, and that thereafter, on the 12th day of April, 1910, after the jury had been impaneled and sworn, the defendant refused to plead when the county attorney made his opening statement to the jury, and that the court thereupon ordered that a plea of not guilty be entered for him.

The general tendency of appellate courts now is to disregard mere technical objections which do not in any manner prejudice the substantial rights of the defendant. It appears that the defendant announced ready for trial without any objection being entered to his not having pleaded to this indictment; the record clearly showing that he was arraigned thereon. Some of the courts hold that where the record shows either an arraignment or a plea, but is silent as to the other, it may be presumed. *Steagald v.*

*State*, 22 Tex. App. 464, 8 S. W. 771; *Wilson v. State*, 17 Tex. App. 525. Other cases also hold that the omission of the record to show arraignment and plea is not fatal, where the record shows that the issue was joined and a fair trial had without objection by the defendant. *Hayden v. State*, 55 Ark. 342, 18 S. W. 239; *State v. Bowman*, 78 Iowa, 519, 43 N. W. 302; *Commonwealth v. McKenna*, 125 Mass. 397; *Territory v. Shipley*, 4 Mont. 468, 2 Pac. 813; *Allyn v. State*, 21 Neb. 593, 33 N. W. 212; *State v. Brown*, 83 S. C. 151, 11 S. E. 641; *People v. Weeks*, 165 Mich. 362, 130 N. W. 699; *State v. Bunker*, 7 S. D. 639, 65 N. W. 34; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170.

[3] In *State v. Reddington*, the Supreme Court of South Dakota, from which state our statute was taken, had the following to say:

"Considering the matters complained of in the order in which they occurred chronologically, we notice that the record nowhere states or affirmatively shows that the defendant, now plaintiff in error, was arraigned, or that he pleaded to the indictment. The statute requires that the defendant shall be arraigned (*Compiled Laws*, § 7263); that he shall plead; and that his plea shall be entered on the minutes of the court, or, if he refuse, that a plea of not guilty shall be so entered. *Id.* §§ 7301, 7303, 7311. If the defendant was not in fact arraigned and did not plead, it was a grave oversight on the part of the court. If he was arraigned and did plead, it was careless in the clerk not to have entered the fact and the plea. But the practical question now is: What is the legal effect, either of such omission in fact, or of such defect in the record? There are many reported cases of high authority squarely holding that omission to plead, or failure of the record to affirmatively show that the defendant was arraigned and did plead, are, upon review, fatal to a judgment of conviction; and such seems to be the established rule of the common law. Our own judgment, fortified by many thoroughly considered and well-reasoned cases from courts commanding high respect, leads us to the conclusion that, under the law as it is in this jurisdiction, this ought not to be held an imperious and inelastic rule. We should say that it was error to try a defendant without arraignment and plea, and that a record is defective which does not affirmatively show such procedure was had; but error does not always justify reversal. Injury is presumed from error, but the presumption is undermined and destroyed by the positive showing by the record itself that injury did not and could not result from such error. By 'injury' is meant 'effect upon the result.' This is the well-defined doctrine of our statute, which allows the defendant to except 'to the decision of the court upon a matter of law by which his substantial rights are prejudiced, and not otherwise' (*Comp. Laws*, § 7439), and which requires this court, on writ of error,

'to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.' Id. § 7520. In this case the record does show that the defendant was present in court personally and by his counsel, and that he was ready for trial, and that the trial proceeded precisely as though the minutes of the court showed a plea of 'not guilty.' In *State v. Greene*, 66 Iowa, 11, 23 N. W. 154, the defendant did not plead, the taking and entering of his plea having been overlooked by the court, and yet the appellate court refused to reverse a judgment of conviction. It said: 'The case was treated, however, as though a plea had been entered. The allegations of the indictment were all regarded as having been denied by the defendant. The state was required to establish the charge in the indictment by the same character of evidence, and with the same certainty, which would have been required if the formal plea of not guilty had been entered. The defendant was permitted to introduce evidence to disprove the charge, and his counsel was permitted to argue the case to the jury on its merits, and the jury were required to determine it under the same rules which would have governed in its determination if the plea had been formally entered.' And this ruling was followed in *State v. Hayes*, 67 Iowa, 27, 24 N. W. 575, and again in *State v. Bowman*, 78 Iowa, 519, 43 N. W. 302. In *People v. Tower*, 17 N. Y. Supp. 395,<sup>1</sup> the record did not show arraignment, or that defendant pleaded, or that any plea was entered for him. The court held that 'there was nothing in these omissions which tended to prejudice the rights of the defendant, and consequently they should be disregarded.'

\* \* \*

"We have drawn upon these authorities quite fully, and it is probable that further research would discover others on the same line to justify our conclusions that we ought not to follow the rigid rule of the common law under the plain instruction of our statute that judgment of conviction must not be reversed on account of error which does not prejudice the substantial rights of the defendant. Neither civil nor criminal cases are tried for the primary purpose of vindicating or exemplifying formulated rules of law or practice. The object of every trial is to get at the very right of the matter in controversy. Rules are intermediate and subsidiary to that end, and nonobservance of the incidental rule, not made mandatory by statute, which obviously did not in any manner interfere with the accomplishment of the very objective end of the trial, and so could work no injury to the defendant, is no ground for setting aside the result of such a trial. In this case the record shows that the case was regularly reached for trial;

that defendant was present in person and by counsel; that he was ready for trial; that the trial proceeded and continued to verdict, without objection, in every respect as though a plea of 'not guilty' had been made and properly entered; and that the jury was instructed that the defendant had plead 'not guilty,' and the nature and effect of such plea fully explained by the court to the jury. Under these circumstances we hold, after much deliberation, that the failure of the record to affirmatively show arraignment and plea does not entitle defendant to a new trial."

The views expressed above meet our entire approval, and are in strict harmony with the statutes of this state and the policy of this court.

Granting all that is contended for by counsel for appellant, the most that could be claimed in his behalf was that a mere irregularity had occurred at the trial of the cause. Counsel did not attempt to show how this irregularity did or could have influenced the jury in finding appellant guilty. It is not claimed that any additional burden was placed upon appellant, or that he was deprived of any substantial right, so far as establishing his innocence was concerned. The objection made is purely an abstract, technical proposition. A technicality has well been defined as a microbe, which, having gotten into the law, gives justice the blind staggers. This court from the first announced that it would not reverse a conviction upon any technicality which did not involve a substantial right. See *Campbell George v. United States*, 1 Okl. Cr. 807, 97 Pac. 1052, 100 Pac. 46; *Byers v. Territory*, 1 Okl. Cr. 677, 100 Pac. 281, 103 Pac. 532. We have invariably held to this doctrine since. We have also repeatedly held adversely to the contention now presented by counsel for appellant. See *Wood v. State*, 4 Okl. Cr. 436, 112 Pac. 11; *Johnson v. State*, 5 Okl. Cr. 1, 112 Pac. 760; *Spencer v. State*, 5 Okl. Cr. 7, 113 Pac. 224; *Hast v. Territory*, 5 Okl. Cr. 162, 114 Pac. 261; *Patterson v. U. S.*, 7 Okl. Cr. 272, 118 Pac. 150.

[3] Thrd. Counsel next contend that the court erred in admitting the dying declaration of the deceased, upon the ground that a proper predicate was not laid for the introduction of such testimony.

J. F. Murphy was placed upon the stand as a witness for the state. He testified that he was acquainted with the deceased, George Smith, during his lifetime and visited him just prior to his death. The record then proceeds as follows: "Q. State whether or not he made any statement to you there with reference to whether or not he realized he was going to die. A. Yes; he did. Q. What did he say? A. Do you want me to tell what happened? Q. What he said with reference to his dying, that he was going to die. A. He said he was about dead; then that he

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 624.

was going to die. Q. State whether or not he made a statement to you about what time was it, do you say? A. It was—I don't know; 8 or 9 o'clock, somewhere along there. Q. State whether or not he made a statement to you there as to the manner in which this shooting, this difficulty, occurred—the killing? A. Yes. Q. What was the statement? (Defendant objects to the introduction of the statement, for the reason that no proper predicate has been laid for its introduction.) The Court: Is that all that was said? A. No, sir; that wasn't all that was said. Q. About dying? A. That is about all he said about dying—all I remember that he said about dying. (Objection overruled, to which defendant excepts.) Q. His statement to you then? Mr. Trice: Did you have any more conversations with him after you got this declaration from him? A. Before I— Q. After he made this statement to you you are fixing to tell about? A. There might have been a few more words. Q. Was the doctor there? A. Yes. Q. Had he already probed for this bullet? A. Yes. Q. Had he got it out? A. Yes. Q. Did Mr. Smith give vent to any expression that he had a hope of recovery? A. I don't know that he did. Q. Did you hear him say anything that would indicate his hope of getting well? A. No, sir. Q. Did you hear the doctor hold out any hopes to him of recovery? A. No, sir. Q. Did you hear anything said about his getting well? A. I don't remember. Q. Was he under the influence of stimulants or opiates? A. I don't know. Q. Judging from his appearance, if you could tell anything from that? A. I couldn't tell it if he was. Q. He wasn't at himself, but you would not know whether it was from the wound? A. He seemed to be kind of stupid. Q. You don't know what produced that? A. No, sir. Q. What about the condition of his mind, if you had occasion to observe that? A. His mind seemed to be good at the time he was talking. Q. Seemed to be at himself? A. Yes. Mr. Wood: All right, Mr. Murphy. A. You want me to tell just what occurred, what he said, I asked him? Court: Tell what he said with reference to this tragedy, and, of course, there might be some things that he said that wouldn't be admissible. You know about what would be permissible to testify to. A. The doctor told me that if I wanted to get a statement from him I had better do it, and I asked Mr. Smith if he wanted to make a statement, and he said he did; and the way that he started—the way that he started off and the way that he told it to me he asked me, 'Were you ever way-laid?' I said: 'No, sir; I never was.' 'Well,' he says, 'I was;' and he says: 'I was going down the road home, and Ed Ryan walked out into the road and says to me, "Say, you are the man that stole my horses and mules, or planned it to be done,"' and said that Mr. Ryan snapped at him, and he

says, 'No, I haven't had anything to do with stealing your mules at all,' and said he told him—said, 'I am not armed, and you oughtn't to want to take the advantage of me in this way;' and Mr. Ryan said, 'You liar, you did,' and shot him, and that is about his statements to me."

It was previously proven that the deceased was shot between 5 and 6 o'clock in the evening, and immediately fell to the ground and had to be carried home; that he was visited by a doctor about 8 o'clock that night, who found that the deceased was shot in the stomach, the ball entering a little to the right and just below the breast bone, taking a downward course and lodging near his right kidney, from which place it was extracted by the doctor. It was also proven that Smith died that night.

George King testified for the state that he saw the deceased lying by the side of the road, where he was shot, and then proceeded to testify as follows: "Q. What statement, if any, did you hear him make there? A. He told me— Q. With reference to whether or not he would live or die, or anything about his death, did you hear him say anything about that? A. Yes. Q. Tell what he said. A. He said Ed Ryan had killed him. Q. Had killed him? A. Had killed him. Q. Did he say anything there and then as to how long he expected to live, or did he make any statement with reference to that matter? A. Yes. Q. What did he say? A. He said that he was— When I first got there, I wanted to take him in; he told me he was cold, and I wanted to take him. Q. The house? A. Yes; and he begged me not to; said his wife was sick, and he didn't care about getting in where she could see him and take on over him, and for me to get some more quilts and let him lie on that. Q. What more did he say, if anything? A. Well, I don't know as he said anything more, only that he told me—I tried to reason with him that he wasn't killed, I knowed, because he seemed to be strong and talked well; and I told him maybe that he wasn't killed. I says, 'Maybe it ain't so bad.' He told me he was positive he knowed he was killed. He didn't want to go home. He told me that two or three different times, I guess. I insisted on taking him home. Q. Said he was killed? A. Yes; knowed it, and he wouldn't only live a very short time. Q. What statement, if any, did he make there in your hearing with reference to the manner in which this killing occurred? (Defendant objects. No proper predicate has been laid to introduce the statement. Objection overruled, to which defendant excepts). A. He told me he was way-laid and killed. Q. Did he say who did it? A. Yes. Q. Who? A. Ed Ryan. Q. Have you told all that he said with reference to the matter? A. No, sir. Q. Tell it all; just tell what he said as you remember it. A. He stated how he was shot. He said that he was going along there and was stopped,

and that Mr. Ryan stopped him; and when he stopped him—I don't recollect just exactly the words he said when he stopped him, but there was a gun fired, and he says, 'Oh, oh, George, I didn't aim that,' and George begged; he says, 'For God's sake, Ed, you would not murder me here,' and then he said he just placed the gun up against him and fired the shot."

R. L. Morgan testified for the state as follows: "Q. Did you see him the evening when he was shot? A. Yes. Q. Where was he when you saw him? A. He was at home. Q. Who was with you there? A. I and Mr. Murphy went over there together. Q. You are deputy sheriff? A. Yes. Q. Did you hear the deceased, George Smith? \* \* \* Who else was there at the time you were there? Do you remember? A. I don't remember the names. I knew the parties, most of them. I believe Fussell. Q. John Fussell, witness in this case? A. I think so. A. Any other? \* \* \* Any doctor there? A. Dr. Filmore was in there. Another doctor. I didn't know his name. Q. Stranger to you. Hear the deceased make any statement? A. Yes. Q. What did he say? (Defendant objects, as no predicate has been laid.) Q. In what condition did you find him? A. He was just lying there on the bed, shot. Q. Did he make any statement as to that shooting? A. Yes. Q. What did he say? A. Said he was going to die and couldn't live long, I believe is the language he used. Q. Couldn't live long. What more did he say, if anything? A. I think Mr. Murphy asked him if he wanted to make a statement. He told him he did. He asked Mr. Murphy if he ever was waylaid and shot, and Mr. Murphy told him 'No.' 'Well,' he says, 'I was,' and went ahead then and said that Ed Ryan shot him. Q. Do you remember what more he said, if anything, with reference to it? A. He said he told him not to shoot him; that he wasn't armed. Said he threw the gun down on him, and it snapped. Said the next time the gun fired. That is the way I understood it, I think."

W. M. Hall testified for the state as follows: "Q. Tell the jury in the words of Mr. Smith just what he said about this difficulty. A. He said that Mr. Ryan halted him and said— Q. Tell it like Mr. Smith said it. A. I am telling it as near as I know. Q. Was it in his words? A. He said that he was halted. Q. Who said he was halted? A. Said he was halted, and he said that Mr. Ryan shot, and he said, 'Oh, oh, I didn't go to do that,' or something similar to that. I don't know that is exactly it or not. And the next time it snapped, and he said, 'Ed, for God's sake, or God Almighty's sake, I haven't got anything to defend myself with;' something similar to that."

The admissibility of dying declarations has repeatedly been passed upon by this court. In the case of *Morris v. State*, 6 Okl. Cr. 41, 115 Pac. 1035, Judge Doyle, speaking

for the court, said: "It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the prosecution, that they were made under a sense of impending death. This may be made to appear from what the injured person said, or where, from the nature and extent of his injuries, it is evident that he must have known that he could not survive. It is sufficient if it satisfactorily appears that they were made under the sense of impending death, whether it be directly proven by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants, stated to him, or from other circumstances of the case, such as the length of time elapsing between the making of the declaration and his death, and the fact that the declarant was so weak that he could not sign his name and so affix his mark, all of which are resorted to in order to ascertain the state of declarant's mind."

In the case of *Offitt v. State*, 5 Okl. Cr. 49, 113 Pac. 554, Judge Armstrong said: "A declaration made by deceased, clearly without premeditation or design, when the record shows he is mortally wounded, and he has made statements showing that he realizes his condition, are properly admitted as dying declarations."

In *Blair v. State*, 4 Okl. Cr. 364, 111 Pac. 1003, Judge Richardson said: "The deceased, shortly after the shooting, was found by two witnesses lying on the ground, covered with wounds made by 47 large-size shot, unable to move, and in a dying condition. They asked him what was the matter, to which he replied that he was dying. They then inquired, 'Did you see who shot you?' And he answered, 'Joe Blair; from ambush; two shots.' This was about 5 o'clock in the afternoon. The witnesses then procured a conveyance and removed the deceased to his home. On the way they met his sister, and the deceased said to her: 'Come kiss me, May; I'm dying.' And the deceased died that night a few minutes before 11 o'clock. These facts were given in evidence, and thereupon the court admitted as a dying declaration the deceased's answer to the question, 'Did you see who shot you?' This ruling of the court is assigned as error on two grounds: First, that it had not been sufficiently shown that the deceased was under a sense of impending death at the time he made the declaration; and, second, that the statement that Joe Blair shot him *from ambush* was a mere opinion or conclusion. As to the first ground, we think the evidence abundantly shows that the deceased was under the solemn conviction that death was impending. As to the second, we regard the declaration as a statement of fact and not a mere opinion. The witness said, in effect, that he saw who shot him; that it was Joe Blair; that the latter was in ambush and fired two shots; and every statement contained in the declara-

tion, on its face, was one of fact and not of mere opinion. Whether, if the declaration was the expression of an opinion based on personal knowledge or observation, and not a mere guess, it would have been competent, it is not necessary to decide. But see *Wigmore on Evidence*, §§ 1447 and 1918."

We think that under the rules laid down in these cases the testimony objected to was all admissible.

[4] Fourth. Appellant contends that the court erred in submitting to the jury an instruction upon the subject of manslaughter, upon the ground that appellant was either guilty of murder or nothing. There is evidence in this record, however, from which provocation can easily be inferred, and also evidence from which may be inferred that the killing might have taken place when the defendant was overcome by a sudden heat of passion. The question raised is not new to this court. In fact, counsel representing this appellant has raised the same question in at least one other case presented to this court. See *Boutcher v. State*, 4 Okl. Cr. 576, 111 Pac. 1006. This court has repeatedly held that where there is the slightest evidence that would justify the giving of a manslaughter instruction, or would support such a verdict, the court should instruct the jury on the law relative to manslaughter. We do not think that the defendant should be heard to complain because the court took a very charitable view of the killing. This instruction of manslaughter was a very merciful act toward this appellant; and we cannot see that this case should be reversed and sent back for a new trial for this reason, because we are satisfied that any honest jury, sworn to administer the law, could arrive at no conclusion other than the guilt of this defendant.

In the case of *John Hopkins v. State*, 4 Okl. Cr. 194, 108 Pac. 420, this court said: "It is always the duty of the trial court to instruct on the law of manslaughter if there is any evidence that the alleged crime might have been done under circumstances that would reduce the crime from murder to manslaughter."

In other words, where there may be the slightest doubt in the mind of the trial court whether the crime was murder, then that doubt should be resolved in favor of the accused and a manslaughter instruction given.

We concur with appellant in believing that the testimony in this case would have supported a verdict for murder, but we cannot reverse a conviction because the jury has found a defendant guilty of a lesser degree of an offense than that of which, in our judgment, he should have been convicted. See *Burns v. State*, 129 Pac. 657, decided at the present term.

[5] Fifth. Appellant complains at the refusal of the trial court to submit special instructions requested. It is not error for the

trial court to refuse to submit a special instruction, although it may be a correct statement of the law, where such instruction is not applicable to the evidence, or where the law governing the question presented is correctly stated in the general instructions. We find that the general instructions contain all that was requested in the special instructions that was applicable to the evidence.

[6] Sixth. Appellant at great length discusses alleged errors in the trial court's instructions to the jury. We fail to find, however, that exceptions as required by law were reserved to the instructions given. See *Boutcher v. State*, 4 Okl. Cr. 576, 111 Pac. 1006. In the absence of exceptions required by law, we can only examine the instructions given for fundamental error. We think the instructions are substantially correct.

[7] Seventh. Appellant's motion for a new trial was overruled, and he was sentenced by the court on the 16th day of May, 1910. He announced his determination to appeal, and the preliminary steps for perfecting the appeal were taken, and appellant was admitted to bail to abide the final decision of this court upon this appeal. Eleven days later appellant filed a second motion for a new trial upon the ground of alleged newly discovered evidence. Waiving a number of objections which might be urged to this second motion, it is sufficient to say it is fatally defective in not stating fully the facts which would make the matters and things therein stated newly discovered; and there is no explanation as to why this alleged evidence could not have been discovered earlier by the exercise of proper diligence.

In the case of *Drew v. State*, 6 Okl. Cr. 348, 118 Pac. 677, Judge Doyle, speaking for this court, said: "A motion for a new trial on the ground of newly discovered evidence, made before judgment, or after the term at which the defendant was convicted, is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, except for an abuse of discretion; the presumption being that the discretion was properly exercised."

In the case of *Johnson v. State*, 5 Okl. Cr. 4, 112 Pac. 761, this court said: "The defendant filed a motion for a new trial upon the ground of newly discovered evidence, and claims that if a new trial were granted him he would be able to prove by Mollie Ingram and Lou Johnson that the prosecuting witness in this cause was over 18 years of age at the time of the commission of this offense. Defendant alleges that since his arrest on the charge of this case he has been confined in jail and been unable to make any inquiries with reference to the testimony in the case; that he has used all reasonable diligence in procuring evidence in his behalf; and that he did not discover the testimony of the said Lou Johnson and Mollie Ingram until after the conviction. Defendant stated that he had



exercised due diligence in procuring testimony in his behalf before the trial began. This is merely the statement of a conclusion. Such an affidavit should state the facts, so as to enable the court to see that due diligence had been exercised. The record shows that the father of the defendant resided at Woodville. With the least effort on the part of the defendant or his counsel, he should have been in possession of the alleged facts set up in his motion for new trial long before the trial of this case took place. The record further shows that the verdict was rendered against the defendant the same day on which the motion for new trial was filed. No explanation was made as to how or why it was that the defendant could discover this testimony as soon as he was convicted, but could not find it out before the trial. Defendant had had a preliminary trial at which the state's evidence was introduced, and in which he was represented by the same counsel who represented him in the final trial. The town of Woodville is about 15 miles from the county seat, where the trial took place. It is not alleged that counsel for the defendant even visited Woodville to make an investigation in behalf of their client; that the defendant or his counsel ever even requested the father of the defendant, who resided at Woodville, to make any investigation as to the facts of the case. They rested their defense entirely upon the hope that the jury would believe the testimony of the defendant rather than the testimony of the prosecuting witness. Under these circumstances it was too late, after the conviction, to begin to exercise that diligence which should have been exercised before the trial. Counsel cannot remain idle before a trial and, after there has been a conviction, discover evidence which they could have discovered prior to the trial by the exercise of diligence, and thereby obtain a new trial. The trial of a criminal case is a very serious matter, and the law requires that defendants and those representing them must be diligent in preparing to defend their cases. It is their duty to prepare their cases for trial before a conviction has been had."

In the case of *Slater v. United States*, 1 Okl. Cr. 278, 98 Pac. 111, this court said: "In *Runnels v. State*, 28 Ark. 121, it is said: 'Applications for new trial on the ground of newly discovered evidence are to be received with caution, and this in proportion to the magnitude of the offense. The application should be corroborated by the affidavits of other persons than the accused, and, if possible, those of the newly discovered witnesses themselves, and it is not sufficient for the applicant to state that he did not know of the existence of the testimony in time to have brought it forward on the trial; but it must appear that he could not have ascertained it by reasonable diligence. *Pleasant v. State*, 13 Ark. 362; *Graham & Waterman*, *New Trials*, vol. 1, pp. 462, 485, and cases cited.' In *Twine, Saddler & Sawner*

*v. Alice Kilgore*, 3 Okl. 643, 39 Pac. 389, Judge Burford said: 'An application for a new trial on the ground of newly discovered evidence must show that the appellant used diligence to procure and present the evidence upon the trial, and the facts showing due diligence must be shown, so that the court may determine whether the diligence used was sufficient. *Allen v. Bond*, 112 Ind. 523, 14 N. E. 492; *Hamm v. Romine*, 98 Ind. 77. There is no showing in the case at bar that the defendant used any diligence whatever to procure testimony upon which their motion for a new trial is based; nor is there any allegation to the effect that they had no knowledge of such evidence prior to the trial of said cause.' In *Flersheim Mercantile Co. v. Gillespie*, 14 Okl. 143, 77 Pac. 183, Judge Irwin said: 'The next assignment of error is that the court erred in refusing to grant plaintiff a new trial on the ground of newly discovered evidence. It is a well-recognized rule of this court that a new trial on the ground of newly discovered evidence will not be sustained, unless it affirmatively appears from the affidavit in support of such motion that diligence has been used to discover such testimony, and that the same could not have been discovered at a time prior to the trial by the use of reasonable diligence. In the affidavit in support of the motion for a new trial in this case, the general statement is made that the plaintiff and its attorneys have used every possible effort to ascertain the names of these witnesses and the facts whereof they would testify; but it does not appear by the affidavit what these efforts were, or in what manner or how they investigated or made inquiry to ascertain the facts.' The above cases present our views of the law upon this question clearly and fully. In this case the affidavit is silent upon the question of diligence. It is therefore fatally defective, and the trial court did not err in refusing to grant a new trial upon this ground. An affidavit for a new trial upon the ground of newly discovered evidence must set out the proposed evidence, and it must be such as could not have been secured at the former trial by reasonable diligence on the part of the defendant, which fact should appear in the affidavit. If possible, it should be accompanied by the affidavit of the newly discovered witnesses." See, also, *Harper v. State*, 7 Okl. Cr. 531, 124 Pac. 1116.

There are several other assignments of error which have been duly considered, but which we do not think are necessary to be discussed. We think the verdict is fully sustained by the testimony, and that no material error was committed upon the trial.

The judgment of the lower court is therefore, in all things, affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

## PERRY et al. v. HOBLIT.

(Supreme Court of Oklahoma. Dec. 3, 1912.  
Rehearing Denied Jan. 28, 1913.)

*(Syllabus by the Court.)*

## 1. APPEAL AND ERROR (§ 564\*)—SERVICE OF CASE-MADE—EXTENSION OF TIME.

Neither the court nor the judge thereof in vacation, after the time prescribed by the statute or granted by the court within which to prepare and serve a case-made has expired, has power to extend the time fixed by statute or previously granted the court in which to make and serve a case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

## 2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—EXTENSION OF TIME.

A judge of the district court has no power to extend the time to make a case-made when he is out of the state, and an order so made is absolutely void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by Oscar Perry and others against D. L. Hoblit. From the judgment, Perry and others bring error. Dismissed.

Bond & Melton and F. E. Riddle, all of Chickasha, for plaintiffs in error. R. E. Davenport and Simpson & Holding, both of Chickasha, and J. W. Bartholomew, of Oklahoma City, for defendant in error.

HAYES, J. [1] This proceeding in error is prosecuted upon petition in error and case-made. A motion to dismiss same has been filed by defendant in error, urging a dismissal thereof upon the ground that the case-made is void for two reasons. On the 12th day of June of this year the trial court made an order extending the time within which plaintiffs in error could serve their case-made for a period of 60 days from that date. This period of time expired on the 11th day of August. The case-made was not served during said period of time, and no further extension of time was made within that period. On the 12th day of August a second order of extension was made, and subsequently the case-made was served within the time attempted by this second order to be granted; but the second order of extension was void, for the reason that it was not made within the statutory three days' time for serving the case-made, nor within any time extended during such period. *Soliss v. Davis*, 28 Okl. 496, 114 Pac. 609.

[2] A further reason why the second order made on August 12th is void is that at the time of making same the trial judge was without the state, being at that time in the state of Arkansas. *Blanchard v. U. S.*, 6 Okl. 587, 52 Pac. 736.

The motion to dismiss should be, and is, sustained.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; KANE, J., not participating.

## PENNINGTON et al. v. NEWMAN.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

*(Syllabus by the Court.)*

## 1. EXECUTORS AND ADMINISTRATORS (§ 533\*)—ACTION ON BOND—WHEN MAINTAINABLE.

Neither an administrator, nor the sureties on his bond, may be sued for a breach of his administrator's bond until there has been a settlement or final accounting in the (probate) county court, and a decree entered therein, showing a balance due, or some other breach of the conditions of the bond, and a failure on the part of the administrator to comply with the decree entered on the settlement or accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2452-2457, 2500; Dec. Dig. § 533.\*]

## 2. EXECUTORS AND ADMINISTRATORS (§ 72\*)—INVENTORY—IMPEACHMENT.

The inventory is prima facie evidence of the extent and value of the estate which has come to the administrator's hands, but he may, in proper cases, show that, through inadvertence, ignorance, or mistake, property has been put into it which did not in fact belong there.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 321; Dec. Dig. § 72.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 72\*)—INVENTORY—IMPEACHMENT.

As a general rule, an inventory may not be impeached by a collateral attack. The proper method of correcting it is by motion, after notice, in the court where the administration case is pending.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 321; Dec. Dig. § 72.\*]

Commissioners' Opinion, Division No. 1. Error from Haskell County Court; A. L. Beckett, Judge.

Action by Lillie A. Newman against C. O. Pennington and others. Judgment for plaintiff, and defendants bring error. Reversed.

Holley & Fannin, of Stigler, for plaintiffs in error. J. F. Lawrence, of Muskogee, for defendant in error.

ROBERTSON, C. C. O. Pennington is the duly appointed, qualified, and acting administrator of the estate of W. M. Newman, deceased. On March 27, 1909, he filed in the county court of Haskell county an inventory and appraisal of the property belonging to the estate, which inventory showed said estate to be of less value than \$1,500. On September 6, 1909, on motion of defendant in error, Lillie A. Newman, widow of deceased, an order was made by the county court, setting aside "for the support of herself and minor children all the personal property of the said estate, after paying the burial expenses of decedent, and the expens-

es of his last sickness, and the costs of administration of said estate," and directing the administrator to deliver the same to the widow. No accounting on the part of the administrator, of any kind or character, has been made, nor has any been demanded, nor has the administrator been discharged or removed from office. So far as the record before us shows, the order hereinbefore alluded to, setting apart the personal property of said estate to the widow and minor children, is the last order made by the court in the administration of said estate. On May 23, 1910, the widow in her own name began this action in the county court to recover the value of certain personal property, shown by the inventory to belong to the estate, and which had been by the court ordered delivered to her, but which the administrator, for various reasons, had failed to turn over. She joined as defendants in said action C. O. Pennington, the administrator, J. E. Pennington, O. H. Jones, and Cad McConnell, the sureties on the administrator's bond. The defendants demurred to the petition, which was overruled by the court, whereupon they answered, and alleged, among other things, first, that the court had no jurisdiction to try and determine the case; second, a general denial; third, that no final or other, settlement, or accounting of any kind had ever been had as required by law; fourth, a full compliance with all orders of the court; fifth, that the allegations of the inventory were untrue, in that it showed certain personal property in the hands of the administrator, when in truth and in fact said property never had been in the possession of the administrator, and that said entry on said inventory had been made through mistake; sixth, that the property, the value of which the suit was brought to recover, even though it had belonged to the estate, had prior to the appointment of the administrator been disposed of by the heirs of said deceased, with the knowledge, approval, and consent of the plaintiff. Plaintiff demurred to paragraph 3, 5, and 6 of defendants' answer, which demurrer was sustained by the court, and thereby left as an answer to the petition, the challenge to the jurisdiction of the court, the general denial, and the plea of full compliance with the orders of the court. Upon the issues thus joined trial was had to a jury, and at the close of the evidence the court directed a verdict in favor of the plaintiff for the full amount claimed. Motion for new trial was filed and overruled, and defendants prosecute this appeal to reverse the judgment entered upon said verdict.

[1] Plaintiffs in error rely upon three grounds for reversal, the first being the alleged error of the court in overruling their demurrer to plaintiffs' petition. Under this assignment, defendants contend that, inasmuch as the action is based upon the breach

of an administrator's bond, it must appeal affirmatively by the petition that there has been an accounting or final settlement, and the petition, being barren of any such allegation, was therefore fatally defective. This contention is correct. It seems to be the universal holdings of the courts that neither an administrator, nor his sureties, can be sued on the bond until there has been a settlement, or an accounting, in the probate court, showing a balance due, or some other breach of conditions of the bond, and a failure on the part of the administrator to comply with the decree entered on the settlement or accounting. In 18 Cyc. 1230, it is said: "Before a creditor, legatee, or distributee can sue on an administration bond to enforce payment of his claim against the estate, the liability of the estate must be established. So a creditor cannot sue on the bond until his claim has been established by a judgment, or has been ascertained and allowed by the probate court, nor can a distributee or residuary legatee sue on the bond until the amount for distribution and the persons entitled thereto have been ascertained by the probate court." In support of the foregoing, see, also, the following: Grady v. Hughes, 80 Mich. 184, 44 N. W. 1050; Tudhope v. Potts, 91 Mich. 490, 51 N. W. 1110; Gott v. Culp, 45 Mich. 265, 7 N. W. 767; Green v. Creighton, 64 U. S. (23 How.) 90, 16 L. Ed. 419; Chaquette v. Ortet, 60 Cal. 594; Allen v. Tiffany, 53 Cal. 16; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; In re Allier, 65 Cal. 228, 3 Pac. 849; Curtiss v. Curtiss, 65 Cal. 572, 4 Pac. 578; Weihe v. Statham, 67 Cal. 84, 7 Pac. 143; Beall v. New Mexico, 16 Wall. 535, 21 L. Ed. 292; Garvey v. U. S. Fid. & Guar. Co., 77 App. Div. 391, 79 N. Y. Supp. 337; Reed v. Hume, 25 Utah, 248, 70 Pac. 998; Hudson v. Barratt, 62 Kan. 137, 61 Pac. 737; Eaton v. Benesfield, 2 Blackf. (Ind.) 52; Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714, 40 Pac. 229.

Plaintiffs' sole reliance is on the decree authorizing and ordering the administrator to turn over and deliver to the widow all the personal property in his hands as such administrator. To our minds this is not such a decree as is contemplated by statute, or by the authorities cited above. It is altogether too indefinite and uncertain to charge the administrator with a breach of the conditions of his bond. Thus an examination of that decree shows that the administrator "be and he is hereby ordered and directed to deliver over to said Lillie A. Newman, for the support of herself and minor children, all of the personal property of said estate, after paying the burial expenses of decedent, and the expenses of his last sickness, and the costs of administration of said estate." There is nothing in the record before us to show whether or not the burial expenses of the deceased had been paid, or

whether or not the expenses of his last sickness had been settled, or that any provision whatever had been made for the costs of administration. If there had been no settlement or final account, the item of expenses and costs of administration could not be ascertained, and, until the same were determined, the administrator could not say how much of the money in his possession, if any at all, would be left for distribution under this decree. The expenses enumerated in the order of the court hereinabove according to the terms of our statute must be paid out of the estate, and this order distributing the estate to the widow and minor children was necessarily made subject to that provision of the statute.

[2] The next assignment relied upon is that the court erred in sustaining plaintiff's demurrer to paragraphs 3, 5, and 6 of defendants' answer. The third count of the answer alleged that no final or other settlement or accounting had ever been made as required by law, the fifth that the allegations of the inventory were untrue, in that it showed certain personal property in the hands of the administrator, when, in truth and in fact, said property had never been in the possession of the administrator, but that said entry, on said inventory, had been made by mistake, and, sixth, that the personal property, the value of which the suit was brought to recover, even though it had belonged to the estate, had, prior to the appointment of the administrator, been disposed of by the heirs of said estate, with the knowledge, approval, and consent of the plaintiff. The first question raised by this assignment has been hereinabove disposed of, and no further consideration will be given it here.

As to the fifth count, it is clear to our minds that the inventory and appraisal filed by the administrator is only prima facie evidence that the administrator had received the property named therein. This being true, its recitations may be rebutted in proper cases. The following seems to be the rule: "Neither the inventory, nor the appraisal, however, is conclusive upon any person, and, in actions by and against an executor or administrator, it is competent to show that property belonging to the estate was improperly or inadvertently omitted therefrom, or that the property therein contained was overvalued or undervalued, or was not the property of the deceased." 5 Ency. Evidence, 445, and cases cited. In *Stewart's Estate*, 187 Pa. 175, 20 Atl. 554, it is said: "The inventory is prima facie evidence of the extent and value of the estate which has come to the administrator's hands, but he may still show that through inadvertence, ignorance, or mistake property has been put into it which did not in fact belong there."

[3] As a general rule, an inventory may not be impeached by a collateral attack.

The proper method of correcting it is by motion, after notice, in the court where the administration case is pending. Hence we cannot say there was error in the ruling of the court on that point.

As to the sixth paragraph of the answer, we are of opinion that the court also erred in sustaining the demurrer. The record clearly shows that prior to the appointment of an administrator, Joe Newman and F. W. Newman, adult sons of the deceased by a former wife, and Mrs. Lillie A. Newman, widow and the plaintiff in the case below, made and entered into an agreement, whereby they consented that all personal and perishable property of the deceased should be disposed of by immediate invoice and sold, and that the proceeds of the sale go to the deceased's two children, namely, Joe Newman and Lonnie Newman. This was such an agreement as the parties under the law and the facts of this case had a right to make. There is no contention but that the same was honestly and voluntarily made and entered into. The widow makes no charge of fraud, duress, or undue influence or mistake of fact or law. If she can show that the contract between herself and Joe and F. W. Newman was procured by fraud and that the administrator was a party thereto, or through any negligence on his part, the property therein enumerated was lost to the estate, she might be heard to complain. The administrator offered by his answer to show that the entry on the inventory showing possession of the property was made by mistake; that it should have been made as an entry showing "claims due the estate"; that the widow well knew what became of the property; that she had voluntarily given it to the children of deceased by a former wife. There is no excuse or reason offered why this agreement should not stand, and it seems to us that before the widow will be permitted to sue the administrator on his bond for the recovery of the value of the property which she well knew he had never received (but which on the contrary she had disposed of herself) would be little short of a travesty on justice, and she ought not to be permitted to maintain such an action, as it would, in effect, be a fraud perpetrated upon the administrator under the guise of law. These conclusions render it unnecessary to notice the other assignments of error urged by plaintiff in error in this case.

The decree made by the county court was not conclusive against the principal or the sureties on his bond, for the reason that it was conditional, indefinite, vague, and uncertain, in that it did not describe the property to be turned over, or the amount to be turned over, but left the administrator to turn over such amount as he might have in his hands, after paying the burial expenses, the expense of decedent's last sickness, and the cost of the administration. As has been said hereinbefore, it was impossible, under

that order, for the administrator to comply therewith until there had been a settlement or final accounting in the probate court, and without which the suit to say the least was prematurely brought.

For the reasons hereinbefore enumerated, the judgment of the county court of Haskell county should be reversed.

PER CURIAM. Adopted in whole.

# CLARK v. FIRST NAT. BANK OF MARSEILLES, ILL.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

## APPEAL AND ERROR (§ 773\*)—REVERSAL—FAILURE TO FILE BRIEFS.

Where counsel for plaintiff in error, in conformity with the rules of this court has prepared, served, and filed a brief, in which, with other contentions, it is insisted that the judgment appealed from is contrary to law, and is not reasonably supported by the evidence, and there is no brief filed, and no reason given for its absence, on the part of the defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from Tulsa County Court; O. S. Booth, Special Judge.

Action by the First National Bank of Marseilles, Ill., against A. D. Clark. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. J. Henderson, of Tulsa, for plaintiff in error.

ROBERTSON, C. This action was originally commenced in the county court of Tulsa county by defendant in error against plaintiff in error to recover a balance alleged to be due and unpaid on two promissory notes executed at Marseilles, Ill., in 1904, payment of which was secured by chattel mortgage. The record shows that by permission of the mortgagee the mortgagor removed the mortgaged property from Illinois to Kansas, where the same was seized and sold by a constable (without complying with the law applicable to the foreclosure of the mortgage in question), for the sum of \$81, when it was worth \$900, as is shown by the special findings of the trial court. The defendant, having thereafter removed from Kansas to Oklahoma, was sued by plaintiff for the balance alleged to be due on said note, and judgment rendered against him, and from which judgment he appeals.

Several important questions are involved in the correct solution of this case. Defendant

in error, for reasons best known to it, has failed to favor us with a brief in support of its judgment. Plaintiff in error has filed a brief, and has raised questions therein based upon the assignments of error, which seem to sustain his view of the case, and convinces us that the judgment as entered is erroneous. As was said by Justice Kane in *First Nat. Bank of Tishomingo v. Blair*, 31 Okl. 562, 122 Pac. 527: "This court has held a great many times that where counsel for plaintiff in error, in conformity with the rules of this court, has prepared, served, and filed a brief, in which, with other contentions, it is insisted that the judgment and verdict appealed from are not reasonably supported by the evidence, and there is no brief filed, and no reason given for its absence, on the part of the defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error." See, also, *Rudd v. Wilson et al.*, 32 Okl. 85, 121 Pac. 252, and cases there cited.

We are therefore of opinion that the judgment of the county court of Tulsa county should be reversed and the cause remanded, with instructions to grant a new trial.

PER CURIAM. Adopted in whole.

# SCHAFFER v. TROUTWEIN.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

## 1. ATTORNEY AND CLIENT (§ 17\*)—BOND—VALIDITY.

An appeal bond, signed by a licensed attorney who was employed in the trial of the case, by virtue of section 273, Comp. Laws 1909, is absolutely void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 25; Dec. Dig. § 17.\*]

## 2. APPEAL AND ERROR (§ 390\*)—BOND—AMENDMENT.

Such bond, being void, cannot be amended after the time for taking the appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2088; Dec. Dig. § 390.\*]

Commissioners' Opinion, Division No. 1. Error from Sequoyah County Court; W. N. Littlejohn, Judge.

Action by George Schaffer against E. W. Troutwein. From an order of the county court dismissing an appeal from a justice of the peace, Schaffer brings error. Affirmed.

Watts & Breedlove, of Sallisaw, for plaintiff in error.

ROBERTSON, C. This action was originally begun in the justice of the peace court of Sequoyah county by E. W. Troutwein, de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pendant in error, against George Schaffer, plaintiff in error. Judgment was rendered in the justice court against Schaffer, who sought an appeal to the county court, and gave an appeal bond signed by Jess W. Watts, one of his attorneys in the trial of the cause before the justice of the peace. This appeal bond was approved by the justice of the peace, and, together with a transcript, was sent to the county court, where, on motion of appellee, the appeal was dismissed for the reason "that the appeal bond herein is absolutely void, because Jess W. Watts, a licensed attorney of this state, who has been employed as counselor of appellant, and a partner of the firm of Watts & Breedlove, the attorneys for said appellant, signed said instrument as surety on the purported bond, in violation of law found in section 241 of the Revised and Annotated Statutes of 1903," etc. It is admitted by counsel for plaintiff in error that the grounds laid in the motion to dismiss the appeal are true, and therefore the only question presented by the record is the correctness of the action of the lower court in holding the appeal bond void.

[1] The lower court held the bond void under and by virtue of the section of the statute referred to in the motion, which statute was brought over from the territory of Oklahoma by the Schedule to the Constitution, the same being section 241, 1 Wilson's Ann. Statutes Okla. 1903 (section 273, Comp. Laws 1909), and which reads as follows: "Licensed attorneys of this state are prohibited from signing any bonds as surety in any civil or criminal action, in which they may be employed as counselors, pending or about to be commenced in any of the courts of this state, or before any justice of the peace. All such bonds shall be absolutely void, and no penalty can be recovered of the attorney signing the same." Counsel for plaintiff in error contends that the name of the attorney on the bond is merely surplusage, and that we must look to the intention of the Legislature in order to determine the purpose for which this act was passed, and that the only construction that can be placed on the statute in question is that it was intended, not to disqualify an attorney from becoming surety on a bond, but to prevent him from being annoyed by clients in the matter of signing bonds for them; in other words, it is a privilege, which the attorney may waive. As we view the matter, we need not concern ourselves with that question at this time, for we are permitted to look to the intent of the Legislature in the enactment of statutes only when the meaning of the act complained of is vague and obscure. The statute in this case needs no such aid, for its meaning and purpose are obvious from a casual reading. Thus it provides that "licensed attorneys are prohibited from signing any bonds in any action in which they are employed as counselors, \* \* \*" and that "all such bonds

shall be absolutely void," etc. To our minds language could not convey more clearly the intention of the Legislature. The bond, if signed by such an attorney, is absolutely void.

In the case of *Sherman v. State*, 4 Kan. 570, relied upon by counsel for plaintiff in error, as sustaining the theory that the act only gives to attorneys a personal privilege, which may be waived, if they so choose, does not apply to the statute under consideration. The Kansas Statute (L. 1867, § 1, p. 46) is not nearly so comprehensive as ours. It reads as follows: "That no state or county officers, or their deputies, shall be taken as surety on the bond of any administrator, executor, or other officer, from whom, by law, bond is or may be required, and no practicing attorney shall be taken on any official bond, or bond in any legal proceeding as aforesaid, in the district in which he may reside; and if any such officer or deputy is surety in any such bond filed in any office, provided by law for the deposit thereof, such officer with whom such bond is filed, shall, within thirty days from and after the taking effect of this act, notify the principal on such bond to give additional security, which shall be approved as the law requires." Thus it is seen that the Kansas statute only prohibits an attorney from being taken on such a bond; while ours not only prohibits the attorney from signing, but in express and emphatic language follows such prohibition by the declaration that "such bonds shall be absolutely void," etc. The Ohio, Illinois, and Missouri authorities cited in the *Sherman Case*, supra, are based on statutes similar to the Kansas statute, none of them containing the declaration that such bonds shall be void, and therefore do not apply to the question herein. In *Towle v. Bradley*, 2 S. D. 472, 50 N. W. 1057, it is held that a statute prohibiting an attorney from signing a bond as surety, does not confer a personal privilege which can be waived, but "on the grounds of public policy, the statute intends to and does, disqualify him absolutely from entering into any such contract." The South Dakota statute, however, contains no provision that "such bonds shall be absolutely void."

The principle involved in the provisions of this statute was first recognized and enforced as a rule of court in England in 1654 (1 Tidd. Pr. 246), and has been quite generally adopted in this country by rule of court or by statute (4 Cyc. 919). Compared with the statutes on this subject in force in other states, it is found that none are as comprehensive or far-reaching in their effect as the one under consideration. So far as we have been able to determine, none provide that "such bonds shall be absolutely void," etc. In nearly all the states, under statutes of more narrow import and meaning, the courts hold that the bond signed by an attorney are, at most, only defective, and may be amended. Some hold that the attorney,

after signing is estopped from denying liability; others hold that the signing being a violation of a rule of court, subjects the attorney to the disciplinary powers of the court as for contempt; none, so far as we have observed, hold the bond void on account of an attorney signing as surety. The subject, however, being one clearly within the powers of the Legislature, and the law being one demanded on account of public policy, and the Legislature having spoken in such positive language, leaves the courts but little to say on the question. There is no room for construction, or judicial legislation, and whether or not the provision complained of is a wise exercise of legislative discretion is a matter that does not concern the courts. We must hold that the bond in question, by reason of this statute, is absolutely void.

[2] There is no merit in the further contention that the court erred in refusing to permit plaintiff in error to amend the bond in the county court. If the bond was void, which it was, then there was nothing to amend. *Washburn v. Delaney*, 30 Okl. 789, 120 Pac. 620.

No error appearing in the record, the judgment of the county court of Sequoyah county should be affirmed.

PER CURIAM. Adopted in whole.

#### COOMBS et al. v. COOK.

(Supreme Court of Oklahoma. Dec. 3, 1912.  
Rehearing Denied Jan. 28, 1913.)

(Syllabus by the Court.)

#### 1. EVIDENCE (§ 158\*)—ADOPTION—BEST EVIDENCE.

Where, under provisions of a statute, an adoption is effected by order or decree of the court, the records of such court constitute the best evidence by which such adoption may be established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.\*]

#### 2. EVIDENCE (§ 178\*)—ADOPTION—BEST EVIDENCE—LOSS OF RECORD.

Where the records of the court have been destroyed by fire, proof of the contents of such records by parol testimony may then be made, and circumstantial evidence introduced, including acts and declarations of an adopting parent, relative to such adoption, for the purpose of establishing the adoption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

#### 3. ADOPTION (§ 17\*)—PAROL EVIDENCE—DESTRUCTION.

Where many years have elapsed since an adoption proceeding was had, and the records of the court have been destroyed by fire, during which time the judge of the court and the clerk thereof have died, proof by a witness that he was present in court at the time of the proceeding, handed the petition for adoption to the judge, heard the order of the court thereon made, and, after the petition and order had been spread of record, read the same, and that it decreed an adoption of the child, and where proof established that the child lived

from said time, until the death of the adopting parent, with the adopting parent, was recognized by the adopting parent as her child, and referred to by her as her adopted child, and where the jurisdictional facts appear, a finding that the adoption occurred, in the absence of any contrary evidence, should be sustained.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. § 17.\*]

#### 4. APPEAL AND ERROR (§ 171\*)—CHANGE OF THEORY.

One who has tried his case in the trial court upon one theory and lost will not be permitted on appeal to this court to change front and try to prevail upon a different theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Error from District Court, McCurtain County; D. A. Richardson, Judge.

Action by Leslie Coombs and L. D. Owsley against Betsy Cook, née Durant. Judgment for defendant, and plaintiffs bring error. Affirmed.

Montgomery & O'Meara, of Bartlesville, for plaintiffs in error. Spaulding & Carr, of Garvin, for defendant in error.

HAYES, J. Plaintiffs in error brought this action in the court below to quiet title to an undivided half interest in a certain tract of land consisting of 225 acres, situated in McCurtain county in this state, and to obtain a decree of partition. They allege in their petition in the court below that the land in controversy was originally allotted by one Isabel O'Bannon, a member of the Choctaw tribe of Indians by blood, who, after taking said allotment, died in the month of March, 1907. She left surviving her no children, no brothers or sisters, and neither father nor mother. She died intestate, and left surviving her husband, Jack O'Bannon, and one niece and one nephew, to wit, Mary and Alfred James, who are the children of a deceased brother, and five children of a deceased sister. Plaintiffs allege that, by virtue of a conveyance from the nephew and niece of the deceased brother, they are the owners of the undivided half interest in Isabel O'Bannon's allotment, and that the five children of decedent's deceased sister are the owners of the other half interest. All of said children are made parties to this proceeding. They allege further that Jack O'Bannon, the husband of deceased, is claiming to hold said land by virtue of some conveyance from one Betsy Cook, who claims some title and interest therein, but allege that neither Jack O'Bannon nor Betsy Cook have any interest or title whatever in said land, and pray that Jack O'Bannon and Betsy Cook be required to plead whatever title or interest therein they claim. Defendant in error Jack O'Bannon, by his separate answer filed, makes only the following claim of interest in the land: He alleges that he and Isabel O'Bannon lived together as hus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

band and wife until her death, and during said time resided upon the land in controversy; that he cleared up some of the land and put a portion thereof in cultivation, and put other valuable and lasting improvements thereon; that he is now in possession of the land, and has not received any pay for the improvements, and he asks that it be decreed that he has a lien on the lands for the value of the improvements. By agreement of the parties, his claim is eliminated from the case until the issues between the other parties are disposed of.

Defendant in error, by her separate answer, alleges that she is the sole owner in fee simple of the lands in controversy by reason of the fact that the said Isabel O'Bannon, in the year 1892, duly adopted her (the said Betsy Cook) as her child; that such adoption was made in the county court of Towson county, Choctaw Nation, which was a court of record; that she is a citizen of the Choctaw Nation; that all the records and written evidence of said adoption have been destroyed and are beyond the reach, and cannot be secured by her; but that she would offer testimony at the trial to prove such adoption. Upon these facts she alleges that she is the sole heir of Isabel O'Bannon, and asks for a decree against the plaintiffs and her codefendants, adjudging her the owner of the title to the land, subject to whatever equities, if any, the defendant Jack O'Bannon may have. The other defendants made no answer and filed no other pleading of any character.

The case was tried to the court without a jury. Before any evidence was heard, the following stipulation was made in open court: "For the purposes of this trial, it is stipulated in open court between attorneys for the plaintiffs and the attorneys for Betsy Cook that the land in controversy was the allotment of Isabel O'Bannon, who was enrolled as a full-blood Choctaw, and who died intestate in McCurtain county. It is further stipulated that the defendant, Betsy Cook, formerly Betsy Durant, is enrolled opposite enrollment No. 2083 as a full-blood Choctaw, and said certificate is made a part of this stipulation. It is further stipulated that Davis James, Rachel James, and Margaret Keel have conveyed to the plaintiffs their interest in the land described in this petition, which interest depends on the ascertainment of the question of adoption in this case. It is further stipulated that the only issue of law and fact between the defendant, Betsy Cook, and the plaintiffs is the fact and sufficiency of the adoption pleaded as a separate answer of Betsy Cook."

The trial court found the issues generally in favor of Betsy Cook and against the plaintiffs, and found specially that Isabel O'Bannon was a Choctaw Indian, and that in the year 1892 she adopted Betsy Cook, as alleged in her answer, in accordance with the laws

of the Choctaw Nation; that she died in March, 1907, after having taken as her allotment the land in controversy; that she left surviving her as her kinsmen only the persons named in plaintiffs' petition; and that Betsy Cook, as her legally adopted child, is the sole and only heir to her estate, and rendered judgment in her favor accordingly, from which judgment only plaintiffs in error, plaintiffs below, prosecute this appeal.

All of defendant's evidence, by which the fact of her adoption was established, was parol evidence, made after proof that the records of the court in which the order of adoption was made had been destroyed. Plaintiffs rely for reversal of the cause upon four contentions: First, that the evidence fails to establish that there was ever a record in any court that had jurisdiction; second, that, if such record ever existed, the evidence does not establish that it is lost and cannot, by the exercise of proper diligence and search, be found; third, that the contents of such record has not been shown; fourth, that, if the evidence establishes an adoption under the laws of the Choctaw Nation, the statutes of that nation, in so far as made part of the evidence at this trial, fail to show that an adoption of a child has the effect to confer upon it the right to inherit from the adopting parent. The first three of these contentions may be discussed together.

Defendant in error pleaded in his answer and proved the following tribal statute of the Choctaw Nation: "Any person or persons who may wish to adopt an illegitimate or orphan child or children shall file a petition to that effect with the clerk of the county they may reside in, which shall remain on file for 30 days; and, if no legal or just cause is shown why the petition shall not be granted, then the county judge shall grant the petition and cause the same to be recorded in the county clerk's office, after which the adoption shall be as binding as if done by special act of the general council."

[1] Where, under the provisions of the statute, an adoption is effected by an order of the court, the records of such court constitute the evidence by which such adoption may be established. *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

[2] In the absence of proof of such order of adoption by the court, as provided by the statute, no presumption of adoption will arise from the fact that a child has lived with a person, who is not his parent, and has been treated as a child; but, where the records of the court or the adoption paper has been destroyed or lost, proof of the contents of such records or papers by parol testimony then may be made, and circumstantial evidence, including acts and declarations of the adopting parent relative to such adoption, may be admitted. *Haworth v. Haworth et al.*, 123 Mo. App. 303, 100 S. W. 531; *Moore*



et al. v. Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 787. All the evidence relative to defendant's adoption is practically uncontroverted by plaintiffs. The evidence establishes that she is an illegitimate child of a woman who was killed while defendant was a very small infant; that defendant was taken by Isabel O'Bannon, when defendant was between one and two years of age; that she constantly lived with Isabel O'Bannon until the death of Isabel O'Bannon; that during all of this time she was treated by deceased as her child, and deceased had at different times made statements that she was her adopted child. All the evidence establishes that both defendant and Isabel O'Bannon, since the birth of the former, have continuously resided in Towson county of the Choctaw Nation until the admission of the state, at which time the territory constituting that county became part of Choctaw county of this state. The exact date when the order of adoption was made by the tribal county court is not clear; but all the evidence places it somewhere between the first part of the year 1892 and the early part of the following year. One witness by the name of Wilson, who was district judge of the Choctaw Nation for Towson county at the time of the admission of the state, testifies that he had resided in Towson county during his entire life; that in 1892 and 1893 his father was county judge of said county; that he had been familiar with the records and affairs of the county court of that county; that the records of that court, made from 1890 to 1894, were burned; that the county clerk kept said records at his home, as there was no office for them to be kept in at the time; and that the clerk's residence was burned and the records of the court destroyed, so that they were never brought back to court. He did not remember the exact date of the fire, but that it occurred along about 1894 or 1895. During this time Henry Williams was clerk of the county. Both he and the judge of the county court at the time of the adoption proceeding have been dead for a number of years.

Another witness, who for a number of years was an officer of Towson county, either in the capacity of sheriff, deputy sheriff, or special ranger, testifies also that the records of the county court during the years 1892 and 1893 were burned up; the exact date of the fire he could not give, but thought it was about the year 1897, which date he fixed by the fact that on the 1st day of October, 1898, he qualified as sheriff of the county. He testifies that, after the burning of the county clerk's residence, the records were never seen by any one. The same witness testifies that he had known both defendant and Isabel O'Bannon practically ever since the birth of defendant. During the greater portion of said time, he has lived near them. He was

in court in the early part of 1892, when Isabel O'Bannon handed to him a petition for the adoption of defendant as her child, which witness, upon request of Isabel O'Bannon, handed to the court. Witness did not read the petition then, but did so after it had been spread upon the records of the court. He was present when the court announced its order permitting the adoption, and afterwards read the order of adoption upon the records of the court. He could not remember all the contents of the record, but does remember that it provided that: "The adoption of such child to be accepted as the adopted child of Mrs. O'Bannon. The proceeding was complete of the adoption of this child, Betsy Durant, to Mrs. O'Bannon." The same witness testifies that, during her entire life thereafter, Isabel O'Bannon treated defendant as her child, and stated that she had adopted her, and that the child would inherit everything she left at her death. Other witnesses testified that they were present in court when a petition for the adoption was presented, and when an order was made thereon. None of them had read the order as entered upon the records of the court and was able to testify as to the contents of the record; but all the evidence tends to corroborate the testimony of the one witness who testified that he read the order, and that it did decree an adoption. We think the foregoing evidence sufficient to establish the existence of the record of adoption and the contents thereof. It is true that defendant does not show that she has made any search for such record; but the evidence of the foregoing mentioned witnesses, to the effect that the records were burned, is corroborated by other evidence. One witness who had married about the time this adoption occurred, testified that he had made a search for the records of the office in order to obtain a copy of his marriage license, and had been unable to find the records; that they had been burned. It is true that secondary evidence as to the contents of records or written instruments is not admissible as a general rule, without a showing, on the part of the person offering such evidence, that he has made a diligent effort to locate the written record or instrument, and has been unable to do so because of the fact they are lost or destroyed, but the law does not require a useless thing; and, where the evidence is sufficient that the record or written instrument has been destroyed by fire, there can be no reason or good purpose subserved by requiring the person offering secondary evidence thereof to make search for such destroyed instrument or record.

[3] The evidence does not harmonize in all of its details, such as the exact date of the adoption and the date of the fire; but there is nothing surprising about this, when it is considered that all these transactions occurred from 15 to 20 years ago, and among a

class of people whose form of government and records thereof were crude, and who were without local newspapers to chronicle local court events and to impress them generally upon the minds of the people.

The fourth contention made by plaintiffs in error does not seem to have been presented to the trial court, and it is stated by counsel for defendant in error, and not denied by plaintiffs in error's counsel, that the trial in the lower court proceeded upon the theory that, if the fact of adoption was established, defendant in error, under the law, inherited as sole heir the land in controversy. What effect an adoption under the statute has upon the right of an adopted child to inherit from its adopting parent is not disclosed by the foregoing statute pleaded and proved, which states that adoption made in county courts shall be as binding as done by special act of the general council. It is well settled that the rights of an adopted child to inherit are determined by the statute under which the adoption is made; and some of the authorities hold that such statutes are to be strictly construed against the right of inheritance. 1 Cyc. 932. This court does not take judicial knowledge of the tribal laws of the Five Civilized Tribes of Indians; and, where they are relied upon to establish a right, they must be pleaded and proved (*Bruner v. Sanders*, 26 Okl. 673, 110 Pac. 730); and we cannot therefore look to the tribal laws, as published, for additional light upon the question of whether, under such law, defendant in error, by reason of her adoption, became the heir of Isabel O'Bannon; but the statement of her counsel that the case was tried upon the theory that such was the effect of an adoption, assuming the adoption to have been made, is supported by the record in this case and by the stipulation made in open court set forth above in this opinion. This stipulation was dictated in open court by counsel for plaintiffs in error, and specifically provides: "It is further stipulated that the only issue of law and fact between the defendant, Betsy Cook, and the plaintiffs is the fact and sufficiency of the adoption pleaded as a separate answer of Betsy Cook."

[4] It is well settled that one may not try his case before the court upon one theory, and, having lost there, shift to another theory in this court on appeal. *Hamilton v. Brown*, 81 Okl. 213, 120 Pac. 950; *Smith v. Colson*, 81 Okl. 703, 123 Pac. 149. The wisdom and justice of this rule finds exemplification in this case, for defendant no doubt relied upon the assumption of all the parties that, if she was able to show that she had been adopted, she was the only heir of deceased, and therefore undertook to introduce no more of the tribal statutes than was necessary to establish the adoption; for the introduction of any of such tribal statutes,

under the issues as defined by the stipulation, and under the theory upon which the trial of the case proceeded, would have been wholly unnecessary and immaterial.

The judgment of the trial court is accordingly affirmed.

TURNER, C. J., and WILLIAMS, J., concur. DUNN and KANE, JJ., absent and not participating.

#### HORTON v. BIRDSONG.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(*Syllabus by the Court.*)

BILLS AND NOTES (§ 64\*)—CONDITIONAL DELIVERY.

A promissory note may be delivered conditionally, and this may be accomplished by delivery to the payee himself, with proper instructions in relation to the condition.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 104; Dec. Dig. § 64.\*]

Error from Oklahoma County Court; Sam Hooker, Judge.

Action by J. W. Birdsong against S. A. Horton. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Roy F. Ford, of Oklahoma City, for plaintiff in error. Snyder, Owen & Lybrand, of Oklahoma City, for defendant in error.

KANE, J. This was an action upon a promissory note, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The uncontradicted evidence shows that the note was executed by the maker at Oklahoma City, and forwarded to the payee at Greenville, Tex., by mail; that accompanying the note was a bill of sale, as follows: "I hereby, for valuable consideration, transfer to S. A. Horton all my right, title and interest that I have in the Queen City Oil & Mining Company, and the Oklahoma City Oil Company by reason of investments made for me by said Horton, the consideration being the repayment to me the amount expended for me as evidence by his promissory note of November 18, 1905, which said note and promise to pay shall constitute a complete settlement between the said Horton and myself." Written across the back of the letter forwarded with the bill of sale was the following: "Sign the transfer I inclose; this will let you out. Since I have to pay my obligations, I am going to insist that the well be finished and believe that I will come out alright; yet, in the present shape we will likely have considerable trouble before we get it wound up." In answer to the question, "Did you offer to deliver the bill of sale, properly signed, before the note became due?"

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mr. Birdsong replied, "I did not." A great portion of the evidence taken at the trial relates to a certain business transaction between the plaintiff and defendant which transaction led up to and culminated in the execution of the note, but, as this is an action upon the note, we do not consider any of that evidence material. It seems too clear for controversy that the note delivered was upon the express condition that the payee should sign and return the bill of sale which accompanied it before the note became effective as such, and that his failure to do so constituted a valid defense to an action upon the note.

It is a settled principle of law that a promissory note may be delivered by the maker to the payee upon condition. *Tovera v. Parker et al.*, 128 Pac. 101. The general rule is stated in 4 Am. & Eng. Enc. of Law, p. 204, as follows: "Bills and notes may be delivered to take effect not at all events, but conditionally upon the happening of a future contingency, and this may be accomplished either by a formal delivery in escrow into the hands of a third person for the promisee, or by delivery to the promisee himself in the nature of an escrow, the intervention of a third person not being absolutely necessary, according to the better doctrine, to make the transfer in effect conditional." As the note in controversy was delivered to the payee upon condition that he sign the bill of sale accompanying it and return the same to the maker of the note, and the condition was not complied with, it follows that it was error for the court to enter judgment upon the note against the defendant.

The judgment is therefore reversed, and the cause remanded, with directions to proceed in accordance with this opinion. All the Justices concur, except DUNN, J., absent.

**BANCROFT-WHITNEY CO. v. MAYFIELD,**  
Constable, et al.

(Supreme Court of Oklahoma. Jan. 7, 1918.)

(Syllabus by the Court.)

**REPLEVIN (§ 69\*)—ANSWER—SUFFICIENCY.**

In an action of replevin, when the answer contains a general denial, the title of the plaintiff is put in issue, and the answer states a defense.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257-279; Dec. Dig. § 69.\*]

Commissioners' Opinion, Division No. 1. Error from Tulsa County Court; N. J. Gubser, Judge.

Action by the Bancroft-Whitney Company against W. S. Mayfield, constable, and J. U. Elliott, deputy constable. Judgment for defendants, and plaintiff brings error. Affirmed.

John D. Wakely and Woodson Norvell, both of Tulsa, for plaintiff in error. Luther James, of Tulsa, for defendants in error.

**AMES, C.** The plaintiff brought an action of replevin against the defendants, alleging that they were, respectively, the constable and deputy constable of Tulsa township; that the plaintiff was the owner of certain law books, being the American Decisions, the American Reports, and American State Reports and the Digests; that the defendants had wrongfully taken the property. The defendants' answer contained, first, a general denial; and, second, as an affirmative defense, that they had taken the books from one Ben. F. Kesterson, that he was the owner thereof, and that they had taken them under certain writs of attachment, issued out of a justice court, and that the property was owned by the said Kesterson. For its reply the plaintiff alleged, first, a general denial; and, second, that the attachment proceedings were invalid. The case was tried to a court and jury, and judgment rendered for the defendants. Nothing is brought to this court except a transcript, no evidence being preserved, and the only question argued is that the answer does not state a defense. This question does not appear to have been raised in the trial court. No demurrer was filed to it, and no motion appears in the transcript for judgment on the pleadings, but, waiving that point, it is sufficient to say that a plaintiff must recover upon his own title, and that the general denial was sufficient to put the plaintiff upon proof, and therefore the answer stated a defense.

The judgment of the trial court should therefore be affirmed.

**PER CURIAM.** Adopted in whole.

**LEAGUE v. TOWN OF TALOGA.**  
(Supreme Court of Oklahoma. Jan. 7, 1918.)

(Syllabus by the Court.)

**1. PUBLIC LANDS (§ 39\*)—TOWN SITES—RESERVATION FOR COUNTY SEATS.**

The devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county seat purposes by the Secretary of the Interior is governed by sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas, as modified by the act of Congress of March 3, 1891, c. 543, § 17, 26 Stat. 1026.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. § 39.\*]

**2. STATUTES (§ 219\*)—INTERPRETATION—CONSTRUCTION BY OFFICERS.**

The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. PUBLIC LANDS (§ 39\*) — TOWN SITES — RESERVATION FOR MUNICIPAL PURPOSES.

The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county seat purposes, conferred upon the Secretary of the Interior by section 17 of the act of March 3, 1891, c. 543, 26 Stat. 1026, embraced the power to set aside for public purposes such lots or parcels of ground situated upon such town site as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county seat town.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. § 39.\*]

Error from District Court, Dewey County; G. A. Brown, Judge.

Action by the Town of Taloga against Mary E. League. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. League, of Tulsa, for plaintiff in error. Adams & Smith, of Taloga, for defendant in error.

KANE, J. This was a suit in equity commenced by the town of Taloga, defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of declaring a resulting trust. The lots in controversy are part of the government town site of Taloga, which town site was reserved for county seat purposes by the Secretary of the Interior, in pursuance of the act of Congress of March 3, 1891, which, among other things, provided for the opening to settlement of the Cheyenne and Arapaho country. The court below granted the relief prayed for, to reverse which action this proceeding in error was commenced.

It seems that the Secretary of the Interior, in carrying out the duty cast upon him by the foregoing act of Congress, caused the tract of land reserved for county seat purposes to be surveyed and platted into streets, alleys, and lots; that by this plat various lots or parcels of ground were shown to be reserved for public uses by marking upon such tracts, as they appeared upon the plat, the purpose for which the reservations were intended. Thus the lot in controversy was marked "Town Bldg." Other tracts were marked "For Parks," etc. This plat, after being approved by the Governor of the territory, was attached to the town site application for entry and filed with the Register of the General Land Office, who thereafter caused a copy thereof to be filed in the office of the register of deeds of the county of which the town site became the county seat. Upon the opening of the town site, notices were placed upon the lots thus reserved to accord with the markings on the plat, stating the purpose of reservation, and the soldiers and other agents of the United States government in charge of the opening directed attention to these notices, and required all prospective settlers to respect the reservations so made. This was the universal practice throughout

the Cheyenne and Arapaho country. After the entry of the town site under sections 2387 and 2388 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), as required by the above act, the town-site commissioners, appointed by the probate judge in accordance with the town-site laws of the state of Kansas, which by the same act were extended to and put in force in the territory of Oklahoma, resurveyed and replatted the town site, making their plat conform to the original plat heretofore mentioned. On the plat prepared by the commissioners the lot in controversy was also marked "Town Bldg." The proceedings of the commissioners, returned to the probate judge, show the lot was reserved for public purposes. In this particular case the evidence discloses that on the day of the opening the lot itself was properly marked, according to the usual custom, and that the soldiers in charge of the opening called attention to the fact that it was reserved, and prevented prospective settlers from occupying it or any of the other lots reserved for public purposes. The first probate judge of Dewey county, of which Taloga was and is the county seat, did not execute a deed to the lot in controversy, and thus matters stood for several years, when a subsequent probate judge, finding the lot still vacant and unoccupied, executed a deed thereto to the grantors of the plaintiff in error herein.

[1] The contention of plaintiff in error is that the attempted reservation is absolutely void and of no force and effect, for the reason that the patent issued by the United States conveyed title to the entire town site to the probate judge, "in trust for the several use and benefit of the occupants" thereof, and that neither the Secretary of the Interior nor the town-site commissioners, had any authority to set aside any part thereof for public use. This contention is based upon the theory that sections 2387 and 2388 of the Revised Statutes of the United States and the town-site laws of the state of Kansas passed in pursuance thereof governed the devolution of the lots embraced within the town site, and that that law contemplates that the entire town site shall be held in trust for the occupants. We think counsel are slightly in error in this. The Kansas town-site law was enacted in pursuance to that part of section 2387 of the Revised Statutes of the United States, supra, which provides that the disposal of lots situated upon a town site and the proceeds of sales thereof shall "be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated," for the purpose of vitalizing the act of Congress. The act of Congress itself was passed, as the title indicates, for the relief of the inhabitants of cities and towns upon public lands. At the time of its pas-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sage a great many cities and towns of considerable population, some of which had been incorporated, had sprung up upon the public domain by mere act of settlement and improvement, and it required action by Congress to enable the inhabitants to acquire title to the lands occupied by them from the United States. In Oklahoma conditions were materially different. Here there were large areas of unoccupied government land which the government desired to open to settlement. The act of Congress of March 3, 1891, *supra*, which was enacted for that purpose, provides, before any such lands in Oklahoma are opened to settlement: "It shall be the duty of the Secretary of the Interior to divide the same into counties, which shall contain as near as possible not less than nine hundred square miles in each county. In establishing said county lines, the Secretary is hereby authorized to extend the lines of the counties already located so as to make the areas of said counties equal, as near as may be, to the areas of the counties provided for in this act. At the first election for county officers the people of each county may vote for a name for each county, and the name which receives the greatest number of votes shall be the name for each county: Provided, further, that as soon as the county lines be designated by the Secretary, he shall reserve not to exceed one-half section of land in each county, to be located near the center of said county, for county seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes: Provided, that in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified, the probate judges of said territory are hereby granted such jurisdiction in town-site matters and under such regulations as are provided by the laws of Kansas." This section must be construed in connection with sections 2387 and 2388 of the Revised Statutes, and the town-site laws of the state of Kansas, and the whole applied to the changed conditions created by the last act.

[3] It will be noticed that by the act of March 3, 1891, the reservation which the Secretary of the Interior is authorized to make is primarily for county seat purposes, and that the Secretary was required to reserve the land as soon as the county lines were designated, which in every instance was prior to the time there could be any occupants or settlers upon the town site. This was clearly a modification of the former town-site laws. Congress recognizing the necessity for county seats in the new counties about to be created in a new country entirely devoid of cities, towns, or villages, made provision for that emergency; and, in our judgment, it would be repugnant to reason to hold that, notwithstanding the reser-

vation for county seat purposes by the Secretary of the Interior pursuant to the last act, the patent thereafter issued to the probate judge conveyed the title to the entire tract in trust for the several use and benefit of the occupants of the town site. Effect must be given to the part of the act of March 3d, *supra*, which provides for the reservation of land for county seat purposes. The Secretary of the Interior evidently considered that the direction to him to reserve a tract of land, to be located near the center of the county, for county seat purposes embraced the power to segregate from settlement such lots or parcels of ground as, in his judgment, would reasonably be necessary for the municipal needs and conveniences of a county seat town, and that the balance of the tract should be distributed to such persons as desired to settle upon and improve the same under the town-site laws. At least, that is what he did in the instant case, and the same practice was followed in all the county seat town sites in the Cheyenne and Arapaho country; and upon the opening the people who sought to acquire lots upon these town sites, in the main, respected the reservations for public purposes made by the Secretary, or were required to do so by the soldiers and others in charge of the openings. The governor of the territory, the probate judge, and the commissioners appointed by him did the same; and it was not until long after these town sites were opened to settlement proved up, and deeds made, in most instances, conveying the title to the segregated lots according to their designation by the Secretary and town-site authorities, that any one claimed a right to acquire title thereto based upon the invalidity of the original reservation. We are not aware of any such attempt being made where the deeds were actually executed by the probate judge, or by persons who claimed a right to the premises by occupancy and improvement. It is only in a few cases, like the one at bar, that a small number of persons, not original occupants, finding that the deeds had not been executed, and that the lots remained vacant and unoccupied by the municipality, sought to acquire title themselves by applying to subsequent probate judges for same.

[2] Not being entitled to the lots as occupants of the town site at the time it was entered (*Winfield T. Co. v. Maris*, 11 Kan. 128), they do not base their right to a deed upon the strength of their own title, but upon the weakness of their opponents. We do not believe that that class of persons should be permitted to disturb a condition which has been generally looked upon as settled for a great number of years, and under which valuable property rights have arisen. Many of the lots set aside have been long used for the public purposes for which they were variously designated, and permanent and valuable improvements have been placed thereon. The practical construction

placed upon the acts under discussion by the Secretary of the Interior, the Governor of the territory, and the town-site commissioners who were immediately charged with their execution, has remained unquestioned for a long period of time, and, as it seems reasonable and just to us, we are constrained to adopt it. The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation. *Hoffman v. County Com'rs*, 3 Okl. 325, 41 Pac. 566; *Higgins v. Brown*, 20 Okl. 355, 94 Pac. 703; *State v. Hooker*, 26 Okl. 460, 109 Pac. 527.

Finding no error in the record, the judgment of the court below must be affirmed. All the Justices concur, except DUNN, J., absent.

#### PAYNE v. WILKS et al.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(*Syllabus by the Court.*)

#### APPEAL AND ERROR (§ 773\*) — DISMISSAL — FAILURE TO FILE BRIEF.

Where the time has expired for filing briefs and the case has been assigned for submission, and no briefs filed by either party, the appeal will be deemed to have been abandoned, and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Jackson County; J. F. Johnson, Judge.

Action by P. L. Wilks and Stella Wilks against W. H. Payne. Judgment for plaintiffs, and defendant brings error. Dismissed.

P. K. Morrill, of Altus, and H. E. Johnson, of Dallas, Tex., for plaintiff in error. O. B. Reigel, of Snyder, and E. E. Gore, of Altus, for defendants in error.

HARRISON, C. This action was filed in the district court of Jackson county September, 1908, by P. L. Wilks and Stella Wilks against the defendant, W. H. Payne, for the wrongful attachment of certain exempt personal property consisting of household goods and wearing apparel of the alleged value of \$200, and for further damages in the sum of \$170.65. At the June term of said court the cause was tried, resulting in a verdict and judgment in favor of plaintiffs in the sum of \$300. Defendant perfected his appeal from said judgment by filing petition in error and case-made in this court July 2, 1910. The cause was assigned for submission March 18, 1912. No briefs have been filed by either party.

Following the rule of this court, the action is deemed to have been abandoned, and the appeal is dismissed.

PER CURIAM. Adopted in whole.

#### NESBIT v. GRAGG et al.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(*Syllabus by the Court.*)

1. WILLS (§ 309\*)—PROBATE—ISSUES TRIABLE. In a proceeding to probate a will under the provisions of Mansf. Dig. Ark. 1884, § 6521 (Ind. T. Ann. Stat. 1899, § 3593), the only issue triable is the factum of the will or the question of devisavit vel non.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 735-737; Dec. Dig. § 309.\*]

2. WILLS (§ 215\*)—PROBATE—PROCEEDINGS—JURISDICTION.

In such proceeding the court lacks jurisdiction to construe the will or determine the rights of the parties or the validity of any devise therein.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, McClain County; R. McMillan, Judge.

Proceeding by Colbert Gragg and another for the probate of the will of H. F. Baker, deceased, to which Arthur Nesbit filed objections. From a judgment in favor of proponents, objector brings error. Modified and affirmed.

Rennie, Hocker & Moore, of Purcell, for plaintiff in error. J. F. Sharp, of Oklahoma City, for defendants in error.

BREWER, C. This appeal is brought to reverse the action of the court admitting to probate an instrument purporting to be the last will and testament of H. F. Baker.

On June 25, 1906, Colbert Gragg filed in the office of the clerk of the United States Court for the Southern District of the Indian Territory, for probate, the last will and testament of H. F. Baker, deceased, and asked that he be appointed executor thereof, as directed in the will. On November 12, 1906, Arthur Nesbit filed in said court, sitting in probate, objections and protest against the admission of the will to probate. The cause was pending, undecided, at the time of statehood, and was at such time transferred, by operation of law, to the county court of McClain county, and on July 1, 1908, a judgment was rendered therein, admitting the will to probate.

The will disposed of all the estate, real and personal, of the deceased to his wife, including the homestead allotment of deceased, who was a citizen of the Chickasaw Nation by intermarriage.

Arthur Nesbit, the contestant, set up in his protest that he was an heir of the deceased by adoption; the adoption being made by a special act of the Legislature of the Chickasaw Nation. The grounds of objection were, in brief, that: (1) The will was void, in so far as it attempted to dispose of the homestead allotment of deceased. (2) That it was void because it contained no mention of contestant as an adopted heir. (3) Mental

incapacity of deceased; undue influence, coercion, and fraud in procuring the execution of the will.

The will was executed on the 16th day of June, 1905, and the testator died June 7, 1906.

At the hearing of the protest, the protestant, in open court, abandoned the ground of protest relative to the mental capacity of the testator, and that he had been subjected to undue influence, coercion, or fraud in the execution of the will. The court found against the protestant on all the objections stated, and entered a judgment, which, after a lengthy recitation of former proceedings and jurisdictional facts, contains the following: "Now on this July 1, 1908, the court, being well and fully advised in the premises, finds that the instrument propounded herein for probate was duly executed by the decedent, H. F. Baker, on, to wit, June 16, 1905, in the city of Purcell, Indian Territory, and that at the time of the execution thereof said testator was of full age, of sound mind and memory, and was not acting under duress, menace, fraud, or undue influence, and that said will was executed in all particulars as required by law; that the said H. F. Baker, testator, died on, to wit, June 7, 1906. The court further finds that the said Arthur Nesbit, under and by virtue of the terms of an act of the Legislature of the Chickasaw Nation, approved September, 1894, is not thereby, under the facts in this case, an heir of the said H. F. Baker, deceased, and not entitled to a distributive share in his estate, and overrules his said protest to the probate of said will. And the court further finds that the said H. F. Baker, deceased, was a citizen of the United States and an intermarried citizen of the Chickasaw Nation or Tribe of Indians, and as such, at the time of his demise, left an estate consisting in part of a homestead allotment, and that said estate passed to the beneficiary under the said will, said Sarah E. Baker, wife of decedent, upon his demise, unless it should be made to appear that other heirs exist, not provided for under the provisions of said will, and no evidence of which fact is before the court. It is further ordered, adjudged, and decreed by the court that said instrument be admitted to probate as the last will and testament of said H. F. Baker, deceased, and that the same be and is hereby established as a valid will, passing both real and personal estate, and that Colbert Gragg, who is named in such will, is hereby appointed executor of said last will and testament upon his taking and subscribing the oath of office required by law, and executing a bond to the state of Oklahoma in the penal sum of five hundred dollars (\$500.00), and upon the approval thereof as required by law. E. E. Glasco, Judge."

On appeal to the district court, a judgment

was rendered, confirming in all things the findings of facts, the conclusions of law, and the judgment thereon of the county court. From this judgment this appeal is prosecuted.

[1] The judgment of the county court as confirmed by the district court, in so far as it admits the will to probate and appoints the executor according to its provisions, is correct. In so far as it attempts to construe the will and the validity of the provisions devising certain items of property, and the status of protestant as an heir, the court exceeded its jurisdiction, and those parts of the judgment are of no force and effect. The case of *Taylor v. Hilton*, 23 Okl. 354, 100 Pac. 537, 18 Ann. Cas. 385, is controlling. In that case, after quoting the sections 6509 and 6521 of Mansf. Dig. Ark. 1884 (Ind. T. Ann. St. 1899, §§ 3581, 3593), the court says: "Thus it will be seen that the only issue the court had jurisdiction to try in this proceeding was the factum of the will or the question of devisavit vel non. Under this issue the court had no jurisdiction to construe the will or try the validity of any devise therein."

[2] The court in that case reviews a number of authorities, and quotes 16 Ency. Pl. & Pr. 1048: "In the absence of authority conferred by statute, the court has no power to construe the will or adjudicate upon the rights of the parties or the validity of the dispositions therein." (Citing authorities.)

The very interesting questions of whether or not Arthur Nesbit has rights as an heir under the special act of the Chickasaw Nation and the facts of the case, and whether the demise of the homestead allotment is valid where the will was executed before, but the testator died after, the enactment of the law authorizing the devise, are open ones, and no opinion is expressed. These questions could only be determined should they arise in some appropriate proceeding.

The judgment of the county court, confirmed by the district court, should be affirmed as modified herein.

PER CURIAM. Adopted in whole.

M. GORLE & CO. v. MILLS.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.

A cause having been duly assigned for hearing, and being reached on the calendar in due course, no briefs having been filed as required by rule 7 (20 Okl. viii, 95 Pac. vi), the same will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; Charles Bagg, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Belle Mills, by her next friend, Eliza Mills, against M. Goble & Co., a partnership composed of Charles Goble and Merritt Goble. From a judgment in favor of plaintiff for \$3,000, defendant brings error. Dismissed.

Davis & White, of Muskogee, for plaintiff in error. Robertson & Kean and W. W. Momyer, both of Muskogee, for defendant in error.

SHARP, C. The petition in error, with case-made attached, was filed in this court on March 27, 1911. The case was duly assigned for hearing at the December, 1912, term, and, being reached in due course on the calendar, it appears that no briefs have been filed as required by rule 7 of this court (20 Okl. viii, 95 Pac. vi). It follows that the appeal should be dismissed for want of prosecution.

PER CURIAM. Adopted in whole.

#### MOORE v. COUGHLIN.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

Error from District Court, Kay County; C. L. Pinkham, Judge.

Action between Reuben L. Moore and Joe Coughlin. From the judgment, Moore brings error. Affirmed.

H. B. Martin, Chas. E. Bush, and John T. Murry, Jr., all of Tulsa, and P. W. Cress, of Perry, for plaintiff in error. J. F. King, of Newkirk, for defendant in error.

PER CURIAM. The issues involved in this case are, so far as its merits are concerned, identical with those involved in the case of Moore v. Coughlin, 128 Pac. 257, handed down by this court on November 26, 1912. The judgment of the trial court in that case was affirmed, and, as the case at bar was submitted on the same evidence as was introduced in that case, the same judgment will follow.

The judgment of the trial court is accordingly affirmed.

#### PENNINGTON v. MERCHANTS' & PLANTERS' INS. CO.

(Supreme Court of Oklahoma. Jan. 7, 1913. Rehearing Denied Feb. 11, 1913.)

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by W. P. Pennington against the Merchants' & Planters' Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Masterson Peyton, of Muskogee, for plaintiff in error. Davidson & Williams, of Tulsa, for defendant in error.

AMES, C. This case should be affirmed upon the authority of Shawnee Fire Ins. Co. v. Thompson & Rowell, 30 Okl. 466, 119 Pac. 985; Phoenix Ins. Co. v. Cephus, 29 Okl. 608, 119

Pac. 583; Des Moines Ins. Co. v. Moon, 126 Pac. 753 (not yet officially reported).

PER CURIAM. Adopted in whole.

#### CAROLINA v. STATE.

(Criminal Court of Appeals of Oklahoma. March 4, 1913.)

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

Prince Carolina was convicted of manslaughter in the first degree, and appeals. Dismissed.

J. Coody Johnson and Crump, Fowler & Skinner, all of Wewoka, for plaintiff in error. Claud Davenport, Asst. Atty. Gen., Jos. L. Hull, Special Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Prince Carolina, was convicted of first-degree manslaughter in the district court of Seminole county on an information charging him with the murder of one Dennis Stewart on or about the 6th day of April, 1910, and was on the 29th day of April, 1911, sentenced to serve a term of eight years' imprisonment in the state penitentiary. To reverse this judgment an appeal was perfected by filing in this court on October 24, 1911, a petition in error with case-made. When the case was called on the regular assignment March 4th, no appearance was made on behalf of plaintiff in error. The Attorney General's office moved for an order dismissing the appeal, for the reason that after said appeal had been perfected the said plaintiff in error Prince Carolina killed a deputy sheriff in Seminole county, and became a fugitive from justice by fleeing beyond the jurisdiction of this court, and by reason thereof he is no longer entitled to have his appeal considered and determined. Following the decision of this court in the case of Tyler v. State, 3 Okl. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921, we are of opinion that the motion to dismiss the appeal should be sustained.

The appeal is therefore dismissed, and the cause remanded to the district court of Seminole county, with directions to cause its judgment and sentence to be carried into execution.

#### DICKINSON BROS. GRAIN & HAY CO. v. TOWN OF OWASSO.

(Criminal Court of Appeals of Oklahoma. March 8, 1913.)

Appeal from Tulsa County Court; N. J. Gubser, Judge.

The Dickinson Bros. Grain & Hay Company was convicted of violating a town ordinance, and appeals. Dismissed.

Hindman & Woodford, of Tulsa, and Ewing, Good & Good, of Iola, Kan., for plaintiff in error. Benjamin C. Conner, of Tulsa, for defendant in error.

PER CURIAM. This is an appeal from a judgment of the county court of Tulsa county imposing a fine of \$10 on the plaintiff in error for violating a town ordinance of the town of Owasso, the plaintiff in error having been prosecuted in the county court on an appeal from the municipal court of the town of Owasso. Counsel for the defendant in error has filed a motion to dismiss the appeal on the following grounds: First, because the proceedings were not filed in this court within 60 days from the date of judgment, no extension of time having been granted by the trial court; second, that



this court has no jurisdiction on appeals of actions brought to enforce a town ordinance, the same not being a criminal action.

The motion is sustained as to the first ground, and the appeal accordingly dismissed.

### JONES v. STATE.

(Criminal Court of Appeals of Oklahoma.  
March 8, 1913.)

Appeal from Okfuskee County Court; W. A. Huser, Judge.

W. F. Jones was convicted of violating the prohibitory law, and appeals. Affirmed.

Huddleston & Hockensmith, of Okemah, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted on an information charging him with the offense of unlawfully having in his possession certain intoxicating liquors with the intent on his part to violate provisions of the prohibition law, and was sentenced to serve a term of 90 days in the county jail, and to pay a fine of \$300. An appeal was properly perfected. The record shows that the defendant filed an application for transfer to the county court at Weleetka, which, omitting the formal parts, is as follows: "W. F. Jones, the above-named defendant, being duly sworn, upon his oath states that he resides nearer to the town of Weleetka, in Okfuskee county, than he does to the town of Okemah in Okfuskee county, Oklahoma. Wherefore he prays this honorable court to make an order transferring the above entitled cause pending against him to the county court of Okfuskee county held at Weleetka in Okfuskee county, Oklahoma. [Signed] W. F. Jones." Acting on this affidavit, the court made an order transferring the cause to Weleetka for trial, where the cause was tried. The only error assigned that is argued in the brief is: "That the action of the court in the impaneling of the jury and trying said cause in the town of Weleetka, Okl., is null and void." And it is argued that the act providing for the holding of terms of the county court at Weleetka is unconstitutional; for the reason that the notice required by article 5, § 32 (94 Williams), of the Constitution, was insufficient. It was not until the defendant had been tried and convicted that he raised this objection. The cause was transferred on the defendant's application, and he will not be heard in this court on appeal to question the action of the trial court in granting his application.

It is our opinion that the appeal is wholly without merit. The judgment is therefore affirmed.

### JONES v. STATE.

(Criminal Court of Appeals of Oklahoma.  
March 8, 1913.)

Appeal from Garfield County Court; Winfield Scott, Judge.

Pearl Jones was convicted of maintaining a

place for the illegal sale of liquor, and appeals. Dismissed.

C. D. Roseman, of Enid, for plaintiff in error.

PER CURIAM. Pearl Jones, plaintiff in error, was convicted of the crime of maintaining a place for the illegal sale of intoxicating liquors, and was on December 16, 1912, sentenced to serve a term of 60 days in the county jail, and to pay a fine of \$400. To reverse this judgment, an appeal was perfected by filing in this court on February 10, 1913, a petition in error with case-made. Now, on this 6th day of March, 1913, plaintiff in error by his counsel of record has filed a motion to dismiss the appeal.

The motion to dismiss is hereby granted, and said appeal is dismissed and the cause is remanded to the county court of Garfield county, with direction to enforce its judgment and sentence therein.

### Ex parte TERRY.

(Criminal Court of Appeals of Oklahoma.  
March 6, 1913.)

Application by M. E. Terry for writ of habeas corpus. Writ denied.

J. W. Bartholomew, of Oklahoma City, for petitioner

PER CURIAM. This is a petition for writ of habeas corpus filed February 22, 1913, wherein it is alleged that petitioner, M. E. Terry, is restrained of his liberty, and is unlawfully imprisoned by John C. Lewis, sheriff of Grady county.

On consideration of the application presented in open court this 22d day of February, the writ is denied.

### Ex parte WARNER.

(Criminal Court of Appeals of Oklahoma.  
March 6, 1913.)

Application by Charles Warner for writ of habeas corpus. Writ denied.

D. P. Farrell, of Okmulgee, for petitioner.

PER CURIAM. This is an application for writ of habeas corpus, wherein Charles Warner alleges that he is restrained of his liberty and is unlawfully imprisoned in the county jail of Okmulgee county by the sheriff of said county. It appears from the petition that he was committed on a judgment of conviction of a violation of the prohibition law, and sentenced to be confined for 90 days and to pay a fine of \$500. It is alleged that the county court exceeded its jurisdiction in adjudging further confinement in default of the payment of the fine, for the reason that, under the statutes of Oklahoma, there is no provision or provisions by which a judgment which calls for both fine and imprisonment can be so executed. The questions presented have been determined by this court in the case of *Ex parte Bowes*, 8 Okl. Cr. —, 127 Pac. 20.

For the reasons given in the opinion in that case, the writ of habeas corpus is denied.

## COUCH v. ADDY et al.

(Supreme Court of Oklahoma. Dec. 3, 1912.  
Rehearing Denied Jan. 28, 1913.)

*(Syllabus by the Court.)*

## 1. DEEDS (§ 3\*)—DEFINITION.

A deed is defined to be a written instrument containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 2-4; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1919-1924; vol. 8, p. 7630.]

## 2. DEEDS (§ 64\*)—VALIDITY—DELIVERY—ACCEPTANCE.

To constitute a valid deed, not only must there have been an intention on the part of the grantors to deliver, but the grantee must accept the same in person, or by some one whom he has authorized to accept for him, or whose conduct he subsequently ratifies.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 142, 143; Dec. Dig. § 64.\*]

## 3. HOMESTEAD (§ 118\*)—DEED—DELIVERY WITHOUT CONSENT OF WIFE—EFFECT.

Where husband and wife sign a deed to the homestead of the family under an agreement that the same shall not be delivered to the grantee named therein, and the husband, without the consent of the wife, delivers the deed to the grantee, who has notice of the agreement, the deed may be avoided by the wife after the death of her husband.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

Error from District Court, Woods County; R. H. Loofbourrow, Judge.

Action by Fannie F. Addy and Charles M. Delzell, administrators of the estate of Wm. Addy, deceased, against Larkin S. Couch. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. J. Womack, of Alva, for plaintiff in error. Rush & Smith, of Enid, and Chase & Stevens, of Alva, for defendants in error.

KANE, J. This was an action, commenced by Fannie F. Addy, wife of Wm. R. Addy, to avoid an instrument in writing involving title to the homestead of the family, and to clear the title to the same. Upon trial to the court there was a decree in favor of the plaintiff, granting the relief prayed for, to reverse which action this proceeding in error was commenced.

The land in controversy was proved up by William R. Addy under the homestead laws of the United States; and the court, properly we think, held that at the times hereinafter mentioned it retained its homestead character.

It seems that William R. Addy was addicted to the excessive use of alcoholic liquors, and at times there were periods covering months in which he was incapable of transacting any business. That for two months immediately prior to the date of the contract hereinafter set out he had been on one of those periodic sprees, during which time he

had squandered a great deal of money. That on the 15th day of June, 1903, the day the instruments were signed, his wife found him at Cleo, a town in Woods county, where, after some conversation between husband and wife concerning their homestead, they entered into the following agreement:

"This article of agreement entered into this 15th day of June, 1903, between W. R. Addy, party of the first part, and Fannie F. Addy, party of the second part, witnesseth: The said party of the first part by and with the consent of the party of the second part hereby agrees to execute a warranty deed to the west half of the southwest quarter of section eighteen (18), in township twenty-four (24) north of range nine west to Thomas E. Addy of New York City, and also to execute a warranty deed to the east half of southwest quarter of section 18, township 24 north of range nine west to Elida Buck of Wichita, Kansas, said deeds to be held in escrow by said grantees and placed with this article of agreement in the custody of the cashier of the Farmers' State Bank of Cleo, Oklahoma, to be held by him until such time when the above-described tracts of land shall be sold, or to be surrendered up to said parties to this agreement upon their joint demand, and that at the instance and request of the parties, or either of the said parties, to this contract said deeds or either of them, or this said article of agreement, shall be sent to the register of deeds of Woods county, Oklahoma, and there placed on record. Parties to this article of agreement further agree that when the said lands above described shall be sold that they will share equally in a division of the proceeds with the exception that party of the first part is to pay one hundred dollars (\$100.00) in cash to party of the second part over and above her half of the proceeds. It is further agreed by the parties to this article of agreement that both of the above tracts must be sold at the same time and not separately. Party of the first part hereby agrees with party of the second part that after the sale of the above-described tracts that if either party shall buy property with the proceeds of the sale of said land the other party shall have a joint interest in said property so bought by paying his or her half of the purchase price of said property. This article of agreement to remain in full force and effect for a period of one year from date thereof, unless rescinded by mutual consent of both parties to said article of agreement. Witness our hands this 15th day of June, 1903. William R. Addy. Fannie F. Addy.

"Witnessed by: Peter T. Koop. D. Brown."

It appears that neither the Thomas E. Addy nor the Elida Buck mentioned in the agreement knew anything about the execution thereof or the deeds therein mentioned, and that they had no knowledge that they had been designated as grantees therein.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Two or three months after the deeds and agreement were placed in the hands of the cashier of the Farmers' State Bank of Cleo, as provided therein, William R. Addy withdrew the deed to Thomas E. Addy and had the same recorded. Thereafter William R. Addy died; whereupon Charles M. Delzell was appointed administrator of his estate. On the 14th day of September, 1904, Thomas E. Addy and Bertha Addy, his wife, executed and delivered a deed of conveyance to Larkin S. Couch. During all this time Mrs. Fannie F. Addy had remained in possession of the premises, and the court below found, upon sufficient evidence, that all of the defendants Thomas E. Addy, Bertha Addy, his wife, Larkin S. Couch, and Elida Buck, had notice of all of the facts upon which the plaintiff based her right of recovery. By way of answer Elida Buck filed a disclaimer, Thomas E. Addy set up the deed heretofore mentioned, and Larkin S. Couch set up the deed to him from Thomas E. Addy and Bertha Addy.

Plaintiff in error presents his grounds for reversal as follows: "(1) No contention being made that there was any fraud practiced in the execution of the deed and contract, or by either of the grantees named in the deeds, the deed having been delivered in accordance with the terms of the contract, the transfer became absolute. (2) There is no evidence which in any manner contradicts the delivery of the deed. Being in the hands of the grantee after being recorded, being accepted by him, there must be positive evidence to show that it was not the intention to deliver the deed. There is no such evidence in the record. (3) That this deed was actually delivered was the finding of the court; the court having held that it transferred the absolute title to the plaintiff in error, except in so far as they conflict with the homestead interest of the plaintiffs therein. The deed delivered for one purpose must be delivered for all purposes. This is a pure mistake of law upon the part of the court."

[1, 2] At the outset, we think the court below and counsel were in error in giving to the instruments executed by Wm. R. Addy and his wife to Thomas E. Addy and Elida Buck the status of deeds. A deed is defined to be a written instrument containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee. *People v. Watkins*, 106 Mich. 437, 64 N. W. 324; *McMurry v. Brown*, 6 Neb. 368. At least two of the essential elements of a deed are lacking in the present transaction: (1) It is apparent on the face of the agreement between Wm. R. Addy and his wife that at the time of the execution of the deeds neither of them intended to sell the land to the grantees mentioned therein; and (2) neither of the grantees had any knowledge that the deeds were executed, and there is no evidence that either

of them ever accepted the transfer to them within the life of the contract between Wm. R. Addy and his wife. It is true that by the terms of the contract they "agreed to execute warranty deeds" to the parties therein named; but that they did not intend the transaction to constitute a sale, or that the deeds should convey title or be delivered to the grantees therein named, is apparent from the subsequent language of the agreement, to the effect that the deeds and agreement should be placed in the hands of the cashier of the Farmers' State Bank of Cleo, "to be held by him until such time when the above-described tracts of land shall be sold, or to be surrendered up to said parties to the agreement upon their joint demand, and that at the instance and request of the parties \* \* \* to said agreement said deeds or either of them, or this \* \* \* agreement, shall be sent to the register of deeds of Woods county, Oklahoma, and there placed on record." In construing this contract it must not be forgotten that the parties to it were Wm. R. Addy and his wife, and that the grantees named therein had no knowledge of it, its execution, or its contents. Further, the parties agreed that when the above land was sold they would share equally in a division of the proceeds, with the exception that the wife was to receive \$100 over and above her half of the proceeds, and that both of the above tracts must be sold at the same time and not separately; and, further, it was agreed what should be done after the sale, in case either party should buy property with the proceeds of the sale. And, finally, they agreed that the contract should remain in force and effect for a period of one year, unless rescinded by mutual consent. The foregoing provisions of the contract are absolutely irreconcilable with an intention to sell the land to Thomas E. Addy and Elida Buck. It is too clear for controversy that the purpose of Wm. R. Addy and his wife, in so far as it is disclosed by their contract, was to sell the land to some one other than the grantees named in the deeds, if it could be done within the life of the contract, and divide the proceeds between themselves in conformity with its provisions. Moreover, the abstract of the evidence contained in the briefs of counsel for the respective parties does not disclose when the deed delivered to Thomas E. Addy was delivered, or when he accepted it, if at all, or whether delivery and acceptance, if such there were, occurred during the life of the agreement. It is well settled that to constitute a valid deed not only must there have been an intention on the part of the grantors to deliver, but the grantee must accept the same in person, or by some one whom he has authorized to accept for him, or whose conduct he subsequently ratifies. *Powell v. Banks*, 146 Mo. 620, 48 S. W. 864; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75.

[3] Section 880, Wilson's Rev. & Ann. Stat. 1903, provides that no deed or mortgage or other contract relating to the homestead, other than a lease not exceeding one year, shall be valid, unless in writing and signed by the husband and wife, where they are living and not divorced, except to the extent hereinafter provided. And section 883 provides that if the husband shall make any deed, mortgage, or contract relating to the homestead without being joined in by the wife he shall be concluded thereby, and it shall only be avoided by the wife. If, after the agreement entered into by Wm. R. Addy and his wife, the husband delivered the joint deed to a part of the homestead, contrary to the terms of the agreement, his action cannot bind his wife, who did not agree to the delivery, whatever effect it may have had in concluding the husband. Under the last section of the statute above cited, the wife, after the death of the husband, was at liberty to avoid the deed in a proper action, and this she has attempted to do.

As we find no reversible error in the proceedings had in the court below, the judgment must be affirmed.

#### CRONE v. DUNCAN et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 773\*) — DISMISSAL — FAILURE TO FILE BRIEFS.

A cause having been duly assigned for hearing, and being reached on the calendar in due course, no briefs having been filed as required by rule 7 (20 Okl. viii, 95 Pac. vi), the same will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by Walter F. Duncan and Lela Duncan, doing business under the firm name and style of the Duncan Millinery Company, against P. M. Crone. From a judgment in favor of plaintiffs for \$500, defendant brings error. Dismissed.

Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

SHARP, C. The petition in error, with case-made attached, was filed in this court April 3, 1911. The cause was duly assigned for hearing at the December, 1912, term, and, being reached in due course on the calendar, it appears that no briefs have been filed as required by rule 7 of this court (20 Okl. viii, 95 Pac. vi).

It follows that the appeal is dismissed for want of prosecution.

PER CURIAM. Adopted in whole.

#### LAWLESS v. RADDIS.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

#### 1. FRAUD (§ 58\*) — DECEIT — VERDICT — EVIDENCE.

Evidence examined, and held sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.\*]

#### 2. EVIDENCE (§ 333\*) — RECORDS — INDIAN ROLLS.

It is not error to permit the introduction as evidence of a printed copy of the final rolls of the citizens and freedmen of the Five Civilized Tribes, prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior; the same being printed under the authority conferred by act of Congress.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.\*]

#### 3. INDIANS (§ 13\*) — IDENTIFICATION — GOVERNMENT ROLLS — EFFECT.

The rolls referred to in paragraph 2 of the syllabus are conclusive evidence of the quantum of Indian blood of any enrolled citizen of any of the Five Civilized Tribes, not for the purpose of proving that particular fact, but for the purpose of fixing the status of the Indian's allotment and the capacity of the allottee to alienate the same.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

#### 4. APPEAL AND ERROR (§ 248\*) — REVIEW — NECESSITY OF EXCEPTIONS.

This court will not consider alleged errors of the trial court, unless such alleged errors appear on the record of the case, and exceptions have been taken thereto by the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459; Dec. Dig. § 248.\*]

#### 5. APPEAL AND ERROR (§ 1170\*) — REVIEW — NONPREJUDICIAL ERRORS.

The court in every stage of action must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party, and no judgment will be reversed or affected by reason of such error or defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4068, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Ottawa County; T. L. Brown, Judge.

Action by Paul Raddis against P. J. Lawless and John S. Hale to recover money obtained by deceit and fraud. Judgment for the plaintiff against Lawless, who brings error. Affirmed.

Paul Raddis, defendant in error, alleges that on April 7, 1910, the plaintiff in error, P. J. Lawless, together with one John S. Hale, represented to said defendant in error that said Lawless had a tract of land for sale; that the same was free and clear of incumbrances; that he offered to loan defendant in error the sum of \$1,000 on his promissory note, to be secured by a mortgage on the land, in order that defendant in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

error might be enabled to buy the same; that Lawless represented to him that the restrictions on the land (which was originally an Indian allotment) had been removed, and that he, Lawless, held the writings showing the removal of such restrictions; that all of said representations were false and untrue; that defendant in error, relying upon the statements of Lawless as being true, agreed to purchase the land, but, when the time came for transferring the same, he discovered that the deed thereto was to be executed by said John S. Hale, and not by Lawless; that at the time of executing the deed both the defendant Lawless, and his codefendant, Hale, told him that the title to the land was clear, and that they were willing to execute a warranty deed to the same, and that relying upon these representations so made by the defendant Lawless, and his codefendant, Hale, he paid defendant Hale the sum of \$500 and executed his note and mortgage to Lawless for \$1,000 to complete the payment on the land; that said note is negotiable, and that Hale is insolvent, and the deed so executed by Hale to the defendant did not convey a good title because of the fact that said land was an allotment of a full blood Cherokee Indian, and restricted by the laws of the United States, and which restrictions had not been removed and the same was therefore inalienable; that all of the representations and statements made by the said Lawless and his codefendant, Hale, to the defendant in error, concerning the title to said land, were false and untrue, and were known to be false and untrue at the time they were made, and were made with the specific intent to cheat and defraud the said defendant in error, who, relying thereon, was induced thereby to pay the money, and execute the note and mortgage, as aforesaid. He prayed that the note and mortgage be canceled, and that he be given judgment against Lawless in the sum of \$500 for the money actually paid, and a further sum of \$1,000 in case the note and mortgage were not returned to him by Lawless, or surrendered to the court. To the allegations of his petition the defendant Lawless entered a general denial, and filed a counterclaim, alleging that prior to April, 1910, he had been requested by Hale to find a purchaser for the land described, that he knew nothing about the title to the land, and that Hale was to pay him \$25 commission for selling the same, and at the solicitation of defendant in error he was induced to loan him the sum of \$1,000 with which to purchase said land from Hale, and further alleging that the representations made by the defendant in error in his petition were false, and that he would not have loaned the \$1,000 except for such false representations so made by the plaintiff, and prayed judgment against the plaintiff for the \$1,000,

with interest at 8 per cent. per annum and for \$500 as damages and \$25 as commission, or a total of \$1,525. Hale filed a separate answer, but made no further appearance in the case, and no judgment was rendered against him. Raddis filed a reply to the allegations of the answer and the counterclaim, and upon the issues thus joined trial was had to a jury, and a verdict was returned in favor of defendant in error and against Lawless in the sum of \$1,500, with interest at 6 per cent. from April 18, 1910, upon which verdict judgment was entered by the court. Raddis, at the time the court entered judgment, agreed to enter a remittitur in the sum of \$1,000, providing Lawless would surrender the note that had been given him by Raddis, which Lawless refused to do. Raddis still offers to enter a remittitur in the Supreme Court in the sum of \$1,000 if said note is surrendered to him by Lawless.

O. L. Rider, of Vinita, for plaintiff in error. O. F. Mason, of Miami, and F. D. Fulkerson, of St. Joseph, Mo., for defendant in error.

ROBERTSON, C. (after stating the facts as above). [1] The first error assigned in the brief of plaintiff in error is "the facts are not sufficient to sustain the verdict." The petition states a good cause of action, and the sufficiency of its allegations, charging deceit and fraud, is in no wise questioned by plaintiff in error. The consideration of the above assignment, therefore, necessitates a complete review of all the evidence. We have examined the same with care, and do not agree with counsel for plaintiff in error. On the contrary, there is ample evidence to sustain the verdict of the jury under the allegations of the petition. The evidence clearly shows that Lawless made the sale to Raddis as alleged in the petition; that he and Hale and others, in their presence, told Raddis that the title to the land was good; that Raddis throughout the entire transaction insisted that he would not purchase unless the title was good. There is an attempt to show that Raddis insisted only on a warranty deed, and that he obtained such from Hale, and that, therefore, all other representations, even though made, were harmless, etc. The evidence shows that Raddis was ignorant concerning the methods employed by Lawless and Hale in and about the sale of this land, and that he was unsuspecting and had confidence in them, and believed he was to have, and that he was obtaining, a clear title to the land. The evidence also shows that Lawless and Hale knew that the restrictions on the land had not been removed, and that the same was inalienable, and that a warranty deed from Hale, who was insolvent, would not carry a clear title to Raddis. In *Prescott v. Brown*, 80 Okl. 428, 120 Pac. 991, it was said

by this court in the syllabus: "A vendee has a right to act on the positive representations of existent material facts made by a vendor, even though the means of knowledge were open to him. The real question in such matters is: Was the party in fact deceived by the false representations? 'It is as much an actionable fraud wilfully to deceive a credulous person with an improbable story as it is to deceive a cautious and sagacious person with a plausible one.' " Reference is also hereby made to the authorities cited in that case sustaining the rule enunciated in the foregoing quotation. The assignment of error under consideration, involving, as it does, the determination of the facts, under the unchallenged allegations of the petition, will not authorize or warrant this court in disturbing the verdict of the jury, especially where there is any evidence reasonably tending to support the same. *Caddo Nat. Bank v. Moore*, 30 Okl. 148, 120 Pac. 1003; *Grimes v. Wilson*, 30 Okl. 322, 120 Pac. 294; *Prescott v. Brown*, supra; *Allen v. Kenyon*, 30 Okl. 536, 119 Pac. 960; *Edwards v. Miller*, 30 Okl. 442, 120 Pac. 996; *Bland v. Peters*, 30 Okl. 798, 120 Pac. 631. In this case we have no hesitancy in saying that there is ample competent evidence in the record to sustain the verdict of the jury and the judgment of the court.

[2] It is next urged that the court erred in permitting the introduction as evidence of a printed copy of the final rolls of the citizens and freedmen of the Five Civilized Tribes, prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior on or prior to March 4, 1907, the same being a book compiled and printed under authority conferred by the act of Congress approved June 21, 1906. From this printed copy it was shown that Reed Wilson, the allottee of the land sold by Hale and Lawless, to Raddis, was a full-blood Cherokee Indian, and incapacitated to convey, unless his restrictions had been removed.

[3] Counsel for plaintiff in error contends that the act of Congress making said rolls conclusive evidence as to the quantum of Indian blood of any enrolled citizen of the tribe is unconstitutional and void, and in conflict with the "due process of law" clause of the federal Constitution, and for other reasons. The brief contains an elaborate discussion of the various objections urged by plaintiff in error, but the question is no longer open to discussion in this state. Congress in the exercise of its undoubted power to deal with the subject has enacted that the rolls of citizenship of the Five Civilized Tribes shall be conclusive evidence of the quantum of Indian blood, not for the purpose of establishing that particular fact, but for the purpose of fixing the status of the allotment and the capacity of the allottee to

alienate the same. It was competent for Congress to do this in the furtherance of its well-established policy in dealing with the Indians. By this act of Congress it is not attempted nor intended to alter existing rules of evidence, but merely to determine the persons who have lands affected thereby. This has been settled by the well-considered opinion by Judge Pollock in *Bell v. Cook et al.* (C. C.) 192 Fed. 597, cited with approval and followed in *Yarbrough v. Spalding et al.*, 31 Okl. 806, 123 Pac. 843. The objection urged against the introduction of the printed copy of the rolls is not good. Section 5896, Comp. Laws 1906, provides that: "Public documents purported to be printed by authority of Congress or either house thereof, shall be evidence to the same extent that authenticated copies of the same would be." Inasmuch as certified copies of the rolls would have been admissible, the copy printed by authority of Congress was likewise admissible.

The objection to the evidence of the witness Tuthill was properly overruled, for the reason that Lawless, in a cross-petition, asking for affirmative relief against Raddis, alleged that by the false and fraudulent representations of Raddis he (Lawless) was induced to loan him the sum of \$1,000 on the theory that the title to the land in question was good, and that, had he (Lawless) known that the title was bad, he would not have made the loan. Tuthill testified that he prior to the sale of the land to Raddis had told Lawless that Reed was a full-blood Cherokee Indian. If, therefore, Lawless knew that Reed was a full-blood Cherokee Indian, he could not have been defrauded by the statement of Raddis. Such testimony was also admissible for the purpose of showing good or bad intent on the part of Lawless in his representations to Raddis concerning the title to the land.

[4] Complaint is made that instruction 4 does not state correctly the law applicable to the facts of the case. There was no exception saved to the giving of this instruction, nor was any objection to the giving of the same made in the motion for a new trial. This court will not consider alleged errors of the trial court, unless such alleged errors appear on the record of the case, and exceptions have been taken thereto by the complaining party. *Taylor v. Johnson*, 23 Okl. 50, 99 Pac. 645; *Saxon v. White*, 21 Okl. 194, 95 Pac. 783; *Osborne & Co. v. Case*, 11 Okl. 479, 69 Pac. 263.

The only other objection urged which is necessary for us to consider is that the verdict of the jury is not sustained by the evidence. This question has been heretofore fully disposed of, but, in addition to what has already been said, it may be observed that the evidence clearly shows that the title to the land sold to Raddis was not in Hale,

but that it, as a matter of fact, was in Reed Wilson, a full-blood Cherokee Indian; that Raddis, by the false representations of Hale and Lawless, was induced to pay to Hale and Lawless \$500 in cash, and to give them a negotiable promissory note for \$1,000; that Lawless well knew there was no title in Hale, at the time he was attempting to sell the land to Raddis. The jury by its general verdict found all these facts to be true. After the verdict had been returned, counsel for Raddis in open court offered to enter a remittitur in favor of Lawless, in the sum of \$1,000, the amount of the note, if Lawless would surrender the same to him or to the court for cancellation. The offer was refused, and by failure to accept the same Raddis was entitled to a judgment against Lawless for the amount of the note. Even now Raddis offers to enter a remittitur in this court for the amount of the note and interest. Lawless, if he still refuses to produce and surrender the note, is in no position to complain, or to invoke the technicalities of the law in an attempt to work an injustice and compel this court to do a wrong.

[5] It is not every error occurring at the trial that will warrant this court in reversing a judgment. "The court in every state of the action must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected, by reason of such error or defect." Comp. Laws 1909, § 5680. On appeal the court must give judgment without regard to technical errors or defects, or to exceptions that do not affect the substantial rights of the parties. We are of opinion that plaintiff in error has had a fair and impartial trial, that substantial justice has been done, and that there are no such errors in the record as would warrant an interference with the verdict of the jury.

The judgment of the lower court should be affirmed, with the following modification; i. e.: If, within 30 days after the receipt of the mandate herein by the clerk of the district court of Ottawa county, Lawless, the plaintiff in error, shall file in said court the original note for \$1,000 given by Paul Raddis and Lydia Raddis to J. P. Lawless, on April 9, 1910, for cancellation by the clerk, and delivery to Raddis, then, and in that event, the judgment herein shall be reduced by the amount of the said note and interest. However, on failure of Lawless to produce and deliver said note for cancellation as above required, then the original judgment shall be and remain in full force and effect, and execution thereon shall issue immediately after the expiration of said 30 days as aforesaid. All costs to be taxed against plaintiff in error.

PER CURIAM. Adopted in whole.

## HUBBARD v. COWLING.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

### 1. LIBEL AND SLANDER (§ 41\*)—CONDITIONAL PRIVILEGE — "CONDITIONALLY PRIVILEGED PUBLICATION."

A "conditionally privileged publication" is a publication made on the occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1410, 1411.]

### 2. LIBEL AND SLANDER (§ 34\*)—"PRIVILEGED COMMUNICATION."

A "privileged communication" is one made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

### 3. LIBEL AND SLANDER (§ 123\*)—PRIVILEGED COMMUNICATION — PRIVILEGED OCCASION — QUESTION FOR COURT OR JURY.

Where there is no dispute as to the circumstances under which a publication was made, it is a legal question for the court to determine whether the occasion is such as to bring the alleged defamatory publication within the protection afforded to privileged communications. But whether the facts which give the publication the privileged character claimed for it are established by the evidence is a question for the jury. Accordingly, where the evidence is uncertain and conflicting, it is proper for the court to instruct the jury as to what facts constitute a privilege, and leave them to say whether those facts are proved.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 358-364; Dec. Dig. § 123.\*]

### 4. LIBEL AND SLANDER (§ 101\*)—PRIVILEGED COMMUNICATION — MALICE — BURDEN OF PROOF.

After it is shown that the alleged slander is privileged, the burden rests upon the plaintiff to show express malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. § 101.\*]

### 5. LIBEL AND SLANDER (§ 19\*)—SLANDEROUS COMMUNICATION—CONSTRUCTION OF WORDS.

Words used in an alleged slanderous communication are to be taken in their most natural and obvious sense, and in which those to whom they are spoken will be sure to understand them.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Action by A. F. Cowling against J. P. Hubbard. Judgment for plaintiff, and defendant brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

White & Du Bois, of Poteau, for plaintiff in error. Hale & Lunsford, of Poteau, Carl Monk, of McAlester, and R. G. Bulgin, of Poteau, for defendant in error.

ROBERTSON, C. This action was commenced in the district court of Le Flore county on September 6, 1910, by A. F. Cowling to recover damages from J. P. Hubbard for slander. In the petition it is alleged "that A. F. Cowling swore a falsehood in the trial of a civil suit in the justice of the peace court of Cowlington township, Le Flore county, Okl." It is also charged that this language was used by defendant Hubbard in the Baptist church, while the congregation was in conference, in the town of Cowlington, on July 16, 1910, and that the language used was false, malicious, scandalous, and defamatory. The defendant answered, first, that the charge was made as alleged, and was true; second: that the charge was made under circumstances of privilege; and, third, that the charge was made without malice. To this answer plaintiff filed a reply, in form a general denial, and upon the issues so joined trial was had to a jury, and resulted in a verdict for \$500 in favor of plaintiff. Upon this verdict judgment was duly entered, and defendant appeals.

Defendant's admission in his answer that he uttered the words as charged in the petition, and that the same were true, relieves us from further consideration of that phase of the controversy, and leaves us to deal only with the pleas of justification and privilege.

We will first consider the question as to whether or not the communication was privileged. It is not contended by defendant that the communication was absolutely privileged, but that it was only a qualified or conditional privilege.

[1] What is a qualified, or conditional, privileged communication? "A conditionally privileged publication is a publication made on the occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. \* \* \* The proper meaning of a privileged communication is 'that the occasion on which it was made rebuts the inference arising prima facie from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that it was malice in fact.'" Townshend on Slander and Libel (4th Ed.) § 209.

[2] Where a communication is made by one having a duty to perform, and it is made in good faith, in the belief that it comes within the discharge of that duty, it is privileged (Bradley v. Heath, 12 Pick. [Mass.] 163, 22 Am. Dec. 418; Rude v. Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717, and note), and the duty here referred to is not limited to legal obligations, but extends to

moral or social duties of imperfect obligation (Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516; Richardson v. Gunby, 88 Kan. 47, 127 Pac. 533). "A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable." Newell on Slander and Libel (2d Ed.) 388.

In this case it is charged, and admitted, that the defendant uttered the alleged slander at a meeting of the Baptist Church, in conference, at Cowlington. The defendant alleges that the charge is true, and was made without malice, and in good faith, by reason of a duty defendant owed the church, and upon a subject in which the church had a corresponding interest. In the light of the above authorities, it is apparent that if the defendant can show that the utterance, which he admits making, was, in fact, made in good faith, and without malice, and upon a subject in which he had an interest, and to the Baptist conference, of which both he and the plaintiff were members, and that the same was made in obedience to a duty which defendant owed the church under its laws and rules, and to which the church had a corresponding interest, the same would become and be a qualifiedly and conditionally privileged communication, and the occasion on which the slander was uttered would rebut the inference of malice prima facie arising out of the alleged slander, and would leave the burden of proving malice on the plaintiff.

[3] Defendant insists that the question of privilege as urged in his answer was one of law for the court, and not of fact for the jury, and complains of the instruction given by the court to the jury, which required the jury to determine that question as one of fact. This contention cannot be sustained, and the decisions are practically uniform in holding that, where the evidence is conflicting, it is the province of the court to instruct the jury as to what facts constitute a privileged communication, and leave it for the jury to determine whether or not those facts have been established. Thus in *Abraham et al. v. Baldwin*, 52 Fla. 156, 42 South. 592, 10 L. R. A. (N. S.) 1051, 10 Ann. Cas. 1148, it is said: "Whether slanderous words uttered are a privileged communication depends upon the circumstances under which they were uttered, and whether or not the facts and circumstances when conceded establish the privilege is a question of law for the court; but, when the facts and circumstances under which the communication was made are not conceded, the court cannot as a matter of law determine whether the



communication was or was not privileged, and a jury must determine the facts under proper instructions from the court. \* \* \* In determining whether or not a communication is privileged, the nature of the subject, the right, duty, or interest of the parties in such subject, the time, place, and circumstances of the occasion, and the manner, character, and extent of the communication, should all be considered. When all these facts and circumstances are conceded, a court may decide whether a communication is a privileged one, so as to require the plaintiff to prove express malice. But, when all the essential facts and circumstances are not conceded, the existence or nonexistence of the privilege should be determined by the jury from all the facts and circumstances of the case, under proper instructions of the court applicable to the case." In 25 Cyc. 549, the following rule is found: "Where there is no dispute as to the circumstances under which a publication was made, it is a legal question for the court to determine whether the occasion is such as to bring the alleged defamatory publication within the protection afforded to privileged communications. But whether the facts which give the publication the privileged character claimed for it are established by the evidence is a question for the jury. Accordingly, where the evidence is uncertain and conflicting, it is proper for the court to instruct the jury as to what facts constitute a privilege and leave them to say whether those facts are proved." See, also, *Bodine v. Times Publishing Co.*, 26 Okl. 135, 110 Pac. 1096, 31 L. R. A. (N. S.) 147. The burden of proving the occasion privileged was also upon Hubbard, the defendant, and it is only when the facts and circumstances are not controverted that the question becomes one of law for the court.

[4] Measured by the above general rules, which seem to be well established, and which, in our opinion, undoubtedly state the law applicable to this case, we are clearly of opinion that the instructions given by the court on the question of privilege are not open to the criticism offered by plaintiff in error. Good faith, a right, duty, or an interest in a proper subject, a proper occasion, and a proper communication to those who have a like right, duty, or interest, are essential to constitute words spoken that are actionable per se a privileged communication, so as to make the proof by the plaintiff of express malice essential to liability. *Abraham v. Baldwin*, supra. The burden of proving the allegations of the answer, that the communication was privileged was on the defendant, and all of the above essential ingredients were required to determine that issue, which was one of fact and for the jury. This issue was properly submitted to the jury by the court, and defendant has no right to complain of the instructions covering the same, as they fairly and clearly state

the rule of law applicable to the facts of the case, and are in conformity with the decisions hereinabove referred to, and to the weight of authority on the subject generally.

The court, after instructing the jury on the question of privileged communications, further instructed them that, if they should find the communication privileged, thereupon the burden of proving that the same were uttered in bad faith, and with malice, etc., would shift, and would rest upon the plaintiff. In other words, the court told the jury that the defendant admitted uttering the words charged, that such utterance prima facie constituted slander and "makes the case, unless you shall find in favor of the defendant on one or the other of the issues which he has made"; i. e., that the same was privileged, or that the same was true. It is urged also in this connection that to charge a man with swearing to a falsehood does not necessarily charge him with having committed a crime; that, before a crime can be charged, all the necessary ingredients of the crime must also be charged. This is not, nor should it be, the law. If such were true, it would be an easy matter indeed, for one to escape punishment for slander for a criminal offense to all intents and purposes can easily be charged without alleging all the material ingredients of the crime. Defendant says: "But does the language alleged and proven charge a crime? It is alleged, proven, and admitted that the defendant said the plaintiff swore a falsehood in a trial in a justice court. It is not alleged, not proven, and not admitted that the falsehood complained of was perjury. It is not shown anywhere that the alleged false statement was material to the issue. It is not alleged, proven, nor admitted that the justice court had any jurisdiction to try the cause referred to. How, then, can it be said that the defendant charged, or intended to charge, that the plaintiff had done something for which he was amenable to the criminal laws of our state?" (Defendant's Brief, pages 9, 10.) This, to our minds, is a far-fetched excuse, and not worthy of serious consideration, and with such plea we have but little sympathy. Section 54, *Newell on Slander and Libel*, p. 123, reads as follows: "It is as a general rule a presumption of law that whatever a witness has sworn to in a judicial proceeding is material to the question or questions involved, and, when he is charged with having sworn falsely in such proceeding, the charge imports perjury. The injury done consists in the fact that the defendant has ostensibly charged the plaintiff with the crime of perjury. The hearers so understand it, and they cannot be presumed to know anything of what actually transpired in the proceeding to affect the materiality of the plaintiff's testimony or to qualify the real nature of the falsehood imputed. No hearer can presume that he had been telling an idle story, having no connection with the

cause, for no court would listen to such a story; and therefore the charge must be interpreted as one of perjury." The true rule, as we understand it, is that the words used in the alleged slanderous communication are to be taken in their most natural and obvious sense, and in which those to whom they are spoken will be sure to understand them. Thus in section 27, Newell on Slander and Libel, p. 304, it is said: "The courts no longer strain to find an innocent meaning for words *prima facie* defamatory; neither will they put a forced construction on words which may fairly be deemed harmless. Formerly it was the practice to say that words were to be taken in the more lenient sense, but that doctrine is now exploded. They are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them. The rule which once prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by the courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them. Now the only question for the judge or the court is whether the words are capable of the defamatory meaning attributed to them. If they are, then it is for the jury to decide what is in fact the true construction. So long as the words complained of are not absolutely unintelligible, a jury will judge of the meaning as well as other readers or hearers. All perplexity and obscurity will disappear under the narrow examination which the words will receive in a court of law. It matters not whether the defamatory words be in English or in any other language, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether cant or slang terms be employed, or the most refined and elegant diction. The insinuation may be indirect, and the allusion obscure; it may be put as a question or as an 'on dit'; the language may be ironical, figurative, or allegorical—still, if there be a meaning in the words at all, the court will find it out, even though it be disguised in a riddle or in hieroglyphics. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence." See, also, pages 302, 303, 304, and 305, Newell on Slander and Libel; Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Wolbrecht v. Baumgarten, 26 Ill. 291; Whitsel v. Lennen, 13 Ind. 535; Niven v. Nunn, 13 Johns. (N. Y.) 48; Smith v. Wright, 55 Ga. 218.

[5] In the earlier reported cases the rule was otherwise, and great particularity in the pleadings and proof was required, but modern authorities have trimmed and adjusted the law on this subject, and words and slanderous statements are now taken in their natural sense, and as the hearer understands

them, and it ought not be, nor is it, the duty of courts to give defamatory words and expressions a sense and meaning not intended by the utterer. Juries, under proper instructions by the court, are best qualified to determine the true meaning and import of the words used, and they will ordinarily give to the language its real meaning, as it was intended, under the peculiar facts and circumstances of each case.

It is also under this objection and in this connection contended that there was no proof of express malice, and that a verdict should have been directed for defendant. Even were this true, defendant would not be entitled to such relief, for malice, sufficient to sustain a verdict, may be inferred from the facts and circumstances of the case. But there is ample proof of express malice in this case to warrant and sustain the verdict. The record shows that defendant conversed with several persons relative to the charges before presenting them to the conference. It is shown that the pastor of the church advised him on the subject. It is also shown that he ignored the plain letter of the church law, under which he pretended to act, and which he claims impelled him to make the charge, and carried the subject of their differences to the church before going privately to the plaintiff with his grievance as the church law directs. The evidence further shows that a committee was appointed by the church to wait upon the parties, and endeavor to settle their differences; that the committee, in effect, fully exonerated plaintiff, but recommended in their report to the church, that the brethren do not go to law about the matter; that defendant was very active in the matter, and that many of the members who were kinsmen of defendant were also very active, and that, because plaintiff failed to obey the recommendation with reference to keeping their trouble out of law, he was, without notice, unceremoniously expelled from membership in the church, at an almost secret meeting, when there were but 20 or 30 members present out of a membership of 213, and notwithstanding plaintiff lived only about 100 yards from the church. These, with many other acts detailed in evidence, together with a personal view of the witnesses, with full opportunity to observe their appearance and demeanor, gave to the jury ample grounds to believe that the charge was made by defendant in bad faith, without reason, and that the same was malicious. There is plenty of evidence in this record to warrant the jury in returning the verdict found, and the rule of this court that, where there is any evidence tending reasonably to sustain the verdict, the same will not be disturbed on appeal, will not permit us to interfere even though we were so disposed.

The other questions raised by the petition in error do not require consideration at our hands, inasmuch as their determination would

not in any manner tend to bring us to different conclusions. There being no error apparent of record of sufficient magnitude to warrant an interference with the verdict, the judgment of the district court of Le Flore county should therefore be affirmed.

**PER CURIAM.** Adopted in whole.

**JONES et al. v. BOSTICK.**

(Supreme Court of Oklahoma. Oct. 8, 1912.  
Rehearing Denied Feb. 4, 1913.)

(Syllabus by the Court.)

**CHattel MORTGAGES (§ 172\*)—REPLEVIN—EVIDENCE—DEFENSE.**

In a replevin action for the recovery of possession of certain chattels by virtue of a mortgage, the answer not disclosing a complete defense to the mortgage debt but only a partial failure of consideration, judgment was properly entered in favor of the plaintiff against the defendant.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 308-308, 310-315; Dec. Dig. § 172.\*]

Error from Jackson County Court; W. T. McConnell, Judge.

Action by J. R. Bostick against M. T. Jones and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Bartholomew, of Oklahoma City, for plaintiffs in error. W. C. Austin, of Eldorado, for defendant in error.

**WILLIAMS, J.** The defendant in error, as plaintiff, sued the plaintiffs in error, M. T. Jones and S. A. Hall, as defendants, in replevin for the recovery of certain chattels by virtue of a mortgage executed by said defendant to secure certain notes. The notes were given as consideration for the purchase of a certain acreage of cotton, corn, and millet. The defendant answered, admitting the execution of the mortgage and notes, but alleged certain fraudulent representations on the part of the plaintiffs, in that they represented said acreage to be in excess of what it actually was, and also as to what such acreage produced the preceding year. There is neither any offer to nor tender back by the defendants in their answer of the cotton, corn and millet for which the notes and mortgage were executed, but a specific allegation of partial failure of consideration is made. Section 1137, Comp. Laws 1909; section 894, Stat. 1890; *Luger Furniture Co. v. Street*, 6 Okl. 312, 50 Pac. 125.

The question for determination under the issues is as to whether the plaintiffs were entitled to possession of said property under said mortgage. If anything was due on said notes, the plaintiffs were entitled to recover said possession. The notes were due at the time the action was brought, and default had been made under the terms of said mortgage. No contention is made as to a

preliminary demand. No prejudicial error was committed in rendering judgment in favor of the plaintiffs for the possession of the property for the possession of which the plaintiffs sued. *Broyles et ux. v. McInteer*, 29 Okl. 767, 120 Pac. 283. All the Justices concur.

**HOLMES v. LE FORS, Sheriff.**

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

**1. FALSE IMPRISONMENT (§ 40\*) — INSTRUCTION.**

An instruction in an action for false imprisonment that, if the plaintiff was engaged in the retail liquor business at the time of his arrest, he had no such character as could be injured by arrest and imprisonment made by the defendant, as sheriff, if in such arrest and imprisonment the defendant was in good faith endeavoring to enforce the prohibitory law of the state, is error.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. § 119; Dec. Dig. § 40.\*]

**2. FALSE IMPRISONMENT (§ 30\*)—DAMAGES.**

If the arrest was unlawful, the jury would have the right to consider plaintiff's occupation in estimating the damages.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 106, 107; Dec. Dig. § 30.\*]

**3. ARREST (§ 63\*)—MISDEMEANOR—NECESSITY OF WARRANT.**

An officer can arrest for a misdemeanor only when he has a warrant, or when the misdemeanor is committed in his presence.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

**4. CRIMINAL LAW (§ 218\*)—WARRANT—VALIDITY.**

A warrant directing an officer to arrest any person he may find engaged in violating the law is void.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 444-451, 457; Dec. Dig. § 218.\*]

**5. ARREST (§ 63\*)—WARRANT—POSSESSION OF INTOXICATING LIQUOR.**

An officer may arrest without warrant any person he finds in the possession of intoxicating liquor, if the possession is for the purpose of violating any of the provisions of the prohibitory liquor law of the state.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

**6. FALSE IMPRISONMENT (§ 35\*) — PUNITIVE DAMAGES.**

An officer making an illegal arrest is not liable for punitive damages, where he made the arrest in good faith, and without malice.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. § 112; Dec. Dig. § 35.\*]

**7. FALSE IMPRISONMENT (§ 27\*)—MEASURE OF DAMAGES—EVIDENCE.**

In an action for unlawful arrest, where the defense is that the defendant had possession of intoxicating liquor at the time of his arrest for the purpose of violating the prohibition law of the state, and the question of the good faith of the officer is also involved on the measure of damages, evidence of the circumstances leading up to the arrest is competent.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. § 100; Dec. Dig. § 27.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by A. F. Holmes against Rufe Le Fors, Sheriff of Comanche County, Okl. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Stevens & Myers and T. B. Orr, all of Lawton, for plaintiff in error. Louis Davis and R. J. Ray, both of Lawton, and S. M. Cunningham, of Hugo, for defendant in error.

ROSSER, C. This was an action by A. F. Holmes against Rufe Le Fors, as sheriff of Comanche county, for damages for false imprisonment. The plaintiff was suspected of selling liquor in a certain building in the town of Chattanooga, in Comanche county, and a search warrant was issued by the county court to search the house. The county attorney and the deputy sheriff, Jackson, who made the arrest, and R. E. Le Fors, a brother of the defendant, went to Chattanooga for the purpose of searching the house. When they arrived at the house, they were informed that the plaintiff, with another party, who was also suspected of selling liquors, had just left the house, and had gone to the O. K. Hotel. Inquiry was made at the O. K. Hotel, and the officers were informed that they were not there. The officers then opened the building which they had first intended to search, and there found a sort of bar with some soft drinks, and also a bottle of whisky. The officers were then informed that just about the time the train came in the plaintiff and the other party with him had taken some whisky out of the building, and the last seen of them they were seen in the O. K. Hotel. The county attorney then wrote out an affidavit for a search warrant for the O. K. Hotel, and also wrote out a warrant, and Le Fors swore to the affidavit for search warrant before John Murphy, justice of the peace. The warrant was then issued and the officers went to the O. K. Hotel and found the plaintiff and the other party there, and found a bottle of whisky in their possession. They then arrested the plaintiff and the party with him.

[1] The court, over the objections and exceptions of plaintiff, instructed the jury as follows: "If you find from the evidence that at the time the arrest and imprisonment complained of was made the plaintiff was engaged in the retail liquor business, then you are instructed that he had no such character as could be injured or damaged by arrest or imprisonment made by the defendant as such sheriff in such arrest and imprisonment if he was in good faith endeavoring to enforce the prohibitory law of the state." This instruction was error.

[2] It would have been proper for the jury to have considered his occupation in estimating damages, had they found that the arrest was unlawfully made, but they could

only have considered his occupation for the purpose of estimating the damages. A person, however mean his station in life, and however low his calling, can only be arrested and imprisoned according to law. The law prescribes the circumstances under which an arrest can be made and under which a person may be imprisoned. Unless these circumstances exist an arrest and imprisonment is unlawful, the officer is a trespasser, and the action will lie, though it might be that the character and occupation of the person arrested would make the recovery very small.

[3] In misdemeanor cases, the officer can arrest only when he has a warrant, or when the misdemeanor is committed in his presence. For the error in giving this instruction, the judgment must be reversed. In view of the fact that there must be another trial, it is proper to notice other matters occurring at the trial which are complained of by the plaintiff. Plaintiff urges that the search warrant under which the hotel was searched was void. It is not necessary to decide this question. This action is not brought for an unlawful search, but for an unlawful arrest. The search warrant was not valid as a warrant of arrest, for the reason that it named no one to be arrested. A warrant must name some one.

[4] A general warrant to go out and arrest any one whom the officer may find violating the law is void, and adds nothing to his authority. This was the common law (*Commonwealth v. Crotty*, 10 Allen [Mass.] 403, 87 Am. Dec. 609), and is still the law. In order for a warrant of arrest to be valid, the court or magistrate issuing the warrant must have some person in mind to be arrested, and must designate the person in the warrant by name, if known, and, if the name is not known, then in some way to show that some particular individual is meant (*Snyder's Comp. L. § 6579*), and the warrant must positively order the arrest. It is not sufficient for it to direct the officer to arrest if he finds persons violating the law. This would be to make the officer the judge as to whether or not the arrest should have been made.

[5] Objection is made to several charges of the court and to his refusal to give several offered by the plaintiff. No material error was committed, except as stated. The court properly charged the jury that if the officer found the plaintiff in possession of intoxicating liquors, and if he had possession thereof for the purpose of in any way violating the law, the officer was authorized to make the arrest. This was a correct statement of the law, and, under the evidence in this case, was the only issue that should have been submitted to the jury. If the officer found him in possession of intoxicating liquor, in violation of the law, he had the right to arrest without warrant, and the plaintiff could not recover. If not, the

warrant was unlawful, and the plaintiff should recover.

[6] The court instructed the jury that if the officer made the arrest in good faith, and without malice in attempting to enforce the prohibitory law, the plaintiff could only recover actual damages. This instruction is assigned as error. This instruction seems to be a correct statement of the law, and no cases are cited showing that it is error. Punitive and exemplary damages are ordinarily not recoverable in such cases, in the absence of circumstances showing malice by the person who made the arrest. 19 Cyc. 371.

[7] It is urged that the court erred in admitting in evidence certain testimony of the county attorney. His testimony was not incompetent. He merely related what was done in the effort to find whisky. It was competent for him to state what he had found that led him to take the various steps that were taken. It was incompetent for him to relate the details of what he was informed, but it was proper for him to state all the facts and circumstances leading up to the arrest to throw light upon the purpose for which the plaintiff had the whisky, and to enable the jury to know whether he had it in his possession for the purpose of violating the prohibitory law of the state at the time he was arrested. It was also competent for the purpose of throwing light on the motives of the officer.

The case should be reversed and remanded.

PER CURIAM. Adopted in whole.

SLOAN et al. v. WARRENBURG.,  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 270\*)—RELEVANCY—  
SUBSEQUENT ALTERATIONS AND PRECAUTIONS.

In an action to recover damages based on alleged negligence in failing to provide safe appliances with which to work, it is error for the court, over objection, to admit evidence disclosing alterations and repairs and precautions made and taken after the accident to avoid the recurrence of similar accidents.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

Commissioners' Opinion, Division No. 1.  
Error from District Court, Logan County;  
A. H. Huston, Judge.

Action by Nellie Warrenburg against G. W. Sloan and another to recover damages resulting to plaintiff for the alleged wrongful death of her husband, Louis G. Warrenburg, deceased. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

John Adams and Devereux & Hildreth, all of Guthrie, for plaintiffs in error. McGuire & Smith, of Guthrie, for defendant in error.

AMES, C. The deceased was an employé of the defendants. The defendants were adding a second story to a brick building in the town of Crescent. The deceased was assisting the defendants in elevating brick to the second story. The method was as follows: A telephone pole, about 28 feet long, was placed on top of the original one-story building. The large end was laid on the roof. Two by four pieces were crossed over this end and nailed into the telephone pole with 20-penny nails, and the other end nailed to the joists supporting the roof. Into the saddle over the telephone pole, produced by the crossing of these 2 x 4 pieces, bags of heavy material, weighing about 200 pounds, were placed, and over the whole was piled several hundred pounds of stone. The evidence also discloses that this was the usual way of constructing this kind of a hoist. At the point where the telephone pole projected over the brick wall the pole was elevated and supported by a crotch constructed for that purpose, so that the front end of it was 5 or 6 feet higher than the other end. The front end projected 5 or 6 feet beyond the wall, and ropes were adjusted at the front end, which were attached to a box, and this box was hauled up through a pulley; the ropes being drawn by a horse. The deceased and one of the defendants loaded the box with brick. Ropes were attached to each end of the box, and it was the duty of the deceased to hold these ropes and prevent the box of brick from rubbing against the wall or into any openings, as it was drawn up, while the defendant drove the horse. At the time of the accident, as the box was being elevated, the deceased failed to get a firm hold on the ropes, and the box swung in toward the building, catching in a doorway. The defendant, not noticing the situation, continued driving the horse; the result being that by reason of this obstruction in the usual method of doing the work the telephone pole fell, the back end was loosened from the roof, and the pole turned a somersault over the wall. The deceased, in backing away from the falling pole, stumbled, was caught by the pole, and killed instantly.

The errors alleged and discussed are that the case should not have been submitted to the jury, because there was no sufficient evidence of the primary negligence of the defendants; that according to the plaintiff's own testimony the deceased was guilty of contributory negligence; and that the court erred in admitting evidence showing that after the accident the defendants replaced this pole and fastened the back end of it in a different manner.

As the case must be reversed upon the last ground, it is unnecessary to consider the first two, although we have some doubt about there being any sufficient evidence of the defendants' primary negligence. Upon a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

new trial, however, the evidence may be different. That the defense of contributory negligence must be submitted to the jury has been decided in other cases. *C. v. R. I. & P. Ry. Co. v. Baroni*, 32 Okl. 540, 122 Pac. 926; *C. v. R. I. & P. Ry. Co. v. Hill*, 129 Pac. 13, recently decided, but not yet officially reported.

Upon the last proposition the record discloses that over the defendants' objection the plaintiff was permitted, upon the cross-examination of one of the defendants' witnesses, to show that after the accident the telephone pole was replaced on the roof, and instead of being fastened in the same manner as before a hole was cut in the roof, and the pole was securely tied to the joists which supported the roof. This was error. Whether or not a defendant is guilty of negligence depends upon the question whether he exercised reasonable care under the circumstances existing at the time, not whether he had done everything which it was possible to do in the light of every possible danger that might arise. It may well be that after an accident has actually happened, in order to prevent its recurrence, an owner might exercise extraordinary care, and in so doing take precautions which would never have occurred to him but for the accident, and which are not usually observed in the business. A party's conduct must be judged by the circumstances, conditions, and duties existing at the time, and which are known to him, or in the exercise of reasonable care should be known to him; and therefore it is almost universally held that precautions taken after an accident are not admissible in evidence as tending to show negligence before the accident. Under similar circumstances the court, in the case of *Missouri, K. & T. Ry. Co. v. Johnson*, 126 Pac. 567, not yet officially reported, held: "Evidence of repairs or alterations in a railroad embankment and bridge, subsequent to a loss of property in a flood, is not competent as tending to establish negligence upon the part of the railroad in the original construction of such embankment and bridge." The authorities upon this proposition are collected at length in 8 *Encyclopedia of Evidence*, page 914, and the rule as announced prevails in the English courts, the Supreme Court of the United States and the federal courts, in Alabama, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, and Wisconsin. In Minnesota this rule now prevails, and earlier decisions to the contrary in that state have been overruled. There seems to be some conflict in the Georgia cases, while the contrary rule prevails in Kansas.

The plaintiff, however, argues that the error was harmless; but we cannot agree with this contention. The primary issue in the case was the question of the defendants' negligence, and it is altogether possible that on the evidence the jury might have found that the defendants were not negligent if this incompetent evidence had not been admitted. The unanimity with which the courts have excluded said evidence of itself indicates the belief that it is material, and one only has to consult his own common sense to perceive that when the court has treated this evidence as competent a jury will naturally regard it as material; and, while we uniformly decline to reverse a case because of an error which is not prejudicial, it seems apparent to us in this case that this error was prejudicial, and that the judgment of the trial court should be reversed and the cause remanded.

PER CURIAM. Adopted in whole.

McPHERRIN v. TITTLE et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 363\*)**—"BONA FIDE HOLDER."

The owner of a negotiable promissory note, who obtains it before maturity for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 790, 791, 960, 962; Dec. Dig. § 363.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 823, 824.]

2. **BILLS AND NOTES (§ 339\*)**—"BONA FIDE HOLDER—SUSPICION AS TO TITLE."

Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or of circumstances sufficient to put him upon inquiry, will not defeat his title; that result can be produced only by bad faith on his part.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 821-823; Dec. Dig. § 339.\*]

3. **BILLS AND NOTES (§ 344\*)**—"BONA FIDE PURCHASER—DEFAULT IN INTEREST."

A negotiable promissory note is not dishonored by reason of a failure to pay interest prior to maturity of the principal, in the absence of a stipulation in the note to that effect; but the fact that interest is due and unpaid is a material circumstance bearing on the question of whether the purchaser acquired the note in good faith and without notice of prior equities or infirmities in the title.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 866-868; Dec. Dig. § 344.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Adair County; John H. Pitchford, Judge.

Action by Grant McPherrin against J. M. Tittle and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—46

Arnold & Chase, of Stilwell, for plaintiff in error. R. Y. Nance, of Stilwell, for defendants in error.

SHARP, C. Plaintiff in error, hereinafter designated as plaintiff, sued defendants in error, hereinafter designated as defendants, as makers of a negotiable promissory note, made payable to G. L. Clark and A. F. Hennessey or order, and by them indorsed, and afterwards purchased by and delivered to plaintiff by the indorsee for a valuable consideration before maturity. Defendants admitted the execution of the note, but charged that their signatures thereto were fraudulently obtained by the payees thereof; that said notes were signed by the makers conditioned upon the payees thereof obtaining the signatures of other responsible parties; that there was a total failure of consideration; that plaintiff was not the owner of said note for value, but was well aware, at the time of its purchase, of the fraud practiced by the payees thereof in obtaining the signatures of defendants to said note. It is urged that the trial court committed numerous errors, but one of which it will be necessary to consider. In its charge to the jury, one of the three instructions given is as follows: "(3) You are instructed that if you find from the evidence that the plaintiff was an innocent purchaser of the note sued on before maturity and for a valid consideration, then he is entitled to recover; but if you find from the evidence that the note was not complete when the same was assigned to the plaintiff, and the plaintiff had knowledge of that fact, or of circumstances sufficient to put an ordinarily prudent person upon inquiry, and he failed to institute such inquiry, then you should find for the defendants."

[1, 2] That there is authority supporting the rule announced, we grant; but it is not the rule in this jurisdiction, and we believe it to be a principle now well settled that neither a suspicion nor defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or put him on inquiry, will affect his right, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. A discussion of the early and modern cases, however, is unnecessary in view of the conclusions reached by this court in *Forbes v. First Nat. Bank of Enid*, 21 Okl. 206, 95 Pac. 785, where the question is discussed at length. It is there said: "It is contended by plaintiff in error that the conduct of Goltry in going to the Citizens' Bank after banking hours and obtaining the draft in question, and the other items of remittance which had been received by the Citizens' Bank during that day and the government bond and a note in settlement of the balance due by the Citizens' Bank to the First National Bank, when Goltry had knowledge that the Citizens' Bank

was in failing condition, and that it had acquired said draft on that day, establishes the bad faith of the plaintiff in taking the draft. He contends that the circumstances under which the draft was obtained were such as should have created a suspicion in the mind of Goltry and put him upon inquiry, and that his not having made inquiry of the assistant cashier of the Citizens' Bank as to how he obtained the draft establishes the bad faith of the plaintiff. We think this contention not well founded; for it has become the well-established rule in the federal courts of the Union and in the greater number of state courts that suspicion of defect of title, or even gross negligence on the part of a taker of a negotiable instrument, will not defeat his title. *Atlas National Bank v. Holm et al.*, supra;<sup>1</sup> *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645; *Clark v. Evans et al.*, 66 Fed. 263, 13 C. C. A. 433; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; 1 *Daniel on Negotiable Instruments*, 766. In *Murray v. Lardner*, supra, Mr. Justice Swayne, speaking for the court, said: "The possession of such paper carries the title with it to the holder. The possession and title are one and inseparable. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.'" In *First Nat. Bank of Watonga et al. v. Wade et al.*, 27 Okl. 102, 111 Pac. 205, 35 L. R. A. (N. S.) 775, it was said: "We are inclined to agree with counsel that there was not sufficient evidence adduced to show bad faith on the part of their clients in acquiring these notes and mortgages. This court is committed to the doctrine that bad faith, not merely a notice of circumstances sufficient to put a prudent man on inquiry, is necessary to defeat recovery by the holder of negotiable paper, whose right accrued before maturity." See, also, *Shawnee Nat. Bank v. Wootten & Potts*, 24 Okl. 425, 103 Pac. 714; *Moore v. First Nat. Bank of Iowa City*, 30 Okl. 623, 121 Pac. 626. Many authorities sustaining the views of this court, as previously expressed, may be found in *Joyce's Defenses to Commercial Paper*, §§ 475, 476, 477, where it is said in the text that merely suspicious circumstances or carelessness are insufficient to necessitate inquiry, and prevent a person from being a bona fide holder; nor is mere suspicion evidence of negligence which will defeat a right to recover as a bona fide holder. From what has been said it clearly follows that the in-

<sup>1</sup> 71 Fed. 489, 19 C. C. A. 94.

struction mentioned did not correctly state the law defining the rights of plaintiff. The question was one of good faith on his part; and knowledge of circumstances sufficient only to put an ordinarily prudent person upon inquiry was not sufficient to defeat his title and right of recovery.

[3] It is insisted, however, by counsel for defendant in error, in his brief, that at the time of plaintiff's purchase of the note it had already been dishonored, and that therefore plaintiff could not be classed as an innocent purchaser for value before maturity, without notice. The note was dated October 15, 1908, and matured November 1, 1909. It bore interest from date at the rate of 8 per cent. per annum, and which interest was made payable annually. The interest, therefore, on the note was due October 15, 1909, or 16 days before the note matured. The plaintiff testified that he purchased the note of a former indorsee on October 27, 1909, which would be 12 days after the interest was due. Is the fact that interest is overdue and unpaid, of itself, sufficient to affect the purchaser of a negotiable note with notice that the instrument is dishonored? There are decisions so holding, among which are the following: *First Nat. Bank of St. Paul v. County Commissioners*, 14 Minn. 77 (Gil. 59), 100 Am. Dec. 194; *Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728; *Newell v. Gregg*, 51 Barb. (N. Y.) 263; *First Nat. Bank v. Forsyth*, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415; *Chouteau v. Allen*, 70 Mo. 290, 339; *Merchants' Nat. Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28; *Citizens' Savings Bank v. Couse*, 68 Misc. Rep. 153, 124 N. Y. Supp. 79.

In the *Forsyth* Case the rule announced in the earlier case of *First Nat. Bank v. Scott County*, 14 Minn. 77 (Gil. 59), 100 Am. Dec. 194, was seriously questioned by the court; but it was said that, having stood unchallenged for 27 years, it would not be disturbed, upon the ground, if no other, of *stare decisis*. In *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697, the Supreme Court of Wisconsin, referring to the earlier case of *Hart v. Stickney*, observed that when the case of *Hart v. Stickney* was decided attention had not been called to the earlier case of *Boss v. Hewitt*, 15 Wis. 260, where a directly opposite conclusion was reached. Referring to the conflict in the opinions of the court, and the occasion thereof, it was said: "And as the earlier case of *Boss v. Hewitt* was entirely overlooked, which, by implication, is sustained by many decisions of this court, made in the farm mortgage cases, and in cases arising upon town, county, and city bonds, we deem it our duty to adhere to the rule that a purchaser for value of unmaturing commercial paper, with interest overdue, is not from that fact alone affected with notice of the prior equities or infirmities in the title." The better rule, and the one sup-

ported by the text-writers and the weight of authority, is that a note is not overdue by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect, because the interest is a mere incident to the debt. *Tiedeman on Commercial Paper*, § 109; 1 *Daniel on Negotiable Instruments* (4th Ed.) § 787; *Gilbough v. Norfolk & P. R. Co.*, 1 *Hughes*, 410, Fed. Cas. No. 5,419; *Preble v. Board of Supervisors*, 8 Biss. 358, Fed. Cas. No. 11,380; *State v. Cobb*, 64 Ala. 127; *Morton et al. v. New Orleans, etc., Ry. Co.*, 79 Ala. 590; *National Bank of North America v. Kirby*, 108 Mass. 497; *McLane v. Placeville & S. V. Ry. Co.*, 66 Cal. 606, 6 Pac. 748; *Cooper v. Hocking Valley Bank*, 21 Ind. App. 358, 50 N. E. 775, 69 Am. St. Rep. 365; *Cooper v. Merchants', etc., Nat. Bank*, 25 Ind. App. 341, 57 N. E. 569; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *United States Nat. Bank v. Floss*, 38 Or. 68, 62 Pac. 751, 84 Am. St. Rep. 752; *Town of Ontario v. Hill*, 33 Hun (N. Y.) 250, affirmed 99 N. Y. 324, 1 N. E. 887; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Indiana & Illinois Central Ry. Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Town of Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612; *Morgan v. United States*, 113 U. S. 476, 5 Sup. Ct. 588, 28 L. Ed. 1044. Many of the authorities cited are reviewed by *Somerville, J.*, in *Morton et al. v. New Orleans, etc., Ry. Co.*, supra, where the conclusion was reached that negotiable bonds not due, with attached coupons past due and unpaid, did not thereby appear dishonored on their face; but the presence of such unpaid coupons was considered a material circumstance bearing on the question of whether the purchaser acquired them in good faith and without notice. But while the nonpayment of interest when due will not be given the effect contended for, it is a fact proper to be considered by the jury, in connection with all the other facts and circumstances, on the question whether plaintiff is entitled to the position of one who has taken in good faith and without notice of existing defenses. *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Nat. Bank of North America v. Kirby*, 108 Mass. 497. As already noted, the question for determination is one of bad faith on the part of plaintiff, if defendants are to escape liability. To that end proof that interest on the note was past due and unpaid when purchased, and all other facts and circumstances connected with plaintiff's acquiring title to said note, would be competent evidence to go to the jury under proper instructions from the court.

The cause should be reversed and remanded, with instructions to grant plaintiff a new trial, and for further proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.



**NATIONAL GRAND LODGE OF UNITED BROTHERS OF FRIENDSHIP AND SISTERS OF THE MYSTERIOUS TEN v. UNITED BROTHERS OF FRIENDSHIP OF THE JURISDICTION OF OKLAHOMA.**

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

**BENEFICIAL ASSOCIATIONS (§ 12\*) — DETERMINATION OF FRATERNAL RIGHTS—JURISDICTION.**

In controversies between individual members of a secret fraternal organization, where civil or property rights, rights as citizens, as contradistinguished from purely fraternal rights, are involved, the civil law is superior to the constitution and by-laws of such order, and the civil courts have jurisdiction to determine such controversies; but where the rights involved are purely fraternal rights, created under, limited, defined, and determined by the constitution and by-laws of such order, the civil courts have no jurisdiction.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 21; Dec. Dig. § 12.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Logan County; I. N. Sandlin, Judge.

Action by the United Brothers of Friendship of the Jurisdiction of Oklahoma against the National Grand Lodge of United Brothers of Friendship and Sisters of the Mysterious Ten. Judgment for plaintiff, and defendant brings error. Reversed.

Brown & Stewart, of Muskogee, S. T. Wiggins, of Wagoner, and James Hepburn, of Guthrie, for plaintiff in error.

**HARRISON, C.** This suit was instituted in the alleged behalf of the United Brothers of Friendship of the Jurisdiction of Oklahoma by John F. Anderson as an alleged Grand Master of said fraternal order, represented by himself and E. I. Saddler as attorneys. The plaintiff claimed in substance: That prior to May, 1906, by virtue of a commission as Deputy National Grand Master issued to John F. Anderson by W. A. Gaines the then National Grand Master of said order, he, the said John F. Anderson, had organized lodges, temples, and juveniles within the territory of Oklahoma. That in May, 1906, having a sufficient number of lodges, temples, and juveniles to entitle this jurisdiction to a grand lodge, the said John F. Anderson, by virtue of said commission from the National Grand Master and by virtue of the constitution and by-laws of said National Grand Lodge, organized a Grand Lodge for the jurisdiction of Oklahoma in the city of Guthrie, the said John F. Anderson then being duly constituted Grand Master of said lodge. That in June, 1907, plaintiff incorporated said Grand Lodge under the laws of the territory of Oklahoma. That thereafter, in May, 1908, and after statehood, the said W. A. Gaines filed articles of incorporation

of the National Grand Lodge with the Honorable William Cross, Secretary of State of Oklahoma, and procured a charter thereupon. That such action on the part of said Gaines was in violation of the rights of plaintiff Grand Lodge, and was knowingly done for the purpose of defrauding and injuring plaintiff lodge. Plaintiff filed copies of the constitution and by-laws of said National Grand Lodge and of said State Grand Lodge, and marked same as exhibits to and part of its petition. That in August, 1907, the said W. A. Gaines, then wrongfully claiming to be the National Grand Master of said lodge, visited the jurisdiction of the plaintiff, and, associating himself with one P. Delancy, E. I. Nickins, and M. H. Martin, and others, called and held a meeting purporting to be a meeting of the Grand Lodge of this jurisdiction, at which the said P. Delancy was elected Grand Master, who thereupon proceeded to the various lodges, temples, and juveniles, and held himself out to be Grand Master of the Grand Lodge for the jurisdiction of Oklahoma. That the said W. A. Gaines on said date was not the National Grand Master of defendant National Grand Lodge, for that at an election held prior to that time one W. M. Farmer had been elected to the office of National Grand Master according to the constitution and by-laws of the National Grand Lodge, and that, although defeated at said election, the said W. A. Gaines had wrongfully contrived to maintain himself in office as National Grand Master, and had persisted in wrongfully exercising authority as such officer. That thereafter, not having lawful authority to act as National Grand Master, he had no authority to call the said meeting of plaintiff Grand Lodge, and that the whole proceedings under which P. Delancy was elected Grand Master were unlawful and void, and that all authority exercised and all proceedings had by said P. Delancy under said authority were in violation of the rights of plaintiff, and in conflict with the authority of said John F. Anderson, the lawful Grand Master of plaintiff.

Plaintiff further alleged that the said W. M. Farmer was then the regular National Grand Master, and as such recognized the said John F. Anderson as Grand Master of plaintiff Grand Lodge. Plaintiff further alleged that it existed under and by virtue of authority from the National Grand Lodge, and that it, together with all other State Grand Lodges, were subservient to the National Grand Lodge, and prayed that said National Grand Lodge be perpetually enjoined from encroaching upon, or interfering with, the rights of plaintiff by or through the said P. Delancy as Grand Master of plaintiff, elected as aforesaid, and further prayed that a mandate issue to the Secretary of State ordering the cancellation of the said charter of said National Grand Lodge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

To this petition the defendant answered, in substance, denying the material allegations in the petition, and further alleging that the National Grand Lodge is a fraternal and secret order among the colored people of the United States, and designated as the United Brothers of Friendship and Sisters of the Mysterious Ten. That as such it, the National Lodge, has supreme control and exercise of jurisdiction over all the various state lodges and all lodges inferior thereto throughout the United States; that it is the supreme source of all laws, rules, and regulations governing subordinate lodges; that it was organized in the state of Kentucky about the close of the Civil War for the general good and uplift of the colored people and for their advancement morally, intellectually, and religiously, and to better enable them to become good citizens of the United States; that, in order to avoid factional differences and to minimize friction between the different state lodges, it became necessary to organize said order as national institution, which in 1908 was done; that one of the paramount purposes of said national organization was to provide a sure, just, and adequate means of determining persons rightfully entitled to offices in all subordinate lodges, and that the only friction in Oklahoma is the question of who are the rightful officers of plaintiff, and not a friction between the National Lodge and the State Lodge, and that said question does not come within the jurisdiction of the civil courts so long as it may be settled within and by the laws of the order, and where no civil or property rights are involved. It further alleged that the said P. Delancy was a true and lawful Grand Master and one T. S. E. Brown was a true and lawful secretary of plaintiff Grand Lodge, and that their authority came from the National Grand Lodge according to the laws thereof, and that the said John F. Anderson had been suspended from said order, was no longer Grand Master, and that he and those acting with him in the institution of this suit were wholly without legal authority from plaintiff to bring such suit. Wherefore they prayed that the temporary injunction theretofore issued be dissolved, and that defendant have judgment for its costs in this action.

The suit was originally filed in the district court of Logan county, and upon the petition filed, at an ex parte hearing, a temporary restraining order was issued by the judge of the district court. Thereafter the cause was transferred to the superior court of Logan county and at the May term, 1909, at a hearing in said matter, the temporary injunction was made perpetual.

It is urged by counsel for plaintiff in error that: "The real question involved in this controversy as shown by the pleadings is: Who were the legitimate officers of the plaintiff in error?" This point is well taken; for, while the suit is brought in the name of the Grand Lodge of the state against the Na-

tional Grand Lodge, yet the record discloses no conflict nor controversy between the State Lodge and the National Lodge as corporate bodies, but merely a controversy between individual members of such lodges as to who are the proper officers under the constitution and by-laws of the order. The real controversy here is whether John F. Anderson or P. Delancy is the legitimate Grand Master of the Grand Lodge of this jurisdiction. A determination of this controversy necessarily depends on whether W. A. Gaines or W. M. Farmer was the National Grand Master of the National Grand Lodge. As to which of the two was entitled to the office in question is not of itself a civil right over which the courts of law or equity have jurisdiction, but is purely a fraternal right created under and determined by the constitution and by-laws of the fraternity. A settlement of the controversy between Farmer and Gaines as to which was the lawful Master of the National Grand Lodge was sought in the courts of Texas in *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 119 S. W. 874, wherein the same election was contested and wherein the Texas Civil Court of Appeals in declining jurisdiction over the controversy, held: "We think it is a well-established rule of law that the civil courts will not interfere with the internal operations of such association of private individuals or assume to review their failure to conduct their business affairs according to the laws and rules of the order, except for the purpose of protecting some civil or property right of the party complaining. When the National Grand Lodge, the proper tribunal of this association, passed upon and declared the result of that election, it was binding upon the courts and all concerned, unless it be shown that the result was accomplished through a proceeding violative of the rules and laws of the order, and that Farmer was thereby deprived of a civil or property right to which he was entitled under the constitution and by-laws of the order. By-laws adopted for the government of such organization are regarded as a contract of the members with one another, and by these their individual rights as such members are to be determined in the conduct of the business affairs of the association. \* \* \* Simply testing an election for the purpose of having the complaining party declared the person elected is not a matter of which courts of justice can take cognizance." *Williamson v. Lane*, 52 Tex. 335; *Ex parte Towles*, 48 Tex. 413; *Rogers v. Johns*, 42 Tex. 339. It is not shown by the record in the case at bar that any civil or property rights have been infringed upon, and while the law of the land is superior to the laws of any fraternal organization, so far as civil rights are involved, and are so recognized by the constitution and by-laws of both plaintiff and defendant herein and are also in their pleadings, yet the civil courts have been very cautious in assuming

jurisdiction over controversies arising between individual members of such organization over purely fraternal rights which of necessity must be determined by the laws of the organization. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Harmon v. Dreher*, Speers' Eq. 87; *Den v. Bolton*, 12 N. J. Law, 206; *Ferraria v. Vasconcelles*, 23 Ill. 456; *State ex rel. Watson v. Farris*, 45 Mo. 183.

A determination of the real controversies presented by this record would not be an alleviation of any friction between the two lodges, for the record shows no such friction or conflict of rights between the two lodges, but would merely be a settlement of the question whether John F. Anderson or P. Delancy is the legitimate Grand Master of the Grand Lodge of this jurisdiction. Under the weight of authority the civil courts have no jurisdiction in such matters. Besides, there is another very potent reason why the order of the court below would work an injury upon both lodges and should not be sustained, which is that it does not settle the real controversy involved, namely, whether Anderson or Delancy is the Grand Master. But the ultimate effect of the order is the restraining of the National Lodge from exercising authority over the State Lodge. This is the very opposite of what is sought; for it appears from the record that there is no desire on the part of the National Lodge to exercise any improper authority over the State Lodge, nor is there any disposition on the part of the State Lodge to resist the lawful authority of the Grand Lodge. It is confessed, not only in the pleadings of the plaintiff and the evidence submitted by it, but also shown by the constitution and by-laws of both orders, that the plaintiff Grand Lodge of Oklahoma derives all of its authority and right of existence from the National Grand Lodge, and is wholly subservient to the interests of the National Lodge and obedient to its authority. Hence, to sustain the order of injunction granted by the court below would have the logical effect of depriving the plaintiff Grand Lodge of its very right of existence by restraining the National Grand Lodge from exercising authority over it; for it must be observed that the suit is not brought in the name of the State Lodge to restrain W. A. Gaines from wrongfully usurping the authority of the National Grand Lodge, nor does it complain that the articles of incorporation of the National Grand Lodge, which are alleged to have been filed by W. A. Gaines, are not the valid articles of incorporation of the National Grand Lodge. In fact, the corporate validity of the National Grand Lodge is not questioned. Its validity is confessed, and yet the plaintiff prays for an injunction and obtained an order which in effect deprives the National Grand Lodge from doing business within this state, plaintiff at the same time confessing that it ex-

ists by virtue of authority derived from the National Grand Lodge. The record does not sustain such an order nor does it disclose wherein any civil rights as citizens, as distinguished from purely fraternal rights as a member of the order, are involved. Nor does it disclose facts which give the court jurisdiction to determine either the controversy between Gaines and Farmer or that between Anderson and Delancy.

Therefore the order of the superior court is dissolved, with instructions that the cause be dismissed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. ASHLOCK.  
(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—FAILURE TO FURNISH COMPETENT ASSISTANTS.

Where the negligence complained of in a suit for personal injuries is "failure of defendant to furnish plaintiff sufficient competent assistants to enable him to perform the work with safety," the question presented is for the determination of the jury, where there is any evidence, or inferences to be legitimately drawn from the evidence, viewed in the light of the situation and circumstances of the parties and the work, tending to show that defendant failed to perform its duty in this regard, and that such failure produced the injury, and that such a result might have been reasonably anticipated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

2. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

The verdict of a jury upon questions properly submitted to it will not be disturbed on appeal, where there is any substantial evidence supporting it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Pottawatomie County; W. N. Maben, Judge.

Action by J. F. Ashlock against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, of El Reno, Thos. R. Beman, of Chicago, Ill., and J. H. Woods, of Shawnee, for plaintiff in error. H. H. Smith and W. T. Williams, both of Shawnee, for defendant in error.

BREWER, C. This was an action by plaintiff Ashlock against the defendant, the Chicago, Rock Island & Pacific Railway Company. The plaintiff recovered a judgment, and the company brings this appeal. Plaintiff Ashlock had been employed by the company as a laborer for some time prior to the injury, and as such had assisted the truck-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

man upon one occasion before the accident in taking out a pair of trucks. But he had assisted the machinists to raise and lower jacks several times before he was hurt, and had brought blocks and had seen the blocks adjusted and the jacks operated. Three or four days before the injury he had been promoted to the position of truckman, and as such it was his duty to take out and repair trucks and replace them under the engines. Upon the morning of the injury he had been ordered by one Van Dinter, who it seems was the foreman under whose orders he worked, to hurry and put a certain engine on the trucks. In obedience to this order, he jacked up the engine. It seems that he put a large timber across under the boiler on top of the frame, and a block of wood between the timbers and boiler. As he was raising it he noticed that the timber was turning and crushing, and he lowered the engine, intending to get another block and put it on top of the jack, under the timber. When he let the engine down so that no weight was resting on the jack, he started to get out from under the engine and in doing so placed his hand on the axle of the truck he was trying to replace. As he did so the block that had been released by the lowering of the engine fell, striking his hand, inflicting the injuries for which recovery is sought.

Plaintiff alleged that the company was negligent in failing to furnish him a safe place to work, and safe tools and appliances with which to work, and also in failing to furnish him sufficient and competent assistants to enable him to perform the work with safety. It is urged by the appellant company that there was no evidence of negligence to support either allegation. The situation and how the injury happened is told by plaintiff as follows: "A. \* \* \* In jacking it up, or trying to jack it up to raise it, it was all I could do with the jack to jack it up there, why the timber began to turn, and I just released the jack and let it down to put a block across under the timber on top of the jack. A. Well, I put blocks behind there. I don't remember just—well—it was oak blocks, and wedged behind the cinder hopper door. It was crossways under the boiler. I could not get a block on top of the main center of the big timber, and I put a block behind the little door, and that bolt, and I put a block in front about 18 or 20 inches long and 8 or 9 inches wide, and 5 or 6 inches thick, and that door would not let it go clear back on the timber so that it would raise all of the timber. It just went partly over the edge of the block, and then I wedged in on top of that block and the cinder hopper door. In jacking it up it crushed that timber, and caused that timber to turn, and I went to get a block to put on top of the jack and raise the whole thing up together, and I was letting the jack down, and in that position it was harder to jack down than up. A. Well,

it was something like this (kneeling) raising the lever it took all I could do to raise it. It was harder to do than jacking the engine up, and in doing that way I was down this way [indicating]. I was down this way working at it, hurrying as fast as I could because he told me to rush, and, when I got the jack down, I had to get out to get me another block, and help myself up. \* \* \* I was out at arm's length. I raised my hand up there to get out, and just as I laid my hand up there the block fell on my hand. A. That block resting on the front of the timber and the boiler. The jack was up under the main big timber which was about 10 or 12 inches square, and that block was on up on top of the big timber; between that and the boiler. A. Both hands, all I could do, it worked heavily. All I could do to lift it. A. No; it was only resting on top of the timber and a wedge drove on top of the block between that and the boiler, and when I released the jack—of course, the big timber was raising up and was not raising the boiler, and I just released the jack and that let it down, and that block fell out on my hand where I laid my hand."

[1] There is evidence that plaintiff was inexperienced and defendant knew it; that the work he was directed to do ought not to have been expected or required of one man; that plaintiff was sent to do it alone, under hurry up orders; that the work was done under the direction of the foreman. A mere statement of the nature of the thing to be done shows that it was beset with dangers. Upon these facts the jury had a right to find that the defendant was negligent in not exercising that care for the safety of its employé required of it by law. This being true, the only escape for defendant from liability is to take shelter under the rule that, notwithstanding the master has been shown to have been negligent, yet he is not liable, unless it be further shown that his negligence caused the injury. This reduces the whole matter to the single question of "proximate cause." This question was for the jury if there was any evidence, or inferences to be legitimately drawn from the evidence, viewed in the light of the situation and circumstances of the parties and the work, tending to show that defendant's failure to perform its duty produced the injury, and that such a result might have been reasonably anticipated. In *Coalgate Co. v. Hurst*, 25 Okl. 597, 107 Pac. 661, where one of the questions involved was the issue as here, the court say: "Was the negligence of the master the proximate cause of the intestate's death? This may be established by circumstantial evidence, and is a question of fact for the jury. From all the evidence in the case, may it be fairly inferred that intestate's death was the result of the failure of the defendant to take some precaution which in the exercise of ordinary care it should have taken?" The opinion of

a jury upon questions properly submitted to it, expressed in its verdict will not be overturned, where there is any substantial evidence supporting it. *Burns v. Vaught*, 27 Okl. 711, 113 Pac. 906; *First Nat. Bank v. Arnold*, 28 Okl. 49, 113 Pac. 719; *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Ry. Co. v. Hardwick*, 28 Okl. 577, 115 Pac. 471; *Bank v. Lookabaugh*, 28 Okl. 608, 115 Pac. 786; *Davis v. Smith*, 28 Okl. 852, 115 Pac. 1017.

Our inquiry, then, reduces itself to this: Did the antecedent negligence of defendant produce a situation or condition, causing things to happen subsequently in the usual course of the work, which produced the injury? Or, rather, was the jury justified under the evidence in finding this to be true? The falling block was the immediate cause of the injury, but it would not have fallen if it had been properly placed and had been under the observation of an assistant standing by helping in the work. To do such things was the duty of an assistant. One man could, with great effort operate the jack, but a helper would have placed the timbers, observed the effect the weight was having on them, and that the operations did not shift them into a position from which they could fall and do damage. The helper would have been on the outside. The plaintiff was crouched or lying prone on the floor under this machinery. He could not so carefully handle or place the timbers, or observe their movements under the strain from his position. If an assistant had been present, there would have been no necessity for plaintiff to scramble out from under the machinery to get a block. It would have been the duty of the assistant to get it. If plaintiff had not attempted to get out to get the block, he would not have been hurt. Of course, he might have done so even with a helper present, but it would not have been necessary. It cannot be presumed that he would have done so. The failure to have an assistant there, however, made it necessary that he do so. It is more reasonably probable that plaintiff would not have done the unnecessary thing than it is that he would have done it. If he had not done the thing defendant's failure in its duty made it necessary for him to do, he would not have been hurt, in the manner he was. And, again, if an assistant had been present in the reasonable performance of his duty in co-operating with the man under the machinery, who was exhausting all his strength operating the jack, he would not only have had his eye on these blocks, but his hands, if necessary, so that when plaintiff loosened the jack, the heavy block would not have been allowed to remain so insecure that without even being touched, it could topple and fall. The fall of the block in obedience to natural laws was but an incident resulting in natural sequence

from its being allowed to get into a position from which it could fall, and which would most probably not have happened if a careful helper had been standing by observing the situation.

[2] This may have been the view the jury took of the matter, and it is believed to be tenable and supported by evidence and reasonable inferences drawn therefrom. Therefore the verdict of the jury, approved by the trial court, ought to stand through an affirmation of the case.

PER CURIAM. Adopted in whole.

#### RICHARDSON v. CHATFIELD.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

#### 1. DEEDS (§ 212\*)—CONDITIONS SUBSEQUENT—PERFORMANCE.

Evidence examined, and *held* sufficient to support a decree canceling a conditional deed of conveyance for failure upon the part of the grantee to keep and perform the conditions named in the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 650; Dec. Dig. § 212.\*]

#### 2. EVIDENCE (§ 461\*)—PAROL EVIDENCE—AMBIGUOUS WRITTEN CONTRACT.

If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from its inspection, extrinsic evidence of the subject-matter of the contract, of the relation of the parties to each other, and of the facts and circumstances surrounding them at the time of its execution, may be received to aid the court in the proper interpretation of the instrument.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Creek County; M. L. Barnum, Judge.

Action by Bert Chatfield against J. S. Richardson. Judgment for plaintiff, and defendant brings error. Affirmed.

Mann & Jackson, of Sapulpa, for plaintiff in error. Henry McGraw, of Tulsa, for defendant in error.

BREWER, C. On March 3, 1910, Chatfield, as plaintiff, sued Richardson, as defendant, in the district court of Creek county to cancel a certain conditional conveyance of about two acres of land, and remove the cloud upon his title caused thereby. The instrument contained the following provision: "This deed is made with the understanding that the party of the second part is to build upon said land a cotton gin and sawmill, and it is mutually agreed between the parties hereto that this land is not to be transferred without consent of the party of the first part, and that at any time party of the second part or his successors ceases to operate the cotton gin or mill thereon, then and in that case the land is to be immedi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ately transferred back to the owner thereof upon the payment of the purchase price above mentioned, party of the second part, however, having privilege to remove all machinery, party of the second part to personally conduct said mill unless otherwise agreed upon."

The plaintiff alleges as grounds for the cancellation of said deed that the defendant has wholly failed to observe, perform, or execute the terms and conditions thereof, although it had been requested and demanded that he do so. By agreement of the parties a jury was waived, and the cause was submitted upon the evidence to the court, which decided the issues in favor of the plaintiff, and decreed that the defendant reconvey the land to the plaintiff, and that the deed from plaintiff to defendant be canceled and annulled.

The defendant below, as plaintiff in error here, argues two propositions: (1) The admission of incompetent evidence. (2) Insufficiency of the evidence.

[2] (1) The admission of evidence complained of is that the court permitted the notary who prepared the deed or contract in suit to explain that the operation of the cotton gin was the material or important thing in the minds of the parties as gathered from their instructions and conversation at the time the instrument was drawn; the objection being that this evidence tended to vary by parol the terms of a written instrument. Whether or not this evidence was competent depends upon the determination of whether or not the terms of the instrument are clear and unambiguous. If they are ambiguous, or the meaning of the instrument taken as a whole is doubtful, the evidence is competent. We believe the meaning of the instrument is open to doubt. The first clause of the condition requires that the grantee "build upon said land a cotton gin and sawmill." Further on it stipulates that if the "grantee ceases to operate a cotton gin or mill" the land shall be immediately reconveyed. The plaintiff in error contends that he was only required to operate one or the other, and that, inasmuch as he did operate the sawmill, under the language of the instrument, he had fully performed its conditions. The reading of the instrument certainly leaves the question in doubt on this point. If the parties intended that the operation of the sawmill would meet the terms of the grant, why was it required that both a gin and a mill be erected? It does not seem reasonable to us that the plaintiff would have been careful to stipulate that the gin must be erected and placed on the land without any obligation upon the part of the defendant to operate. We think, therefore, that, the terms of the condition of the grant being doubtful, they were subject to the explanation.

[1] (2) The evidence in this case was ample to support the findings and judgment of the court. These two acres involved were a portion of plaintiff's farm. The grant of the land appears to have been made as an inducement to the defendant to erect and operate a cotton gin, which would be of advantage to plaintiff, his tenants, and neighboring farms. After erecting the gin, the defendant, in the fall of 1908, ginned about 79 bales of cotton, and then declined to operate his gin further. He let it remain idle through the ginning season of 1909, also that of 1910. On this point the proof is conclusive, and we think the court was abundantly authorized to find that the condition subsequent named in the deed had not been performed. This requires the affirming of the case.

PER CURIAM. Adopted in whole.

SKIRVIN v. GARDNER et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 82\*)—COMMISSIONS—AGENT FOR BOTH PARTIES—PETITION.

A petition for the recovery of commission for the sale of real estate, which on its face shows that the plaintiff, a real estate agent, was to receive a commission from both purchaser and seller, to be good as against a general demurrer, must contain the allegation that such relationship was known by both parties, and that they both assented thereto.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

2. BROKERS (§ 65\*)—ACTION FOR COMMISSIONS—ACTS FOR BOTH PARTIES.

An agreement that has for its purpose, or which necessarily results in, the accomplishment of a wrong, or which tends to produce disloyalty or unfaithfulness, to those persons whose interests a fiduciary has in charge, will not be enforced by the courts of this state.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by C. J. Skirvin against R. H. Gardner and another, constituting Pryor-Gardner & Co. Judgment for defendants on demurrer, and plaintiff brings error. Affirmed.

The petition in this cause alleges, in substance, that defendants were a firm of real estate brokers; that plaintiff was negotiating for the purchase of a farm from one Mrs. M. G. Addington, said farm being of the value of \$13,000; that defendants learned of said negotiations, and thereupon sought plaintiff and orally represented that they could purchase the said farm as cheaply from Mrs. Addington as plaintiff, and could, in addition thereto, induce Mrs. Addington to pay them a commission for the sale of said farm, and orally promised plaintiff that, if he would purchase said farm through said de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants, they would divide the commission and give plaintiff one-half thereof; that plaintiff, relying on said oral promises, agreed to and did purchase said farm from Mrs. Addington, and did induce Mrs. Addington to sell the same through the agency of the defendants, paying plaintiff, Mrs. Addington, therefor the sum of \$13,000, and in addition Mrs. Addington was to pay defendants for their services in selling said farm the sum of \$600; that thereby defendants became indebted and bound to pay plaintiff one-half of said \$600; that said sum is due and owing and unpaid, etc. Defendants challenged the sufficiency of the petition by a general demurrer, which was sustained by the court. Plaintiff refused to plead further, but elected to stand on his demurrer, whereupon the court entered an order dismissing his petition, with costs, from which order he appeals.

Claud W. Stringer, of Oklahoma City, for plaintiff in error. John H. Wright and Clarence J. Blinn, both of Oklahoma City, for defendants in error.

ROBERTSON, C. (after stating the facts as above). It will be observed that defendants "sought the plaintiff and orally represented and promised the plaintiff that they (the said defendants) would be able to purchase said farm as cheaply, from the said Mrs. M. G. Addington, as the plaintiff could and would, in addition thereto induce the said Mrs. M. G. Addington to pay them a commission for the sale of said farm, and orally promised and agreed with the plaintiff that, if he would purchase said farm through the said defendants, Pryor-Gardner & Co., they would divide the commission upon the purchase with the plaintiff, and give the plaintiff one-half thereof." Case-made, p. 2. Thus it is seen the plaintiff was not induced to enter this oral contract with defendants in order that he might obtain the farm from Mrs. Addington at a sum less than she had offered it to him, or for less than it was really worth. It was understood by the parties that Pryor-Gardner & Co. could purchase the farm from Mrs. Addington as cheaply as plaintiff could. Plaintiff could also purchase it just as cheaply without the intervention of the real estate brokers. Hence the only reason why he agreed that defendants might make the sale was that he might obtain one-half the commission, and thus indirectly, but at the cost of Mrs. Addington, reduce the purchase price of the farm.

[1] Of course it is not shown by the petition that Mrs. Addington had, or had not, been advised of the two-faced character of her agents. It may be that she knew they were to divide the commission, but it is more probable that she did not. Under the doctrine laid down by this court in Plotner v. Chillson & Chillson, 21 Okl. 224, 95 Pac. 775,

129 Am. St. Rep. 776, it occurs to us that, where a petition shows that an agent, or broker, is obtaining commission from both parties, it must affirmatively appear that both parties knew his relationship and assented thereto. The opinion in the above case does not state this rule in positive words, yet it is impossible to avoid such inference. At any rate, the effect of such a contract, as that shown to exist between the plaintiff and defendants, is to work a civil wrong against Mrs. Addington.

[2] It is a fraudulent scheme, amounting to a conspiracy, the sole object of which is to take an undue advantage of one who, as in this case, was entitled to the unwavering loyalty and honesty of her agent. If such a contract works a civil wrong, the courts will not enforce it, for the reason that such conduct, being reprehensible and unfair, is against public policy. As was said in McKinley v. Williams, 74 Fed. 95, 20 C. C. A. 313: "To permit the agent of a vendor to become interested as the purchaser or as the agent of a purchaser in the subject-matter of the agency inaugurates so dangerous a conflict between duty and self-interest that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty." In 9 Cyc. 468, it is said: "An agreement is illegal and void where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime, either at common law or under the statutes. This is true for an example \* \* \* of an agreement to perpetrate a fraud upon a third person."

An agreement that has for its purpose, or which necessarily results in, the accomplishment of a wrong, or which tends to produce disloyalty or unfaithfulness to those persons whose interests a fiduciary has in charge, will not be enforced by the courts of this state.

We are therefore of the opinion that the judgment of the superior court of Oklahoma county is correct and should be affirmed.

PER CURIAM. Adopted in whole.

STATE ex rel. MCINTOSH, County Attorney,  
v. PERKINS.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 80\*)—COUNCILMEN.

Under the provisions of chapter 136, p. 316, Sess. Laws 1910-11, and the acts of which

the same is an amendment, two councilmen are provided for each ward in all cities of the first class.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 184; Dec. Dig. § 80.\*]

**2. MUNICIPAL CORPORATIONS (§ 149\*)—COUNCILMEN—UNEXPIRED TERM.**

Where no election is held at the time fixed by law, a city councilman, appointed to fill an unexpired term, holds until his successor is duly elected and qualified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 327-332; Dec. Dig. § 149.\*]

Error from District Court, Bryan County; A. H. Ferguson, Judge.

Quo warranto by the State on relation of J. T. McIntosh, county attorney, against T. J. Perkins, counsel of the city of Durant. Judgment for defendant, and plaintiff brings error. Affirmed.

J. T. McIntosh, of Durant, in pro. per. S. H. Kyle, of Durant, for defendant in error.

DUNN, J. This case presents error from the district court of Bryan county, and is an action in the nature of quo warranto, brought for the purpose of ousting the defendant in error, T. J. Perkins, from the office of councilman of the second ward of the city of Durant. Plaintiff in error, as plaintiff, stated in his petition that the city of Durant was a city of the first class, and had been since statehood; that it contained four wards, and that T. J. Perkins and J. A. Moore were acting as councilmen from ward No. 2 thereof; that the said J. A. Moore was duly elected at the April, 1911, election, and that T. J. Perkins was appointed by the city council of the said city on the 27th day of September, 1911, to fill the unexpired term of B. A. McDaniel, who was duly elected in May, 1910; that no election was held for the selection of councilmen in the said city on the first Monday in May, 1912; and that said defendant in error had not been elected or appointed to fill the office now occupied by him since the date of his original appointment, and that the city of Durant had held several municipal elections since statehood, at which councilmen were elected. To the petition, defendant filed a general demurrer which, on consideration by the court, was sustained, and, from the judgment entered, this appeal has been prosecuted.

In this court, counsel for plaintiff in error insist that, if the city of Durant has held no election since statehood, it would be entitled to eight councilmen instead of four; but that in view of the fact that elections had been held at which councilmen had been elected, under the provisions of chapter 136, p. 316, Sess. Laws 1910-11, the number of councilmen in cities of the first class was limited to four instead of eight. And it is also ar-

gued that the defendant in error could not continue to hold under the appointment which he had, because he was appointed to fill only the unexpired term, which ended the first Monday in May, 1912. In neither of these contentions are we able to agree. In order to fully understand the force and effect of the act cited and relied upon by plaintiff in error, it is necessary to consider the previous acts and their amendments. The Legislature of 1909, in an act approved March 13, 1909 (Sess. Laws 1909, p. 262, art. 2, c. 16 [Senate Bill No. 155]), provided for elections in cities, towns, and villages of the state; the manifest purpose of which act being to make uniform, in cities of the state located in the different portions thereof, formerly known as Oklahoma and Indian Territories, the election and number of city officials. This act was afterwards amended by an act approved March 24, 1910, c. 92, p. 178, Sess. Laws 1910 (Senate Bill No. 110). In this act, and under section 1 thereof, there is a provision validating and legalizing acts of those members of administrative boards of cities and villages where two members from each ward had not been previously elected, as provided for by Senate Bill No. 155, Sess. Laws 1909, *supra*.

[1] This same proviso is contained in chapter 136, Senate Bill No. 193, p. 396, Sess. Laws 1910-11, upon which plaintiff in error relies, manifesting an intent throughout all of this legislation that, in the different wards in the cities of the first class, two councilmen should be elected. The different acts, as amended and as finally completed, cover several pages of the session laws, and it is not deemed necessary, for the consideration of this case, to set them out at length; but a careful reading and consideration of the terms and purposes of the legislation, covering this entire subject, leaves no doubt of the intent of the Legislature in reference thereto, and we therefore hold, in accord therewith that, in cities of the first class under these acts, each ward is entitled to two councilmen.

[2] On the other question, it appears T. J. Perkins, defendant in error, was appointed September 27, 1911, to fill the unexpired term of B. A. McDaniel, who was elected in May, 1910. Counsel's insistence on this point is that, in view of the fact that B. A. McDaniel's term would have expired in May, 1912, and that the city held no election at that time, therefore the defendant's term expires of that date. Counsel have cited no authorities on this question, but an investigation thereof convinces us that defendant in error accepted his appointment just as his predecessor accepted his election, and that he holds the office, under his appointment, until his successor is elected and qualifies, notwithstanding the fact that an election provided for by the statute may have failed in being held.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



A case very much in point on this proposition is that of *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118. In this case it appeared that under section 2018, Comp. Laws of Utah 1888, there was a provision that the qualified electors should in 1878, and biennially thereafter, elect a collector for each county whose term of office should be for two years, or until his successor was elected and qualified. Under section 2020, Id., it was provided that, in case the said office became vacant, the county court should have the power to fill such vacancy by appointment until the next general election. In 1886 the county court, acting under this provision, appointed the defendant to fill a vacancy in the office of collector; and, at elections held in 1887 and 1889, this appointee, whose name was upon the ticket, was voted for and declared elected to the said office. No election was held in 1888 or in 1890, and, on quo warranto being brought to challenge his right to hold the office the Supreme Court of Utah held that the elections for this office, held in 1887 and 1889, were nullities, and that, as no elections were held at the time fixed by law, the incumbent held under his appointment. The court, discussing the case, says: "There can be no actual vacancy as long as the rightful occupant continues to hold office—that is, until death, resignation, removal, or some legal disability occurs. This provision is a proper one, and is so provided in order that vacancies in office may not occur from a failure of the people to elect at the regular general election fixed by the statute for that purpose. The result necessarily follows that a failure to elect at a period fixed by the statute creates no vacancy in the office, but imposes a right and a duty upon the incumbent to continue in office until his successor is legally elected and qualified; and this right falls upon the incumbent the same, whether appointed or elected. In other words, a person appointed to fill a vacancy in the office of collector can only be superseded by one who is duly elected, the person so appointed continuing to hold office in the same manner as if he were originally the incumbent; and his term of office will not expire until he is suspended by death, resignation, removal, or some other legal disability occurs, or until his successor is duly elected and qualified." This case has been approvingly cited and followed in the following cases: *State ex rel. v. Elliott*, 13 Utah, 471, 45 Pac. 346; *State ex rel. v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; *State ex rel. v. Acton*, 31 Mont. 37, 77 Pac. 299; and *State ex rel. v. Schroeder*, 79 Neb. 759, 113 N. W. 192.

From the foregoing, it follows that the judgment of the trial court must be affirmed.

HAYES, C. J., and WILLIAMS and KANE, JJ., concur. TURNER, J., absent.

LORENSEN et al. v. J. H. CONRAD & CO.  
(Supreme Court of Oklahoma. Jan. 9, 1913.  
Rehearing Denied Feb. 4, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564\*)—CASE-MADE—SERVICE.

Where a case-made is not served upon the defendant in error or its counsel within three days after the motion for a new trial was overruled, nor within the extension of time granted by the trial court, the appeal must be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Error from Superior Court, Grady County; Will Linn, Judge.

Action between Jacob Lorensen and another and J. H. Conrad & Co. From a judgment in favor of the latter, the former bring error. Dismissed.

Thomas J. O'Neill, of Chickasha, for plaintiffs in error. Barefoot & Carmichael, of Chickasha, for defendant in error.

KANE, J. There is a motion to dismiss the appeal in the above-entitled cause, upon the ground, among others, "that the case-made was not served upon the defendant in error or its counsel within three days after the motion for a new trial was overruled, as provided by law, and was not served upon the defendant in error or its counsel within the extension of time granted by the trial court for the plaintiffs in error to prepare and serve the case-made."

The record shows that the case-made was not served until three days after the expiration of the time granted by the court to the plaintiffs in error to prepare and serve the case-made upon the defendant in error or its counsel. That is a sufficient ground for dismissal.

The appeal is dismissed. All the Justices concur.

SANDS v. DAVID BRADLEY & CO.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 52\*)—COMPETENCY—WIFE OF PARTY.

Defendant offered his wife as a witness in his own behalf, on the theory that the transaction about which she was to testify occurred prior to their marriage, and that the statute prohibiting a wife from testifying for or against her husband did not extend to transactions or communications prior to the marriage. She was not jointly interested in the action; nor was she the agent of her husband. Held, that she was incompetent as a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 124, 126-136, 165, 415-417, 419, 424; Dec. Dig. § 52.\*]

2. WITNESSES (§ 52\*)—COMPETENCY—WIFE.

The competency of the wife as a witness depends upon the relationship at the time of the trial, when she is offered as a witness, and not as to whether she was the wife at the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

time the cause of action accrued, or the occurrence transpired, about which she is expected to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126-136, 165, 415-417, 419, 424; Dec. Dig. § 52.\*]

**8. APPEAL AND ERROR (§ 1002\*)—CONFLICTING EVIDENCE—REVIEW.**

Where the evidence on an issue of fact is conflicting, this court will not examine the same to determine where the weight lies; but if there is any evidence reasonably tending to support the verdict the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Osage County; John J. Shea, Judge.

Action by David Bradley & Co. against A. S. Sands to recover a money judgment. From a judgment for plaintiff, defendant brings error. Affirmed.

Boone, Leahy & MacDonald, of Pawhuska, for plaintiff in error. Hainer, Martin, Bush & Murry, of Tulsa, for defendant in error.

**ROBERTSON, O.** This was an action to recover from defendant the sum of \$500, together with interest thereon at 6 per cent. from August 31, 1901. Plaintiff, in its petition, charged that defendant, in 1901, was a practicing attorney at Wilber, Saline county, Neb.; that in 1894 it obtained a judgment in the district court of said county against Wilder & Nelson in the sum of \$1,252.16; that said judgment was placed in the hands of defendant for collection; that he collected thereon the sum of \$500 on August 31, 1901, and failed to remit the same, but, on the contrary, converted it to his own use; that said collection so made by said attorney was not known by plaintiff until subsequent to 1907, after defendant had removed from Nebraska to Oklahoma. Defendant answered by general denial, and a trial was had to a jury, which resulted in a verdict in favor of plaintiff and against defendant in the sum of \$749.75, on which judgment was entered. Motion for new trial was presented and overruled, and defendant appeals.

Two questions are presented by the record for our consideration; the first being: The court erred in excluding the testimony of Mrs. Mable D. Sands, the wife of defendant.

[1] Defendant does not claim that she was a competent witness by reason of her being his agent, or jointly interested in the action, but upon the grounds that at the time the transaction took place, about which she was to testify, she was not the wife, but the stenographer, of defendant, and that the statute prohibiting the wife from testifying for or against the husband clearly intended only to prevent the wife or husband from giving evidence for or against each other concerning a transaction or communication during coverture. We cannot find such an

exception to the statute; nor has counsel directed us to any authority sustaining such contention. Subdivision 3 of section 5842, Comp. Laws 1909, reads as follows: "Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards." This statute was called into existence on the grounds of public policy. It is based upon the marital relation, and has been universally upheld by the courts. In volume 6, Ency. Evidence, p. 847, it is said: "Various reasons were assigned for this rule of exclusion. Among these were the supposed bias of affection, fear of sowing dissensions between man and wife, occasioning perjury, and the like. The most usual reason, however, given for this rule of exclusion was partly identity of interest, and partly the necessity of guarding the security and confidence of the marriage relation; the objection of interest applying more particularly to their being witnesses in favor of each other, and the objection of public policy applying to their being witnesses against each other."

Mr. Justice Trunkey, in Darlington's Appeal, 86 Pa. 519, 27 Am. Rep. 726, in discussing the reasons for the prohibition of the parties testifying who sustain such confidential relations, said: "The foregoing principles are too familiar for citation of text-book or report. It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she is in the menial service of a rude hut, or in daily toil for the support of her family, or in charge of a mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants; when treated almost as a servant, when governed and corrected as a child, as did our sturdy ancestors, or when confided in as a companion and equal, her will is subdued to her lord. \* \* \* The common-law rights and disabilities consequent on marriage grew out of these differences, and the husband's power and influence distinctly appear. 'By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.' \* \* \* Under advancing culture and civilization, modern legislation has materially changed the common law respecting the rights incident to the marriage relation. In Pennsyl-

vania the wife may hold and enjoy her own property, and easy modes are provided for her disposal of it. But the unity of person remains, resting on foundation older than the common law, and the husband's influence over his wife, so strongly expressed by the common-law writers, will end only with the marriage relation itself."

[2] The competency of the wife as a witness depends upon the relationship at the time of the trial, when she is offered as a witness, and not as to whether she was the wife at the time the cause of action accrued, or the occurrence transpired, about which she is expected to testify. The statute will not bear any other construction; and as defendant does not claim she was acting as his agent, or that she had a joint interest in the action, or that she was in any other manner qualified as a witness, under the statute, it must be held that there was no error in the ruling of the trial court on the subject.

[3] The next assignment of error urged is that the court erred in refusing to pass upon the weight and sufficiency of the evidence. In overruling the motion for a new trial, the court said that he felt that the jury should be the final arbiters of the fact, where there was any evidence at all for them to pass upon. Whether the trial court made use of such language or not would be a matter of no moment in passing upon the question as to whether or not a new trial should be granted. The general rule followed by the courts of this state is that, where the evidence on an issue of fact is conflicting, the court will not examine the same to determine where the weight lies; but if there is any evidence in the record tending reasonably to support the verdict the same will not be disturbed on appeal. The determination of questions of fact is always for the jury. The cases cited in the brief of plaintiff in error do not sustain his contention. The authorities referred to are not applicable to the case at bar. Here there was presented squarely to the jury certain issues of fact. Under these issues testimony was offered by both parties. The court submitted the issues to the jury, which by its general verdict resolved them all in favor of the plaintiff. We have read the evidence submitted, and find that it reasonably tends to support the verdict of the jury; and such being the case the judgment rendered thereon is not reviewable here. *Armstrong, Byrd & Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *Caddo Natl. Bank v. Moore*, 30 Okl. 148, 120 Pac. 1003; *Grimes v. Wilson*, 30 Okl. 322, 120 Pac. 294; *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991; *Edwards v. Miller*, 30 Okl. 442, 120 Pac. 996; *Allen v. Kenyon*, 30 Okl. 538, 119 Pac. 960; *St. L. & S. F. Ry. Co. v. Young*, 30 Okl. 588, 120 Pac. 999; *Bland v. Peters*, 30 Okl. 798, 120 Pac. 631.

Finding no error in the record, the judgment of the district court of Osage county should be affirmed.

PER CURIAM. Adopted in whole.

MIDLAND VALLEY R. CO. v. EZELL.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 215\*)—SHIPMENT OF STOCK—DELIVERY.

Upon the arrival of cattle at their destination, the carrier unloaded them into a receiving pen, then dipped them in oil according to custom, and then turned them into another pen and held them for several hours after the consignee had demanded possession. While in this last pen, it was alleged that the cattle drank crude oil, which had been allowed to collect there, and died as a result of it. The carrier contended that the cattle had been delivered to the consignee upon their arrival at destination. *Held*, that under the circumstances of this case the cattle had not been delivered until the consignee had been permitted to remove them from the pens of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 923; Dec. Dig. § 215.\*]

2. CARRIERS (§ 229\*)—INJURIES TO STOCK—EVIDENCE OF DAMAGES—MARKET VALUE.

In an action to recover damages for loss of cattle, the only evidence of the value of the cattle was the following: "Q. What was the value of the cattle? A. \$16.80. Q. You mean \$16.80 each? A. Yes, sir." As the evidence did not show that the witness was qualified to give opinion evidence, and as the evidence did not disclose the market value, and as it did not fix any time or place, it was inadmissible.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.\*]

Commissioners' Opinion, Division No. 1.  
Error from District Court, Osage County;  
John J. Shea, Judge.

Action by H. G. Ezell against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Edgar A. de Meules and Sol H. Kauffman, both of Muskogee, for plaintiff in error.  
Boone, Leahy & MacDonald, of Pawhuska, for defendant in error.

AMES, C. The plaintiff sued the defendant for damages to a shipment of cattle, alleged to have been caused by the defendant's negligence in leaving crude oil in the pens in which the cattle were unloaded for delivery. Plaintiff alleged that the cattle drank the oil and died from the effects of it. The material facts are: That the shipment of cattle originated at Ft. Worth, Tex.; that they were consigned to the plaintiff at Foraker, Okl. That they were delivered by the Missouri, Kansas & Texas Railway Company to the defendant at Nelagony, Okl. That the defendant carried them from Nelagony to Foraker. That the plaintiff accompanied them. That upon their arrival at Foraker

they were unloaded into a receiving pen. From this they were dipped, and then delivered into a large pen or trap, containing about 30 acres, where they were held for several hours before the plaintiff was allowed to remove them. The dipping vat is about  $2\frac{1}{2}$  or 3 feet wide and 20 feet long. It is filled with crude oil, and each steer was driven in at one end and completely submerged in the oil, and then swam out at the other end, where he stood on a drainage platform, so that the oil might drip off of him and flow back into the dipping vat. He was then passed into this large trap. The dipping was done by the defendant. Some of the oil running from the cattle, instead of being conveyed back to the dipping vat, was permitted to escape into the trap into which the cattle were removed, and there it formed in pools and was allowed to remain standing. The plaintiff's cattle drank this oil, and there is testimony tending to show that it resulted in their death; some of them dying within a few days, and others lasting longer, so that the last of them died six months after dipping.

The defendant argues at great length that there is a fatal variance between the cause of action alleged and the cause of action proven, in that the defendant is sued as a common carrier, while the recovery is for breach of a contract to dip properly; but the record does not support this contention. The defendant is sued for damages for injuries to the cattle resulting from the negligence of the defendant in allowing oil to be in the pen, and the recovery is on the same theory.

[1] It is also urged that the injuries sustained by the cattle were after they had been delivered to the plaintiff, but the evidence does not bear out this contention. It is the duty of a carrier to deliver the freight to the consignee at the place to which it is addressed, in the manner usual at that place (Comp. Laws 1909, § 450); and it appears from the evidence as a whole that in handling quarantine cattle before delivery the railroad company dips them, and in this case it received compensation therefor, which is probably usual. It also appears that after these cattle were dipped the plaintiff immediately paid the freight and dipping charges and demanded the possession of the cattle, so that he could remove them from the pens, but that the defendant declined to permit him to remove them for several hours, under a mistaken idea that under the quarantine rules the cattle should be dipped twice. Under these facts, therefore, it cannot be said that the cattle had been delivered to the plaintiff.

[2] The only assignment of error in the case that presents any serious difficulty is as to the evidence relating to the damages sustained by the plaintiff. The plaintiff's testimony is to the effect that he had lived at Foraker for about four years, and was en-

gaged in the cattle business. The only testimony in the record tending to prove the plaintiff's damages is the following from his evidence: "Q. What was the value of the cattle? A. \$16.80. Q. You mean \$16.80 each? A. Yes, sir." This evidence was objected to as incompetent, irrelevant, and immaterial. This objection, while general in its terms, is by statute admitted to cover all matters ordinarily embraced within such objections, and further specification is unnecessary. Comp. Laws 1909, § 5863. Upon making such a general objection, the statute provides that the court or opposing party may inquire for a more specific statement of the ground of objection; but as that was not done in this case we are compelled to assume that every legitimate ground of incompetency was considered by the court. The plaintiff's correct measure of damages was the market value of the cattle at Foraker at the time involved (4 Elliott on Railroads, § 1738), and this question was objectionable in three particulars: It did not ask for the market value. It did not fix any time. It did not fix any place. Neither had the witness qualified himself to answer the question, although upon the theory that he was a cattleman and had been engaged in the business for a number of years, and was the owner of the cattle, we might overlook this defect, if it were the only one. *C. O. & G. Railroad Co. v. Deperade*, 12 Okl. 367, 873, 71 Pac. 629; *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 South. 284; *E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 44, 7 South. 813; *Berry v. Ingalls*, 199 Mass. 77, 85 N. E. 191; *Lawson on Expert and Opinion Evidence*, 15, 19. We might also overlook the objection that the inquiry was not for the market value of the cattle, if that was the only defect, under the holding in *Filson v. Territory*, 11 Okl. 351, 67 Pac. 473, that when a witness testifies generally to the value of an article in common use it would be assumed that he means the market value, unless it appears to the contrary. However, that was a prosecution for larceny, and it is probable that market value was not the sole criterion in determining whether the larceny was grand or petit. *Vandegrift v. State*, 151 Ala. 105, 43 South. 852. *Coyle v. Baum*, 3 Okl. 695, 718, 41 Pac. 389, which was a civil case, is to the same effect as *Filson v. Territory*.

The evidence in this case, however, is not only subject to the defects of failing to qualify the witness and of omitting all reference to market value, but also omits all reference to time and place, so that the naked question is presented whether the court can presume that the witness was qualified, that the market value was meant, and that the right time was implied and the right place referred to. In this case it appears from the plaintiff's testimony that he bought these cattle at Ft. Worth, upon the recommendation of a friend; that some of them were

yearlings and some two year olds; that two year olds were worth more than the yearlings; that he did not know how many were yearlings, nor did he know how many were two year olds; and that the cattle had just been shipped from Ft. Worth to Foraker. We therefore cannot say whether the value stated by the plaintiff was the value of the cattle at Ft. Worth or Foraker. We cannot say whether it was the value at the time of the injury or one week or two weeks or six months thereafter, although the cattle were dying during this entire length of time. In *St. L. & S. F. R. Co. v. Young*, 30 Okl. 588, 120 Pac. 999, it was held that evidence of a much higher class than this was, perhaps, not the best class of evidence obtainable on the subject; but the evidence there was held to be competent, although it was expressly pointed out that the market value of the cattle at the point of origin was taken from the consideration of the jury by the court's instructions.

The language of Justice Hayes, in delivering the opinion of the court in *Scott v. Vulcan Iron Works Co.*, 31 Okl. 334, 342, 122 Pac. 186, 190, is directly applicable to the case at bar. There the testimony was as to the usable value of certain machines, and in discussing this subject it is said: "The witnesses were asked upon direct interrogatories if they were acquainted with the reasonable usable value per day of machines of this character. In response to these interrogatories the witnesses answered in the affirmative, and stated in answer to further interrogatories that the usable value was \$15 per day; that said amount was the rental value of such machines. Objection was made to the introduction of this evidence, upon the ground that the witnesses were not required to qualify themselves as to their knowledge of the usable value of the machines in the locality where this machine involved was detained by defendant, or at the time of its detention. We think there can be no doubt as to the correctness of defendant's contention that the measure of damages is to be determined by the reasonable usable or rental value of the machine at the time and place where it was detained by defendant, to which place it had been by plaintiff shipped for use; and, if the answers of the witnesses to the direct interrogatories referred to above constituted all the evidence of these witnesses upon this matter, the action of the court in refusing to sustain defendant's objection to this evidence would constitute prejudicial error; but upon the cross-interrogatories these same witnesses testified that the market rental value of steam shovels of the character here involved was general and did not vary in different localities, nor because of the difference in the nature of the soil in which they were used; that the usable and rental value in the Indian Territory, where the shovel was used, was the

same as in other states; that it was no greater or less in one section of the country than in another. They testified to having had experience in handling such shovels, using and renting the same, and to their knowledge of the general market usable value. Under this evidence we think the answers of the witnesses objected to were rendered competent, and it was not error to refuse to strike them out."

It is thus seen that the court there held that the admission of the evidence of usable value, without a limitation as to the time and place, was reversible error; but the error was cured by the cross-examination of the same witnesses, when it was disclosed that they were testifying with reference to the correct time and place. In the case at bar, however, the cross-examination did not cure the defect in the original examination but, so far as it extended, emphasized it, as counsel for defendant inquired of the plaintiff, on cross-examination, whether it was not a fact that these cattle, when purchased at Ft. Worth, were "tailings," and this testimony was excluded. As tending to support this rule, see *Freeman v. Taylor* (Tex. Civ. App.) 130 S. W. 733, and *Galveston, H. & S. A. Ry. Co. v. Giles* (Tex. Civ. App.) 126 S. W. 282.

It is also a notable fact in this case that plaintiff's counsel do not undertake to defend their action in asking this question without limiting it in any way, nor the action of the trial court in admitting the evidence.

For the error in the admission of evidence, the judgment of the trial court should be reversed and the case remanded.

PER CURIAM. Adopted in whole.

ADVANCE THRESHER CO. v. DOAK et al.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 63\*)—DEFENSES.  
A proper defense, set-off, or counterclaim is not barred by the statute of limitations until the claim of the plaintiff is so barred. Comp. Laws 1909, § 5635.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 343; Dec. Dig. § 63.\*]

2. CHATTEL MORTGAGES (§ 169\*)—POSSESSION AFTER CONDITION BROKEN—SALE—CONVERSION.

When a mortgagee, after default in some condition of the mortgage, takes possession of the mortgaged chattels, or sells them to another party, authorizing him to take possession of them, and he does so, and when this is done without any proper foreclosure of the mortgage, and when the chattels are detained from the mortgagors, the mortgagee is guilty of a conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 302-304; Dec. Dig. § 169.\*]

### 3. APPEAL AND ERROR (§ 171\*)—RIGHT TO ALLEGE ERROR—VERDICT.

A plaintiff who recovers the full amount sued for cannot complain because he might have recovered more if he had sued upon a different theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Jackson County; J. T. Johnson, Judge.

Action by the Advance Thresher Company against D. B. Doak and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John Rogers, of Altus, and H. M. Thacker, of Mangum, for plaintiff in error. E. E. Gore and P. K. Morrill, both of Altus, for defendants in error.

AMES, C. The plaintiff sued the defendants upon certain promissory notes for a balance of \$1,772.89, alleging that this balance remained due after it had foreclosed a chattel mortgage upon certain threshing machinery which it had sold to the defendants. The answers admitted the purchase of the threshing machinery and the execution of the notes and chattel mortgage, but alleged that, at the time the notes were executed, there was an express agreement between the plaintiff and the defendants that they should not become valid or binding until they had been executed by two other persons, and that these other persons never executed them. For further defense the defendants alleged that they had purchased the threshing machinery for the sum of \$2,950; that they paid \$600 on the notes; that after the maturity of the notes the plaintiff, without the consent of the defendants, took possession of the mortgaged property and sold it to two men who had originally been interested with the defendants in the purchase, and that these men at that time paid the plaintiff \$500 in cash, and assumed the remainder of the indebtedness; that this was done without a legal foreclosure and amounted to a conversion; and that at that time the property was worth the balance due. The reply, in addition to a general denial, pleaded the statute of limitations against the alleged set-off or counterclaim because the same had not accrued within three years next before the filing of the answers. The evidence tended to support the allegations of the pleadings, and upon this evidence the court submitted the cause to the jury, which returned a verdict for the defendants.

It is first argued that a promissory note cannot be delivered conditionally, so as to make the subsequent signatures of another person essential to its validity, but as the court expressly so instructed the jury and directed it to return a verdict, unless the

other defense was sustained, this point cannot avail the plaintiff.

[1] It is next argued that the statute of limitations has barred the claim for damages on account of the conversion, but we cannot agree with this contention. The effect of the argument is that the plaintiff could sell the threshing machinery to the defendants, taking their notes, secured by chattel mortgage, for the purchase price; that upon the maturity and nonpayment of the notes the plaintiff could then convert the property to its own use; that it could then wait until the statute of limitations had run against the conversion, and, if the statute had not then run upon the notes, could recover the full balance due upon them. This position cannot be maintained. Comp. Laws 1909, §§ 5634, 5635; *Staufer v. Campbell*, 30 Okl. 76, 118 Pac. 391.

[2] It is next argued that the defendants cannot maintain conversion, because the conditions of the mortgage were broken, and because there was no sufficient possession of the property taken by the plaintiff, but it is settled that "a mortgagee of personal property, who takes possession under an invalid sale, is a mortgagee in possession; and, if he disposes of the property without complying with the requirements of law or the terms of the mortgage, he is guilty of a conversion." *Continental Gin Co. v. De Bord*, 123 Pac. 159, not yet officially reported; *Hoover v. Brookshire*, 32 Okl. 298, 122 Pac. 171; *Harrill v. Weer*, 26 Okl. 313, 109 Pac. 539. It is also settled that: "While it is generally true that one, in order to be guilty of a conversion of personal property, must be in possession of it, yet, if he exercises acts of dominion over the property and participates in the wrongful act of him who is in actual possession by aiding and abetting in the wrongful disposition and sharing in the proceeds thereof he would then be guilty of a conversion." *Continental Gin Co. v. De Bord*, supra, and the cases therein reviewed.

[3] Objection is also made to the amount of the verdict, it being claimed that the plaintiff was charged with both the money paid at the time it resold the machinery, and the value of the machinery, and that thereby the defendants were allowed credit twice for the same item. The verdict, however, was found for the plaintiff in the full amount for which it sued and for the defendants for the value of the machinery, and, as the defendants were not given more than the value of the machinery, the plaintiff cannot complain, because it was not given more than it sued for.

Other minor errors are assigned which need not receive consideration.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

**GRAHAM v. SPARLAN.**

(Supreme Court of Oklahoma. Jan. 7, 1913.)

*(Syllabus by the Court.)***JUSTICES OF THE PEACE (§ 159\*)—APPEAL—FAILURE TO FILE BOND.**

G. sued A. in the justice of the peace court, filing therein an affidavit in forma pauperis, in lieu of a cost bond. Judgment was entered against G., and she sought an appeal to the county court, without giving an appeal bond, relying on the affidavit in forma pauperis as a substitute therefor. The appeal was dismissed by the county court, and she brings error. *Held*, there was no error in the order of dismissal. An appeal being purely a statutory privilege, litigants must bring themselves clearly within the requirements of the statute regulating the subject.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

Commissioners' Opinion, Division No. 1. Error from Comanche County Court; J. H. Wolverton, Judge.

Action by Joanna Graham against A. Sparlan. Judgment for defendant before a justice, and from an order of the county court dismissing her appeal plaintiff brings error. Affirmed.

Moore & Hughes, of Lawton, for plaintiff in error. J. A. Diffendaffer, of Lawton, for defendant in error.

**ROBERTSON, C.** Joanna Graham sued A. Sparlan for damages in the justice of the peace court. Judgment was for the defendant. Plaintiff sought an appeal to the county court, and in lieu of an appeal bond filed an affidavit in forma pauperis. Appellee moved to dismiss the appeal, on the ground that no appeal bond had been filed, as required by statute. The motion to dismiss was sustained, and plaintiff brings error. Appellant contends that she may have an appeal without filing an appeal bond, if, in lieu thereof, she files, as she has done in this case, an affidavit in forma pauperis.

An appeal from a judgment of a justice of the peace to the county court is purely a statutory privilege, and in order to obtain that privilege a litigant must bring himself clearly within the requirements of the statute regulating the subject. "Where no bond is given, no right to an appeal exists, and no such right can be acquired in the absence of a bond. The jurisdiction of the cause is in the court rendering the judgment, and such jurisdiction cannot be transferred to the district court, unless an appeal bond be executed and approved by the justice who rendered the judgment. There is an exception to this rule in favor of municipalities, but such exception has no application here." *Vowell v. Taylor et al.*, 8 Okl. 625, 58 Pac. 944. See, also, *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631; *Beckwith v. Railroad Co.*, 28 Kan. 484; *Dowell v. Caruthers*, 26 Kan. 720; *Railway Co. v. Morse*, 50 Kan. 99, 31

Pac. 676. These cases are cited to show that the jurisdiction of the appellate court depends upon the giving of an appeal bond.

Unless there is provision made by statute for the substitution of an affidavit in forma pauperis for an appeal bond, in such cases as the one at bar, no appeal by such method can be had. The only expression in our statute relative to appeals from justices of the peace is found in article 9, c. 88, Comp. Laws 1909; section 6387 thereof reading as follows: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party with at least one good and sufficient surety to be approved by such justice in a sum not less than fifty dollars, in any case, nor less than double the amount of the judgment and costs, conditioned, first, that the appellant will prosecute the appeal to effect and without unnecessary delay; and, second, that if judgment be rendered against him on appeal, he will satisfy such judgment and costs. Said undertaking need not be signed by appellant: Provided, that when any municipality desires to appeal, no bond shall be required, and it shall be sufficient to perfect any such appeal if the appellant shall, within ten days after the rendition of the judgment, cause to be filed with the justice of the peace a statement in writing that appellant does appeal from such judgment to the district court, and 'file an affidavit setting forth the appeal is not taken for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment.'"

It is thus seen that no provision for an appeal by affidavit in forma pauperis is made by statute.

In 2 Cyc. 844 it is said: "The fact of poverty does not, of itself, relieve an appellant of the necessity of giving an appeal bond; but there must be express statutory authority for an appeal in forma pauperis."

In many states statutes have been enacted expressly providing and permitting an appeal in forma pauperis, but there is no such statute in Oklahoma. So, also, has Congress, by statute, authorized the bringing of actions by poor persons in the federal courts, with the right to "prosecute to conclusion"; and in some of the federal appellate courts it has been held that this authorizes an appeal without bond.

The cases authorizing such an appeal, cited in the brief of counsel for plaintiff in error, are all from jurisdictions having a statute authorizing such appeals, and hence can have no application to the case under consideration. Plaintiff in error could have brought her action originally in either the county court, or in the district court, without a cost bond, by making the necessary affidavit. It is the policy of the law to give to every person, rich or poor, his day in court, and to furnish a remedy for every legal wrong; but it is not the policy of the state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to furnish free appeals through all the courts. One free trial, in any court, is guaranteed to all who, on account of poverty, are unable to furnish security for costs. The statute makes no provision for appeals, except to municipalities, without an appeal bond. If such appeals are to be allowed, the Legislature, and not the courts, must provide therefor.

The judgment of the county court of Comanche county should therefore be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. HARDESTY.  
(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 441\*)—KILLING STOCK—EVIDENCE.

In the absence of proof that the place where the animals were killed by a railroad train was exempted from the provisions of the law prohibiting animals from running at large, it will be presumed that they were so prohibited.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1596; Dec. Dig. § 441.\*]

2. RAILROADS (§ 415\*)—KILLING STOCK—INSTRUCTIONS.

In an action against a railroad company to recover for live stock killed by its train at a place where the herd law is in force, it is error to instruct that it is the duty of the employees in charge of the train to keep a lookout for the purpose of discovering animals on the track. In such cases it is the duty of such employees to exercise ordinary care to avoid injuring them after they are discovered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.\*]

Commissioners' Opinion, Division No. 2. Error from Tulsa County Court; N. J. Gubser, Judge.

Action by F. E. Hardesty against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error.

ROSSER, C. This was an action by F. E. Hardesty against the St. Louis & San Francisco Railroad Company to recover damages for the killing of certain hogs by one of the defendant's trains.

The court instructed the jury, in substance, that it was the duty of the engineer and fireman in charge of the train to keep a sharp and vigilant lookout for live stock on the track, and, in effect, instructed them that it was the duty of the defendant to use reasonable care to discover animals on the track. This instruction is assigned as error.

[1] The hogs were killed in Tulsa county. There is no proof that the county, or subdi-

vision thereof where the stock were killed, was exempt from the general law prohibiting animals from running at large; and there being no proof the presumption is that they were prohibited from running at large. M., K. & T. R. Co. v. Savage, 32 Okl. 376, 122 Pac. 656.

[2] The law does not require a lookout to be kept for animals on the track of a railroad company in those portions of the state not exempt from the operation of the herd law. This rule is established by a number of decisions. See A. T. & S. F. R. Co. v. Davis & Young, 26 Okl. 359, 109 Pac. 551; A., T. & S. F. R. Co. v. Ward, 32 Okl. 187, 120 Pac. 984; M., K. & T. R. Co. v. Savage, 32 Okl. 376, 122 Pac. 656; St. L. & S. F. R. Co. v. Brown, 32 Okl. 483, 122 Pac. 186; St. L. & S. F. R. Co. v. Little, 125 Pac. 459. In such cases the duty of the defendant's employees is to exercise ordinary care to avoid injuring the animals after they are discovered.

It follows that the instruction in this case was erroneous, and as, under the evidence, it was very material the judgment should be reversed.

PER CURIAM. Adopted in whole.

McGUIRE v. SKELTON et al.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 150½, New, vol. 12 Key-No. Series)—DISTRICT COURTS—JURISDICTION—ACTION AGAINST TOWNSHIP OFFICERS.

The district court has jurisdiction of actions brought under the provisions of sections 2 and 3 of the Public Funds Act, approved March 8, 1901 (Sess. Laws, c. 25, art. 2; Comp. Laws 1909, §§ 7413, 7414), against township officers for misconduct in office (Williams' Ann. Const. § 12, art. 7).

2. OFFICERS (§ 119\*)—MISCONDUCT—ACTION BY PRIVATE INFORMER.

An informer cannot maintain an action for damages under the first provision of section 7413, Comp. Laws 1909, the right of action thus afforded being for damages to all innocent persons in any manner injured by the wrongful official act, meaning thereby those able to show a special and particular damage as distinguished from an injury sustained in common with others.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 197-206; Dec. Dig. § 119.\*]

3. TOWNS (§ 61\*)—TOWNSHIP OFFICERS—MISCONDUCT—TAXPAYER'S ACTION.

Actions authorized to be brought by a resident taxpayer of the affected township permit a recovery for double the amount of all such sums of money wrongfully paid out, and double the value of the property so transferred, as a penalty therefor, and not for damages as authorized in a prior provision.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 104; Dec. Dig. § 61.\*]

4. OFFICERS (§ 119\*)—MISCONDUCT—ACTIONS—NOTICE.

The demand and notice provided for by section 7414, Comp. Laws 1909, must be served upon the officers of the board whose offi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



cial conduct is being attacked, and not upon the county attorney of the county.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 197-206; Dec. Dig. § 119.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Dewey County; G. A. Brown, Judge.

Action for damages and statutory penalty by H. D. McGuire, suing in the name of the State of Oklahoma, against S. A. Skelton, D. M. Wilson, Lewis Ferguson, and the Township of Trail, Dewey County. From a judgment sustaining a demurrer to plaintiff's petition and dismissing plaintiff's cause of action, plaintiff brings error. Reversed and remanded.

Hickok & Myers, of Taloga, for plaintiff in error. Robert E. Adams and Harry H. Smith, both of Taloga, for defendants in error.

SHARP, C. The determination of this case involves a consideration and construction of sections 2 and 3 of the act of March 8, 1901, fixing the liability and determining the procedure against certain classes of public officers, guilty of a misappropriation of public funds. Sections 7413, 7414, Comp. Laws 1909. Plaintiff's petition consisted of two counts. In the first it was charged that he was damaged in the sum of \$76.25, the amount of the unauthorized, unlawful, fraudulent, and void warrant issued and paid by the officers of defendant township. The second count was to recover \$152.50, being the amount of said warrant and penalty. Defendants interposed a demurrer to each of the two causes of action stated, charging that it failed to state a cause of action in favor of plaintiff in error and against said defendants; and, second, that the court had no jurisdiction of the subject-matter of the action. Upon hearing the demurrer was sustained, and plaintiff's cause dismissed.

[1] In our opinion there can be no question but that the district court had jurisdiction of the action, regardless of the amount involved. It was one based upon official misconduct under a statute fixing a liability therefor. Section 12, art. 7, Williams' Ann. Const., provides that: "The county court shall not have jurisdiction \* \* \* in any action against officers for misconduct in office. \* \* \*" By section 10, art. 7, the district courts of the state are given original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by the Constitution or by law conferred upon some other court. The action, therefore, being one arising out of official malfeasance or misconduct in office, and the county court not having jurisdiction, it follows that this jurisdiction by the terms of section 10, art. 7, was committed by the Constitution to the district court.

[2] We do not think that the first para-

graph of plaintiff's petition states a cause of action. Obviously it was the purpose of the Legislature, as expressed in section 7413, supra, to create two classes of liability for the acts of malfeasance named in said section. The first class of actions accrued to all innocent persons in any manner injured thereby; the second, to the county, township, city, town, village, or school district affected. To the first class the cause of action was for damages; to the second, for a penalty in double the amount of all sums of money unlawfully expended and paid out. The first provision does not appear to place any limitation upon the amount that may be recovered as damages; the second, or penalty provision, limits the amount of recovery to double the amount of the money wrongfully paid out. Clearly it was not the purpose of the first provision to give a right of action in damages to a common informer, but, instead, to some person in no wise connected with the unlawful transaction, able to show a special and particular damage to himself, as distinguished from an injury sustained in common with others. *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219. It nowhere appears in the first paragraph in what manner plaintiff was injured, or whether he was injured at all, except by the general and concluding allegation that he was damaged in a sum stated. This conclusion of law tendered no issuable fact. *International Harvester Co. v. Cameron*, 25 Okl. 256, 105 Pac. 189. There is, therefore, nothing in the first paragraph of the petition to show a right of action in the plaintiff. The statute does not authorize a recovery of damages in such case to a common informer, but to the innocent injured party. Suits against officers may be classified into actions, the object of which is the maintenance of private rights, and those in which it is sought to uphold the rights of the public generally. In the former class no one should be allowed to sue whose rights are not alleged to have been violated by the officer against whom the action is brought. The first provision of the statute under which said action was brought does not attempt to confer such a right of action upon a citizen or taxpayer acting in the role of informer.

Does the second paragraph sufficiently state a cause of action? The reason for sustaining the demurrer does not appear in the journal entry, but it seems to be agreed by counsel that the trial court took the position that the petition did not show that demand in writing had been made on the county attorney of Dewey county to institute the action, upon the theory that the county attorney was the proper officer to bring such action. A careful reading of sections 7413 and 7414, supra, compels us to disagree with the judgment of the trial court in this regard.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] The latter paragraph of the petition is, as we have seen, one accruing in favor of the township, and provides for a recovery of double the amount of all such sums of money wrongfully paid out, and double the value of property wrongfully transferred, as a penalty to be recovered at the suit of the proper officers of such township, or any resident taxpayer thereof as therein provided. It is further provided that upon the refusal, failure, or neglect of the proper officers of the township, after written demand upon them by 10 resident taxpayers of the township to institute proper proceedings at law or in equity for the recovery of any money or property belonging to such township, paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent, or void contract, made or attempted to be made by any of its officers, or for the penalty provided in the preceding section, any resident taxpayer of such township affected by such payment or transfer, after serving the notice aforesaid, and after giving bond for costs, may, in the name of the state of Oklahoma as plaintiff, institute and maintain any proper action at law or in equity, which the proper officers of the township might institute and maintain for the recovery of the property or penalty, one-half of the money and one-half of the value of the property recovered in any action maintained at the expense of a resident taxpayer to be paid to such taxpayer as a reward.

[4] Manifestly the written demand and notice contemplated by the statute should be made upon the board of directors of the township, the words, "after written demand made upon them," referring to the officers of the township. This written demand to be made upon the officers is the notice referred to in the following provision of the statute enumerating the conditions precedent to the bringing of the action by a resident taxpayer. By statute organized townships are made a body politic and corporate, and may sue and be sued, and may appoint by its proper officers the necessary agents and attorneys in that behalf. Comp. Laws 1909, § 8713. Nor does the fact that the statute which requires county attorneys without fee to give opinions and advice to the board of county commissioners and other civil officers, and to prosecute and defend on behalf of the state or county, all actions or proceedings, civil or criminal, in which the state or county is interested or a party (Comp. Laws 1909, §§ 1594, 1596), affect the provisions of the statute under consideration. The language of the statute requiring the preliminary notice to be served upon the proper officers of the township, and not upon the county attorney, is too clear to admit of misconstruction. Not only this, but we think the Legislature acted wisely in prescribing that the notice should be served upon the officers whose official

conduct was attacked, and who were by statute made liable on account thereof. The right of action upon the failure, refusal, or neglect of the proper officers of the township to act was given to any resident taxpayer upon compliance with the provisions of the statute, the suit to be brought by him in the name of the state. The statute provides that a moiety of the recovery shall be paid to such taxpayer as a reward. If the amount of the recovery is for the full amount wrongfully paid out, the township would be reimbursed for the full amount due it, and this, we think, was the legislative purpose. The action should have been brought in the name of the state on the relation of plaintiff as a resident taxpayer of Trail township, but, as no objection to the manner in which the suit was brought was made, we simply make this observation as a guide in further or other proceedings of a like nature.

For the reasons named, the judgment of the trial court in sustaining defendants' demurrer to the second paragraph of plaintiff's petition should be reversed, and the cause remanded, with instructions to overrule the demurrer to said second paragraph, and for further proceedings in conformity to the views herein expressed.

PER CURIAM. Adopted in whole.

MOREN v. NICHOLS et al., County Election Board.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. ELECTIONS (§ 254\*)—CANVASSING BOARDS—CORRECTION OF ERRORS.

Where the only defect in the returns from an election precinct to the county canvassing board is that the certificates showing the number of votes cast for the various persons voted for were not authenticated by the signatures of two of the four counters at the election in said precinct, as required by section 7, c. 106, Sess. Laws 1911, and where, before the county canvassing board had completed the canvass of the returns, all the election officers of said precinct appeared before the county board and offered to correct the errors in said returns by authenticating the same with the signatures of said two counters who had omitted to sign same, it was the duty of the board of county canvassers to permit such correction and to canvass the returns from said precinct; and, upon failure or refusal to do so, the board of county canvassers may be compelled to permit such correction, or treat the returns as if corrected, and canvass same.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 230; Dec. Dig. § 254.\*]

2. ELECTIONS (§ 259\*)—COUNTY ELECTION BOARD—OPENING RETURNS.

By reason of section 8, c. 106, Sess. Laws 1911, the county election board as the county board of canvassers is under no duty, and is without authority, to open the envelope returned by the election officers of any precinct containing the voted ballots and tally sheets, labeled as by the statute required, to wit, "Voted Ballots," "Tally Sheets," and "Stub Book of Ballots," in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order to search for the certificate of returns which should have been inclosed in a separate envelope, labeled "returns," in order that the returns from said precinct may be canvassed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259\*]

Error from District Court, Cherokee County; John H. Pitchford, Judge.

Mandamus by Joe Moren against Virgil Nichols and others, constituting the Election Board of Cherokee County. Decree for defendants, and petitioner brings error. Reversed and remanded.

Bruce L. Keenan and M. C. Reville, both of Tahlequah, for plaintiff in error. Houston B. Teehee and E. C. McMichael, both of Tahlequah, for defendants in error.

HAYES, J. The facts in this case appear from the pleadings and by stipulation upon which the case was tried in the lower court. Plaintiff in error, who brought this proceeding in the court below for mandamus, and one J. F. Musgrave, were rival candidates at the general election held on the 5th day of November, 1912, for the office of county commissioner of the First commissioner's district of Cherokee county. By a canvass of part of the returns from the different election precincts of the commissioner's district the county election board ascertained that Musgrave had received 307 votes, and plaintiff in error 302 votes. The county election board, however, refused to canvass the returns from Hulbert precinct No. 1, because the certificate to said purported returns had been signed by only two of the counters of said precinct. They also refused to canvass and count the votes as returned from Hulbert precinct No. 2 and Moody precincts Nos. 1 and 2, for the reason that said returns were sealed up in the envelope labeled "Voted Ballots," "Tally Sheets," and "Stub Book of Ballots." If the votes from the several precincts, the returns from which were not canvassed by the county election board, are canvassed and counted, the result of the election will be changed. This action was commenced by plaintiff in error to secure mandamus to compel the county election board to recanvass the votes from the various election precincts of the district, including those precincts not heretofore canvassed by the board, and to issue certificate to the successful candidate in accordance with the result of the election ascertained thereby. At the time the action was instituted in the court below, the county election board was then in session, engaged in canvassing the returns of the votes for county and state officers from the various precincts of the county. During the time the vote from the different precincts of the commissioner's district here involved was being canvassed, the election officials of Hulbert precinct No. 1 appeared before the county election board, and asked per-

mission to correct the irregularly executed certificate to the returns made by the precinct election officers by attaching thereto the signature of the other two counters, and by swearing to same before the precinct election inspector. This the county election board refused to permit the precinct election officers to do, and in their canvass rejected the returns from this precinct.

By section 7, c. 106, Sess. Laws 1911, it is provided that, when the count at any election precinct is completed, the two tally sheets shall be signed by the four counters, and the four counters shall then fill out the certificate in the back of the book of the ballots without detaching it from said book, and also shall make out at least four duplicates thereof. Such certificate shall have only the total of each candidate's votes, and shall be signed by each of the four counters, and be sworn to before the inspector of elections. One such certificate is required to be kept by the inspector of the election and the other two constitute the returns, and, "when properly certified to, shall be prima facie evidence of the correctness of the precinct vote." By section 8 of the same act the two duplicate copies of the certificate are required to be placed into an envelope labeled "Returns," and returned to the county election board, which the county election board shall open and canvass.

[1] It was the duty of the canvassing board to examine the returns and ascertain whether the certificate had been executed by the officers as provided by law, and whether the purported returns were in fact genuine and sufficient for the purpose of their action. *State ex rel. Montgomery et al. v. State Election Board*, 29 Okl. 31, 116 Pac. 168. When they found that such certificate had not been executed by the counters as required by law, they violated no duty in refusing to canvass the returns in that condition; and, had they completed their canvass of all the other returns from the district, ascertained the result thereof, issued the certificate of election and adjourned, without the occurrence of the other events we shall subsequently advert to, they would have fully discharged their duty, and a writ of mandamus would not lie to compel them to reassemble and to canvass a new set of returns, or returns whose irregularities had been corrected. *Roberts et al. v. Marshall et al.*, 127 Pac. 708, recently decided, but not yet officially reported. But, before they completed the canvass, the precinct officers offered to correct the irregularities in the certificates which resulted from the negligent omission of two of the counters to sign same, and not from any fraud or misconduct on the part of any one. The regularity of the returns otherwise is not questioned; nor was it proposed in any manner to change same, other than to perform by the two counters the omitted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

act required by law, so the returns might be canvassed. Had the counters arbitrarily or negligently refused to sign the certificates before the returns were made to the county canvassing board, and an action for that purpose had been brought, they could have been compelled to do so by mandamus. They cannot by a negligent or willful failure to perform a plain ministerial duty block the operation of the law. If the precinct officers could have been compelled to perform the omitted duty, they should not, in the absence of fraud, be refused permission to perform it voluntarily; and a narrow and technical rule that would defeat the performance of an omitted duty by these officers that can affect unjustly no one should not be adopted, but one that will effectuate the will of the people as expressed at the election and the fulfillment of the purposes of the statute without needless litigation. We are of the opinion that it was the duty of the county election board to permit the precinct counters to correct the certificate by signing same; and that it is competent for the court to order them by mandamus to do so, although they have canvassed all the other returns and issued a certificate to the prevailing candidate as disclosed by the returns canvassed. The board, not having fully and completely discharged the duty under the statute at the time the purported canvass was made, may be compelled to reconvene and recanvass and correct the mistake it has made. *Stearns et al. v. State ex rel. Biggers et al.*, 23 Okl. 462, 100 Pac. 909. In the view that the precinct officers should have been permitted to correct these returns we are supported by the following authorities in point: *Rummel v. Dealy et al.*, 112 Iowa, 503, 84 N. W. 526; *People ex rel. v. Nordheim et al.*, 99 Ill. 553; *Bates v. Crumbaugh*, 114 Ky. 447, 71 S. W. 75, 24 Ky. Law Rep. 1205. In *People ex rel. v. Nordheim et al.*, supra, upon a very similar state of facts, the court said: "That the offer by the officers to sign the returns after it was discovered that they had omitted to sign them, and after the returns had been sent to the proper authorities, was sufficient to treat the returns as if they were in fact signed, and they should have been so treated." It follows from this conclusion that the county election board should be ordered in this proceeding to reconvene, if they have adjourned, permit the election officers of the precinct to correct the certificate to the returns from said precinct, or to treat said returns as if corrected, and to consider them in their canvass of the returns from said commissioner's district.

[2] The statute requires that as the ballots are counted by the election officers they shall be strung upon a string, and when the canvass is completed, the string shall be tied and the knot sealed. Section 8 of the act of 1911, above referred to, provides that, when the ballots are thus tied and the knot sealed, they and the stub ballot books with all the

untouched ballots attached to the stubs and the original certificate in the back thereof, and the two tally sheets, shall be placed in an envelope, labeled "Voted Ballots," "Tally Sheets," and "Stub Books of Ballots," and provides that "this envelope shall not be opened except upon order of the Supreme Court or district court or a judge thereof, in case of contest or some legal proceeding, necessitating the opening of the same." This envelope, together with the envelope labeled "Returns," which should contain the two duplicate copies of the certificate, after having been sealed, are required to be placed by the precinct election officers into the ballot box and the box to be securely locked, which shall not again be opened, but shall be delivered in that condition to the secretary of the county election board. "The county election board shall not disturb anything in the ballot box except the envelope, marked 'Returns,' which, when canvassed, shall be returned to the ballot box and the ballot box will again be securely locked. \* \* \*

From the other precincts involved there appears to have been returned by the election officers no envelope indorsed "Returns," containing the two duplicate certificates required by the statute. The only envelope returned was the one indorsed as heretofore mentioned; and the certificates from which the canvass of returns of these precincts are to be made by the county election board, if executed and returned by the precinct boards, are in said envelope with the ballots and tally sheets, which plaintiff desires the court to compel by mandamus the county election board to open. But it is clear from the foregoing quoted portion of the act that the county election board is without authority to open this envelope. It was the purpose of the statute to preserve intact the ballots, the tally sheets, the unvoted ballots, and the stub books of the ballots, untouched by any other hands than those of the precinct election officers, in order that they may be used in case of contest or in any other legal proceeding wherein they may become important as evidence. It was evidently contemplated by the Legislature that any procedure that permitted these ballots and tally sheets to be handled after they left the hands of the precinct election officers would render the perpetration of fraud in the alteration and change thereof easy, and the responsibility therefor difficult to locate, and would reduce greatly their value as evidence in any proceeding, civil or criminal, in which they might be needed. The delinquency as to these precincts lies not in the county election board, but in the respective precinct election boards in failing to make up properly the returns and inclose the necessary certificates in the envelope indorsed "Returns" as provided by statute. Whether in a proceeding for that purpose the returns as made to the county election board might not be required to be returned to the precinct election boards

and said precinct election boards compelled yet to make the returns as the statute requires, or whether if the precinct election boards, before the canvass of the returns, had appeared before the county election board and requested permission to have returned to them the election boxes so they could make up the returns as required by the statute, it would not be the duty of the county election board to permit them to do so, are questions this proceeding does not present. It is clear to our minds that the statute does not make it the duty nor authorize the county election board to open the envelope containing the voted ballots and tally sheets for the purpose of searching for that portion of the returns upon which the statute requires the canvass to be made, and in unmistakable language prohibits them from doing so. The writ of mandamus will not compel them to do under order of the court that which they could not do without such writ. The function of the writ is not to create duties that did not theretofore exist, but to compel the performance of duties theretofore imposed by the law.

It is urged by defendants in error that, although it be their duty to canvass any of the returns which they have refused to canvass, plaintiff in error has a plain, speedy, and adequate remedy at law, and his action for mandamus will not lie. This contention is not sound. This is not an action to obtain possession of an office or try the title thereto. If such were the relief sought, the proper remedy would be a contest or quo warranto proceeding; but the relief plaintiff in error seeks is to have the county canvassing board make a full and complete canvass of the legal returns before it and declare the result of the election from a canvass of all the returns before the board, instead of a canvass of a part of them, and to issue a certificate of election accordingly. To secure the performance of a ministerial duty, enjoined by law upon an officer, the only adequate remedy ordinarily is that of mandamus. *Rummel v. Dealy*, supra. We know of no remedy by which plaintiff could secure the performance of its duty by the board than the one he has pursued.

The judgment of the trial court is accordingly reversed and the cause remanded, with instructions that the writ issue as to Hulbert precinct No. 1.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

#### MITCHELL et al. v. HUMPHREY.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

#### 1. EJECTMENT (§ 9\*)—TITLE TO MAINTAIN.

At common law, in an action of ejectment, the plaintiff seeking to recover lands occupied

by another must recover upon the strength of his own title, rather than upon the weakness of the title of his adversary.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

#### 2. EJECTMENT (§ 13\*)—EQUITABLE TITLE.

Under section 6122, Comp. Laws 1906, an equitable title will support an action in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. § 13.\*]

#### 3. EJECTMENT (§ 95\*)—EVIDENCE.

Evidence examined, and it is held that it fails to show title, either legal or equitable, in plaintiff, and that the finding of the court on the evidence in favor of defendant was correct.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Craig County; T. L. Brown, Judge.

Action by Harry M. Mitchell and others against Walter D. Humphrey, administrator. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Kornegay, of Vinita, for plaintiffs in error. W. D. Humphrey, of Nowata, for defendant in error.

BREWER, C. This is an action in ejectment to recover possession of the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , section 17, and the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 21, all in township 26 N., range 16 E., and for damages for unlawfully withholding possession of the same.

These lands were allotted to John E. Sheehan, a Cherokee Indian of one-sixteenth Cherokee blood, who became 21 years of age April 24, 1908. On January 20, 1908, the allottee executed a departmental oil and gas lease covering these lands in favor of the defendant, Geo. L. Berringer, under the terms of which the allottee was to receive a bonus of \$500 and 12 $\frac{1}{2}$  per cent. of the oil produced. One hundred dollars of this bonus was paid to the allottee upon the execution of the papers. The remaining \$400 was deposited in a bank in escrow, to be paid the allottee upon the approval of the lease by the Secretary of the Interior. On April 24, 1908, the date he became of full age, upon a promise of a larger bonus, the allottee entered into another lease with the Delaware Development Company, subject to the approval of the Department of the Interior. Both these leases were filed with the Indian agent at Muskogee, to be transmitted in the usual course for the action of the Secretary of the Interior. The allottee filed with the Indian agent a protest against the approval of the Berringer lease. On May 16, 1908, the allottee received from the defendant, Berringer, \$50 of the bonus money due on the Berringer lease. This was after he became of full age. At the hearing at Muskogee the findings and conclusions were in favor of the Berringer lease, and it, together with the

lease to the Delaware Development Company, was transmitted to the Department of the Interior for consideration. The Commissioner of Indian Affairs recommended the approval of the Berringer lease and the disapproval of the Delaware Development Company lease, and on July 24, 1908, the Acting Secretary of the Interior finally approved the lease to Berringer, who went into possession of the lands, prospected for and discovered oil in paying quantities, and had, at the time this suit was filed in November, 1908, four or five producing oil wells on the property, representing an outlay of about \$22,000; oil having been produced to the value of approximately \$6,000. The defendant has been at all times in possession of the land. The plaintiffs have at no time been in possession of any part of the land.

This suit in ejectment for possession of the land is based upon a certain written instrument executed by the allottee John E. Sheehan on August 6, 1908, and which was placed of record in the office of the register of deeds of Nowata county in a few days after its execution. The instrument named in its body each of the parties plaintiff, but was signed and executed by the allottee H. M. Mitchell and M. F. Knight only. The language employed in the body of the instrument is that usually found in oil and gas leases; describes the land, mentions the consideration, and "does hereby grant, let, lease and demise unto the said parties of the second part, their heirs and assigns, for the sole and only purpose of mining and operating for oil and gas," etc., with the description of the property, following with the usual conditions found in such leases, and with the following special provisions: "It is further provided that five hundred (\$500.00) dollars of the purchase price is to be paid by the parties of the second part to the party of the first part at the execution of this agreement, and that the balance of said purchase price, to wit, twenty-five hundred (\$2,500.00) dollars, is to be paid by said second parties to the said first party as soon as the leases heretofore executed by said first party to George L. Berringer and to the Delaware Development Company are disapproved by the Secretary of the Interior. It is further provided that this lease shall become null and void if a well is not commenced on the leased premises by said parties of the second part within thirty (30) days after they have been notified of the disapproval by the Secretary of the Interior of the two (2) leases aforesaid. It is further agreed that in case either the lease executed by said first party to the Delaware Development Company, or the lease executed to George L. Berringer, should be approved by the Secretary of the Interior, thereby rendering this lease null and void, the said party of the first part hereby agrees to repay to the said parties of the second part the aforesaid sum of five hundred (\$500.00) dol-

lars, and such other sums as they may advance to him, with interest at the rate of eight (8) per cent. per annum, within two (2) years from the approval of either of said leases. And in that event, to secure the said payment of the five hundred (\$500.00) dollars, party of the first part hereby mortgages to said parties of the second part the land herein described."

The court made and filed written finding of many facts, all in favor of defendant, and concluded, among other things, that "the lease executed by John E. Sheehan to the plaintiffs, upon which they have sued in this case, is, since the approval of the lease held by Berringer, by the Secretary of the Interior, effective only as a mortgage, and not as an oil and gas mining lease."

The court found correctly. Under the admitted facts the contract relied on had, by its express provisions, become simply a mortgage between the plaintiffs and Sheehan for the repayment by him to them of the sums advanced to him under the contract. Had the condition subsequent happened—the disapproval of Berringer's lease—the money would have been retained by Sheehan as a part of his bonus, since the contract would have been a lease. As the condition subsequent failed in the approval of Berringer's lease, then the instrument lost all potentiality as a lease, and became a mere mortgage engagement upon the part of Sheehan to return the money so paid him. No reasonable person, we believe, will assert that this paper could be enforced against Sheehan as defendant in any other sense.

The allottee is not a party to this suit. It does not appear that he has taken any steps in court to prevent either the development or production of oil by the defendant. He received the \$50 of the bonus on May 16, 1908, and upon the approval of the lease the following July accepted the \$350 balance of the bonus. Beginning in November, 1908, he has received substantial monthly royalty checks from the defendant's production of oil, and was so receiving them up to the time of trial. The final judgment was rendered in January, 1910. If oil is still being produced, his testimony leaves no doubt but that he is still willingly receiving the royalties under defendant's lease. After the approval of defendant's lease, the Delaware Development Company seems to have abandoned any interest in the transactions.

[1, 2] It is well settled that at common law, in an action of ejectment, the plaintiff seeking to recover lands occupied by another must recover, if at all, upon the strength of his own title, rather than upon the weakness of the title of his adversary. This is too well settled to need citation of authorities. While it is true that under our statute (section 6122, Comp. L. 1909) an equitable title will support the action, while it would not at common law, and this has been ruled (*Shy v. Brockhause*, 7 Okl. 35, 54 Pac. 306; *Jen-*

nings v. Brown, 20 Okl. 294, 94 Pac. 557), yet the plaintiffs in this case have shown no kind of title, either legal or equitable. Their contract indicates they were speculating upon the outcome of a controversy between the allottee and defendant in possession.

[3] Having no rights other than as mortgagees against Sheehan, the owner of the land, the plaintiffs cannot substitute themselves as his tenants. If Sheehan has any controversy with Berringer, which his conduct has not prevented him from asserting, it will be time enough to discuss their relations and respective rights in a suit in which they are involved.

This case being decided on the facts presented, an application of the doctrine of the case of *Kolachny v. Galbreath*, 28 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451, and note, which would appear to preclude a recovery in this case, is unnecessary; but it is considered timely to state that the rule therein announced has been quoted approvingly in the later case of *Frank Oil Co. v. Belleview Gas & Oil Co. et al.*, 29 Okl. 719, 119 Pac. 260, and by the United States Circuit Court of Appeals, Eighth Circuit, in an opinion by Judge Hook, sitting with Judges Sanborn and Adams, in the case of *Barnsdall v. Owen*, 200 Fed. 519, at the September, 1912, term of that court.

The case should be affirmed.

PER CURIAM. Adopted in whole.

SECURITY STATE BANK v. FUSSELL.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 354\*) — DOCUMENTARY EVIDENCE.

The original passbook of a bank customer, containing the original entries of deposits made by him, and the original checks signed by the customer on which the deposits were withdrawn, are competent evidence of the facts disclosed by them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.\*]

2. BILLS AND NOTES (§ 534\*)—COLLECTION—EVIDENCE.

When a customer of a bank asks for the balance due on a note, and is informed by the bank of the amount, and pays to the bank the amount so requested, the bank cannot subsequently recover from the customer an attorney's fee because the note had been placed in the hands of an attorney, where the attorney had made no effort to collect it, and the customer did not know that it was held by the attorney.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.\*]

Commissioners' Opinion, Division No. 1. Error from Pontotoc County Court; Conway O. Barton, Judge.

Two cases were commenced in the justice court by the Security State Bank against J.

E. Fussell. One was on a note for \$150, and the other was on a note for \$20 and an alleged balance of a note for \$286.50. Judgments were rendered for the plaintiff, and the defendant appealed to the county court, where the cases were consolidated, and on the trial judgment was rendered for the defendant, and the plaintiff brings error. Reversed in part and affirmed in part.

Emanuel & Broadbent, of Sulphur, for plaintiff in error. Bullock & Kerr, of Roff, for defendant in error.

AMES, C. The defense in both cases was payment. In the suit on the \$150 note the defendant testified that he called at the bank with a check for a little over \$300, that he gave this check to the banker, instructed him to pay the note, and place the remainder to his credit. This was his evidence tending to show payment.

[1] The bank offered in evidence the original passbook of the defendant and his original checks for the purpose of showing that he was given credit for the full amount of this check, and that he drew it all out in due course of business, and that the note was not paid as claimed by the defendant. This evidence was excluded, and this is the error assigned. This was error, as the passbook and original checks were competent evidence tending to show the facts disclosed by them. The other case, however, should be affirmed.

[2] There the defendant testified that he had paid the \$20 note in cash, and the jury accepted his testimony as true. He also testified that he asked the bank by letter for the amount due on the \$286.50 note, that they informed him what was the amount, that he then gave them a check for the amount, which they received and wrote him that there was still a balance due on account of attorney's fee, but it does not appear that he had knowledge that the note was in the hands of an attorney, or that an attorney had rendered any service in the matter, and as the bank dealt direct with him and gave him the amount due, and as he paid to the bank the amount due, we do not think it was error not to permit the attorney's fee to be collected. There is also a question as to a small balance of interest, which need not receive further attention, as there is no claim of mistake or accident, and no issue is properly presented on account of it.

We think the judgment of the trial court should be reversed as to the matters involved on the note for \$150, and the cause remanded for a new trial, and that the judgment should be affirmed as to the other action, and that the costs in this court should be equally divided between the parties.

PER CURIAM. Adopted in whole.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## FREDERICK COTTON OIL &amp; MFG. CO. v. TRAVER.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

The defense of contributory negligence under section 6, art. 23, of the Constitution, being made a question of fact to be determined by the jury, it is the duty of the court in such cases, where an instruction on this theory is asked, to instruct the jury that one who has negligently contributed to his own injury cannot recover, and a refusal to give such instruction when asked is error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**2. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—"ASSUMPTION OF RISK"—MASTER'S NEGLIGENCE.**

A servant in accepting an employment assumes all the ordinary and usual risks and perils incident thereto, whether they be dangerous or otherwise, and all the risks he knows or may by the exercise of reasonable care know to exist, unless there is some agreement to the contrary. He does not, however, assume such risks as are created by the master's negligence, nor such as are latent or are only discovered at the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 8, pp. 7584-7585.]

**3. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE AND APPLIANCES.**

It is the duty of the master to provide his servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed, and the dangers and hazards ordinarily arising therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Tillman County; J. T. Johnson, Judge.

Action by J. A. Traver against the Frederick Cotton Oil & Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This action was begun in the district court of Tillman county, December, 1909, by J. A. Traver against the Frederick Cotton Oil & Manufacturing Company upon a petition wherein it was alleged in substance that on October 2, 1909, the plaintiff was engaged as a common laborer in defendant's employ; that as such he was under the direction and control of one P. L. Burkes, a vice principal of defendant; that a part of his duties, as designated by said vice principal, was to look after the pulleys and belts used in running the machinery and to adjust the belts and keep them in place on such pulleys; that such belts and pulleys were defective, in that

the belts were loose and frequently slipped off and became detached from the pulleys, thus necessitating frequent adjustments, in order to keep the machinery running; that plaintiff was directed by the vice principal to keep such belts adjusted and in running order; that on the date of the injury the belts slipped off and became detached from the pulleys with such frequency the vice principal directed defendant to apply a certain preparation called, "belt dressing," for the purpose of preventing their slipping off; that such belt dressing was an adhesive, sticky substance, the nature of which was known to the vice principal, but not known to plaintiff; that the pulleys and belts in question were up close to the roof of the mill building, some 25 feet above the ground; that, in order to adjust same, it was necessary to climb a ladder and from there step onto a six by six on which he was compelled to stand while adjusting the belts; that the belts had to be adjusted from the opposite side of the pulley from where plaintiff stood; that it was necessary to balance himself on this six by six on which he was compelled to stand and reach over the pulley to adjust the belt; that in the adjustment of such belts it was necessary to hold same in position with his hands for some moments after the machinery started in order to prevent the belt from again dropping off, owing to its being so loose that the pulley would turn some moments before taking hold of the belt, and starting the machinery; that he had been in such employment about five days only, and was wholly inexperienced in this character of work; that after applying the belt dressing as directed by the vice principal, not knowing but what it would yet be necessary to hold the belt in place with his hand until the pulleys began taking hold of same, he adjusted the belt with the dressing on it, intending to hold same as he had theretofore done, and that the instant the pulley came in contact with the dressing, the machinery started, catching his hand, and drawing him under the machinery, causing the injury sued for. He alleged that such injuries were the result of defendant's negligence in failing to provide a safe place on which to stand while adjusting the belts and in directing plaintiff to apply the belt dressing under such conditions, and further alleged that the dangers incident to the use of the belt dressing under such conditions were wholly unknown to him, he being inexperienced, but were well known to the vice principal who had directed him to use same.

Defendant answered by general denial and by a plea of contributory negligence. Plaintiff replied, denying the new matter in the answer, and, upon the issues thus joined, the cause was tried at the October term, 1910, resulting in a verdict and judgment in favor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of plaintiff for the sum of \$700. From this judgment the Cotton Oil Company appealed.

Shartel, Keaton & Wells, of Oklahoma City, and Wilson & Roe, of Frederick, for plaintiff in error. H. P. McGuire, of Frederick, and Lewis P. Mosier, of Oklahoma City, for defendant in error.

HARRISON, C. (after stating the facts as above). It is contended that the allegation "that defendant negligently directed the plaintiff to apply the belt dressing which caused the machinery to start the instant it came in contact with such dressing and that the nature of such dressing was unknown to plaintiff, but was well known to defendant," was insufficient upon which to base a finding that defendant's negligence consisted in failing to instruct plaintiff as to the character of the dressing. However, as the judgment must be reversed under other assignments of error, and as the defects complained of may be avoided by making the allegation more definite and certain, we will not say whether such defect is sufficient to justify a reversal.

[1] The decisive question involved is whether the court's failure to instruct the jury, "if they found from the evidence and from all the surrounding circumstances and under the surrounding conditions the plaintiff had negligently contributed to the injuries received, that, in that event, he could not recover," is sufficient to justify a reversal in the face of the whole charge. In paragraph 6 the court instructed the jury as follows: "If you find and believe from the evidence by fair preponderance thereof that the plaintiff, while working for the defendant in its mill, as charged in his petition, suffered the injury complained of, and at the time of such injury was free from negligence on his part, as the same has been hereinbefore defined, but that such injury was the direct and proximate result of the negligence of the defendant, as the same has been hereinbefore defined, then you are instructed that the plaintiff would be entitled to recover herein, and, if you so find and believe from the evidence, you will return a verdict in favor of the plaintiff for such sum as you may find would fairly compensate him for the injury sustained, not to exceed the amount sued for in his petition." It is contended by plaintiff in error that this instruction, either standing alone or considered in connection with the entire charge, is insufficient to give the jury to understand that, if plaintiff was guilty of contributory negligence, he could not recover. In the absence of any other paragraph in the court's charge, and in the absence of any language in the entire charge, by which the jury might be given to know that if plaintiff was guilty of contributory negligence he could not recover, we think the contention is well taken. The law as to what constitutes contributory negligence is

fairly stated in the charge, but the court nowhere told the jury that, if the plaintiff had negligently contributed to his own injuries, he could not recover. We cannot estimate what effect this failure to so instruct may have had on the jury. It may have had no effect whatever. It may have had no influence upon the jury in reaching the verdict. On the other hand, it may have had a material influence, and, if the jurors were influenced thereby, then whatever influence or effect it had on their minds was prejudicial to the rights of defendant.

The defense of contributory negligence, under section 6, art. 23, of the Constitution, being made a question of fact to be determined by the jury, it is the duty of the court in such cases, where an instruction on this theory is asked, to instruct the jury that one who has negligently contributed to his own injury cannot recover. The same arbiter of justice which requires an instruction that the plaintiff may recover if the defendant be found guilty of negligence also requires an instruction that plaintiff cannot recover if he be found guilty of negligently contributing to his own injuries.

It is also contended by plaintiff in error that the plaintiff below, being an adult man, possessing ordinary intelligence, should have known the dangers incident to this character of employment, and should be held to have assumed the risk of such dangers. This contention, however, cannot be sustained under this record.

[2] It is true as a matter of law that a servant assumes the risk of such dangers as naturally arise from the nature of the work to be performed. But it is equally true that he does not assume the risk of such dangers as arise from the negligence of the master when such negligence is unknown to the servant. "Where a person voluntarily enters into a contract of hiring, he assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards." 20 Am. & Eng. Enc. of Law, 109. But "risks arising out of the negligence of the master, or of one whom the master intrusts with the superintendence of his work, are not risks ordinarily incident to the employment, and are not assumed by the employe." Id. 123. "While a servant does not assume the extraordinary and unusual risks of the employment, the rule is well settled both in England and in this country that, on accepting employment, he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or may, in the exercise of reasonable care, know, to exist, unless there is some agreement to the contrary. He does not, however, assume such risks as are created by the master's negligence, nor such as are latent or are only discovered at the time of

the injury." 26 Cyc. 1177. However, for two reasons, we cannot agree that the question of assumption of risk as a legal proposition is involved in this controversy, viz.: First, because, under the facts disclosed in this record, the decisive issues were the question of negligence on the part of defendant, and contributory negligence on the part of plaintiff; second, that the issue of assumption of risk was not raised by the pleadings. The defendant did not plead assumption of risk, but pleaded contributory negligence. It is true the court at the request of defendant gave some instructions on the question of assumption of risk which were prepared by defendant, but we cannot see from the record where this was properly an issue in the case. However, on the issue of contributory negligence, there seems to be a wide divergence of opinion between the learned counsel for plaintiff and defendant over the meaning of, and proper construction to be given to, section 6, art. 23, of the Constitution. The effect of plaintiff in error's contention is that the rule of law generally recognized before that time was not changed by the adoption of this provision of the Constitution, and that the court still has power to say to the jury whether there is or is not sufficient evidence to constitute contributory negligence. On the other hand, it is contended by defendant in error "that the issue of contributory negligence having been made by the answer, and evidence having been introduced thereon, the court, under the provisions of the Constitution, was required to submit the issue to the jury." Section 6, art. 23, of the Constitution, reads as follows: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." Now, we believe that this section of the Constitution means that: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." However, we cannot hold that the court has fully discharged its duty in submitting this question to the jury, however fully the law may have been defined, unless it also instructed the jury that, if they should find that the plaintiff had been guilty of contributory negligence, he could not recover.

[3] There is one other assignment which plaintiff in error urges at considerable length, which, in order to prevent its arising in a future trial, it might be well to settle here, viz., that the court erred in the following instruction: "You are instructed that, under the law, it is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools or appliances with which to work." It is contended by plaintiff in error that this instruction is erroneous and vicious, in that it instructs the jury that the master must furnish a place reasonably safe, whereas his du-

ty is only to use reasonable care in furnishing such a place. The materiality of this distinction has not been generally recognized by the courts. The two terms, "reasonably safe place" and "reasonable care in providing a safe place," as a general rule have been used interchangeably. Some of the standard text works use the term "reasonably safe place" as the adopted rule. Others use the two terms interchangeably. In 20 Am. & Eng. Enc. of Law (2d Ed.) 55, we find the following text supported by more than 200 decisions from 37 different states, and from the United States Supreme Court and the courts of Canada and England, viz.: "In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of providing them with a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required, and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment; and the servant is entitled to rely upon the assumption that the master has performed the duty imposed on him by law, of providing a reasonably safe place to work." In 26 Cyc. 1097, the following rule is stated: "It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith, and place wherein, to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had, not only to the character of the work to be performed, but also to the ordinary hazards of the employment; and the servant may assume that the master has performed his duty." This rule is supported by decisions from 43 states and from the United States Supreme Court and the courts of England and Canada. Our own court in the case of McCabe & Steen Construction Co. v. Wilson, 17 Okl. 355, 87 Pac. 320, uses the two terms interchangeably or treats the terms as having the same legal effect. In the course of the opinion the court quotes from Ruemmell-Braun Co. v. Cahill, 14 Okl. 422, 79 Pac. 260, as follows: "It is the positive duty of the master to use reasonable care in providing safe tools, machinery and appliances to work with; a safe place to work in, safe materials to work on. \* \* \* And, after quoting the above language, the court says: "As above stated, it is now the fundamental and well-settled law of the land that it is the duty of the master to furnish the servant safe tools, materials, and structures to work with and upon; and to keep them in proper repair." In view of the overwhelming recognition of the interchangeable use of the terms "duty to pro-

vide a reasonably safe place," and "duty to exercise reasonable care in providing a safe place," we cannot be constrained to treat this objection of itself reversible. However, we believe the rule might be stated with more exact correctness by saying: "It is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed and the dangers and hazards ordinarily arising therefrom."

This, we think, disposes of the meritorious contentions urged by plaintiff in error, and for the reasons herein given, considering the record as a whole, we do not believe that the decisive issues were fairly submitted to the jury. Therefore the judgment is reversed and the cause remanded.

PER CURIAM. Adopted in whole.

**BUTLER et al. v. OKLAHOMA STATE BANK OF DURANT.**

(Supreme Court of Oklahoma. Jan. 7, 1913.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—MOTION FOR NEW TRIAL—DENIAL.**

Where appellant fails to assign in his petition in error as error the overruling of a motion for a new trial, no question that seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court, and such cannot be reviewed. *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

Commissioners' Opinion, Division No. 1. Error from Bryan County Court; Charles A. Phillips, Judge.

Action by the Oklahoma State Bank of Durant against E. O. Butler and another on a note. Judgment for plaintiff, and defendants bring error. Affirmed.

Robert Crockett and W. L. Boner, both of Durant, for plaintiffs in error. Utterback, Hayes & MacDonald, of Durant, for defendant in error.

**ROBERTSON, C.** On September 1, 1910, leave was given plaintiffs in error to file an amended petition in error. The amended petition in error was filed August 1, 1911. On November 22, 1911, a motion was filed by defendant in error to strike the said amended petition in error from the files, which motion was, by the court, sustained on March 5, 1912, leaving the cause standing here on the original petition in error. Counsel for defendant in error now insist that this court is without jurisdiction to inquire into or consider the questions raised by the

original petition in error, for that all questions so raised require the examination and consideration of the evidence introduced at the trial, and that plaintiffs in error have waived the consideration of such errors by failing to assign in their petition in error the overruling of their motion for a new trial. An examination of the record proves this contention to be true. "Where appellant fails to assign in his petition in error as error the overruling of a motion for a new trial, no question that seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below, is properly presented to this court, and such cannot be reviewed." *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016; *McDonald v. Wilson*, 29 Okl. 309, 116 Pac. 920; *Cox v. Lavine*, 29 Okl. 312, 116 Pac. 920; *Burrus v. Funk*, 29 Okl. 677, 119 Pac. 976. These authorities are decisive of the question involved. Our investigation, therefore, is confined to the question of the sufficiency of the bill of particulars, which is the usual and ordinary form of a declaration on a promissory note. It was not challenged by motion or demurrer. The execution of the note is expressly admitted by the answer. The answer raises issues of fact which were heard and determined by the jury, and the consideration of which, in this court, as has been seen above has been waived.

The judgment is regular on its face, the court had jurisdiction of the subject-matter and the parties, and, perceiving no error in the record, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

**DAVIS et al. v. NORTON.**

(Supreme Court of Oklahoma. Jan. 7, 1913.)

*(Syllabus by the Court.)*

**1. JUSTICES OF THE PEACE (§ 171\*)—APPEAL—RETRIAL—TRIAL DE NOVO.**

Section 14 of article 7 of the Constitution of Oklahoma requires all cases appealed from a court of a justice of the peace to be tried de novo in the county court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 655-657; Dec. Dig. § 171.\*]

**2. JUSTICES OF THE PEACE (§ 127\*)—JUDGMENT—VACATION.**

Where a judgment is rendered before a justice of the peace for the plaintiff, in the absence of the defendants, two in number, and one of them on the same day appeared and filed a motion to vacate the judgment, and which motion, made in compliance with the requirements of section 6380, Comp. Laws 1909, is sustained, and a notice served upon the plaintiff, signed by both defendants, it must affirmatively appear that the judgment was only set aside as to the person asking it, otherwise it will be deemed set aside as to both defendants.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. § 127.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. JUSTICES OF THE PEACE (§ 159\*)—JUDGMENT — VACATION — APPEAL — BOND — FILING—TIME.

Where a judgment is so vacated, and notice served in compliance with the statute, and the case afterwards comes on for trial, and the justice thereupon attempts to rescind his former action in vacating said judgment, and to reinstate his former judgment, and an appeal is prosecuted from said latter judgment, it is error for the county court to dismiss said appeal for the reason that the appeal bond was not filed and approved within 10 days of the rendition of the original judgment; the appeal being prosecuted from the final order rescinding the order vacating the judgment and attempting its reinstatement, the appeal bond being filed and approved within 10 days from rendition of said final order.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550-578; Dec. Dig. § 159.\*]

### 4. JUDGMENT (§ 1\*)—WHAT CONSTITUTES.

A judgment is the final determination of the rights of the parties in an action. Section 5916, Comp. Laws 1909.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1, 3, 4; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

Commissioners' Opinion, Division No. 1. Error from Seminole County Court; T. S. Cobb, Judge.

Action by Sam Norton against Bob Davis and another. From a justice's judgment in favor of plaintiff, defendants appeal to the county court, where the appeal was dismissed, and, from the order of dismissal, defendants bring error. Reversed and remanded.

J. A. Baker, of Wewoka, for plaintiffs in error.

SHARP, C. Judgment before the justice of the peace was rendered November 9, 1909, in the defendants' absence. On the same day the defendant Bob Davis filed a motion, duly verified, asking that said judgment be vacated and set aside. This affidavit was in pursuance of the provisions of, and in compliance with the requirements of, section 6380, Comp. Laws 1909. Upon being filed before said justice of the peace, an order was made sustaining the motion, and the judgment so rendered was set aside, and the case set for hearing on November 18, 1909. On said last-mentioned day notice was served on plaintiff by defendants, as required by the fourth subdivision of said section 6380. On the same day plaintiff filed what he termed a special appearance, in which it was sought to have the order setting aside the judgment vacated, and to have the court decline to assume further jurisdiction of the cause. Pursuant to defendants' notice, the case came on for hearing on November 27th; the plaintiff on said day filing a second motion objecting to the court entertaining further jurisdiction of the cause for the following reasons: (1) That the judgment had never been legally set aside; (2) that the court had lost jurisdiction; (3) be-

cause no application to set aside the judgment as to Harriet Davis was ever served on plaintiff. Plaintiff's motion was sustained by the court, who made the following order: "The court, after examining the proceedings and pleadings in this case, and being fully advised in the premises, finds that the motion of the plaintiff filed herein should be sustained, and that the court should decline to take further jurisdiction in this cause. It is therefore ordered that this cause stand upon the original judgment rendered in this case against the defendant, and in favor of the plaintiff, dated November 27, 1909." From this judgment, an appeal was taken to the county court; appeal bond being filed and approved November 29th thereafter. The case coming on for trial in the county court, the defendants filed a motion asking that the appeal be dismissed for the reasons: (1) That no appeal would lie from the judgment rendered November 9th, the court's action, if reviewable at all, being upon bill of exceptions, and not by appeal; (2) that the appeal bond was not filed and approved within 10 days of the rendition of the judgment of November 9th. A second motion was filed, which included the grounds in the former motion, and, in addition thereto, the further ground that Harriet Davis was not made a party to the appeal. The motions were sustained, and defendants' appeal dismissed.

[1] The first question raised by the motion to dismiss the appeal is decided adversely to defendant in error upon the authority of *Redus v. Mattison*, 30 Okl. 721, 121 Pac. 253; *Patten v. Ogle*, 32 Okl. 499, 122 Pac. 154; *Gulf Pipe Line Co. v. Vanderberg*, 28 Okl. 637, 115 Pac. 782, 34 L. R. A. (N. S.) 661, Ann. Cas. 1912D, 407; section 14, art. 7, of the Constitution of Oklahoma, requiring that all cases appealed from a court of a justice of a peace be tried de novo in the county court.

[2] The second contention is not supported by the record. The final judgment was rendered November 27th, and the appeal bond filed and approved by the justice of the peace, before whom the action was pending, on November 29th thereafter. Plaintiff's bill of particulars asked for a judgment against both Bob and Harriet Davis. The judgment of November 9th presumably was taken against both defendants, though neither are named; simply a judgment for the plaintiff for the immediate possession of the corn, or its value, \$125, and costs of suit, taxed at \$46.30. This judgment was set aside on the motion of defendant Bob Davis; said motion being in part as follows: "Comes now Bob Davis, one of the defendants in the above-stated case, who, after being duly sworn, deposes and says on oath that the judgment rendered against the defendants in the above-stated case was upon default; neither of these defendants were present, either in person or by counsel. \* \* \*" The notice served on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff on November 18th was signed by both Bob Davis and Harriet Davis. We think there was sufficient warrant for the court setting aside the judgment in its entirety. The defendants were alike affected by the judgment, and it is unnecessary that each of them appear and comply with the statute before the court could make an order binding upon both. Section 1785, Burns' Ann. Stats. of Indiana 1908, is not unlike section 6380 of our statutes. In *Robinson v. Snyder et al.*, 97 Ind. 56, it was held that where a judgment by default before a justice of the peace is rendered upon a partnership note against both partners, and one of them within 10 days thereafter appears, pays the costs, and moves to set aside the judgment, which is done, it must affirmatively appear that such judgment was only set aside as to the person asking it, otherwise it would be deemed to be set aside as to both defendants. Obviously the appearance of Bob Davis was both in his own behalf and that of his codefendant, Harriet Davis, and the court so concluded by its order vacating and setting aside the judgment, without limitation or reference to either one of said defendants. It was unnecessary for Harriet Davis in person to have joined in the original motion to vacate the judgment; and, as she was a party to the notice that was subsequently served, no irregularity in that particular can be said to exist.

[3] It appears that notice of appeal was given on the day the judgment was rendered; that on the second day thereafter appeal bond was filed and approved, and the appeal allowed. We cannot say, from the record before us, that Harriet Davis was not a party to the appeal, though under the authority of *Barnard v. Douglass-Whaley Grocery Co.*, 31 Okl. 124, 120 Pac. 563, this would not have been necessary. The appeal was from the order of November 27th, which attempted to reinstate the former order of the 9th. Until

the order of the 27th was made, there was no judgment against either of said defendants. It was the order of that day that was final, and from which the appeal was taken. We had occasion to investigate a very similar question in *Fooshee & Brunson v. Smith*, 124 Pac. 1070, where it was observed: "The remaining question is, Was the judgment from which the appeal was taken such a final judgment from which an appeal could be prosecuted? Section 6386, Comp. Laws 1909, provides: 'In all cases not otherwise especially provided for by law, either party may appeal from the final judgment of the justice of the peace to the county court of the county where the judgment was rendered. \* \* \*'. While section 6395 provides: 'An appeal may be taken from the final judgment of a justice of the peace in any case, except in cases hereinafter stated, in which no appeal shall be allowed: First, on judgments rendered on confession; second, in jury trials, where neither party claims in his bill of particulars a sum exceeding twenty dollars.' Section 6066 provides: 'A judgment rendered, or final order made, by a justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court (county court), may be reversed, vacated or modified by the district court (county court).'"

[4] It was the judgment rendered November 27th by the justice of the peace that constituted the error. The original judgment was proper; the judgment vacating and setting aside this judgment we have already held was proper; no appeal was prosecuted from one or either of these judgments. The vice was in the final order; and it was from that, and not from the original judgment, that the appeal was prosecuted.

The judgment of the trial court must therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

**DARLING v. MILES.**

(Supreme Court of Oregon. Feb. 11, 1913.)  
**APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS OF FACT.**

There being any evidence to support them, findings of fact, in an action at law, cannot be reviewed, the credibility of witnesses being for the court, trying the case without a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Thomas Darling against S. A. Miles. Judgment for defendant, and plaintiff appeals. Affirmed.

The essence of the complaint is that the defendant, being the owner of certain lots in Pleasant View, a suburb of the city of Portland, falsely and fraudulently, with intent to cheat the plaintiff, stated to him that one of the lots was of certain dimensions which were greater than the true boundaries of the tract; that the plaintiff, relying upon the truth of what the defendant thus said and believing the same, purchased the ground, and paid for it in cash; and that, by reason of these false and fraudulent representations knowingly made by the defendant and relied upon by the plaintiff, the latter has been damaged in the sum of \$400. The material allegations of the complaint having been traversed by the answer, the action was tried by the court without a jury, resulting in findings and judgment for the defendant, from which the plaintiff appeals.

Otto J. Kraemer, of Portland (Chamberlain, Thomas & Kraemer and Lester W. Humphreys, all of Portland, on the brief), for appellant. George A. Brodie, of Portland (Murphy, Brodie & Swett, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). We glean from the bill of exceptions that the plaintiff put in his case on the testimony without encountering any adverse ruling of the court, whereupon the defendant moved for and obtained findings and judgment in his favor. The case is before us on exceptions to the findings on the ground that there is no evidence to sustain any of them. These findings in an action at law are tantamount to a verdict of a jury, and we cannot set them aside if after a regular trial there is any evidence to support such a determination of the facts. An examination of the testimony reported in the bill of exceptions convinces us there is evidence on both sides of at least one element of the disputed question of fact, namely, as to whether the defendant made any statement about the dimensions of the tract. It would unnecessarily incumber the reports to go through this testimony in detail and comment upon it. An illustration will be sufficient, based on

the feature of the case just mentioned. The court might well have believed that the only representation about the matter was that contained in the deed itself, which makes no mention of the size of the lot, and that, this being in writing, it contained all the inducements held out by the defendant. The judge may also have been influenced by the fact that in all the letters addressed by the plaintiff to the defendant no intimation is conveyed that the latter ever mentioned that subject. Of course, the plaintiff testified that the defendant made such statements, but we cannot instruct the trial judge whom he shall believe on issues of fact, or what weight he shall give to any piece of testimony. If the bill of exceptions had disclosed that there was no testimony to support the finding of the trial judge, we could sustain the contention of the plaintiff, but such is not the situation here.

The judgment is affirmed.

MOORE, J., did not participate in the decision.

**COLLIS et al. v. CONE et al.**

(Supreme Court of Oregon. Feb. 11, 1913.)  
**TRIAL (§ 389\*)—WAIVER OF ERRORS AND IRREGULARITIES.**

In an action for the possession of land, where the parties waived a jury, and, to avoid the necessity of making formal findings of fact, agreed, in open court, that the court might prepare a verdict, have it signed by a bystander, and make the record as if the trial had been had with a jury, the failure of the trial judge to make findings of fact was not reversible error, since the statutory provision requiring him to make findings of fact is for the benefit of the aggrieved party on appeal, and may be waived by him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 912; Dec. Dig. § 389.\*]

Appeal from Circuit Court, Tillamook County; Geo. H. Burnett, Judge.

Action by E. H. Collis and others against W. S. Cone and another. From the judgment, plaintiffs appeal. Affirmed.

An action was commenced in the circuit court for the recovery of possession of a tract of land in Tillamook county, Or.; plaintiffs alleging that they are the owners and entitled to the possession thereof, and that the defendants are in possession and wrongfully withholding the property from plaintiffs. Defendants admit that they are in possession of the property, but deny every other allegation of the complaint, and allege title thereto by virtue of the tax sale, and, as a second defense, allege that they have been the owners and in possession of the premises since November 1909. Thereafter plaintiffs filed a supplemental complaint, alleging that since the filing of the complaint defendants have been attempting to dedicate portions of the premises above mentioned to public use, and have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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dug up the soil and graded streets thereon, to plaintiffs' damage in the sum of \$250. The record shows that the trial was had before a jury, and a verdict duly rendered in favor of plaintiffs, finding that they are the owners in fee simple and entitled to the immediate possession of an undivided one-third of the property; that the defendants are the owners in fee simple and entitled to the immediate possession of an undivided two-thirds thereof; and that plaintiffs have been damaged in the sum of \$5. Said verdict was signed, "Wm. D. Bodyfelt, Foreman." Judgment was rendered accordingly. Thereupon plaintiffs filed a motion for a new trial, which, on November 21, 1910, was denied, and plaintiffs were given until December 12th in which to serve and file a bill of exceptions. However, no bill of exceptions was filed. After the appeal was taken, namely, about November 14, 1911, plaintiff filed a motion for the entry nunc pro tunc of an order to make the record conform to the facts, said motion being heard upon affidavits of the parties, their attorneys, and others, upon which motion the court entered an order to the effect that, "it appearing to the court that prior to the trial of said cause it was agreed in open court, in the presence of the parties, plaintiffs and defendants herein, by the attorneys of record for said parties plaintiffs and defendants, that said cause should be tried by the court without a jury, but that the record should be made as if the trial had been had with a jury, and after trial thereof the court should prepare a verdict and have the same signed by a bystander, so that it would be in the form of a verdict of a jury, duly signed by its foreman and returned by such jury and received by the court as the verdict thereof, and that judgment should be entered thereon as upon a verdict of a duly chosen, impaneled, sworn, and qualified jury, \* \* \* and it appearing to the court that the foregoing does not otherwise appear in the record of this court, it is therefore ordered that said motion of plaintiffs be sustained, and, in order that the record of this cause may be corrected to conform to and disclose the facts as herein stated, it is hereby further ordered that the record of this order be made in the journal of the said court as of the date prior to the trial of said cause." It appears from the affidavits of the attorneys for the respective parties that when the case was called for trial the plaintiffs E. H. Collis and A. Bonham, together with their attorneys, and the defendant W. S. Cone, and the attorneys for the defendants, were present in court; that the parties thereupon, in open court, agreed that the case might be tried by the court without the intervention of a jury; that the judge then stated that he would not so try the case, unless the same would be tried and a verdict prepared and signed by some one to be selected by the court in the same manner and form as though a jury had been impaneled and sworn, and that

the same should appear upon the records of the court in every respect as though a jury had been regularly impaneled and sworn to try the cause; that said statement was made by the court in open court, in the presence and hearing of all of the parties then present, including all of the plaintiffs except Kate Bonham. The judge stated that, unless it were agreed to try said cause in said manner, he would require that the same be tried by a jury. The trial in the manner suggested by the judge was agreed to, and the same was tried according to said agreement. The plaintiffs appeal. Appellants' attorney here was not the attorney representing them in the circuit court.

H. M. Esterly, of Portland, for appellants.  
T. H. Goyne, of Tillamook (H. T. Botts, of Tillamook, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). The only contention urged by the plaintiffs is that, by reason of the irregularity of the proceedings, the judgment should be reversed and remanded for a new trial, because the court did not make findings of fact. Without appearing to approve or indorse the irregularity of the proceedings had, we find that the judgment should be affirmed. It appears that the divergence from the regular form of procedure at the trial was agreed to by the attorneys in the presence of their clients, and it was done for the benefit of the parties, and to avoid the necessity of making formal findings of fact. We think that the parties should be bound by the result, if, by stipulation or agreement of the parties in a law case tried by the court, the making of findings by the court may be waived. They agreed in open court that the proceeding followed might be adopted to relieve the court of the time and labor of making findings, thereby inducing the court to take up the trial of the case. No wrong is complained of, other than as plaintiff's remedy upon appeal is affected.

The provision of the statute that, in all actions tried by the court without the intervention of a jury, the decision shall state the facts found and the conclusions of law separately, without argument or reason therefor, is a provision for the benefit of the aggrieved party. Baylies' Trial Practice, p. 279. And the rule is that any matter that involves the individual rights of parties to a cause may properly be made the subject of a stipulation between them. They may, by a stipulation, waive the benefit of a statutory or constitutional provision, rule of law, or any irregularities. 38 Cyc. 1285; Baylies' Trial Practice, p. 281; Smith v. Rowley, 66 Barb. (N. Y.) 502. In legal proceedings parties are held by particular conduct or admissions conclusively to have waived rights which otherwise they might have insisted upon. If jurisdiction to act exists, and the only objection to its exercise is one intended for the protection of the party complaining thereof,

such right may be waived. Thompson on Trials, § 1438. This right to waive a rule of law or a constitutional provision enacted for his benefit or protection may be waived, where it is exclusively a matter of private right and does not involve questions of public policy, or morals; and, having once waived it, he cannot invoke its protection. 20 Pl. & Pr. p. 607; *Sentenis et al. v. Ladew et al.*, 140 N. Y. 466, 35 N. E. 651, 37 Am. St. Rep. 571; *Bank of Ravenswood v. Hamilton et al.*, 43 W. Va. 78, 27 S. E. 297; *In re Cooper*, 93 N. Y. 507; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624. Where parties stipulated that the court's decision should be expressed in a verdict, for the purpose of relieving the court of the necessity of making formal findings, it was in effect an agreement that findings should not be required or made. The stipulation necessarily operated as a waiver of the findings, and took the case out of the statute. *Blomberg v. Stewart*, 67 Wis. 455, 30 N. W. 617.

We find that there was no error committed by the trial court of which plaintiffs can complain. The judgment is affirmed.

#### CITY OF PORTLAND v. TIGARD et al.

(Supreme Court of Oregon. Feb. 11, 1913.)

#### 1. EVIDENCE (§ 524\*)—EXPERT EVIDENCE—VALUE.

Expert witnesses may give their opinions as to the increase in the market value of a lot by reason of a street improvement, and are not limited to giving their opinion of its value before and after the improvement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2332; Dec. Dig. § 524.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 402\*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF DAMAGES—DATE.

Where, in a street opening proceeding under the Portland charter, the report of the viewers as to the damages therefrom is adopted by the city council, and an appeal taken to the circuit court, the damages should be determined as of the date when the city council adopted such report, and not of the date of the trial in the circuit court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 969-981; Dec. Dig. § 402.\*]

#### 3. EVIDENCE (§ 543\*)—EXPERT TESTIMONY—QUALIFICATIONS OF WITNESS.

A real estate dealer having charge of the sale of a tract of platted land adjacent to the property sought to be condemned, having an idea of the value of land in nearly every section of the country, and a fair idea of the market value of property in the location of that involved, could testify as to the value of that sought to be condemned.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2358½-2358; Dec. Dig. § 543.\*]

#### 4. EVIDENCE (§ 113\*)—VALUE—COST PRICE.

In a proceeding to assess the damages for property taken for a street, testimony as to the price paid therefor 2½ years before was properly excluded; the time being too remote.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

Appeal from Circuit Court, Multnomah County; Wm. N. Gatens, Judge.

Action by the City of Portland against C. S. Tigard and others. Judgment for plaintiff, and defendants appeal. Affirmed.

On April 27, 1910, the city council of the city of Portland passed ordinance No. 21,130, adopting the report of the viewers, which said ordinance assessed the benefits and damages occasioned to adjacent owners by the location and extension of Ainsworth avenue. The damages and benefits assessed to appellant are damages for taking the north 20 feet of lot 9, block 30, Piedmont addition, \$320; damages for taking the south 58.43 feet of lot 1, block 31, \$925; benefits to balance of lot 1, block 31, \$10; benefits to the south 20 feet of lot 2, block 31, \$75. The defendant appealed from said ordinance and assessment to the circuit court, where the case was tried before a jury, whose verdict was in accordance with the assessment by the viewers. From judgment thereon the defendant appeals to this court.

Ralph R. Duniway, of Portland, (Conrad P. Olson, of Portland, on the brief), for appellants. Frank S. Grant, City Atty., of Portland (H. M. Tomlinson and John F. Cahalin, both of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). Many exceptions were taken upon the admissibility of evidence and to the instructions of the court, and are covered by defendant's brief under four propositions.

[1] First. The court erred in permitting certain witnesses to state their opinions to the jury as to the amount of the benefits and damages resulting to the defendant. The objection to the questions involved did not relate to the damages to the property, but to the benefits accruing to lot 2, block 31, which did not abut upon the proposed street. The witnesses Simmons and Sinnott are admitted to be expert witnesses, who gave their opinions as to the increased market value of lot 2, block 31, by reason of the opening of the street. The fact that they are expert witnesses brings the admission of the evidence within the decision in *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315, where Mr. Justice Bean says, at page 255 of 23 Or., at page 653 of 31 Pac. (18 L. R. A. 315): "It is undoubtedly true as a general rule that a witness is only permitted to testify to facts within his own knowledge, and not to inferences and opinions, but to this rule there are certain exceptions; and one of these exceptions is that when the value of real estate, which is always largely a matter of opinion, is in controversy, persons who are acquainted with the property in question, and know the value of real estate in the same neighborhood, are competent to give their opinions as to its value. \* \* \* In

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



many of the states, in such a case a witness is not allowed to state his opinion as to the amount of damages, but only as to the value of the land before and after the contemplated improvement or burden, leaving the subtraction to be made by the jury." And he cites with approval the language of Rogers on Expert Testimony, 369, to the effect that the weight of authority as well as reason is in favor of allowing the witness to express his opinion as to the amount of the damages as it is but a mere mathematical calculation. This rule is also recognized in *Burton v. Severance*, 22 Or. 94, 29 Pac. 201, where it is said: "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in or have some knowledge of the article concerning which he speaks." In *United States v. McCann*, 40 Or. 19, 66 Pac. 274, the same justice states the general rule as contended for by the defendant here; but excepts cases where expert opinion or testimony is competent. The rule announced in *Blagen v. Thompson*, supra, is cited with approval by Mr. Justice McBride in *Elliott v. Wallowa County*, 57 Or. 243, 109 Pac. 130.

[2] The second alleged error is the instruction given to the jury to the effect that the damage should be determined as of date April 30, 1910, the date the council adopted the report of the viewers, instead of the time of the trial in the circuit court, and many authorities are cited in support of defendant's contention; but the proceedings before the viewers and the council was the original trial, and is the proper date at which to determine the value. As this was an appeal to the circuit court, and not the original trial, it must be tried upon the conditions as they existed before the viewers. This is the evident contemplation of section 353 of the charter. Although the property is not deemed taken until warrants are drawn in payment of damages for the property condemned, that does not mean that to make the assessment binding the payment must be made immediately upon the making of the assessment, or that a new assessment must be made at the time of payment. Such a proceeding would be impractical. If no appeal is taken, the assessment by the viewers is the final one to be paid, when the assessments of benefits are collected, and although the appeal may delay the time of payment, at least as to appellant, he cannot by that act make a new date at which the damages are to be ascertained. This is the result of the following authorities: *Ellsworth et al. v. Chicago & I. W. Ry. Co.*, 91 Iowa, 386, 59 N. W. 78; *Irrigation Co. v. McLain*, 69 Kan. 334, 76 Pac. 853; *Matter of Brooklyn Union El. R. R. Co.*, 105 App. Div. 111, 93 N. Y. Supp. 924; *Montclair R. R. Co. v. Benson et*

*al.*, 36 N. J. Law, 557; *Shannahan v. City of Waterbury*, 63 Conn. 420, 28 Atl. 611.

[3] The third contention is that the expert witness Smith was not shown to be qualified to testify. The testimony discloses that he is a real estate dealer, having charge of the sale of a tract of platted land adjacent to the property sought to be condemned; that his idea of values was largely from sales made in West Piedmont, which was the property he was handling, but that he had an idea of the value in nearly every section of the country, that he had a fair idea of the market value of property in the location of this property, and that it was not error to permit him to testify.

[4] As to the fourth contention, it was not error for the court to exclude testimony as to the price paid by the defendant for the property 2½ years before, as the time was too remote, and not a proper criterion of present values. *Oregon R. & N. Co. v. Eastlack et al.*, 54 Or. 205, 102 Pac. 1014, 20 Ann. Cas. 692.

We find no error in the trial, and the judgment is affirmed.

#### CITY OF PORTLAND v. INVESTMENT CO. (Supreme Court of Oregon. Feb. 11, 1913.)

##### EVIDENCE (§ 142\*)—VALUE—ADMISSIBILITY.

In a proceeding to assess the damages to property condemned for a street, testimony as to the selling price of lots, three blocks from the property in question, and a part of a tract platted into lots adjoining those in question, was admissible on the question of value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.\*]

Appeal from Circuit Court, Multnomah County; Wm. N. Gatens, Judge.

Action by the City of Portland against the Investment Company for an assessment of damages for property condemned for a street. From the judgment, defendant appeals. Affirmed.

Ralph R. Dunlway, of Portland (Conrad P. Olson, of Portland, on the brief), for appellant. Frank S. Grant, of Portland (H. M. Tomlinson and John F. Cahalin, both of Portland, on the brief), for respondent.

EAKIN, J. With the exception that this case relates to a different street in the same locality, the issues therein are identical with those in the case of *Portland v. Tigard*, 129 Pac. 755, the opinion in which was filed this day. Reference is made to the said opinion for the statement of facts and the points decided. On the appeal in this case one additional error in the admission of testimony of J. L. Pettinger, who was called as an expert witness, is relied on. After qualifying and testifying to the value of the lots in question, as further evidence of the values, he was asked as to sales of lots in that im-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mediate locality about that time, to which he answered that he had sold for \$600 each lots 5 and 6, block 9, in West Piedmont, three blocks from the property in question. The ground of this exception is that the lots sold were not in the same locality, but they are only three blocks distant therefrom, and are a part of a tract, platted into city lots, that adjoins the lots in question. We think this indicates that they are in the same locality, and it was not error to overrule the objection as to the competency of such evidence. See *Oregon R. & N. Co. v. Eastlack*, 54 Or. 205, 102 Pac. 1014, 20 Ann. Cas. 692, where the question is discussed.

The judgment is affirmed.

#### BELL v. PAQUET et al.

(Supreme Court of Oregon. Feb. 11, 1913.)

##### TRIAL (§ 260\*)—REFUSAL OF INSTRUCTIONS.

The refusal of requested instructions in a personal injury case was not error, where the instructions given, taken as a whole, fairly covered the issues, and the requested instructions would not and should not have affected the verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Action by William Bell against Joseph Paquet and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Harry Beckett, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellants. Claude Strahan, of Portland (Strahan & Seton, of Portland, on the brief), for respondent.

**PER CURIAM.** This is an action for damages for personal injuries. Exceptions are taken to the refusal of various instructions requested by defendant. We have carefully examined the testimony in the case and the instructions requested, and are of the opinion that, taken as a whole, the instructions given fairly cover the issues, and that the giving of the instructions requested would not have affected the verdict, and should not have affected it.

No new questions of law are involved, and in accordance with section 3, art. 7, of the Constitution, as amended November 8, 1910 (*Laws of 1911*, p. 7), the judgment is affirmed.

#### SORENSEN v. SMITH.

(Supreme Court of Oregon. Feb. 11, 1913.)

##### 1. BROKERS (§ 8\*)—COMMISSION—EVIDENCE—EMPLOYMENT.

Evidence, in an action for a real estate broker's commission, held to show that plaintiff's assignor was never employed by the defendant owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 9; Dec. Dig. § 8.\*]

##### 2. BROKERS (§ 18\*)—EMPLOYMENT CONTRACT—CONSTRUCTION.

The power of a real estate broker to grant an option for a limited time, and to extend such time, is in the nature of a personal trust, so as to negative an implied power to appoint a subagent for whose services the principal will be liable.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 7; Dec. Dig. § 18.\*]

##### 3. TRIAL (§ 89\*)—EXAMINATION OF WITNESSES—ANSWER NOT RESPONSIVE—MOTION TO STRIKE.

When a witness answers a question before an attorney can object, the proper practice is to move to strike out the answer, unless the court, in sustaining the objection, also directs the jury not to consider such answer.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 228-234; Dec. Dig. § 89.\*]

##### 4. BROKERS (§ 40\*)—COMMISSION—LIABILITY OF OWNER TO SUBAGENT.

Where a real estate broker, merely under his general authority, employs a subagent to procure a purchaser, the principal is not thereby made liable for the subagent's commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.\*]

##### 5. VENDOR AND PURCHASER (§ 78\*)—OFFER TO SELL LAND—TIME OF THE ESSENCE.

Time was of the essence of an offer to sell land to a certain purchaser, providing he accepted the proposal within a time stated.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121-125; Dec. Dig. § 78.\*]

##### 6. BROKERS (§ 9\*) — DURATION OF EMPLOYMENT.

Where a broker is employed to procure a purchaser within a fixed time, his agency, unless extended, terminates at the expiration of that time.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 10; Dec. Dig. § 9.\*]

##### 7. BROKERS (§ 50\*)—COMMISSIONS—LIABILITY OF OWNER TO SUBAGENT.

Where a subagent, employed by a real estate broker under his general authority, was directed by the broker to continue his efforts after an option, which he had procured a purchaser to take on the land, had been declared canceled, the principal was not liable for a commission on a sale by reason of the subagent's acts pursuant to these directions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.\*]

##### 8. BROKERS (§ 43\*)—COMMISSIONS—LIABILITY OF OWNER TO SUBAGENT.

That an owner consented to sell to a purchaser procured by a subagent of his broker, with knowledge that the purchaser had been so procured, did not constitute a ratification of the subagent's employment or render him liable to the subagent for a commission; the provision of the statute of frauds (*L. O. L. § 808*), that an oral agreement employing an agent or broker to sell real estate for a commission shall be void, requiring that a principal's ratification of an oral agreement respecting a broker's compensation be in writing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.\*]

##### 9. WORDS AND PHRASES—"VOID."

Where a statute declares a particular act to be void, and its performance, without authority, is denounced as a misdemeanor, for which a penalty is prescribed, the word "void," as thus used, is occasionally held to mean what its

technical sense would imply, and not to mean "voidable." (Citing 8 Words and Phrases, 7332).

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by N. V. Sorenson against Charles A. Smith. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

This is an action by Mrs. N. V. Sorenson against C. A. Smith to recover \$15,000 as broker's commission for services alleged to have been performed by her husband and assignor, George Sorenson, in procuring purchasers who entered into a valid contract with the defendant, whereby they stipulated to pay him \$300,000 for his interest in real property in Douglas county, Or. The cause, being at issue, was tried, resulting in a judgment for plaintiff as demanded in the complaint, and the defendant appeals.

R. R. Giltner and A. H. Tanner, both of Portland (Giltner & Sewall, of Portland, on the brief), for appellant. Martin L. Pipes, of Portland (George A. Pipes, of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). It is maintained that errors were committed in denying a motion for a judgment of nonsuit when the plaintiff had introduced her evidence and rested, and in refusing to direct a verdict for the defendant, when the cause was finally submitted. There has been brought up a transcript of the entire testimony, which will be examined with reference to the application for an instructed verdict, since that request necessarily supersedes the motion for a judgment of nonsuit. The facts are that the defendant was the owner and holder of certificates issued by the Northern Pacific Railroad Company for 7,480 acres of timber land in township 27 south, of range 2 west, of the Willamette meridian. Smith, who it appears resided in Minnesota, employed F. A. Kribs, a real estate broker of Portland, Or., to negotiate a sale of his estate in the premises, which interest will be designated herein as lands. Kribs informed George Sorenson, who was engaged in the same business in that city, that these lands were for sale, and gave him a map on which the real property was represented. The plaintiff's assignor thereupon procured J. O. Storey, who on September 28, 1906, was granted by Kribs an oral option of 60 days within which to purchase the premises at \$25 an acre, on account of which he was to have paid \$50,000 before the expiration of that limit, and the remainder at stated intervals. The time thus specified was allowed in order to permit an inspection of the quantity and quality of the timber growing on the real property so as to determine its value. After a partial examination, Storey was reasonably satisfied that the lands were worth the sum demanded; but, being unable to secure a complete cruise of several subdi-

visions of the tract within the time limited, he obtained from Kribs an extension for that purpose until December 15, 1906. In the meantime, Storey had engaged to sell the lands for \$250,000 to other persons, in whose interests he on December 9, 1906, offered to pay Kribs \$10,000 as evidence of good faith, but the proposal was declined. At the expiration of the time ultimately limited, but before a complete inspection of the timber could be made by Storey, and without his offering to pay the \$50,000 required, Kribs, at the defendant's direction, withdrew the lands from sale, and so notified Sorenson and Storey. The latter on July 7, 1907, commenced an action against Kribs in the circuit court of the state of Oregon for Multnomah county to recover \$63,000 as damages for an alleged breach of the agreement to sell and convey the land, and the further sum of \$2,027 as expenses incurred in cruising the timber.

A written contract was prepared at Minneapolis July 23, 1909, whereby the defendant, in consideration of \$300,000, to be paid as specified, stipulated to sell and assign all his interest in the real property to C. P. Bratnaber of that city, and the Storey-Bracher Lumber Company, an Oregon corporation, of which J. O. Storey and G. Bracher were respectively the president and secretary. This contract, referring to the purchasers and to the defendant, contained a clause as follows: "The vendees agree to save the vendor harmless from any claim or demand on him by any one save and excepting Frederick A. Kribs of Portland, Or., for commissions in the sale of the certificates hereinbefore mentioned, and also agree to save the said Frederick A. Kribs harmless from any claim or demand made by any one on him for commissions on account of the sale of said certificates." This contract was executed by the several parties to it at Albany, Or., September 2, 1909. Thereafter Sorenson assigned his claim for a commission of 5 per cent. of the stipulated purchase price to the plaintiff, who instituted this action, which eventuated as hereinbefore narrated.

[1] George Sorenson testified, in substance, that after December 15, 1906, pursuant to Kribs' promise to pay him a commission of 5 per cent. of the purchase price of the land, if a profitable sale thereof could be made, he continued to negotiate with Storey until July, 1909, when Kribs said to him, "If you can get Storey to give \$300,000, I can put the sale through," declaring, however, that Smith should be personally consulted about the matter. This information was communicated to Storey, who immediately went to Minneapolis, where the terms of the contract were settled. Sorenson admitted he never conversed with the defendant until after the sale was consummated; nor did he have any writing authorizing him to procure a purchaser of the lands or promising to pay him a commission in case of a sale. This testimony was corroborated in many particulars

by that of F. A. Kribs, who was asked, in reference to Sorenson's efforts, originally to procure Storey as a purchaser, "You acted upon your general authority from Mr. Smith to sell the land?" He replied, "Yes, sir." After this answer was given, defendant's counsel said, "Now, if the court please, I object to that question." A ruling was then made as follows: "The objection is sustained." In obedience to a subpoena duces tecum, Kribs produced and identified copies of letters which he had written to the defendant, and also telegrams which the latter had sent to him. These writings, having been received in evidence, show that, before the final bargain for the sale of the land was concluded, Smith knew that Sorenson claimed a commission for the services which he had performed.

J. O. Storey, referring to the visit at Minneapolis to confer with the defendant in July, 1909, testified as follows: "We had agreed on the negotiations for this land, and Mr. Sorenson, who was working with me at that time to get this land in our hands in some shape so we could jointly sell it again, telegraphed me and asked me what shape I had it, and replying I wired: 'Have Smith deal cinched. What can you get? Answer.'" Referring to that message, he said: "What I meant by that was, How much money can you get for the land?" This witness further said that the Storey-Bracher Lumber Company paid no money for the lands, and had no interest therein, except the right to sell the premises; that Mr. Bratnaber agreed to buy the property and allow us to sell it; but that neither Sorenson nor himself was able to find a purchaser at the price demanded. Storey received a letter written December 9, 1906, by Sorenson, wherein the writer, referring to Kribs and to the original option to purchase the lands, said: "He wanted to divide the commission with me and leave you out of the deal. I told him you was in on the deal, and that you was to get an equal division."

The foregoing is deemed to be a sufficient statement of all the material evidence involved in a consideration of the question whether or not, under the original option to sell the property, or by subsequent ratification, Smith became liable to Sorenson for the payment of a commission. It will be remembered that the defendant, a nonresident of Oregon, appointed F. A. Kribs, a real estate broker of this state, to sell lands therein. If Kribs had been a nonresident of Oregon, and Smith had known that he did not expect to come into the state, it might reasonably have been concluded that the selection of the agent, under such circumstances, carried with it, by necessary implication, the right to delegate his authority to a subagent. The modification of the general rule in this respect is founded on the assumption that, since the person originally appointed to negotiate a sale of land cannot, by

reason of his nonresidence, be expected to visit and inspect the real property, he must of necessity select in his stead some one who can identify the premises to a prospective purchaser. *Eastland v. Maney*, 38 Tex. Civ. App. 147, 81 S. W. 574. This principle, however, can have no application to the case at bar, since Kribs resided in the state where the land is situated.

[2] It will also be kept in mind that Kribs originally allowed an option of 60 days, and further extended the time in which the timber might be inspected. The privilege thus granted implies a bestowal of power, the exercise of which evidences a personal trust and confidence that, in the absence of express authority, negatives a right to appoint a subagent, for a performance of whose services the principal would be liable. *Storey, Agency*, §§ 12, 13; 1 Am. & Eng. Ency. Law (2d Ed.) 972. From a careful examination of the entire evidence, it is believed that Sorenson was only a subagent, and that no privity existed between him and the defendant. This conclusion seems to be confirmed by Sorenson's letter to Storey, wherein he stated that Kribs wanted to divide with the writer the commission, and to exclude Storey from any participation therein. The statement in the letter that Sorenson had told Kribs that Storey "was in on the deal" and "was to get an equal division" reasonably implies that Kribs, Storey, and Sorenson were ratable to share the expected commission. The letter referred to unmistakably shows that, for the services originally performed by Sorenson, he must have believed a part of the compensation to be paid Kribs would be shared with him, and that he was only a subagent of the latter.

[3, 4] This deduction, in our opinion, is not defeated by Kribs' reply to the inquiry, whereby he stated that, in giving Sorenson a plat of the lands and requesting him to procure a purchaser, he acted upon his general authority from the defendant. An objection was made to this answer after it was given; but no motion was made to strike it out. When a witness responds to a question before an attorney has had time to object to the inquiry, the proper practice is to move to strike out the answer, unless the court, in sustaining the objection, also directs the jury not to consider the reply given. The testimony referred to was not properly eliminated; but in our opinion the answer was a legal conclusion, and not the statement of a material fact. In any event, the reply to the inquiry does not show that Kribs undertook to bind his principal, nor does it negative the conclusion that he employed Sorenson as a subagent, with whom Smith sustained no relation as a contracting party. *Mechem, Agency*, § 197; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443.

[5, 6] The original offer to sell the land

having been definitely limited, Storey's acceptance of the proposal made the period of time so stipulated of the essence of the agreement. *Watson v. Brooks*, 11 Or. 271, 3 Pac. 679; *Hardy v. Sheedy*, 58 Or. 195, 113 Pac. 1133. Where the employment of a broker is thus precisely fixed, his agency terminates with the end of the time specified. *Zelmer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *La Force v. Washington University*, 106 Mo. App. 517, 81 S. W. 209.

[7] Whatever the rule may be with respect to annulling a real estate broker's contract, it will be kept in mind that Sorenson testified that he was directed by Kribs to continue his efforts to consummate a sale of the premises after the original option was declared canceled. Any services, however, that were performed pursuant to the latter order must be construed as acts done by a subagent at the command of an agent, and for the payment of which the principal would not be liable.

[8] This conclusion leaves for consideration the question of Smith's acceptance of the purchase price that was partly paid, and his consummation of a valid bargain for the sale of the land, with full knowledge of the benefit which he probably derived from Sorenson's endeavor to procure a purchaser. When a principal, with entire comprehension of a usurpation of authority by a person who pretends to act for him in dealing with his property, accepts the advantages which might accrue, he thereby ratifies the unwarranted conduct and renders himself liable for all the burdens that may result. *Hahn v. Guardian Assurance Co.*, 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; *Connell v. McLoughlin*, 28 Or. 230, 42 Pac. 218; *Rumble v. Cummings*, 52 Or. 203, 95 Pac. 1111. Any unauthorized act by an agent for his principal that tends to impair the public health or to corrupt the public morals is void ab initio, and for that reason it is incapable of ratification, since any attempted approval of the transaction would necessarily be contaminated with the original illegality, thereby making the principal in pari delicto with the agent. *Clark & Skyles' Law of Agency*, § 115. In the same section of the work referred to, it is said: "If, however, the act was one merely voidable in its nature, it may be subsequently ratified by the principal, although unauthorized." Another text-writer, in discussing this subject, observes: "An act, to be capable of ratification, must be voidable or defeasible only, and not void. That an act which could not have been authorized in the first instance cannot be ratified seems clear, and upon this point the adjudications are in full accord." *Reinhart, Agency*, § 98.

[9] It is sometimes said that any unjustifiable conduct of one person in disposing of, or procuring property for, or prejudicial or beneficial to, the rights of another, which

act could have been previously authorized by the latter, may subsequently be ratified by him. This observation is not universally applicable, for where a statute declares a particular act to be void, and its performance without authority is denounced as a misdemeanor in the enactment, which also prescribes a penalty upon conviction for a violation thereof, the word "void," as thus used, is occasionally held to mean what its technical sense would imply, and not voidable, thereby rendering the unauthorized act incapable of ratification. 8 Words and Phrases, 7332. Thus, under a statute making it a misdemeanor on the part of a broker to earn a commission for the sale of real property without written authority, it was held that, in the absence of a writing of that kind, no action could be maintained. *Adler v. Schaumborger* (Sup.) 84 N. Y. Supp. 235; *Charles v. Arthur* (Sup.) 84 N. Y. Supp. 284; *Kronenberger v. Quinn* (Sup.) 86 N. Y. Supp. 139. It has also been ruled that, without such written authority, no recovery could be had on a quantum meruit. *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Rodenbrock v. Gress*, 74 Neb. 409, 104 N. W. 758; *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989; *Whiteley v. Terry*, 39 Misc. Rep. 93, 78 N. Y. Supp. 911.

Under a section of a statute of frauds declaring that "no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the same, or exchange any real estate unless the authority for selling or exchanging such land is in writing, signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority," it was determined that, in the absence of a previous written contract, a subsequent written promise to pay the commission was without consideration and void. *Stout v. Humphrey*, 69 N. J. Law, 436, 55 Atl. 281; *Leimbach v. Regner*, 70 N. J. Law, 608, 57 Atl. 138; *Bagnole v. Madden*, 78 N. J. Law, 255, 69 Atl. 967. A different conclusion was reached in the case of *Muir v. Kane*, 55 Wash. 131, where, in construing a statute providing that any agreement authorizing a broker to sell or purchase real property for a commission should be void unless the contract or some note or memorandum thereof was in writing, it was decided that the performance of the services under an oral agreement, void under the statute of frauds, raised a moral obligation which was a sufficient consideration to support a subsequent written promise to pay the stipulated compensation. When an enactment expressly declares that an agreement for the payment of a commission for securing a purchaser of land is void, unless it is in writing and signed by the owner of the real property, the rule is well established that, in the absence of a written contract, a full performance of the services by

the broker does not take the case out of the statute of frauds. *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Dolan v. O'Toole*, 129 Cal. 488, 62 Pac. 92; *Beahler v. Clark*, 32 Ind. App. 222, 68 N. E. 613; *Price v. Walker*, 43 Ind. App. 519, 88 N. E. 78; *King v. Benson*, 22 Mont. 256, 56 Pac. 280; *Marshall v. Trerise*, 33 Mont. 28, 81 Pac. 400; *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Rodenbrock v. Gress*, 74 Neb. 409, 104 N. W. 758; *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989; *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462.

Our statute of frauds, providing that: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law"—was amended February 9, 1909, by adding the following: "An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for a commission or a compensation." L. O. L. § 808. This supplemental clause went into effect after the original option referred to herein was given, but before the final bargain for the sale of the land was concluded.

A text-writer, in discussing the phraseology of the common designation of a very celebrated English statute, enacted in 1677 (29 Car. II, c. 3), and which has been adopted in a more or less modified form in nearly all states of the Union, says: "It may be said that an oral contract within the statute of frauds is not illegal or void, but is only voidable or nonenforceable. Such contracts have been likened to *nuda pacta*. The lack of a writing is merely a matter of evidence." *Reed, Stat. Frauds*, § 678; 20 Cyc. 284. Such an enactment simply annexes the necessity of a writing to the common-law requirement that a contract must be based upon an adequate consideration. 20 Cyc. 281. While there is an irreconcilable conflict in the decisions with respect to the proper methods of ratifying the act of an agent, whose authority should originally have been in writing, it is believed that reason supports the rule that the approval by the principal of such act cannot be predicated upon the mere acceptance of the benefits of a bargain concluded for him; but, when the act is not declared by the statute to be a misdemeanor, the ratification must be evidenced by a writing, which mode of proving the act is made by the statute indispensable. *Reed, Stat. Frauds*, § 382, and notes. An exception to this requirement exists in

cases where possession of real property has been taken by a purchaser, who has made permanent and valuable improvements upon land pursuant to an oral contract to sell and convey the premises. This departure from the general precept is founded upon the principle that, unless specific performance was decreed in a suit instituted for that purpose, the purchaser could not be adequately compensated in an action at law to recover the damages sustained. Another reason is that, in suits to enforce the specific performance of an oral contract to convey land, the possession and betterment of which by a stranger to the title, when such occupancy and improvement are clearly traceable to the contract relied upon, afford indisputable evidence of the actual or constructive assent of the owner, thereby establishing the purchaser's right, and sufficient in law to take the case out of the statute of frauds. *Brown v. Lord*, 7 Or. 302; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pa. 399.

The purpose sought to be accomplished by the enactment of the English statute mentioned was to prevent the practice of frauds which were supposed to be perpetrated, and to preclude a resort to perjuries which were believed to have been committed when oral contracts respecting certain matters could be enforced upon evidence existing only of the recollection of witnesses. It is thought that the primary object that induced the enactment of our statute, hereinbefore quoted, demands that, where the original contract respecting the broker's compensation was not in writing, as required, the ratification can only be by a writing. The plaintiff's assignor never having been employed by Smith, nor the services rendered by Sorenson ratified in the manner indicated, it follows that error was committed in refusing to direct a verdict for the defendant.

The judgment should therefore be reversed, and the action dismissed, and it is so ordered.

#### HOFER v. SMITH et al.

(Supreme Court of Oregon. Feb. 11, 1913.)

##### 1. APPEAL AND ERROR (§ 1061\*)—HARMLESS ERROR—RULING ON NONSUIT.

Though plaintiff, when he rested, had not offered sufficient proof to warrant submission of the cause, a ruling denying a nonsuit will not be disturbed, where such failure was supplied by evidence subsequently introduced.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4137, 4209-4218; Dec. Dig. § 1061.\*]

##### 2. APPEAL AND ERROR (§ 1002\*)—FINDINGS—CONFLICTING EVIDENCE.

The Supreme Court will not consider any conflict in the evidence; that being settled by the verdict of the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. EVIDENCE (§ 208\*)—ADMISSIONS.

A pleading served in another action, if material, may be used in evidence, though the party offering such evidence was not a party to the action in which the pleading was served.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.\*]

### 4. EVIDENCE (§ 208\*)—ADMISSIONS—JUDICIAL PROCEEDINGS.

In an action against defendants, as partners, to recover for advertising, plaintiff offered in evidence a complaint filed by the defendants, as partners under the same firm name, against another person, which alleged that the complaining partners "were and now are conducting a general real estate and brokerage business" under the name and style, etc., and sought to recover commissions for the sale of realty under an agreement made in 1908; the complaint being verified by one of the partners in February, 1911. Held, that the complaint was admissible in evidence in the present action on the question of whether defendants were partners between December 31, 1908, and August 1, 1910.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.\*]

Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by E. Hofer, doing business as the Capital Journal Publishing Company, against A. C. Smith and others, doing business as A. C. Smith & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action to recover money. The cause was tried before a jury, and a verdict rendered in favor of plaintiff for \$100. From a judgment thereon, defendants appeal.

The complaint is in the usual form in such cases, and alleges, among other things, that plaintiff published advertising matter for defendants in a daily newspaper between December 31, 1908, and August 1, 1910; that during that time the defendants were copartners, doing a general real estate and brokerage business in the city of Salem, Or., under the firm name and style of A. C. Smith & Co. The answer contains a general denial of the facts alleged in the complaint. Upon the trial plaintiff introduced evidence tending to substantiate the averments of the complaint. At the close of plaintiff's case defendants' counsel moved for a nonsuit, on the ground that there was no competent evidence tending to show that they were partners during the time the services were rendered.

Wm. P. Lord, of Salem, for appellants.  
John D. Turner, of Salem, for respondent.

BEAN, J. (after stating the facts as above). In order to show that the defendants were copartners at the time the advertising was done, plaintiff offered in evidence a complaint filed in an action in the circuit court of the state of Oregon, for Marion county, wherein A. C. Smith, W. A. Rutherford, and J. A. Simpson, partners doing business under the firm name and style of A. C. Smith & Co., were plaintiffs, and one Rineman was defendant. It was alleged therein that during

the time mentioned "plaintiffs were and now are conducting a general real estate and brokerage business in the city of Salem, county and state aforesaid, under the firm name and style of A. C. Smith & Co., and duly licensed as such under the laws of said city." The action was brought for the purpose of collecting a commission for the sale of real estate, pursuant to an agreement made in May, 1908. The complaint was verified on the 21st day of February, 1911, by defendant J. A. Simpson. This proof was admitted over the objection and exception of counsel for defendants. On behalf of defendants Simpson and Rutherford, it is urged in support of the motion for a nonsuit that the evidence does not tend to show that defendants were copartners at the time the services were rendered, for which compensation is claimed in this action. It appears that the advertising was done by plaintiff between December 31, 1908, and August 1, 1910. The only question for the determination of the court is whether or not there was any evidence showing that the partnership existed between defendants sufficient to be submitted to the jury.

[1] To determine this we should consider all the evidence in the case, for the reason that it is the rule in this state that, although plaintiff at the time of resting may have failed to offer proof sufficient to entitle the cause to be submitted to the jury, a ruling denying such motion will not be disturbed, if the omission is supplied by the subsequent introduction of evidence. *Trickey v. Clark*, 50 Or. 516, 519, 93 Pac. 457; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 100 Pac. 300, 101 Pac. 204.

[2] After the ruling on the motion for a nonsuit, defendants introduced evidence tending to controvert that upon the part of plaintiff, and explaining the dates of the copartnership of defendants as alleged in the complaint in the Rineman Case, claiming that it might be an error. Defendants assert that, while they were engaged together in the real estate business prior to that time, they were not copartners until August 11, 1910, when a partnership agreement was executed. This court has nothing to do with the conflict in the evidence. That matter was settled by the verdict of the jury.

[3] Admissions or declarations of a party contained in a pleading served by him on the adverse party in another case may be used in evidence by plaintiff, though not a party to the action in which the pleading was served, if it contains statements material to the issue on trial. *General Electric Co. v. Jonathan Clark & Sons (C. C.)* 108 Fed. 170; *Every v. Rains*, 84 Kan. 560, 115 Pac. 114; 18 Cyc. 969.

[4] It appears that defendant Simpson verified the complaint offered in evidence, and defendant Rutherford knew of and ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quiesced in bringing the action in the Rine-man Case. The defendants were represented by well-known attorneys in that case. The pleading contained a plain statement of a fact relied and acted upon by all of the defendants, and material to the issue in the case under consideration. It is true that the defendants had the right to explain this statement, which they attempted to do. the issue in regard to the copartnership was plainly submitted to the jury by the trial court, and the jury found against the claim and explanation of defendants and in favor of plaintiff. The circumstances and the complaint offered in evidence certainly indicate that between May, 1908, and February 25, 1911, these defendants were copartners.

Under the provisions of section 3, article 7 of the Constitution, as amended November 8, 1910 (Laws 1911, p. 7), no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. This we cannot say in the case at bar. Other errors are assigned which, after a careful examination of the record, we do not think are prejudicial, or that they changed the result.

Finding no error in the record, the judgment of the lower court is affirmed.

**GLADSTONE LUMBER CO. v. KELLY et ux.**  
(Supreme Court of Oregon. Feb. 11, 1913.)

**1. EVIDENCE (§ 183\*)—BEST AND SECONDARY.**

Secondary evidence of a building bond and of an application for the bond was improperly admitted, where there was no showing of diligence to produce the original instruments, except the witness' testimony that he had forwarded them to the home office of the bonding company in another state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

**2. HUSBAND AND WIFE (§ 149\*) — WIFE'S SEPARATE PROPERTY—LIABILITY FOR HIS DEBTS.**

Where a husband purchased property with his wife's money, taking title in himself, contrary to her instructions, the property could not be subjected to his debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 573, 574; Dec. Dig. § 149.\*]

**3. ESTOPPEL (§ 110\*)—PLEADING—NECESSITY.**

The defense of estoppel cannot be considered when not pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.\*]

Appeal from Circuit Court, Multnomah County; H. E. McGinn, Judge.

Action by the Gladstone Lumber Company, a corporation, against J. H. Kelly and wife. From a decree for defendants, plaintiff appeals. Affirmed.

The plaintiff, in its own right and as assignee of sundry claims of others, recovered judgment against the firm of Kelly & Mahoney. While the partnership was indebted on

the original claims, Kelly conveyed to his wife certain real property, the record title of which theretofore was in the name of them both jointly. An execution having been issued on the judgment and returned unsatisfied, the plaintiff began this suit against Kelly and his wife to set aside the conveyance mentioned, on the ground that the husband had made it with intent to hinder, delay, and defraud his creditors, and particularly the plaintiff here. The answer of the defendants admitted the indebtedness, the rendition of the judgment, and the return of the execution unsatisfied, but denied all the allegations charging an attempt to defraud creditors. The substance of the new matter in the answer is to the effect that with money which was her own separate property, acquired by inheritance from her former husband, the defendant, Hattie I. Kelly authorized her present husband, before the contracting of any of these debts, to buy for her the realty in dispute; that in pursuance of her authority, he purchased the tract, taking title to both her and himself jointly, without her knowledge; that as soon as she became aware of this form of the deed, she demanded of her husband that he immediately convey to her the title to the premises, but that he neglected to do so until the date mentioned in the complaint, when he deeded the property to her, as already requested. The reply consists only of a traverse of all the allegations of new matter in the answer, except the fact that Kelly made the deed to his wife. The court, after trial, made findings and decree in favor of the defendants and the plaintiff appeals.

L. E. Crouch, of Portland, and O. D. Eby, of Oregon City, for appellant. Sam White, of Portland (Manning & White, of Portland, on the brief), for respondents.

**BURNETT, J. [1]** On behalf of the plaintiff the only testimony about where the real ownership of the premises in dispute was vested came from the defendant husband, whom the plaintiff called as a witness. The plaintiff having thus vouched for his credibility, he testified very clearly that the money invested in the land was his wife's separate property, coming to her from the estate of her former husband; that he himself did not invest anything whatever therein; that, without his wife's knowledge or consent, he took the title of the property in the names of them both; and that as soon as the fact came to her notice she demanded of him a reconveyance of the property to her in severalty. To contradict him, although he was the plaintiff's own witness, an attorney of a bonding company was called by plaintiff, and, over the objection of defendant, was allowed to testify, without producing the writing, that in an application made by Kelly and his partner to the company for a building bond, in a transaction occurring

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



long before the indebtedness in question arose, a statement in writing was made of the property of the applicants, in which it was set out that the defendant Kelly, the husband, was the owner of the tract in question. This property statement was not shown to have come to the knowledge of the wife, and was not signed by her, although she executed the building bond in connection with that statement. Even this was not proven, except by the attorney witness. No showing is made of any diligence to produce the original writing, or the bond which the defendant wife is said to have signed, except the statement of the witness that a few days before the trial he had forwarded them to the home office of the company in New York; hence the testimony on that subject was inadmissible under the rule laid down in *Wiseman v. N. P. R. R. Co.*, 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135; *Harmon v. Decker*, 41 Or. 598, 68 Pac. 11, 1111, 93 Am. St. Rep. 748; *Price v. Wolfer*, 83 Or. 15, 62 Pac. 759.

[2] The only other testimony in the case about the ownership of the money invested in the land came from the defendant wife, and she gives a very clear statement of how the property from which the money was derived descended to her from the estate of her former husband. The effect of the statements of the only persons who testify on the subject is that the defendant husband never invested a dollar in the land, and that all the consideration for its purchase was paid out of the wife's separate property, over which he had no right or control. Although the legal title appears of record to be in a judgment debtor, only his actual interest therein is liable to a judgment against him. *Meier v. Kelly*, 22 Or. 136, 29 Pac. 265; *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100; *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513.

[3] Much space was devoted in the plaintiff's brief to the argument that the defendant wife was estopped from claiming any interest in the property, because she had allowed the property to stand so long in the name of her spouse; but no estoppel is pleaded, and it cannot be considered here. *Rugh v. Ottenheimer*, supra; *Remillard v. Prescott*, 8 Or. 37; *Bruce v. Phoenix Ins. Co.*, 24 Or. 486, 34 Pac. 16; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26; *Nickum v. Burckhardt*, 30 Or. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; *Christian v. Eugene*, 49 Or. 170, 89 Pac. 419. Even if the estoppel had been urged in the reply, there was nothing to sustain it in the evidence, except the incompetent testimony above mentioned. The judgment debtor having put nothing into the property, his creditors can take nothing out of it.

The decree in favor of the defendants was right, and must be affirmed.

BEAN, J., concurs in the result.

## STATE v. DES CHUTES LAND CO.

(Supreme Court of Oregon. Feb. 11, 1913.)

### 1. PUBLIC LANDS (§ 135\*)—RECLAMATION OF DESERT LANDS—DISPOSAL BY STATE.

Act Cong. Aug. 18, 1894, c. 301, 28 Stat. 422 (U. S. Comp. St. 1901, p. 1554), authorized the Secretary of the Interior to contract with states, in which there was situated desert lands, to grant such lands to the state as the state might cause to be irrigated, reclaimed, occupied, and cultivated by actual settlers, and provided that the state might make all necessary contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation. Act Cong. June 11, 1896, c. 420, 29 Stat. 434, authorized the state to create liens on the separate legal subdivisions of land reclaimed for the cost of reclamation. Laws 1901, p. 378 (B. & C. Comp. § 3283 et seq.), accepting such lands, provided that upon application by any person, company, etc., desiring to reclaim any desert lands, the state land board should apply to the Secretary of the Interior and contract with him for the patent of the lands to the state. Section 2 authorized the state land board to make such contracts and agreements, and assume such obligations concerning the lands, as might be necessary to induce the reclamation thereof, and to create liens against the separate legal subdivisions for the cost of reclamation, and provided that the state should not be liable for the amount of any such liens. Section 4 provided that the state land board, on receipt of the application, map, etc., should contract with such person, company, etc., for the construction of the works according to the plans; and that the board should, by the contract, fix the amount due such person, company, etc., for the reclamation and the annual charge for maintenance of the irrigation system, and create a lien against the separate legal subdivisions for such amount. Section 6 provided that such person, company, etc., should be entitled to enter on the land and retain full possession, control, etc., until the lien thereon should have been satisfied. Section 10 provided that any citizen desiring to purchase any quarter section on which there was a lien for the cost of reclamation should pay the proportionate amount of the entire lien; and that the holder should then release the tract so paid for from the lien. *Held*, that the state land board was not authorized to insert in a contract any provision restraining the alienation of the contractor's lien or possessory interest in the land; and hence a provision in a contract that no agreement for the purchase of water rights and release of the lien or settlement should be entered into between the contractor and any settler until after the date of reclamation and notice thereof to the board was void, especially in view of Act Feb. 24, 1909 (Laws 1909, p. 377; L. O. L. § 3860 et seq.), revising the law of 1901, and providing, in section 12 (L. O. L. § 3871), that no land shall be open to entry, and no water rights sold by the parties, under the contract with the board, until the construction of the works is sufficiently advanced to insure a water supply, and the entry of an order by the board, opening the land to entry and sale—this being a legislative recognition that there was no such provision in the previous law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. § 135.\*]

### 2. OFFICERS (§ 103\*)—AUTHORITY—NOTICE.

Persons dealing with an agent of the state acting under a public law are bound to take notice of the enactment conferring his authority; there being no such thing as apparent au-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thority in such a public officer, as there would be in the case of an agent for a private party.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 163–172, 175; Dec. Dig. § 103.\*]

### 3. OFFICERS (§ 103\*)—EXCEEDING AUTHORITY—EFFECT.

A contract by a public officer in excess of the provisions of the statute authorizing the contract is void, so far as it departs from or exceeds the terms of the law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 163–172, 175; Dec. Dig. § 103.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by the State against the Des Chutes Land Company. From a judgment dismissing the action, the State appeals. Affirmed.

On September 25, 1907, the defendant entered into a contract with the then state land board for the reclamation of certain desert lands in this state under what is known as the Cary Act of Congress and legislation of this state in pursuance thereof. That board having been supplanted by the desert land board by virtue of the act of February 24, 1909, passed by the Legislative Assembly of Oregon, the latter body, acting in the name of the state, brought this suit to restrain the defendant from violating certain negative provisions of that contract. The circuit court dismissed the suit on demurrer to the complaint, and the state appeals.

Claude C. McColloch, of Baker, A. M. Crawford, Atty. Gen. (James W. Crawford and H. C. Brodie, both of Salem, on the brief), for the State. A. C. Shaw and Charles W. Fulton, both of Portland, for respondent.

BURNETT, J. [1] By the act of Congress of August 18, 1894, entitled "An act making appropriations for sundry expenses of the government for the fiscal year ending June 30, 1895, and for other purposes," the Secretary of the Interior, with the approval of the President, was authorized and empowered, upon proper applications of certain states, of which Oregon was one, "to contract and agree from time to time with a state in which there is situated desert lands \* \* \* to donate, grant and patent to the state free of cost of survey or price such desert lands not exceeding 1,000,000 acres in each state as the state may cause to be irrigated, reclaimed and occupied and not less than 20 acres of each 160-acre tract cultivated by actual settlers within ten years next after the passage of the act as thoroughly as is required of citizens who may enter under the desert land law." After providing for the preparing and submitting to the Secretary of the Interior for his approval plans, specifications, and maps of the proposed scheme of irrigation, the act says: "That any state contracting under this section is hereby au-

thorized to make all necessary contracts to cause the said lands to be reclaimed and to induce their settlement and cultivation in accordance with and subject to the provisions of this section, but the state shall not be authorized to lease any of said lands or use or dispose of the same in any way whatever except to secure their reclamation, cultivation and settlement." Act Aug. 18, 1894, c. 301, 28 U. S. Stat. at Large, 422 (U. S. Comp. St. 1901, p. 1555); L. O. L. p. 65. The act also stipulated that as fast as any state might furnish satisfactory proof that the lands are irrigated, reclaimed, and occupied by actual settlers the general government will issue patents to the state or its assigns for such lands; that the state should not sell or dispose of more than 160 acres of land to any one person; and that any surplus of money derived by any one state from the sale of lands above the cost of their reclamation should be held as a trust fund, to be applied to the reclamation of other desert lands in that state. The act of Congress of June 11, 1896 (29 Stat. at Large, 434, c. 420), making appropriations for sundry civil expenses of the government for the ensuing year and for other purposes, made a rule, in substance, that under any law enacted by a state providing for the reclamation of arid lands pursuant to and in acceptance of the acts of Congress already mentioned liens were authorized to be created by the state to which such lands were granted, and by no other authority whatever, and when created should be valid against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers. The act also specified that when an ample supply of water is actually furnished patents should issue to each state without regard to settlement or cultivation, and further provided that in no event should the United States be responsible for the amount of the liens or liability in whole or in part. This legislation is known in common parlance as the "Carey Act."

By an "act to provide for the acceptance by the state of Oregon of certain lands and for the reclamation and disposal of the same," filed in the office of the Secretary of State February 28, 1901, the Legislative Assembly accepted the conditions of the Carey Act. Laws 1901, p. 378; B. & C. Comp. § 3283 et seq. By this law it was declared that, upon application to the state by any person, company, association or corporation desiring to reclaim any of the desert government lands in Oregon, the state land board should make proper application to the Secretary of the Interior and contract with him for the patent of such lands to the state.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This further provision appears in section 2 of the act (B. & C. Comp. § 3284): "Said state land board is hereby authorized to make and enter into such contracts and agreements and to assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such reclamation thereof as is required by the contract with the Secretary of the Interior and the acts of Congress, and is authorized and empowered to create a lien or liens which when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expense of reclamation and reasonable interest thereon from the date of reclamation until said lien shall have been satisfied; provided, that in no event, in no contingency and under no circumstance shall the state of Oregon be in any manner directly or indirectly liable for any amount of any such lien or liability in whole or in part." Section 3 of this act required the person or corporation desiring to enter into a contract to furnish all preliminary maps, plans, and surveys for the approval of the Secretary of the Interior. Section 4 reads thus: "Upon the receipt of the application, map, plan of irrigation, payment, etc., as provided in section 3225, the state land board shall enter into a contract with the said person, company of persons, association, or incorporated company applying therefor, for the construction of the works substantially according to the plans submitted under said contract. The person, company of persons, association, or incorporated company entering into the same shall undertake and agree to furnish an ample supply of water, substantially in accordance with the plans submitted, to reclaim said lands in compliance with the act granting the same to the state, and make the proofs required by the Secretary of the Interior for the issuance of patent, and to pay all costs of advertising and other expenses incident to such proof and application for patent. Said person, company of persons, association, or incorporated company shall further agree and undertake that work will be commenced upon the ditches or other works necessary for the reclamation of said lands within six months after the signing of the contract by the Secretary of the Interior; that by the end of the first year ten per cent. of all the necessary expenditures will be made, and that this work will be prosecuted with due diligence until complete, and the proof of reclamation is made as required by the acts of Congress. The state land board shall, by said contract, fix the amount due the persons, company of persons, association, or incorporated company for the reclamation of said land, and the annual charge for the maintenance of the irrigation system, and create a lien which shall be valid on and against the separate legal subdivisions of the land reclaimed for

the amount due as agreed upon, and interest thereon at the rate of six (6) per cent. per annum from the date of reclamation until said lien shall have been satisfied." Section 6 said that: "Immediately upon the execution of the contract, the person, company of persons, association or incorporated company undertaking the reclamation shall be entitled to enter upon the land the reclamation of which has been undertaken and shall have and retain the full possession, control, use and right of occupancy of said land until the lien thereon shall have been satisfied." The succeeding section provides for a forfeiture of the contract in case the contracting party fails to complete the work as specified. By section 10 it is laid down that: "Any citizen desiring to purchase any unsold quarter section of desert land on which there is a lien for the cost of reclamation shall pay to the holder of said lien such proportion of the amount of the entire lien as the true value of the tract bears to the true value of the whole tract subject to liens; provided, that the state land board having control of these lands shall designate the proportion of the amount of the entire lien which the desired tract bears to the whole tract subject to the lien. Thereupon the holder of said lien shall release the tract so paid for from the lien and the purchaser shall be entitled to settle upon said tract, and it shall be the duty of the state land board to deed the tract to the purchaser without further payment."

The agreement of September 25, 1907, was made by the defendant, as party of the first part and the state land board, acting for the state of Oregon, as party of the second part. In respect to the lien for reclamation the contract stipulated that: "The party of the second part hereby declares, fixes, and establishes the sum of \$36 per acre for each acre of land embraced in this contract which may be reclaimed as the amount due and payable to the said party of the first part for the actual cost and necessary expenses for the reclamation of the lands and now hereby creates a lien on and against the lands which shall be valid on and against the separate legal subdivisions of the land reclaimed from the date of reclamation until disposed of or released to settlers, together with interest at 6 per cent. per annum on the full amount of the lien from the date of reclamation until paid." It was specified in the contract that: "No agreement for the purchase of water rights and release of the lien or settlement upon any of said lands shall be entered into between the party of the first part and any settler or any person or persons until after the date of the reclamation and notice thereof given in writing by the party of the second part to the party of the first part." It is for an alleged breach of this last-mentioned provision that this suit is instituted.

As stating a violation of the contract, the complaint alleges: "That defendant has caused to be printed, placed on the market, is

threatening to sell, offering to sell, has sold, and is selling to citizens of the state of Oregon and of the United States, its so-called 'assignment of lien,' a true copy of which is as follows." The pleading then sets out a blank form of agreement, in which neither the names of the parties, sums of money, nor description appears. It provides, however, that on payment of sundry sums of money at various periods within the lapse of ten years from the date of reclamation, amounting in all to \$36 per acre, the defendant here agrees to assign, sell, and set over unto the supposed purchaser all the defendant's right, title, and interest in and to the lands to be described when said subdivision shall have been reclaimed by the defendant. The blank also contains a condition that the proposed purchaser shall settle on the subdivision and obtain his deed thereto within three years from the date of reclamation, or cause the same to be done within that period.

The complaint charges in general terms that the acts of the defendant thus specified are in violation of its contract and amount to a contract to sell water rights and land; that if the defendant is permitted to continue placing on the market such an instrument irreparable damage will be done to the plaintiff and the people of the state; and that if it is not enjoined it will continue the injury of the state and its people aforesaid. We observe in passing that, like the federal government, the state disclaims in the statute all responsibility for the enforcement of the liens mentioned, and that it has no beneficial interest in the lands, or in the proceeds of the sale thereof; the net proceeds being reserved as a trust fund for the reclamation of other arid lands.

[2, 3] The question is whether the state land board had authority to insert the provision quoted in the contract with the defendant. By its legislation the state created the state land board as its agent to transact the business provided for in the act. There is no apparent authority, so called, in a public officer whose duties are prescribed by statute like there would be in the case of an agent for a private party. The representative of the state must have actual authority in such cases. The agent of the state, acting under a public law, must find sanction for his doings in the statute itself; and parties dealing with such agent are bound, at their peril, to take notice of the enactment conferring the agent's authority. A contract made by a public officer in excess of the provisions of the statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law under which it was attempted to be negotiated. *Bunch v. Tipton*, 76 Ark. 167, 88 S. W. 888; *Ohill v. Board*, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493; *Carolina Natl. Bank v. State*, 60 S. O. 465, 38 S. E. 629, 85 Am. St. Rep. 865; *State v. Chilton*, 49 W. Va. 453, 39 S. E. 612; *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *Jobe v.*

*Urquhart* (Ark.) 143 S. W. 121; *Louisville & N. R. R. v. Railroad Com'rs* (Fla.) 58 South. 543; *Allin v. County Board*, 148 Ky. 746, 147 S. W. 920.

The general scope and purpose of the Carey Act and of the state legislation supplemental thereto was to encourage the reclamation of desert lands, so that the same should become habitable. There is no intimation in any of the legislation noticed that alienation of lands should be hindered or impeded. Both the national legislation and the state law authorized the contracts and agreements that may be necessary to "induce and cause such reclamation." The Oregon statute itself prescribes this in general terms, and in addition thereto lays down with particularity the conditions which shall be included within the contract with any person or corporation desiring to undertake a reclamation project; but it does not authorize the board to insert any provision restraining the alienation of the contractor's lien or possessory interest in the lands conferred by the statute. On the contrary, section 10 of the act prescribes that any citizen desiring to purchase any unsold quarter section of desert land on which there is a lien for the cost of reclamation shall be entitled to purchase the same on the terms therein specified; that the state land board is empowered to apportion the amount of lien resting upon the tract sought to be purchased; and that the holder of the lien shall be required to release the tract from the lien. In our judgment, the provision of the contract upon which the state relies in this suit is inconsistent with the provisions of that section just noted; and hence it is in plain excess of the authority of the board, conferred by the statute in force at the time the contract was made. Being a departure from the board's authority, and thus contrary to the statute, the provision is void and does not bind either party to the instrument, because a contract, to be efficacious, must be equally binding upon both parties. The defendant had a right to contract to do in the future what might legally be done under the provisions of that section. While it would be within the scope of legislative authority to prevent actual settlers from going upon the land and stipulating with the corporations for the extinguishment of its lien, so that the settler could proceed unhampered in the establishment of his home, yet this species of paternalism was not vested in the state land board.

We have, in effect, a legislative construction of the act in question; for by the terms of the later act of February 24, 1909 (*Laws* 1909, p. 377), this whole statute of 1901 was repealed, and a revised procedure was established, relating to desert lands. L. O. L. § 3860 et seq. Section 12 of the repealing act (L. O. L. § 3871) provided that: "No land shall be open to entry and no water rights shall be sold by the parties under the con-

tract with the board until the construction of the works is sufficiently advanced to insure a water supply and the entry of an order by the board opening such land or any portion thereof to entry and sale." This legislation is an evident recognition that this provision was lacking and could not be enforced under the previous law. The Legislature did not attempt to and could not inject into the previous contract here in question any element not authorized by the former statute.

The demurrer was properly sustained, and the judgment of the circuit court is affirmed.

#### STATE v. BILYEU.

(Supreme Court of Oregon. Feb. 11, 1913.)

#### 1. INDICTMENT AND INFORMATION (§ 125\*)—COMPLAINT—DUPLICITY—INTOXICATING LIQUORS.

A complaint, stating that defendant did wrongfully and unlawfully "sell" and "give away" intoxicating liquor with intent to evade the provisions of the local option law, charged but one crime, the unlawful disposal of liquor in prohibited territory in violation of L. O. L. § 4934; and hence it was not duplicitous.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 2. INTOXICATING LIQUORS (§ 33\*)—LOCAL OPTION ELECTION—POSTING OF NOTICES—SHERIFF'S RETURN—SUFFICIENCY.

Under L. O. L. § 4926, providing that the sheriff shall "briefly" enter of record his compliance with the provisions of such section as to the posting of notices of local option elections, a sheriff's return alleging receipt of notices, their contents, and the posting of same in due time at five public places in each precinct, was sufficient, though it did not state the particular point in each precinct at which each notice was posted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 40, 41; Dec. Dig. § 33.\*]

#### 3. INTOXICATING LIQUORS (§ 226\*)—CRIMINAL PROSECUTION—EVIDENCE.

Testimony in a prosecution for violating the local option law that a mug in evidence, with which it was claimed defendant dealt out whisky, was similar to those commonly used in other establishments in dealing out soft drinks, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 282-286; Dec. Dig. § 226.\*]

#### 4. WITNESSES (§ 277\*)—OCCUPATION—CROSS-EXAMINATION OF DEFENDANT.

Where, in a prosecution for violating the local option law, the defendant testified on direct examination that he was a farm laborer and woodchopper, it was not error to permit the state on cross-examination to elicit that he had several times been employed as a barkeeper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.\*]

#### 5. CRIMINAL LAW (§ 1159\*) — APPEAL — WEIGHT OF EVIDENCE.

The weight of the testimony in a prosecution for violating the local option law was for the jury, and could not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Jake Bilyeu was convicted of violating the local option law on appeal from justice court, and he again appeals. Affirmed.

The defendant was convicted in the justice's court for violation of the local option law, and appealed from a judgment of conviction to the circuit court, where he was again convicted, from which judgment he appeals to this court. The material part of the complaint, so far as it relates to this appeal, is as follows: "On the 1st day of December, 1911, said Jake Bilyeu, in the county of Linn, state of Oregon, then and there being, did then and there wrongfully and unlawfully sell and give away intoxicating liquor to J. W. Blackburn, with an intent and purpose then and there had by him, the said Jake Bilyeu, of evading the provisions of the local option liquor law of the state of Oregon, proposed by the people by the initiative and enacted by the people of the state of Oregon by a majority of the votes cast thereon at the general election held in said state on the 6th day of June, 1904, contrary to the provisions of said law in such cases made and provided, and against the peace and dignity of the state of Oregon." On demurrer it was urged, and is urged on appeal, that the complaint charges more than one crime, in that it charges the defendant with both selling and giving away intoxicating liquor. Error is also predicated upon the refusal of the court to permit defendant to introduce in evidence the return of the sheriff, setting forth the manner of posting notices of the local option election, which return is as follows: "I, D. S. Smith, sheriff of Linn county, Oregon, do hereby certify and return that on the 15th day of October, 1910, I received from the county clerk of Linn county, Oregon, certain liquor election notices, consisting of five notices for each polling place in each of the several precincts in Linn county, Oregon; that the following is a copy of said notice, to wit: 'Liquor Election Notice. Notice is hereby given that on Tuesday the 8th day of November, 1910, at the polling place in the precinct [here was inserted in each of said five notices the name of the precinct in which said notices were posted] in the county of Linn, an election will be held to determine whether the sale of intoxicating liquors shall be prohibited in Linn county, which said election shall be held at 8 o'clock in the morning and will continue until seven in the afternoon of said day. Dated this 15th day of October, 1910. J. W. Miller, County Clerk of Linn Co. Ore.' That more than twelve days prior to the said 8th day of November, 1910, and subsequent to the 15th day of October, 1910, I posted five of said notices in public places in the vicinity of the polling places where said election is to be held in each of the precincts of Linn county, Ore-

gon, viz.: Albany, West Albany, East Albany, Calapoota, Know Butte, Price, Syracuse, Santiam, North Scio, South Scio, Shelburn, Kingston, Fox Valley, Rock Creek, Lacombe, North Lebanon, South Lebanon, Sodaville, Waterloo, Sweet Home, Foster, Tallman, Center, Shedd, Halsey, Orleans, Tangent, North Harrisburg, South Harrisburg, North Brownsville, South Brownsville, Crawfordville, and Jordan. D. S. Smith, Sheriff of Linn County, Oregon." Other alleged errors are noted in the opinion.

Geo. W. Wright, of Albany, for appellant. Gale S. Hill, Dist. Atty., of Albany (John H. McNary, Dist. Atty., of Salem, on the brief), for the State.

McBRIDE, C. J. (after stating the facts as above). [1] The offense made punishable by the provisions of section 4934, L. O. L., is the disposal of liquor in prohibition territory. This offense may be committed either by selling the liquor or by giving it away with intent to evade the provisions of the act. There is but one crime involved in this case—the unlawful disposal of liquor. The mischief to be remedied and the punishment to be inflicted in either case is the same. Under similar statutes, it has been uniformly held in this state that, where the statute states the acts necessary to constitute the offense disjunctively, the indictment may charge all the acts conjunctively, and that such indictment will not be bad for duplicity. *State v. Carr*, 6 Or. 134; *State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229.

[2] We are of the opinion that the return of the sheriff was sufficient. The provisions of section 4928, L. O. L., in regard to posting notices of local option elections, and the returns of the sheriff thereon, are *sui generis*, and in no wise comparable with the provisions providing for posting notices of applications for the laying out of public highways. Section 4783, Bellinger and Cotton's Comp., now superseded, but upon the construction of which most of the decisions cited by counsel were based, required that any petition for laying out a county road should "be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding county court, and also in three public places in the vicinity of said road," etc. It will be noted that the posting and proof were not committed to any public officer, but might be made by any person, and in practice the proof was usually made by some person interested in the promotion of the highway. Again, in proceedings for the laying out of highways, only four notices were required, and it was a comparatively light task to describe the method and particular place of posting. Under all these circumstances, and particularly because the notices were posted by interested parties, and not by officials, the courts of the state adopted a very strict rule in regard to the

method of proof, and one which perhaps has given rise to more litigation in regard to the legality of county roads than all other causes combined. The framers of the local option law, having in mind the fact that the duty of posting election notices was performed not by interested parties but by a public official, acting under his oath of office, and mindful also that a specific return as to each notice posted would in many instances run up into hundreds of special narratives as to the time, place, and circumstances under which each notice had been posted, proceeded to cut the routine red tape by prescribing this short and easy method of making a return: "It shall be the duty of the sheriff at least twelve days before any election hereunder to post said notices in public places in the vicinity of the polling place or places. Thereupon the clerk and sheriff shall each briefly enter of record their compliance with the provisions of this section, and such record shall be prima facie evidence that all the provisions of this section have been complied with." Section 4928, L. O. L. It is evident that it was not the intent that the old and cumbrous method employed in proof of posting highway notices should be employed. The sheriff is required to "briefly" record his compliance with the provisions of the section. The act presupposes that the sheriff has intelligence enough and a sufficient knowledge of his county to know a public place when he sees it, and that his common honesty will require him to post his notices at such places, and that, this being an official duty, he performed it regularly. Had he been required with each of the 170 notices he was required to post to follow the formula of saying that he posted a particular notice on a particular stump at the intersection of two particular highways, where large numbers of persons were in the habit of passing, and that he posted it right side up and written right side out, six feet from the ground, and so near the road that it could be readily seen and perused by persons passing along the highway, he might have got his return completed before the time came to declare the result of the election, but he would certainly not have stated "briefly" his compliance with the section cited. The return is sufficient.

[3] The state introduced in evidence a mug, and it was claimed by a witness for the prosecution that the whisky which he bought was served therein. On cross-examination the witness was interrogated as to whether or not it was the custom of other establishments selling soda water and soft drinks to serve the same in similar mugs. The questions directed to this point were objected to by the state, and to the ruling of the court sustaining the objection the defendant excepted, and assigns error here. The fact that other dealers used similar mugs for dispensing soft drinks had no tendency to prove that defendant had not used it to deal out

whisky. The mug is an exhibit in the case, and seems a rather nondescript affair, which might be used indiscriminately to contain soda water, beer, whisky, or milk for babes. The fact that other people used similar mugs to contain soda water, milk, or water would have not the slightest tendency to show that the defendant did not use it to hold whisky.

[4] The defendant was called upon the stand, and upon direct examination testified that he had been a farm laborer and wood-chopper. Upon cross-examination it was elicited that he had at several times been employed as a barkeeper, but that, except on one occasion, he had not followed that occupation for several years. To this line of cross-examination the defense objected, and the adverse ruling of the court is assigned as error. It was not necessary for the defense to have examined the defendant as to his occupation, but having entered upon this line of examination, and having placed the defendant before the jury in the light of a laboring man and woodchopper, who by reason of that alleged occupation would not likely be selected for employment as a barkeeper, we think it was competent to show that he had previously acquired such experience in that occupation that his employment in such capacity would not appear so unlikely as might have appeared from his direct testimony.

Other errors are specified, but we do not deem them important, nor do we find any error in any ruling of the court during the trial.

[5] On the hearing counsel discussed at length the weight of the testimony adduced on behalf of the prosecution, which to the writer does not appear to be very convincing; but this court has nothing to do with the weight of the testimony. That is a question entirely for the jury. The defendant, who testified that he was born and raised in Linn county, had a trial before a justice's court, and was convicted, and was tried before the circuit court and again convicted. The jury heard the evidence and saw the witnesses. The best judges of defendant's guilt or innocence are the jurymen of his vicinage, and a jury does not usually convict an old citizen without strong proof of his guilt; and, even if we have a doubt of defendant's guilt, we have no right to interfere with a verdict which has any evidence to support it.

The judgment is affirmed.

LONNERGAN v. STANSBURY et al.  
(L. A. 2,868.)

(Supreme Court of California. Jan. 14, 1913.)

1. MASTER AND SERVANT (§§ 101, 102\*)—LIABILITY FOR INJURIES—MACHINERY, TOOLS, AND APPLIANCES.

While an employer is not obliged to furnish his employé with the latest improvements in

machinery, tools, or appliances, it is his duty to use proper care to furnish him with suitable machinery, tools, and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.\*]

2. MASTER AND SERVANT (§§ 285, 286\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a teamster's action for injuries, where the evidence showed that the wagon was not equipped with a brake and had no seat except a loose board across the sideboards, that the team ran away, causing the wagon box to swing from side to side and the loose board to fall, precipitating plaintiff on his back, and that, before he could recover himself, the wagon struck the curb and threw him therefrom, causing his injuries, it was a question for the jury whether the failure to equip the wagon with a brake and to furnish a proper brake was negligence, and whether the lack of either or both was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. §§ 285, 286.\*]

3. MASTER AND SERVANT (§ 288\*)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Where a teamster, who had been driving a dump wagon, was told by the foreman to take a wagon not equipped with a brake and haul bricks, and, upon telling the foreman that he wanted a brake on the wagon, was told that no brake was needed, that he would only have to haul brick for one day, and would then go back to his former employment, it was a question for the jury whether he assumed the risk of injury from the lack of a brake by using the wagon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288.\*]

4. TRIAL (§ 296\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Where an instruction that it was the employer's duty to furnish suitable appliances by which the service was to be performed, and to keep them in repair and order, and make such provisions for the safety of the employes as would reasonably protect them from the dangers incident to their employment, was merely a preliminary announcement, and other instructions fully stated that the employer was only required to exercise ordinary care and diligence in securing proper appliances, there was no error, since the first instruction was sound in itself, and merely failed to contain a full exposition of the law, and hence was not in conflict with the other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

5. TRIAL (§ 296\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

While an instruction on the measure of damages for personal injuries, authorizing a recovery of the damages "reasonably probable" to result in the future, might better have conformed to Civ. Code, § 3283, authorizing damages for detriment resulting after the commencement of the action or "certain to result" in the future, it was not erroneous, where it summed up its declaration of the law with a pronouncement of the correct rule.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by James Lonnergan against Charles Stansbury and another, copartners under the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

firm name of Charles Stansbury. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Scarborough & Bowen, of Los Angeles, for appellants. Morton, Riddle & Hollzer, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff was a teamster employed by defendants, a contracting firm. His horses ran away. He was thrown from the wagon in which he was riding, and sustained injuries. His action for damages against his employers resulted in a verdict and judgment in his favor. From that judgment, and from the order denying their motion for a new trial, the defendants appeal.

The gravamen of the complaint lies in the allegation that defendants furnished to plaintiff a wagon that was dangerous and unfit to be used, in that there was no brake or other appliance provided, by means of which the wagon could be impeded or stopped; that the sides of the wagon were loosely and insecurely placed upon and attached to it, and thereby plaintiff's seat, which consisted of a board placed horizontally across the sides, became insecure and dangerous. It is then alleged that, while plaintiff, engaged in his work, was driving this empty wagon down a hill, the horses became unmanageable, ran away, and, because of the swaying wagon box and shifting seat and absence of brake, the plaintiff was unable to control them, and was thrown from the wagon, when, in their career, they dashed it against the curb. The testimony supporting these allegations is sufficient. That of the plaintiff is to the effect that he was experienced in the use of horses, had been a teamster, and had driven this particular team of horses, which, it is conceded, were ordinarily gentle. He was told to put his horses in this particular wagon upon the morning of the accident, and to haul bricks from a brickyard, delivering them at various points where defendants were engaged in work. Prior to the accident, he had never driven a wagon that was not equipped with a brake or some appliance for stopping it. When told by the foreman to use this particular wagon, he noticed that it was without a brake, and told the foreman that he wanted a brake on the wagon. The foreman replied that he needed no brake, as his draught was up hill; that he would have to haul brick but one day, and on the following day would go back to his former employment—that of driving a dump wagon. There was no seat in the wagon, simply a loose board across the sideboards. The seat shifted so, because of the swaying of the wagon box, that he tried to drive standing in the wagon; but he could not stand because of the swaying of the wagon bed. Once or twice during the day, on downgrades, the team had started with him; but he had checked them. At the time of the accident, he was returning with the team from his

work. The horses had galled necks; the galled places being more inflamed at night after the day's work than in the morning. As he started down the grade, it is probable that the first horse started because of the pain produced by the collar bearing on its galled neck in holding back the weight. The plaintiff at the time "had the lines through his hand." The other horse became frightened, and the first one lunged ahead, and "the two horses just plunged right down that grade." The wagon box began to swing from side to side; the loose board upon which he was sitting fell off and precipitated plaintiff on his back in the wagon. He recovered himself as quickly as possible, but too late to prevent the wagon striking the curb. This sufficiently indicates the evidence in the case; and from it appellants urge that there is not the slightest evidence of negligence upon their part; and, in the same connection, that, whatever were the defects in the appliances furnished to plaintiff, he, as a skilled teamster, knew them, knew their danger, and accepted their risk.

[1] As to the first of these propositions, however, while it is quite true that the master is not obliged to furnish his employé with the latest improvements in machinery, tools, or appliances, he is always under the duty in the use of proper care to furnish him with suitable machinery, tools, and appliances.

[2] It was at least for the jury in this case to say whether, for the work in which the plaintiff was engaged, a wagon such as was furnished by defendants came up to the requirements of the law as a suitable instrumentality. To the argument of appellants that it is not established that the lack of brake and insecure seat were, or was either of them, the proximate cause of the injury, it must be answered that, while in such a case as this it never can be demonstrated beyond peradventure that if the seat had been secure, or if there had been a brake, the accident would have been avoided, still enough is shown to establish the probability, at least, that, with the brake and the secure seat, he could have controlled the horses, which were recognized as being ordinarily a gentle team.

[3] Upon the proposition of assumed risk, it is true that, after protest concerning the absence of a brake and the assurance of the foreman to the effect that he would not need one, plaintiff undertook the work with the wagon furnished. It is probably not true that he quite appreciated the defective condition of the wagon bed until he learned it by experience in driving. But this experience was his first day's experience. Unless we can say, under these circumstances, that it was the duty of the plaintiff to have abandoned his work upon the discovery, then, we cannot say, as a matter of law, that plaintiff had assumed the risks with full appreciation of their nature and danger. But such a peremptory assertion of right and



sudden cessation of employment is not expected of one in a dependent position. The case upon which appellants principally rely, and the one nearest to the case at bar in its facts, is *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33. There an experienced teamster fell or was thrown from his wagon and suffered the loss of a leg. He sued, alleging, as here, the furnishing of defective appliances. The defects consisted "of a wagon having no seat and also of a pair of lines that were too short." The opinion of this court goes off upon the concession that the appliances were defective, but holds that as plaintiff had continuously used them for a period of 11 months, without objection or protest of any kind, it must be held that he assumed all of the risks incident to their use. What has already been said makes plain the broad distinction between that case and the case at bar, where plaintiff had in fact protested over the absence of a brake, had been assured that he would not need a brake, and where he was engaged in his first day's employment with the defective appliance, under an assurance that the first would be the only day. These questions, then, were properly submitted to the jury, and its determination will not here be disturbed.

[4] Touching asserted errors in the giving and refusing to give instructions, preliminarily it may be said that the instructions were quite as favorable to the defendants as the law warrants. In one of its earliest instructions, the court, speaking generally of the employer's duty, declared a part of that duty to be "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order and to make such provisions for the safety of the employes as will reasonably protect them from the dangers incident to their employment." It is contended that this instruction was erroneous in its failure to announce that the employer is liable only if he has failed to exercise reasonable care and ordinary diligence in the selection and furnishing of such appliances. If this instruction were standing alone, appellants' contention would have much force. *Sterne v. Mariposa Coml. Co.*, 153 Cal. 516, 97 Pac. 66. But it is manifestly a preliminary announcement, and sound enough in and of itself. In point of law, it is the employer's duty so to do; but, in point of law, he has fulfilled that duty when he has exercised ordinary care and diligence in securing proper appliances. All this was abundantly set forth in numerous instructions. It is found in many specific instructions proposed by the defendants and given by the court. So that we repeat, while, if the instruction complained of stood alone, it would be impeachable as not containing a full exposition of the law, taken in connection with the numerous explanatory in-

structions which followed, there could have been no misunderstanding upon the part of the jury. The case does not present at all the same situation shown by the instructions in *Melone v. Sierra Railway Co.*, 151 Cal. 114, 91 Pac. 522. There the instructions were in absolute conflict, and, it was said by this court, that it could not be determined under which the jury acted. Here there is no conflict in the instructions. There is in the preliminary instruction the absence of a qualification, the lack of a full exposition of the law, which absence and lack are fully and harmoniously set forth in all the succeeding instructions.

[5] Upon the measure of damages, the court gave an instruction identical with one reviewed in *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591. The instruction was there affirmed, and a petition for a hearing of the cause before this court was denied. The phrase "reasonably probable" may well be omitted from all such instructions, and the statutory requirement of the Civil Code (section 3283) strictly adhered to. That section declares that a plaintiff is entitled to damages for "detriment resulting after the commencement thereof or certain to result in the future." But the instruction here in question, while using the unhappy phrase "reasonably probable," sums up its declaration of the law with the pronouncement of the correct rule.

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

KINGS COUNTY et al. v. REA, County Auditor. (S. F. 6,431.)

(Supreme Court of California. Jan. 14, 1913.)  
BONDS (§ 9\*) — VALIDITY — DESCRIPTION OF MONEY.

In the absence of a specific requirement of law, it is not essential that a bond shall designate money of any particular form or kind, but it is sufficient that it calls for "lawful money of the United States."

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 28; Dec. Dig. § 9.\*]

In Bank. Petition for mandamus by Kings County and others against D. Bunn Rea, as Auditor, etc. Mandate ordered to issue.

J. L. C. Irwin, of Hanford, for petitioners  
H. Scott Jacobs, of Hanford, for respondent.

HENSHAW, Acting Chief Justice. If those are your two propositions, I speak for the court in saying that, where there is no specific requirement of the law declaring that money of a particular form or kind shall be designated, it is a good bond, and it is in full compliance with the law, when it calls for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"lawful money of the United States." And, second, it is clearly a power vested with the supervisors, after election, to determine whether the interest shall be paid semiannually or annually.

If those are your two propositions, they are resolved in favor of petitioner, and mandate will issue accordingly.

Ex parte McMULLIN. (Cr. 1,748.)

(Supreme Court of California. Jan. 14, 1913.)

HABEAS CORPUS (§ 99\*)—SUPPORT OF CHILDREN — DIVORCE AND GUARDIANSHIP DECREES.

Where a mother obtained in another state, upon substituted service of summons, a divorce and custody of minor children, and then obtained letters of guardianship of such children in this state, the legal effect of the guardianship decree, and also of the divorce decree, in the absence of supplementary proceedings in this state upon personal service to secure an award against the father for a custody of the children and provision of their support by him, was to give the mother the custody of the children without charging the father with their support, under Civ. Code, § 196, providing that the parent entitled to the custody of a child must support him.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

In Bank. Petition for writ of habeas corpus by Smith McMullin. Petitioner discharged.

See, also, 126 Pac. 368.

C. D. Dorn, of San Francisco, and Phil Ware, of Santa Rosa, for petitioner. Clarence F. Lea, G. W. Hoyle, and J. W. Ford, all of Santa Rosa, for respondent. L. Horwitz, of San Francisco, amicus curiæ.

PER CURIAM. Petitioner alleges that he is unlawfully imprisoned by the sheriff of the county of Sonoma by reason of an order of a committing magistrate holding him to answer for trial in the superior court for an alleged violation of section 270 of the Penal Code, in failing to furnish his minor child, Juanita McMullin, with necessary food, clothing, shelter, and medical attendance. It appears from the evidence taken at the preliminary examination that petitioner and Emma H. McMullin were husband and wife and the parents of Juanita; that Emma H. McMullin went to the state of Nevada, taking with her said child, and thereafter instituted in that state an action for divorce against this petitioner; that he was personally served with summons in the county of Sonoma, state of California, the place of his residence; that petitioner did not appear in said action; that on March 21, 1910, a decree was given and made by the district court of the first judicial district of Nevada, granting a divorce to said Emma H. McMullin from petitioner, awarding her the custody of her two minor chil-

dren, and ordering the payment to her of \$100 per month by way of alimony; that thereafter, in 1911, Emma H. McMullin returned to the county of Sonoma and took up her residence there; that in April, 1912, she was appointed guardian of the person and estate of said Juanita; that petitioner did not since the divorce provide his daughter with support, maintenance, or education, except that he paid for her tuition at school and did furnish her with a few articles of necessity; that the mother has been supporting said child; and that said Emma H. McMullin has had the custody of her daughter ever since said divorce.

The question presented to us is whether, after a decree of divorce obtained in another state upon substituted service of summons and granting custody of a minor child to the mother, and after she has sought and obtained letters of guardianship of said child in this state, the father is under the duty of supporting such child. Respondent depends largely upon the principles announced in the recent case of *People v. Schlott*, 162 Cal. 348, 122 Pac. 846. But this case differs in several essential particulars from that. In the *Schlott* Case there was a valid decree of divorce depriving the father of the custody of his child, while requiring him to pay alimony partly for the support of said minor, and it was held that section 196 of the Civil Code had no application to a father who, because of his own misconduct, had been deprived of the custody of his child, but required to pay for the support of said minor. But here, while the decree of divorce had conferred the right to the custody of the minor upon the mother, there had been no order with reference to the payment by the father for the support of his offspring, unless we read such a provision into the decree for the payment of alimony to the plaintiff in that action. Respondent's position is that the amount of alimony (\$100 a month) decreed by the court in Nevada shows that that court must have intended a part thereof for the support of the children (there were two), and that the order itself is tantamount to a declaration that the husband must support the offspring of the marriage. We cannot so interpret that part of the decree adjudging that the defendant must pay alimony to his wife; but, even if we could do so, we are confronted with the fact that, owing to the substituted service upon defendant of the summons in that action, the part of the judgment requiring the payment of alimony cannot be enforced against petitioner. The court that rendered that judgment, never acquired jurisdiction of his person. Code Civ. Proc. § 413; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *De la Montanya v. De la Montanya*,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

112 Cal. 109, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. In this case we find the mother, at the time of the preliminary examination of petitioner, entitled to the custody of her minor child, either by virtue of the decree of the court in Nevada or by reason of the issuance to her of letters of guardianship by a court of competent jurisdiction in California. If she is qualified under the former authority, she is required to support the minor, because section 196 of the Civil Code provides that "The parent entitled to the custody of a child must give him support and education suitable to his circumstances," and there is no valid adjudication, equivalent to an order made under a power similar to that granted by section 139 of our Civil Code, by which the husband is obligated to support his progeny while denied their custody. If we attribute her custody of the children to her letters of guardianship, we must read section 196 in conjunction with section 204 of the Civil Code, which declares that the authority of a parent ceases "upon the appointment, by a court, of a guardian of the person of a child," and the same result is reached.

The conclusion, therefore, is inevitable that neither by force of the Nevada decree, nor by force of the California proceedings in guardianship, had a duty to support the children been cast upon petitioner. The Nevada decree dissolved the marriage status and fixed the right of custody of the children with the wife while they remained in Nevada. It could do nothing more. To this extent full faith and credit will be accorded to the Nevada decree. Thus it fell within the power of the wife, under supplementary proceedings brought in this state, with personal service upon the former husband, to have procured, if the facts warranted, an award of the custody of the children, with provision for her own and their support. She did not do this, but resorted to guardianship proceedings, under which, in terms, she was awarded the custody of the persons and estates of the minors. The legal effect, then, of both the Nevada decree and the guardianship decree was to give the mother the custody and control of the children, *without* charging upon the husband their support. Under section 196, Civil Code, this situation *prima facie* relieves the husband of the duty of support and casts it on the wife. If it be said that it is a reproach to our law that a father be thus permitted to escape the paternal duty of aiding in the support of his minor offspring, the answer is that no such reproach attaches. Our law is adequate, but the obvious steps to be taken, and which, if taken, clearly would have fixed the father's duty in this regard, and so made him penally liable for his breach of duty, were disregarded. Instead of resorting to appropriate measures, by proceed-

ings under the Nevada judgment, to straighten the legal tangle which now exonerates the husband from the duty of furnishing such support, resort was had to the criminal court, where the only result of success would be to make it impossible for the husband to earn the money with which he could furnish such support.

The petitioner is discharged.

#### MCCLUNG v. PARADISE GOLD MINING CO. (S. F. 5,670.)

(Supreme Court of California. Jan. 15, 1913.)

##### 1. MINES AND MINERALS (§ 114\*) — MINING CLAIMS—CLAIMS FOR LABOR.

A statement of a claim of lien for labor recited that claimant performed 31½ days' labor upon the realty under an agreement with the owner's agent to pay a certain sum per day, and that there was justly due him the sum claimed, and further stated that defendant was and is the owner of the realty, and that the person named as agent was the person by whom plaintiff was employed, and who caused the work to be done. Code Civ. Proc. § 1183, requires every person performing work in a mining claim to file for record a claim containing a statement of his demand, the owner's name, that of the person employing him, with the statement of the terms, time, and conditions of his contract, and the description of the property. *Held*, that the statute did not require claimant to state the character of his labor, though his proof must show that it was such as to be lienable, so that the statement was not defective for not stating that the labor was performed in development or work by the subtractive process, for which work a lien is given by section 1187, being sufficient to authorize proof of the nature of the labor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

##### 2. MECHANICS' LIENS (§ 5\*)—CONSTRUCTION OF STATUTES.

The mechanics' lien law is remedial in its character, and should be liberally construed to effectuate its purpose.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.\*]

##### 3. MINES AND MINERALS (§ 112\*)—LIENS FOR LABOR—CONTRACTS.

An option contract to purchase mining stock, which authorized the prospective purchaser to go upon the corporation's claims, repair the flume for the company, etc., was sufficient to put the corporate officers on notice that such purchaser intended to go to the mines for the purpose stated in the contract, and to engage laborers, who would be entitled to a lien for their services.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

##### 4. MINES AND MINERALS (§ 117\*)—LABORER'S LIEN—EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.

In an action to establish and enforce a laborer's lien for work done in a mine, evidence *held* to show that the person who employed plaintiff was the owner's statutory agent for employing labor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. § 117.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. MINES AND MINERALS (§ 112\*)—LIENS—“AGENT.”**

One who was in charge of a mine, with the owner's consent, under a contract permitting him to do work in the mine with a view to developing and purchasing it, and was controlling the operations in part for the owner's benefit, was the owner's statutory agent for employing labor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 262-270; vol. 8, p. 7569.]

**6. MINES AND MINERALS (§ 112\*)—LIENS—“DEVELOPMENT WORK.”**

The construction of a flume to bring water from a mine for the sole purpose of working it, which was the only way it could be prospected, was development work within Code Civ. Proc. § 1183, giving one a lien for work performed in developing a mine.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

**7. MINES AND MINERALS (§ 112\*)—LABORERS' LIENS—ASSIGNMENT—TIME EFFECTIVE.**

An assignment of a laborer's mining lien, reciting the assignment of all claims against an amount due, from the person named, for labor performed upon the property of a mining company, “together with the claim of lien heretofore filed by each of” the assignors against the property and recorded in the volumes of liens stated, which assignment bore date subsequent to the recordation of the liens, took effect only after the filing of the liens, though they were in fact executed and verified when the assignment was executed, and were filed by the assignee as agent for the assignor, and hence the lien was not invalid as having been filed after assignment of the claim.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

**8. MINES AND MINERALS (§ 114\*)—LABORER'S LIEN—FILING—FILING BY AGENT.**

The physical act of filing the paper constituting a lien for mining labor may be done by claimant's agent.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 236; Dec. Dig. § 114.\*]

**9. MINES AND MINERALS (§ 117\*)—LABORER'S LIEN—PERSONS ENTITLED—AGENT FILING LIEN.**

One who acted as the agent of a claimant for filing a lien for mining labor could enforce the lien, as assignee thereof, after it was perfected by filing.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 239; Dec. Dig. § 117.\*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by M. C. McClung against the Paradise Gold Mining Company. From a judgment of the appellate court, reversing in part a judgment for plaintiff, defendant appeals. Judgment of trial court for plaintiff. Affirmed.

L. L. Cory, of Fresno, and Carrier & Richards and Canfield & Starbuck, all of Santa Barbara, for appellant. Geo. Cosgrave, of Fresno, for respondent.

PER CURIAM. This case was decided by the District Court of the Third appellate

district. That court sustained the judgment upon plaintiff's individual claim and that against defendant Lyall, who does not appeal, but reversed the judgment as to those claims assigned to plaintiff. Since we agree with the District Court of Appeal, except as to the last conclusion, we adopt so much of the opinion of that court, written by Mr. Presiding Justice Chipman, as is applicable:

“The action is for the enforcement of laborer's liens against the property of defendant mining company, and for judgment against defendant Lyall. Plaintiff brings the action in his own behalf and as assignee of the claims of eight other persons. The court made findings in favor of plaintiff, and entered judgment against defendant Lyall for the sum of \$839.66, with interest from June 25, 1909, and for costs, and adjudged that plaintiff ‘have a lien upon the real property hereinafter described for the payment of the sum of \$680, together with interest thereon since June 25, 1909, at the rate of 7 per cent.,’ with costs, amounting in all, exclusive of costs, to \$695.50. The usual decree for a sale of the property was made.

“Within 60 days from the entry of judgment, defendant, Paradise Gold Mining Company, appealed from the judgment on bill of exceptions. Defendant Lyall does not appeal. \* \* \*

[1] “The individual claim of plaintiff is \* \* \* to be noticed. His claim states: ‘I performed 31½ days labor upon said real property, commencing the same May 3, 1909, and ending June 8, 1909, under an agreement with Dr. Robert Lyall to pay the sum of \$2.50 per day, or the sum of \$78.25 in all, for said labor, and there is justly due me, on account thereof, the sum of \$78.25, after deducting all just credits and offsets.’ The claim then states that defendant corporation is and was at the time the owner and reputed owner of said real property; that defendant Lyall was the person by whom plaintiff was employed, ‘and said labor was performed as tending giant’; that said Lyall ‘is and was, at all times herein mentioned, the person who caused said work to be done, who claimed an interest therein, and was and is the agent of the said owner.’ There was no statement in the claim, in terms, that the labor performed was in the development of any mining claim or work thereon by the subtractive process, and it is hence argued that no legitimate inference can be drawn from the facts that plaintiff is entitled to a lien. It was not necessary that the claim should use the language of the statute. The averment was sufficient to warrant proof of just what the labor was, and from such proof it was to be determined whether the labor was in development work or mining by the subtractive process. Section 1183, Code of Civil Procedure, pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

scribes the class of persons entitled to the lien, and the purpose for which the labor is to be performed in the case of a mining claim or real property worked as a mine, namely, 'either in the development thereof or in working thereon by the subtractive process.' The preparation of the claim and its recordation are provided for by section 1187. It is there provided: 'Every person \* \* \* within thirty days after the performance of any labor in a mining claim, must file for record \* \* \* a claim containing a statement of his demand \* \* \* with the name of the owner, \* \* \* also the name of the person by whom he was employed, \* \* \* with a statement of the terms, time given, and conditions of his contract and also a description of the property to be charged with the lien,' etc. This section does not require the claimant to state the particular character of his labor, although he must show by his proof that it was of such kind as is made lienable by the statute—i. e., development work or mining by the subtractive process. It was held, in *Continental, etc., Assn. v. Hutton*, 144 Cal. 609, 78 Pac. 21, that the mechanics' lien law is part of the Code of Civil Procedure adopted pursuant to the requirements of the Constitution.

[2] "It is remedial in its character, and should be liberally construed with a view to effect its objects and promote justice.

"Plaintiff testified that defendant Lyall employed him to work in the mine of defendant company and at the agreed rate of \$2.50 per day and board, and that he worked 31½ days. He testified: 'I was employed to do general work about the mine until they worked two shifts with the hydraulic, and after that I ran the giant hydraulic nights. I did that a week just preceding the time I left.' We think plaintiff's claim of lien was sufficient in form, and was supported by the evidence, unless rendered ineffective on other grounds urged against its validity.

"It is contended by appellant that there was no evidence that defendant Lyall was either the actual or constructive agent of appellant, or that any portion of the work was done in the development of the mine, or in working thereon by the subtractive process. It appeared that defendant corporation owned the mining property involved; and on April 5, 1909, defendant Lyall had in contemplation the purchase of a large block of the shares of defendant corporation, and on that day took an option to that end from the corporation, by which he was given authority 'to go in and upon its claims on Sycamore creek, near Trimmer, Fresno county,' and he was to 'repair the flume for said company as in his best judgment he may think necessary, but in any event sufficient to run water for the whole length of it,' and he was also to deliver 'to the treasurer of

the corporation one-half of all the gold he and his associates and workmen may have secured or taken out of the company's property prior to July 1, 1909.' He was also authorized to 'prospect and examine the same up to July 1, 1909, and to remove the gold therefrom, and to keep one-half thereof, paying and delivering the other one-half thereof to' the company. Lyall, shortly after April 5th, went to Selma, in Fresno county, and, as directed by the officers of the corporation, reported to a Mr. Matthews at that place, who was a stockholder in the corporation, for information how to reach the mine. Matthews gave him this information; and Lyall reached the mine between April 10th and 20th. He informed Mr. Matthews by letter of his arrival at the mine, and this letter was forwarded to the corporation.

[3] "It appears that the officers of the corporation knew that Lyall was at work at the mine; the contract itself was sufficient to put these officers on notice that Lyall intended to go to the mine to carry out its objects. *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401. And later, learning that the men were not getting their pay promptly, the corporation caused the statutory notice of nonliability to be posted at the mine. The men quit work, and hence these claims, all of which had already accrued. The work necessary to be done to prospect or work the mine required that the flume referred to in the contract should first be restored, and it was over a rough country and a mile long. It was finished and water brought to the mine and the giant started; the mine being a hydraulic proposition. The ground was worked in this way for some time, but proved unsatisfactory, and Lyall gave up the venture.

[4] "Without going into the evidence further, of which there was considerable, we think enough appears to show that Lyall was the statutory agent of the corporation, as defined in section 1192, Code of Civil Procedure.

[5] "He was there in charge with the consent of the owner, and was controlling the mining operations in part, at least for the benefit of the owner. *Higgins v. Carlotta G. M. Co.*, 148 Cal. 700, 84 Pac. 758, 113 Am. St. Rep. 344. While it is true his primary object was to prospect the mine, both parties anticipated a possible output of gold, and provided for its division by the contract. We think also that the work done may reasonably be said to be development work, and it requires no unwarranted construction to treat the work as having in view the operation of the mine by the subtractive process. They did take out some gold, but not enough to satisfy Dr. Lyall.

[6] "In constructing the flume and bringing the water to the mine for the sole purpose of working it, the only way, indeed,

that it could be worked or prospected was, in our opinion, development work."

Discussing the claims upon which plaintiff sued as assignee, the District Court of Appeal said: "The evidence was that the various claims of lien were prepared and sent to plaintiff at Trimmer Springs, near the mine, where the claimants were assembled; that the assignment, executed by the claimants, purports to assign plaintiff 'all claim or claims, demands against, and amounts due, from Dr. Robert Lyall and others for work and labor performed upon the property of the Paradise Mining Company, or Paradise Gold Mining Company, together with the claim of lien heretofore filed by each of us against the property of said company, and recorded in the office of the county recorder of Fresno county in volumes H and I of liens, at pages variously numbered.' The assignment bears date June 30, 1909, which was subsequent to the date of the recordings of the liens; but the evidence was that the liens were all executed and verified at the time the assignment was executed, which was before the liens were recorded; that after their execution, and after the execution of the assignment, they were sent down by the assignee to Fresno to be recorded; that the assignment was made solely for the purpose of collection. Upon the point the court made finding 9 that 'after the due execution of said liens, but before the recordation thereof, all of said persons \* \* \* assigned their said claims of lien to plaintiff; but said assignment was made to take effect after the recordation of said claims of lien, and not before, and was made for collection only, and was not an absolute assignment; and the said plaintiff at no time had or claimed ownership of any of said claims filed by the persons other than himself, except for the purposes of collection only.' The plaintiff testified: 'It was through the consent of all the parties that I got this assignment. I had written to Mr. Cosgrave for information, and as the result he sent up this paper to me. I took it around myself and had the signatures attached to it. \* \* \* I don't know the exact date when it was signed; it was after we stopped work. They were all right there in Trimmer; \* \* \* that was before I filed my lien.' (The liens were all filed June 25, 1909.) He testified that he was 'simply collecting it for these different people. \* \* \* It was before the liens were filed that the assignment was made. I know that because I had part of the liens in my possession at the time. \* \* \* At the time I was getting the liens signed, I got the assignment signed. I know the assignment was signed before the liens were recorded.' The averment of the complaint in each of these assigned claims is that 'said claimant, \* \* \* since the recordation thereof, and prior to the filing of the complaint herein, duly assigned the said claim of lien, together with all claim

and demand against said defendants to this plaintiff.' We have given substantially all the testimony in support of this averment and in support of the finding of the court."

[7] From these facts, the District Court of Appeal determined that there was no evidence to support the finding of the lower court that "the assignment was made to take effect after the recordation of said claims," and that neither by averment in the complaint nor by evidence is the finding that it was "not an absolute assignment" justified further than, on the testimony above quoted, that it was "made for collection only." With the latter view, we agree but it is immaterial for the purposes of this case, whether the assignment was absolute or not. The material question is whether or not the assignment took effect only after the filing of the liens. Relying on *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168, in which it was held that a laborer or materialman cannot assign his mere right to assert a lien and clothe the assignee with the power to create final evidence thereof for himself, the District Court concluded that, since the actual signing and delivering of the assignment occurred before the final step in establishing the liens by filing the notices had taken place, the assignors had attempted to assign the inchoate right considered in the cited case, and that under that authority their act was a nullity. We reach a different conclusion. *Mills v. La Verne Land Co.* has been very severely criticised in the opinion in a well-considered case in Utah (*Smoot v. Checketts*, 125 Pac. 415); but its doctrine has long been the established law in this state. See, also, *Duncan v. Hawn*, 104 Cal. 14, 37 Pac. 626. However, the doctrine of that case has never been extended nor amplified. *People v. Moxley*, 17 Cal. App. 469, 120 Pac. 43. The gist of it is that an assignee cannot file the lien in his own name, and that therefore the attempted assignment of the personal right to perfect it is of no value nor effect. The lien has practically no existence for the purposes of assignment until the notice has been duly filed by the lien claimant in his own name. That is all that the case of *Mills v. La Verne Land Co.* decides.

[8] The physical act of filing the paper may of course be done as well by an agent as by the lien claimant in person. In this case the plaintiff deposited the claims with the proper officer; but there was evidence sufficient to show that in so doing he acted as the agent of his associates, and to justify the court's findings to the effect that each assignor had filed his own. The assignments in terms operated upon the indebtedness of defendants to the assignors only after the filing of the claim of lien. There was nothing to prevent the claimants from assigning something not yet created in such manner that the assignments should not be effective until the happening of a future event.

[9] If McClung had gone to the county seat, carrying the notices of lien and an envelope containing the assignments directed to an agent of the other claimants, and if after filing the claims and delivering the envelope said agent had given him the assignments, we think there could be no question of the regularity of the proceeding and the validity of his title; and we see no incongruity in his acting both as agent, for the purpose of perfecting the liens, and as assignee of them after they should be perfected. Under the text of the assignment, it operated neither upon the indebtedness nor the evidence thereof, until the due filing and recordation of the latter. We conclude, therefore, that the superior court's finding in this regard was justified.

The judgment is therefore affirmed.

In re PACKER'S ESTATE.  
SAMPSON et al. v. GORDON et al.  
(Sac. 2,021.)

(Supreme Court of California. Jan. 16, 1913.)

1. WILLS (§ 155\*)—VALIDITY—"UNDUE INFLUENCE."

To render a will invalid because of undue influence, it must have been executed by the testator under pressure which destroyed his free agency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

2. WILLS (§ 163\*)—UNDUE INFLUENCE—BURDEN OF PROOF.

That a will makes provision for one occupying a fiduciary relation to the testator does not raise a presumption of undue influence, or throw the burden on him of disproving undue influence, unless he took some part in making the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

3. WILLS (§ 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF PROOF.

Testimony that a person charged with undue influence was in the house shortly after the will was executed was insufficient to show that he was present when the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

4. WILLS (§ 47\*)—TESTAMENTARY CAPACITY—SUFFICIENCY.

A will will not be set aside merely because the testator was a man of advanced years, whose sight was failing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.\*]

5. WILLS (§ 82\*)—VALIDITY—UNNATURAL WILLS.

A will cannot be set aside merely because its dispositions do not conform to the jurors' notions of justice or propriety.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

6. WILLS (§ 82\*)—VALIDITY—UNNATURAL WILLS.

A testator gave the bulk of his estate to a nephew and another person, who had been taken into the testator's family as a mere child, and virtually treated as his son. These two

with the testator's wife were closest to the testator, enjoyed his confidence, and assisted in the management of his affairs. His other heirs were nephews and nieces, who did not live near him, and whose relations with him were not particularly intimate. His wife at the date of the will was suffering from a disease believed to be incurable, and she died before his death. *Held*, that the will was neither unnatural or unjust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

7. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

Testimony that a testator would walk around the table where the hired men were eating, and go out without saying anything, and that he set fire to some fox-tails along a road, and when a witness observed that a fence post was on fire, and went to put it out, the testator said he was old enough to watch his own affairs, was too trivial to show lack of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

8. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

Testimony tending to show that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, was insufficient to show want of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

9. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

In action to revoke the probate of a will, evidence held insufficient to show want of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

10. WITNESSES (§ 257\*)—REFRESHING RECOLLECTION—ADMISSIBILITY OF WRITING IN EVIDENCE.

Where letters are used by a witness to refresh his recollection, they cannot be read to the jury by the party calling such witness, nor can he examine the witness concerning their contents, although, under the express provisions of Code Civ. Proc. § 2047, the adverse party may read them to the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 892; Dec. Dig. § 257.\*]

11. WILLS (§ 384\*)—REVIEW—HARMLESS ERROR.

In a will contest, where there was no evidence showing an exercise of undue influence, the exclusion of testimony that those charged with exercising it entertained feelings of hostility toward the contestants, if erroneous, was harmless.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 855-858; Dec. Dig. § 384.\*]

12. APPEAL AND ERROR (§ 1058\*)—ERROR—CURE.

The exclusion of questions was not prejudicial error, where everything of consequence that could have been brought out thereby was covered by other answers of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

13. EVIDENCE (§ 471\*)—FACTS OR CONCLUSIONS.

The exclusion of questions asked witnesses which called for conclusions or opinions, rather than facts, was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 14. APPEAL AND ERROR (§ 1058\*)—EVIDENCE—HARMLESS ERROR.

The exclusion of a question whether a witness had ever heard Mrs. P. "say anything to her husband" about a certain matter was not prejudicial error, where she subsequently testified that she never heard any conversation between P. and his wife regarding the same matter.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

Department 1. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Petition by Olive Sampson and others against E. W. Gordon and others to revoke the probate of the will of George F. Packer, deceased. From a judgment of dismissal; the petitioners appeal. Affirmed.

Arthur O. Huston, of Woodland, and Seth Millington, of Colusa, for appellants. White, Miller & McLaughlin and Seymour & Yell, all of Sacramento, and Thomas Rutledge, of Colusa, for respondents.

SLOSS, J. On February 15, 1910, the superior court of the county of Colusa admitted to probate an instrument purporting to be the last will of George F. Packer. The appellants, children of deceased brothers and sisters of said George F. Packer, filed a petition for revocation of the probate of said will. The grounds upon which revocation was asked were that the document was not executed by George F. Packer in the manner required for the execution of wills, that the decedent was not of sound mind at the time of executing the alleged will, and that the execution was induced by undue influence and fraud. The proponents having answered denying the material allegations of the petition with respect to each of these grounds, the matter came on for trial before a jury. At the close of the contestants' case, the proponents moved for a nonsuit on the ground that no evidence in support of any of the causes of contest had been introduced. The motion was granted, and judgment of dismissal entered. The contestants appeal from the judgment.

The alleged will bore date the 27th day of April, 1907, some two years before Packer's death. By its terms, the decedent bequeathed \$500 to his niece, Mary Glanning, a like sum to his sister, Jane Packer, a steam harvester to George H. Gordon, and the residue of his estate in equal shares to Edward M. Gordon and the decedent's nephew, Albert M. Packer. George F. Packer was a farmer owning a large ranch and other property in Colusa county, where he had resided for many years. At the date of the will he was of the age of 88 years. He was married, but had never had any children. His wife, Hannah Packer, was alive when the instrument in controversy was signed. She died on March 20, 1908, during Packer's lifetime. The only other persons who would, at the

date of the will, have been entitled to succeed to his estate as heirs, were his sister, Jane Packer, and children of deceased brothers and sisters, such children including Albert M. Packer and the contestants.

[1] There was no attempt to offer any evidence in support of the averment that the paper had not been executed in due form. Nor does the record contain any evidence tending to show the exercise of undue influence or the commission of fraud. There is a total want of testimony which would justify an inference that any of the beneficiaries, or their wives, or the wife of the decedent (the persons named in the petition for revocation as having exercised undue influence and made fraudulent representations), undertook to influence the testator in any manner whatever. So far as the evidence shows, the will was the product of George F. Packer's free and independent volition. Certainly there is nothing to indicate that he acted under pressure which destroyed his free agency. Nothing less than this is undue influence. In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Ricks, 160 Cal. 459, 117 Pac. 532; Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

[2, 3] It is argued that there was a confidential relation between the decedent and Albert M. Packer, and that this threw upon the latter, benefiting by the will, the burden of disproving undue influence. But no presumption that the testator was unduly influenced arises from the mere fact that the will makes provision for one occupying a fiduciary relation to him. There must, in addition, be at least a showing that the person so benefited had some part in the making of the will. Estate of Higgins, 156 Cal. 257, 104 Pac. 6. The appellants assert in their brief that Albert M. Packer was present when this will was executed. But the record does not bear them out. All that was testified to was that he was in the house when E. M. Gordon entered after the will had been executed. This is clearly insufficient to raise a presumption of undue influence. Of the issue of fraud nothing more need be said than that evidence to sustain the allegations of the petition is not to be found in the transcript.

[4-9] The testimony regarding mental incompetency was not such as to have justified the submission of the question to the jury. George F. Packer was a man of advanced years. His sight was failing. But these circumstances alone are not sufficient to justify the court or a jury in setting aside a will. Estate of Dole, 147 Cal. 188, 81 Pac. 534; Estate of Motz, 136 Cal. 558, 69 Pac. 294. After giving to the contestants the benefit of every favorable interpretation and inference which the testimony can reasonably bear, as we are bound to do on this appeal (Estate of Arnold, 147 Cal. 583, 82 Pac. 272), we are still forced to the conclusion that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nothing substantially tending to show a lack of mental capacity to make a will was produced. Stress is laid upon what is called the "unnatural" character of the will. It can hardly be necessary to repeat that a jury is not authorized to overturn a will merely because its dispositions do not conform to the jurors' notions of justice or propriety. "It is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will." *Estate of McDevitt*, 95 Cal. 33, 30 Pac. 101. But, in fact, it cannot truthfully be said that the will before us is either unnatural or unjust. The principal beneficiaries are the persons who were (except for his wife) closest to the testator, who enjoyed his confidence and assisted him in the management of his affairs. One of them, Albert Packer, was his nephew. The other, Edward M. Gordon, had been taken into the testator's family as a mere child, and had lived upon the Packer property, and been treated virtually as a son of George and Hannah Packer all his life. The contesting nephews and nieces did not live near the Packers, and the relations between them and the testator were not particularly intimate. Much is made of the failure of the testator to provide for his wife. This is a somewhat strange criticism, in view of the fact that the wife herself is named in the contest as one of the parties exerting undue influence. But, apart from this, the omission to give anything to the wife is not surprising when we note that she was, at the date of the will, suffering from a disease which was believed to be incurable. Indeed, the appellants themselves, in their petition, allege that at the date of the will she was so afflicted, "and that both she and the said George F. Packer knew that she could not recover."

[7-8] There was no testimony by either expert witnesses or intimate acquaintances that in their opinion George F. Packer was not of sound mind. One of appellants' witnesses testified that the decedent's health had been failing for some years, but that his mind, so far as she knew, was strong. One witness, who had worked for Packer as a farm hand, stated that his employer "appeared irrational," but based this statement upon grounds which wholly fail to support the conclusion. One of the circumstances mentioned was that Packer would ask the witness his name and what he was doing, and then, on meeting him another day, would repeat the same questions. Again, that Packer often spoke of things that had occurred many years before, while he was living in Pennsylvania; that the testator would walk around the table where the hired men were eating, and go out without saying anything. Another witness testified that in 1907, he saw Packer set fire to some fox-tails along the road, that he observed that a fence post was on fire, and went to put the fire out, whereupon Mr. Packer said he was old enough to watch

his own affairs. At the time of the incident, Packer "appeared" to this witness, too, to be irrational. The facts testified to by the two witnesses just mentioned are too trivial to deserve extended comment. It must be apparent that they can furnish no support for a conclusion that the testator did not possess the mental capacity required for the making of a will. The only circumstance having any bearing on the matter of mental soundness is the repetition of questions that had already been asked and answered. It had a tendency to show that Packer's memory was somewhat weakened. But this, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation; and the objects of his bounty, would not suffice as proof of want of testamentary capacity. *Estate of Dole*, supra. Taking the case as a whole, it may fairly be said that the evidence in support of the allegation of unsoundness of mind is decidedly weaker than that presented in various cases in which this court has as matter of law held the proof offered to have been insufficient.

[10] We think no material error was committed in ruling upon the admission and exclusion of testimony. The appellants offered the deposition of Henria Compton, a niece of decedent. The deposition was taken in June, 1911. In 1909 Mrs. Compton had written letters to relatives, in which she made certain declarations concerning the decedent and other members of his family. The appellants sought to get these letters before the jury upon the plea that they could be used to refresh the recollection of the witnesses. The court declined to permit them to be read. We are satisfied that it was right in so ruling. Even if it be assumed that the circumstances were such as to authorize the use of the letters to refresh the witness' recollection (Code Civ. Proc. § 2047), the party calling her was not thereby authorized to put the papers before the jury. Such a paper is "in no sense testimony. \* \* \* The opponent, but not the offering party, has a right to have the jury see it. \* \* \* That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." 1 Wigmore on Ev. § 763. And such seems to be the fair construction of section 2047 of the Code of Civil Procedure, which expressly declares the right of the adverse party to read the writing to the jury. *Reid v. Reid*, 73 Cal. 206, 208, 14 Pac. 781. To permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit. For like reasons, it was proper to exclude questions in which counsel for appellants, after reading a passage from one of the letters, asked the witness what she meant by the declaration quoted, or based other inquiries upon such passage.

[11-13] Some other rulings are criticized.

but we think none of them, if erroneous, was of sufficient importance to justify a reversal. If it be conceded that appellants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward the contesting relatives, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence had in fact been exercised. Besides, while some questions on this line were excluded, others were permitted to be answered, and the appellants had the benefit of everything of consequence that could have been brought out if the rulings on the earlier questions had been as appellants contend they should have been. Many other questions on this line called for conclusions or opinions, rather than facts, and were properly ruled out for this reason.

[14] The witness Henria Compton was asked whether she had ever heard Hannah Packer "say anything to her husband about doing anything for Jane Packer." An objection was sustained. If the ruling was erroneous (see *Estate of Snowball*, 157 Cal. 301, 309, 107 Pac. 598), the error was harmless, since it appears that the witness subsequently testified that she had never heard any conversation between George Packer and his wife "in regard to doing anything for Jane Packer."

The appellants urge that the court erred in excluding testimony tending to show that the testator, before and after making his will, had made gifts of property to E. M. Gordon and Albert Packer. We need not pass on the admissibility of this testimony. If it had been admitted, it could not have strengthened the appellants' case to such an extent as to justify the submission of the issue to the jury.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

# HOBBS v. TOM REED GOLD MIN. CO. et al. (L. A. 3,240.)

(Supreme Court of California. Jan. 14, 1913.  
Rehearing Denied Feb. 13, 1913.)

## 1. CORPORATIONS (§ 174\*) — AGENCY FOR STOCKHOLDERS.

A corporation is the agent and trustee of the stockholders, holding and managing the business for their benefit.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 649-652; Dec. Dig. § 174.\*]

## 2. COURTS (§ 29\*)—JURISDICTION—TERRITORIAL SCOPE.

A writ of mandamus cannot run to persons, or be enforced upon realty, without the state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 82½, 112-118; Dec. Dig. § 29.\*]

## 3. COURTS (§ 12\*)—JURISDICTION—RESIDENCE OF PARTIES.

Where a corporation, organized under the laws of another state, holds its directors' meet-

ings in the state, and its directors reside there, and a part of its business is done there, mandamus will issue to compel the officers to order the persons in charge of its mine in another state to permit a stockholder to examine the mine; Code Civ. Proc. § 1097, providing adequate remedy to compel obedience by authorizing punishment for refusal to obey an injunction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 32-36, 40, 41, 43, 45; Dec. Dig. § 12.\*]

## 4. MINES AND MINERALS (§ 104\*)—INSPECTION BY STOCKHOLDERS.

A stockholder of a mining corporation has a right to inspect the company's mines.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 228; Dec. Dig. § 104.\*]

## 5. CORPORATIONS (§ 181\*)—RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

At common law a stockholder has a right to inspect the corporate books.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 674-682, 685; Dec. Dig. § 181.\*]

## 6. MANDAMUS (§ 129\*)—PURPOSE.

The right of inspection by stockholders of corporate records and business, when given by statute, is absolute, and may be enforced by mandamus, though, where the right depends on the common law, the issuance of the writ is discretionary as applicant's motives may be questioned, and he must show good cause.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 264; Dec. Dig. § 129.\*]

## 7. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAW OF ANOTHER STATE.

The statute law of Arizona as to a mining stockholder's right to examine the corporation's mines is presumed to be the same as that of California.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis A. Wilbur, Judge.

Mandamus proceedings by John H. Hobbs against the Tom Reed Gold Mining Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. W. McKinley, of Los Angeles, Thomas, Bryant, Nye & Malburn, of Denver, Colo., and H. L. McNair, of Los Angeles, for appellant. N. P. Moerdyke and Hunsaker & Britt, all of Los Angeles, for respondents.

SHAW, J. This is a proceeding in mandamus. The writ of mandate may be issued to any corporation, board, or person "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station, or to compel the admission of a party to the use or enjoyment of a right" to which he is entitled, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1085, 1086. The natural persons named as defendants to the action are the persons composing the board of directors of the corporation defendant, and including its president and secretary. The plaintiff is a holder of stock in the defendant corporation.

[1] A corporation is the agent and trustee of its stockholders, in their behalf and for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

their use and benefit holding, controlling and managing the corporate property and business. *Wright v. Oroville M. Co.*, 40 Cal. 27; *Ashton v. Dashaway Ass'n*, 84 Cal. 65. 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809. The directors are the trustees for the stockholders and also for the corporation. It is practically conceded that there is no plain, speedy, and adequate remedy in the ordinary course of law, whereby the plaintiff may obtain the relief he seeks. The foregoing statements show that the defendants occupy the position of official trustees from which duties may arise to perform acts on behalf of the plaintiff. The two questions presented for determination are, first, whether or not upon the facts alleged in the complaint there is any act which the law specially enjoins as a duty resulting from this trust or station, and, second, whether or not the superior court of Los Angeles county can enforce performance of such act by means of the writ of mandate.

Tom Reed Gold Mining Company is a corporation organized under the laws of Arizona, and having its principal place of business in Pasadena, in Los Angeles county, Cal., and it there maintains an office and holds meetings of its directors. All of the directors, the president and secretary being members of the board, reside in Los Angeles county. None of them "reside or remain" in Arizona. The company owns a gold mine in Arizona, the operations of which are carried on by agents and employees in Arizona, and subject to the direction and control of said board of directors. The plaintiff owns more than 2,000 shares of the stock of said company. Having heard that there had recently been a discovery of a new body of ore in the underground workings of said mine, and desiring to examine said mine and inspect said ore, and ascertain whether the mining operations were carried on with skill and good judgment, so as to be advised of the value of his stock, the plaintiff demanded of the company permission to visit, inspect, and examine the mine accompanied by an expert mining engineer to assist him. The company refused to permit him to do so. The prayer of the complaint is for a writ of mandate commanding the defendants to permit plaintiff to visit, inspect, and examine said mine, accompanied by a mining engineer to assist him therein, and requiring defendants to make and deliver to plaintiff an order directed to its agents and servants in charge of the mine, instructing them to show him such parts of the mine as he wishes to examine, and for such other relief as may be just and proper.

[2] The mine being in Arizona, it is not within the jurisdiction of the courts of this state. Our personal writs cannot run to persons who are not present in the state, and they cannot be enforced upon real property beyond its limits. The writ of man-

date cannot be invoked to compel performance of an act which cannot be performed within this state, but must be done, if at all, at some place in another state. So far as these objections go, the refusal of the writ was proper.

[3] But there is an act in furtherance of the proposed inspection, which the defendants may perform, and which it is their duty to perform in this state, to which the plaintiff upon the facts stated is clearly entitled and which comes within the scope of the relief prayed for. The corporation holds its directors' meetings in this state, its directors reside here, and the corporate business in part, at least, is done here. The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state. *Wait v. Kern R. M. Co.*, 157 Cal. 21, 106 Pac. 98. Its directors, acting in this state, may make and deliver to the plaintiff an order to the persons in charge of the mine, instructing them to permit the plaintiff to enter and examine the same. In the ordinary course of business, it is to be presumed that such an order would be made in this state, rather than in Arizona, since the directors and officers reside here and hold meetings here. There is, therefore, no physical or jurisdictional obstacle to prevent the issuance and execution of a writ of mandate to compel the defendants to perform such act. Ample power to compel obedience is conferred by section 1097 of the Code of Civil Procedure, although, doubtless, the power would exist in the absence of such express grant. There is therefore an act which the defendants may do in this state in their trust capacity, the performance of which the court can compel.

[4] The remaining question is whether or not this act is a duty resulting from the relations between the parties. Has a stockholder of a mining corporation the right to visit and inspect the mines of the company? We think there can be no doubt that the right exists.

[5] It is settled that at common law a stockholder has the right to inspect the books of the corporation. 2 Cook on Corp. § 511; 4 Thompson on Corp. § 4406 et seq. The reasoning on which this rule is founded is that a stockholder has an interest in the assets and business of the corporation, and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interest therein. There is not a feature of this reasoning that does not apply with equal force to the claim of a right to examine the property of the corporation, especially where it is mining property, the condition and value of which is so easily concealed or misrepresented. The books would often afford no information of the nature of the ore bodies exposed or of the manner in which the work

was carried on. "The stockholders of a corporation are the owners of its franchises and its assets, and they have a right to be informed of the financial condition of the company." *Kuhbach v. Irving, etc., Co.*, 220 Pa. 431, 69 Atl. 981, 20 L. R. A. (N. S.) 185. In *Guthrie v. Harkness*, 199 U. S. 153, 26 Sup. Ct. 5, 50 L. Ed. 130, 4 Ann. Cas. 433, the court quotes with approval the following passage from *Cockburn v. Union Bank*, 13 La. Ann. 289: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land. As long as the charter or the rules and by-laws, passed in conformity thereto, do not restrict his individual rights, he possesses them in full and can demand to exercise them. It cannot be denied that it is the right of one to see that his property is well managed and to have access to the proper sources of knowledge in this respect." Again the court says (199 U. S. page 155, 26 Sup. Ct. page 6, 50 L. Ed. 130, 4 Ann. Cas. 433): "The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property"—citing *Cincinnati V. Co. v. Hoffmeister*, 62 Ohio St. 201, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707. In the *Guthrie Case* the United States Supreme Court held that the stockholders had the right, not only to inspect the books of the banking company, but also to examine its accounts and loans, or, in other words, its property. It would, indeed, be a strange rule which would allow the stockholder to examine the books of a corporation to ascertain its condition and deny him an inspection of the property to verify the statements contained in the books. The rule at common law, in our opinion, extends to the corporate property as fully as to the books.

[6] Where such right is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute, and may be enforced by mandamus, regardless of the purposes or motives of the stockholder, or the existence of good cause. *Johnson v. Langdon*, 135 Cal. 626, 67 Pac. 1050, 87 Am. St. Rep. 156. Where the right to be enforced is a common-law right, the issuance of the writ is discretionary, and the motives of the applicant may be questioned, and he is required to show good cause for granting the relief. *Id.* Section 589 of our Civil Code provides that any stockholder of a mining corporation, formed under the laws of this state, is entitled to visit and examine its mines accompanied by his expert, and that, on his application, the president of the corporation must cause its secretary to issue and deliver to him an order to the superintendent of the mine to show the stockholder such parts of the mine as he may wish to see. The case was de-

cided below on a demurrer to the complaint, which contains no allegations as to the law of Arizona on the subject.

[7] It is therefore presumed to be the same as the law of this state. Conceding for the purposes of this decision the claim of the defendant that section 589 does not apply to an Arizona mining corporation having its principal place of business in this state, and having mines only in Arizona, it would follow that under the law of Arizona, as we presume it to be, the same right would exist, and the same duty would rest upon the defendants as under the section of the Civil Code above mentioned. If it should turn out that Arizona has no such law and that section 589 should be held inapplicable, substantially the same right and duty would exist under the common law, provided the inspection was desired for a legitimate purpose and good cause was shown therefor.

It is suggested that the court should not indulge in useless or ineffectual proceedings, and that it would be useless to require the officers of the corporation to give an order to the mining superintendent in Arizona to allow an inspection of the mine, unless the court possessed the power and the means to compel the superintendent to obey the order. There seems to be a suggestion here that the defendants are disposed to be refractory and to resist the judgments of the courts of this state so far as they dare, while at the same time availing themselves of the privilege of carrying on the general corporate business here. We will not indulge the supposition that this motive or intent exists. Obedience to the writ commanding the issuance of a permit means an obedience in good faith with the sincere intent to carry out the judgment of the court, and we will presume that such obedience will be promptly accorded. It is true the court cannot send its officers into Arizona to induct plaintiff into the mine, but it can compel the issuance by the defendants in this state of the order for the inspection thereof, under such restrictions as may seem proper, and it can see that there is no trifling with the court in the manner of performing that act. It is not to be supposed that the mine superintendent will disobey or disregard a real order from his superiors. The court will give such relief as its powers and territorial jurisdiction authorizes it to give. It will not refuse any relief because it cannot give the full relief that plaintiff asks, or because it cannot act directly upon the premises to which the relief relates. From what we have said the conclusion necessarily follows that the court below erred in sustaining the demurrer to the complaint and in giving judgment for the defendants.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

**SNOWBALL v. SNOWBALL.** (Sac. 1,974.)  
(Supreme Court of California. Jan. 10, 1913.  
Rehearing Denied Feb. 8, 1913.)

**1. APPEAL AND ERROR (§ 205\*)—EXCLUSION OF EVIDENCE—STATEMENT OF EXPECTED ANSWER.**

Where the defendant made no statement to the court as to the substance of a conversation, it cannot be determined whether the exclusion of evidence of such conversation was error or not, and there was no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.\*]

**2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EVIDENCE—EXCLUSION.**

The exclusion of a statement of a beneficiary that he was satisfied with the will, though tending to show bad faith in his later threats to contest, was not reversible error in an action on notes given him in a settlement of the estate arising out of such threats, where he conveyed his entire interest in the estate, and thus divested himself of the right to make a contest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Department 1. Appeal from Superior Court, Yolo County; H. M. Alberty, Judge.

Action by Leutie C. Snowball, executrix of the estate of Milton S. Snowball, against H. H. Snowball, administrator of the estate of Lucy A. Snowball, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur O. Huston, of Woodland, for appellant. Thomas & Thomas, of Ukiah, and Hudson Grant, of Woodland, for respondent.

**SHAW, J.** The defendant appeals from the judgment, and presents the proceedings at the trial upon a bill of exceptions.

On March 7, 1906, Lucy A. Snowball executed to Milton S. Snowball two promissory notes, one for \$1,500, due two years thereafter, and the other for \$500, due three years thereafter. Afterwards both the payer and payee died. This action was begun by the executrix of Milton S. Snowball's estate to recover from the estate of Lucy A. Snowball the amount due on said notes. After hearing the evidence the court below directed the jury to return a verdict for the plaintiff for the amount due upon the notes. This was done, and a judgment was entered accordingly.

The defense set up in the answer was that there was no consideration for the notes sued on. There was also an attempt to allege that the notes were procured by fraud exercised upon the maker by the deceased, Milton S. Snowball, and Leutie A. Snowball. Defendant charges that Milton and Leutie for the purpose of inducing their mother to execute said notes falsely stated to her that Milton intended to contest the will of John W. Snowball in order to secure a judgment that he died intestate; that Milton

in fact had no intention to make such contest, but that the mother believed he did so intend; and that relying on that belief and on his said declarations that he did so intend, and by reason thereof, she executed the said notes, and that there was no consideration for the said notes. These allegations constitute a detailed statement of the defense that the notes were given without consideration. It is not alleged that they were given in settlement of the threatened contest or to induce Milton to refrain from making the same. The evidence, however, shows that they were given to accomplish that purpose. It is conceded that the evidence admitted was sufficient to establish the fact that the notes were given for a good and sufficient consideration. The only errors alleged are that the court erred in certain rulings excluding evidence offered by the defendant.

John W. Snowball, the husband of Lucy A. Snowball, died on February 5, 1906. He left four surviving children, namely, Leutie A., Milton S., Leon, and H. H. Snowball. The will of John W. was admitted to probate on March 5, 1906, and Leutie A. Snowball was appointed executrix thereof. The facts shown by the evidence are substantially as follows: John W. Snowball's will was made some two years before his death. It gave to Milton two parcels of land. Milton had been living upon one parcel and paying the taxes thereon for some ten years, and claimed that it belonged to him. The other tract was sold by John W. before his death. The will also gave to Leon bank stock of the value of \$2,000. Milton and Leon were dissatisfied with the provisions of the will in their favor and made threats to the mother, Lucy, and to their sister, Leutie, that they would initiate a contest against it. Thereupon a settlement agreement was made between these four, in pursuance of which said contest was abandoned. This agreement was made on the 7th of March, 1906, and the notes in controversy were executed as a part thereof. In substance, the agreement was that Milton was to receive \$5,000 and Leon was to receive the sum of \$5,000, in consideration whereof they were to refrain from making the contest. Leutie was to give \$3,000 to Leon and \$2,000 to Milton, and Lucy, the mother, was to execute the two notes to Milton amounting to \$2,000, and Milton was to accept the lot which had not been sold and of which he claimed to be the owner, in lieu of \$1,000 of the \$5,000 to be received by him. In pursuance of this agreement Leutie gave the \$3,000 to Leon and the \$2,000 to Milton. Lucy executed to Milton the two notes sued on, and Milton and Leon thereupon executed to Leutie conveyances of all of their interest in the estate of their said father. Leutie agreed that upon the settlement of the father's estate she would reconvey the said home place

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to Milton. As a matter of fact, they did abandon the contest, and no such contest was ever filed or instituted.

[1] H. H. Snowball was called as a witness for the defendant, and he testified that, after John W. Snowball's death and before his will was filed for probate, he had a conversation with Milton in regard to contesting his father's will. The will was filed on February 17, 1906. He was asked to state what the conversation was, and the court refused to allow the question to be answered on the ground that it was immaterial, irrelevant and incompetent. This ruling is assigned as error. The defendant made no statement to the court showing what he claimed the substance of the conversation to be; hence, it cannot be determined whether the exclusion of the evidence was erroneous or not, and this ruling of itself constitutes no ground for reversal. *Marshall v. Hancock*, 80 Cal. 84, 22 Pac. 61; *Houghton v. Clarke*, 80 Cal. 420, 22 Pac. 288; *Taylor v. Kelley*, 103 Cal. 186, 37 Pac. 216. As was observed in *Marshall v. Hancock*, "the conversation, if there was one, may have been about a matter entirely aside from the matter under investigation."

[2] The witness was then asked whether or not after the father's will was read, which was a few days after his death on February 5th, and before March 7, 1906, he had a conversation with Milton wherein Milton stated that he was satisfied with his father's will, and had no intention whatever of contesting the same. An objection that this question was immaterial, incompetent, and irrelevant was sustained. A similar question as to a conversation after the 7th of March was also excluded. It is claimed that these rulings are erroneous.

The evidence of the settlement agreement, of which the notes constituted a part, was introduced by the defendant, it is clear and positive, and there is no claim that it is not substantially correct. Milton and Leon, in consideration of the money and notes received by them, respectively, not only agreed not to contest the will, but each also conveyed to Leutie all his interest in the estate, thereby divesting himself of the right to make such contest. Code Civ. Proc. § 1327; *Estate of Edelman*, 148 Cal. 236, 82 Pac. 962, 113 Am. St. Rep. 231; *State v. Superior Court*, 148 Cal. 56, 82 Pac. 672, 2 L. R. A. (N. S.) 643; *Estate of Wickersham*, 153 Cal. 612, 96 Pac. 311. This conveyance was necessary in order to make the settlement secure, and it formed a material part of the consideration for the notes. It is true that an agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith. *McGlynn v. Scott*, 4 N. D. 24, 58 N. W. 460; *McClure v. McClure*, 100

Cal. 343, 34 Pac. 822. The answer to the question, if affirmative, might perhaps tend to prove bad faith in Milton. But a person's intentions readily change. An expression of intent at one time is but slight evidence that it has continued to a subsequent time, especially when, as here, the contrary purpose is positively declared on the subsequent occasion and is followed up by action to the extent of conveying a valuable right and interest. Counsel did not even state to the trial court that he expected an affirmative answer. It would have been better policy for that court to have admitted the evidence, but, under the circumstances and in the absence of any indication as to the nature of the answer, we deem the error, if it can be so termed, to be too trivial to justify a reversal. Declarations of intent not to contest, made after the settlement, would be entirely consistent therewith and would not tend to impeach the settlement agreement or to show bad faith in making the claim.

A considerable part of the discussion in the appellant's brief relates to the question of confidential relations and the effect thereof upon the duty of one to show good consideration for a contract in his favor made by another party to whom he stands in confidential relations. We do not think this question is of any importance. Although the relation between Milton and Lucy was that of parent and child, it is clear from the evidence that there was no confidential relation between them sufficient to impose upon him any duty to have his mother call in independent advice in the matter. Furthermore, the evidence also shows that the settlement was made upon the advice of an attorney called for that purpose by the mother herself.

There are no other points of sufficient importance to deserve mention.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

#### PEOPLE v. SMITH. (Cr. 1,720.)

(Supreme Court of California. Jan. 8, 1913.)

#### 1. HOMICIDE (§ 203\*)—EVIDENCE—DYING DECLARATIONS—EXPECTATION OF DEATH.

Deceased, after a necessarily fatal wound, in answer to questions of the district attorney an hour before his death, said that he did not know that he was pretty badly hurt, but presumed so; that the doctor had not told him that he had a poor chance; that he did not know that he was going to die and hoped not; that he was not feeling weak; and that so long as there was life there was hope. Held, that his statement as to the encounter with accused was not made without hope or expectation of recovery, so as to be admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—50

## 2. HOMICIDE (§ 203\*)—EVIDENCE—"DYING DECLARATIONS"—IMMINENT DEATH.

It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that at such a time a man will tell the truth, that justify the reception of dying declarations against the defendant, thus deprived of a confrontation and cross-examination of witnesses.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

## 3. HOMICIDE (§ 210\*)—EVIDENCE—DYING DECLARATIONS—REAFFIRMANCE OF INADMISSIBLE STATEMENTS.

While a declaration not made under the belief of immediate and impending death may, under fear of death, be reaffirmed by the declarant under circumstances entitling it to admission, a greater care should be exercised by the trial court and a more satisfactory showing of the patient's condition of mind required than when the declaration was in the first instance admissible; and where the answers of deceased, necessarily fatally wounded, were not, in the first instance, made with a sense of impending death, and his later statements in answer to leading questions were made when in such condition that he either could not appreciate their consequences, or from extreme illness or recklessness was willing to give the answers he thought wanted, reaffirmation was not sufficiently shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 442; Dec. Dig. § 210.\*]

## 4. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.

In a trial for homicide defended on the ground of self-defense, an instruction that, if defendant acted from reasonable and honest convictions, he was not criminally responsible for a mistake in the actual extent of the danger, where other judicious men would have been so mistaken, using the word "judicious" in place of the word "reasonable," and an instruction that if one kills another under circumstances not sufficient to induce a reasonable and well-founded belief of danger to life or great bodily harm in the mind of an "ordinarily courageous man," instead of an ordinarily reasonable and prudent man, the law would not justify the killing on the ground of self-defense, are useless changes from the ordinary definitions, and are disapproved.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 5. HOMICIDE (§ 116\*)—"SELF-DEFENSE"—RELIANCE ON APPEARANCES.

One may rely upon appearances and act in self-defense, if the appearances are sufficient to excite the fears of a reasonable man that he is then in immediate danger of death or great bodily injury at the hands of another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6402-6405; vol. 8, p. 7797.]

## 6. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE—APPEARANCES.

An instruction that the fact that a person of violent and dangerous character threatened the life of another would not justify an immediate resort to self-defense in the absence of some "demonstration, real or apparent, of an attempt," coupled with ability to take life, instead of a demonstration "or" attempt, coupled with a real or apparent ability to take life, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 7. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—REASONABLE DOUBT.

An instruction in a trial for murder that a doubt to justify acquittal must be reasonable, and that, if upon all the evidence the jury had an abiding conviction of the truth of the charge, they were satisfied beyond a reasonable doubt, was objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1848, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Thomas J. Smith was convicted of murder in the second degree, and he appeals. Reversed and remanded.

William Tomsky and T. J. Crowley, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HENSHAW, J. The defendant, charged with murder, was convicted of murder in the second degree. From the judgment and from the order denying his motion for new trial he prosecuted his appeal to the Court of Appeals, where his appeal was denied. A hearing was ordered before this court for the further consideration of certain of the legal questions involved.

The theory of the prosecution, as outlined in the opening statement of the prosecuting attorney and in the instructions given by the court at the request of the prosecution, was that defendant Smith nursed a feeling of bitter hostility against Wolters; that about 10 o'clock on Sunday, the 4th day of September, 1910, in the city of Sacramento, Smith purchased a pistol, lay in wait for Wolters, met him in front of the Western Hotel, and then "without one word spoken by either side, by either the deceased or the defendant," drew his pistol, or, at the time firing "exclaiming at the same time, 'You will not beat me out of another job, you son of a bitch'" (both quotations are from the opening statement of the district attorney), shot Wolters to death.

By the defense it was contended that as early as half past 5 o'clock of that Sunday morning the deceased, in a saloon, had twice made an unprovoked savage assault upon the defendant, who was crippled in one hand, and that the defendant escaped serious bodily injury only by the intervention of bystanders; that the deceased made threats, both communicated and uncommunicated, to beat, injure, and kill defendant; that, still upon the morning of Sunday, the defendant made appeal to the police department of Sacramento for a warrant for the deceased's arrest, and was told to come back the next day, and, failing thus of police protection, purchased a pistol with which to defend himself; that defendant was employed as a solicitor or "runner" for the Western Hotel; that he repeatedly avoided the deceased dur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing the day, but that deceased hung about the hotel, threatening injury to the defendant, and apparently seeking a conflict with him; that, leaving the hotel early in the evening in the pursuit of his regular business, he was approached by the deceased, who had been standing on the sidewalk in front of the hotel, and who, with vile language of abuse, began to threaten him as he approached; and that, in fear of death or great bodily injury, he drew his pistol and fired. The killing was thus admitted, and the defense was self-defense.

The evidence of the prosecution bearing upon the homicide consisted of the testimony of the witness Simmons, who conducted a cigar store next to the Western Hotel. He had seen deceased in front of the Western Hotel about half an hour before the shooting, leaning against a post upon the sidewalk. Witness was reading a newspaper, when he heard a pistol shot. Looking up at the pistol shot, he saw Wolters falling off the sidewalk and into the gutter. "Smith was standing kind of sideways, and, after the first shot, why, he turned around and fired two more shots." When his eye first caught the scene, Smith was standing near to the wall of the building, between him and Wolters, and about eight feet from the latter. He saw nothing of the affray before this moment of time, and heard no words spoken by either of the men.

Another witness, Perry, testified that he had a slight acquaintance with both the defendant and deceased; that, passing the Western Hotel, he saw the defendant standing up against the wall, spoke to him, and received no response, but as he passed the defendant "stepped right behind me and said to somebody—I didn't notice who it was—he says, 'You damned son of a bitch, you will not beat me out of another job,' and just then he fired." By the time the witness had turned three shots had been fired, and the deceased was falling or had fallen into the gutter.

All the other evidence of the prosecution is contained in the dying declaration of Wolters, which was admitted in evidence over the objection of the defense. The matter of this dying declaration will require more detailed consideration. For the present it is sufficient to say that Wolters' statement is that the defendant shot him to death, the shooting being sudden, unexpected and unprovoked.

For the defense, it was shown that both men were solicitors or "runners" for the same hotel; that the deceased, and not the defendant, had by the proprietor upon Saturday the 3d of September been discharged. It was further shown that Smith had not been discharged from that or any other employment, and was at the time of the homicide still in the employ of the hotel. Also, it was shown by a mass of testimony that the reputation of Smith for peace and quiet

was good, and that of the deceased very bad. Still further it was shown by testimony presumably disinterested, and certainly unimpeached, that upon the morning of the homicide the deceased, ugly and inflamed with liquor, had between half past 5 and 6 o'clock demanded that Smith pay him \$1.75 which he insisted Smith owed him; that Smith replied that he did not owe him the money, but would pay him for the sake of peace, and gave Wolters \$1.75; notwithstanding this, that Wolters assaulted Smith and struck him, Smith making no resistance. The barkeeper who testified to these things, as well as did Smith, declares that he pulled Wolters from Smith, and protested against his assaulting an inoffensive man; that nevertheless, when the barkeeper had returned behind the bar, Wolters again assaulted Smith, and again the barkeeper, with assistance, stopped the assault, and Smith left the saloon, Wolters saying as Smith left, "If I had a gun, I would kill that man." Evidence of other assaults and attempted assaults by Wolters upon Smith during the day are in evidence. It is in evidence, also, that after Smith had purchased his weapon he left at least two places upon the entry therein of Wolters, one the office of the hotel, another the adjoining saloon. Threats of violence against Smith by Wolters are also shown by other witnesses. Thus witness Hyde testifies that during that day Wolters said, referring to Smith, "I will get him. I will make a good dog out of him yet." Another witness, Hoffman, testifies that upon the same day Wolters said, referring to Smith, that "he would lick him every time he met him in Sacramento; and, if he left Sacramento and went to San Francisco, he would go to San Francisco and lick him there, and, if he went to New York, he would follow him to New York and lick him there." And, finally, there is the evidence of the witness Bascherini testifying for the defense, the one witness who, aside from the defendant himself, was an eyewitness to the occurrences, immediately preceding the shooting. He testified that he was a bootblack; that his bootblack stand was in the immediate neighborhood of the place of the shooting; that he was there at work upon the evening of and at the time of the shooting; that he saw Smith standing by the wall; that Wolters was close to him, about two feet or two feet and a half away; that Wolters' attitude and appearance were those of an angry man; that he was shaking his head and his lips were moving as though in speech, though he could not distinguish the words; that at this moment he turned to his work of polishing shoes and immediately thereafter heard the first shot.

Reverting to the evidence of the prosecution, it is manifest that the only testimony (aside from the dying declaration) tending to show the deliberate and unprovoked murder for which the prosecution contended was



given by the witness Perry, and that Perry's account material support for the reason that, while his testimony would abundantly justify the inference of a willful and cold-blooded murder, the testimony itself is lame and halting by reason of the language which he puts in the defendant's mouth; for, as has been stated, it would be strange for the defendant to have said to the deceased, "You will not beat me out of another job," when the facts were that the defendant had not been beaten out of any job, was still holding his position, while the deceased had been discharged, and thus "beaten out of his job" but the day before. Therefore it is that the evidence contained in the dying statement of the deceased becomes most material in the establishment of the crime charged and in the overthrowing of the self-defense asserted by the defendant in justification of his act; for, without the evidence of the dying declaration, it cannot be said that the jury would have accepted the somewhat curious account given by the witness Perry.

The facts concerning and attending the dying statement are that a bullet from defendant's pistol had pierced the abdominal cavity from the front, passed through the body, and lodged in the spine. The wound was necessarily fatal, and from it Walters died about 12 o'clock the following day. He was taken to a hospital upon the evening of the shooting. The next morning the abdomen was much extended, peritonitis had set in, and by the testimony of one of the physicians Walters was irrational from the fever of that inflammation. However, by the testimony of the district attorney, who received the dying statement, and by the testimony of another physician, Walters was rational and appreciated what was said to him. The district attorney called upon Walters in the hospital about 11 o'clock on Monday morning. There came to the bedside of the dying man the district attorney, his deputy, Mr. Brown, and Mr. Doan, the stenographic reporter.

[1] By the stenographic report the preliminary conversation is as follows: "Charley, I am the district attorney, and I want to take a little statement from you, if you feel like you can give it to us. Now, Charley, are you pretty badly hurt? A. Well, by God, I don't know. Q. Well, do you think you are going to die? A. I hope not. Q. Well, how do you feel about it? Did the doctor tell you you didn't have much chance? A. No. Q. You know you are shot pretty bad, don't you? A. I presume. Q. The doctor said, Charley, that the chances are that you are going to die. Now, how do you feel about it? A. If he feels that way, I don't know. Q. You think you are going to die? A. Well, I can't say. Q. You feel pretty weak, do you? A. No." Immediately following this the district attorney proceeded by questions to elicit from Walters his version of the fatal affray. Certainly no word up to this

time gives evidence that Walters was answering these questions in the presence of death, in the prospect of "almost immediate dissolution," without expectation or hope of recovery. *People v. Hogdon*, 55 Cal. 72, 36 Am. Rep. 30; 1 Greenleaf, Ev. § 158. Moreover, in the course of the inquiries put to him by the district attorney, Walters, having stated that just before the shooting he was talking to a conductor on the sidewalk, is asked: "Is that conductor going to work to-day or to-morrow? A. I can get his name if I get better. So long as there is life, there is hope." At the conclusion of the district attorney's inquiry, Dr. White was called in from the operating room, and had a conversation with Walters, lasting about a minute and a half, in which he stated to Walters that he was going to die. The doctor was asked what he said to the wounded man, and answered: "I told him he was in a dying condition, and my opinion was that he was going to die." Asked what the patient replied, he answered: "I don't know. In fact, I have forgotten." Mr. Wachhorst, the district attorney, testifies: "Do you say that the wounded man expressed himself any more strongly as to his condition after the doctor had spoken to him than appears in this report or transcript by the reporter? A. Well, all I can say in response to that question is to repeat what he did say in response to the statement made by the doctor. Q. I understand you then, Mr. Wachhorst, to say that the wounded man said, 'All right, doctor, I understand. Go ahead.' A. Something to that effect, substantially so." The testimony of Mr. Doan, the stenographic reporter, is found in the transcript of his notes. By them, what took place is the following: "Now, Charley, you know I am the district attorney. A. Yes. Q. This is the shorthand reporter. A. Yes. Q. Now, of course, if you are going to die, Charley, we want to get a statement from you, you see, before you die. Now, the doctor will talk to you. [Dr. White talks to Walters.] Mr. Wachhorst: Now Charley we won't bother you much more, but this is very important. Now, the doctor has advised you that you are going to die. Do you realize it now, Charley? A. Yes. Q. And you feel that you are pretty bad off? A. Yes. Q. Now, all that statement that you have made to us has been under the belief that you are going to die? A. Yes. Q. You have told us the whole story, have you? A. Yes; I can't tell any more. Q. What you have told us is the truth, is it? A. That is the truth. Q. The whole truth, and nothing but the truth? A. Yes. Q. Now, Charley, before you die do you want to say anything more? A. No."

[2] The conditions under which the declarations of a deceased may be received in evidence as a dying declaration, the anomaly which permits the reception of such evidence at all, have both received such elaborate exposition that it would be a waste of time to

expatiate upon the subject. It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that, at such an awe-inspiring time, a man about to be called to account before his Maker will tell the truth, that alone have justified the reception of such statements against a defendant who is thus deprived of his most valuable rights of confrontation of witnesses and cross-examination. *People v. Sanchez*, 24 Cal. 17. The extracts which we have quoted give evidence of an assiduous effort upon the part of the district attorney by leading and suggestive questions to evoke a declaration from the lips of the wounded man measuring up to the requirements of the law. But they show no more than this: That the man was injured unto death, that he was indeed in a moribund condition at the time the so-called statement was taken, are unquestioned facts; but that he appreciated this and made his declarations with a sense of the gravity of the situation and of the consequences of his words we cannot for one moment believe. As has been said, and as will be further shown, the whole statement was made after the sick man's declaration that he did not know whether he was badly hurt or not, that he hoped he was not, that he did not know whether he was going to die or not, and that he did not feel "pretty weak." In the course of his answers, as has been pointed out, he declares that "while there is life there is hope." Yet to the district attorney, at the conclusion of the interrogatories, he answered "Yes" to the most leading question: "Now, all that statement that you have made to us has been under the belief that you are going to die?" Still further, the internal evidence of the asserted dying declaration may itself help establish the state of mind of the declarant, and in this case does so. One cannot read the statement here offered, made up in all essential particulars, as it is, of leading questions, designed to draw particular answers from the witness, without becoming convinced that the sick man was either semi-irrational, as one of the physicians testified, or that from extreme illness or extreme recklessness, he was willing to answer any question as he thought the district attorney desired it to be answered.

It may be well to make some quotations: "Q. How many shots did he fire at you? A. Two. Q. Two shots? A. Yes. Q. Well, he fired three shots, Charley? A. Well, that is all I know. Q. All you know, he fired two shots? A. Yes. Q. Struck you once in the stomach? A. Yes. Q. And once on the finger? A. Yes. Q. Now, Sunday you met him in the saloon there—in Cody's saloon—didn't you? A. Yes. Q. Did you have any trouble with him there? A. No. Q. Did you strike him there? A. No. Q. Sure, Charley? A. I am sure. I will tell you, after he called me all the Dutch sons of bitches and all that, I think I gave him one punch, but

that wasn't when the shooting took place. That was before. Q. Yes; in the morning? A. Yes. Q. Now, how many times did you strike him Sunday? A. Once. Q. That was in Cody's saloon? A. Yes; I guess it must have been. Q. You only struck him once, Charley? A. Yes. I am no fighting man. Q. That is the only trouble you had with him? A. That is all, because I refused to give him money. Q. Now, did he pay you the \$1.75 in Cody's saloon? A. Yes; he did. Q. You hit him first, didn't you? A. He looked at me, and he said to me, 'Here, you son of a bitch,' he says, 'that is not the way I let you have the money that time.' Q. Well, when you struck him in Cody's saloon, did he strike you? A. Of course, he struck me. Q. Where did he strike you? A. In the face. Q. Can you move your face over this way? Is that where he struck you, down here [indicating]? A. Yes. Q. There is a mark here on the right temple. Is that where he struck you? A. Yes. Q. He struck you there, did he, Charley? A. Yes. Q. What time in the afternoon was the shooting, about, as near as you can remember? A. Oh, it was about half past 5—quarter past 5, probably a quarter to 6. Q. It was later than that, Charley. It was about 7 o'clock. A. Well, it may have been. It was getting dusk. Mr. Brown: It was getting dark, wasn't it? A. Oh, boys, I want a drink of water. Mr. Wachhorst: Well, we will see if we can get you a drink, Charley. [Wolters was given a drink of water.] Mr. Brown: Charley, did Smith say anything to you before he commenced to shoot? A. Not a word. Q. Did you see him pull a gun or pistol or anything? A. No. Mr. Wachhorst: Q. Charley, did he call you any name when he shot? A. He says, 'Take that, you ——.' Q. Then he shot the second time? A. Yes. Q. Did you walk toward him when he shot? A. I don't think I did. Q. You don't think you walked toward him at the second shot, do you? A. No. Mr. Brown: After you heard the first shot, did he come towards you then? Did you see him coming towards you? A. Yes. Q. Was he walking quickly or slowly? A. Well, he was trying to get me more; don't you see? Q. Where did he first hit you, if you remember? A. In the back. Mr. Wachhorst: Did you have your back toward him when he shot? A. Yes. Q. Did you turn toward him then? A. Why, of course, naturally. Q. Did you know that he was standing there when you walked up? A. No, no. Q. You didn't know he was there at all? A. No. Q. You had no intention of doing him any harm, had you? A. No."

In the one breath, the deceased states that he saw the defendant talking to a woman and the defendant saw him coming down the street and walked toward him. In the next he says that he did not know that Smith was standing there when he walked toward him. In one sentence, in answer to the question "Did Smith say anything to you before

he commenced to shoot?" he replies, "Not a word." Here Mr. Wachhorst takes the interrogations away from his assistant, Mr. Brown, with the question: "Charley, did he call you any name when he shot?" And the witness answered: "He says, take that you —." Again, he says that he had his back toward Smith at the time Smith first shot him, that the first shot struck him in the back. He had previously testified that Smith approached him from in front, and the physical fact is that he was not shot in the back, but that the fatal wound, unquestionably the first shot fired, struck him from the front in the abdomen.

[3] To sum up on this matter: It is not because the declarations of the deceased were not in the first instance made under the belief of immediate and impending death that they are inadmissible. It is recognized that a statement not so made may under fear of death be reaffirmed by the declarant under circumstances entitling it to admission. *People v. Crews*, 102 Cal. 174, 36 Pac. 367. But certainly considering the character of such evidence and the tremendous consequences following to a defendant from its admission, considering that if a declaration is taken from the injured person when he is not in fear of death, if subsequently he has abandoned hope and feels that death is imminent, he is frequently, if not usually, in a debilitated state of mind and body, it is not too much to say that a greater care should be exercised by the trial court and a more satisfactory showing of the patient's condition of mind made manifest than where the statement itself is uttered in the first instance under the circumstances required by the law. What, then, we do mean to say is that the evidence is conclusive that the statement was not made originally under the circumstances contemplated by the law, and that the showing is wholly insufficient to establish that it was reaffirmed afterward under such circumstances. The fact that the man was dying has, of course, its significance, but it is not the fact of controlling significance. The fact of controlling significance is his belief that the hand of death was upon him. *People v. Cord*, 157 Cal. 562, 108 Pac. 511. The materiality of the evidence thus improperly introduced has been sufficiently commented on. In view of the new trial which must be ordered, certain instructions demand attention. In contemplation of the character of the evidence and the plea of self-defense in justification, the instructions given at the request of the prosecution could with advantage be made much briefer.

[4] As a part of an instruction, the court charged that, if the defendant "acted from reasonable and honest convictions, he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been

alike mistaken." "Judicious" is here used in place of the well-accepted word "reasonable." Fundamentally, a defendant's conduct, it has been over and over said, is measured by the standard of what the ordinarily reasonable and prudent man would have done under the same circumstances. The introduction or injection of new words is without benefit, and serves only to afford a ground of more or less reasonable complaint. The same may be said of the following instruction: "If one person kills another through mere cowardice or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well founded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense." Here, again, the court shifts the standard from that of the ordinarily reasonable and prudent man to that of the "ordinarily courageous man." It might be that the logician could establish that the ordinarily reasonable and prudent man was the ordinarily courageous man. It might be that the logician could not do this. But, again, we say that nothing is gained by the introduction before the jury of these new measures and standards.

[5, 6] The following instruction is unhappily worded: "Nor does the fact that one person had made threats against the life of another, though taken in connection with the fact that the threatener was of a violent and dangerous character, justify or excuse an immediate resort to deadly weapons, resulting in killing him, in the absence of some demonstration, real or apparent, of an attempt, coupled with ability, to take life." Elsewhere the jury was properly instructed as to a defendant's right to rely upon appearances, if those appearances were sufficient to excite the fears of a reasonable man that he was then in immediate danger of death or great bodily injury at the hands of the deceased. But here the jury is told that the "demonstration of an attempt" (meaning probably demonstration or attempt) shall be "coupled with ability to take life" before the defendant may resort to a deadly weapon in his self-defense. This, of course, is not the law. It may be that the jury was not misled by this instruction. It is unfortunate, however, that inconsistent instructions should be given. What the court probably meant, and certainly should have said, is that the demonstration or attempt should be coupled with a real or apparent ability to take life. The court instructed the jury upon the distinction between direct and circumstantial evidence. There was not only direct evidence of the homicide in this case, but it was admitted. There was, therefore, no occasion to instruct upon the character and value of circumstantial evidence.

[7] The court further instructed the jury as follows: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." A like instruction was criticised and condemned in *People v. Schoedde*, 126 Cal. 376, 58 Pac. 859. It certainly does not better the long approved instruction of Chief Justice Shaw.

None of the asserted errors in the rulings of the court admitting and rejecting evidence require detailed consideration. The rulings themselves were either correct or were without prejudice to the defendant. But for the error of the court in admitting against the defendant the purported dying declaration of Wolters, the judgment and order are reversed, and the cause remanded.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

GRAY v. ELLIS et al. (L. A. 2,969.)  
(Supreme Court of California. Jan. 11, 1913.)

1. MONEY RECEIVED (§ 8\*) — LIABILITY OF PRINCIPAL.

Where an agent representing two corporations received plaintiff's money for stock in one of them, but delivered it to the other corporation for its stock, which plaintiff refused to accept, the corporation receiving his money was liable to plaintiff on an implied promise to repay it, although it received it without notice of the terms under which its agent received it.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 30; Dec. Dig. § 8.\*]

2. PRINCIPAL AND AGENT (§ 136\*)—PERSONAL LIABILITY OF AGENT.

In such case, the agent, who was unable to furnish stock in the corporation for which plaintiff paid, was also liable on an implied promise to repay the money to plaintiff.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 476-491; Dec. Dig. § 136.\*]

3. MONEY RECEIVED (§ 17\*)—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint alleged an agreement by which plaintiff promised to pay money to E. and C., agents, for stock in the Northern or Western Trust Companies, a payment thereof, an election by plaintiff to take stock in the Western Company in which election E. and C. acquiesced, and which they acknowledged in the receipt for the money, the payment of the money by E. and C. to the Northern Company for its stock, a refusal by plaintiff to accept it, that the Northern Company had retained plaintiff's money, insisting that it was entitled to retain it, and that E. and C. had refused to apply the money on account of a subscription for stock in the Western Company. *Held*, that the complaint stated a cause of action against both E. and C. and the Northern Company on an implied promise to repay the money to plaintiff.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 54-68; Dec. Dig. § 17.\*]

4. MONEY RECEIVED (§ 12\*)—ACTIONS—DEFENSES.

Where plaintiff paid money to the agent for two corporations for stock in one of them, and the agent diverted it to the other corporation, whose stock plaintiff refused to accept, the fact that there was no difference in the value of the stock of the two companies, and that the property of each was the same in character and value, was not a defense to an action to recover back the money paid.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 38, 39; Dec. Dig. § 12.\*]

5. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR.

Plaintiff signed a subscription to the stock of the Northern or Western Trust Companies. When he paid the subscription, he elected to take stock in the Western Company, in which election the agent of the two corporations acquiesced. The agent, however, transmitted the money to the Northern Company, whose stock plaintiff refused to accept. In an action to recover the money, the court at defendants' request charged that the jury should determine whether plaintiff's subscription meant that he was to choose the company in which the stock was to be purchased, or whether the agent had a right to put him as a subscriber in either company as they might elect; that they should determine whether at the time of the issuance of the receipt for the money paid or prior thereto it was agreed between the agent and plaintiff that stock in the Western Company would be delivered, and what the arrangement between the parties as to delivery was, and that if they found that the right to place plaintiff's subscription in either company was in the agent, and they elected the Northern Company, the verdict should be for defendants. *Held* that, in view of these requests, defendants could not complain because the court did not determine as a matter of law what the agreement meant as to who should elect where the subscription should be placed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

6. CORPORATIONS (§ 78\*)—SUBSCRIPTIONS TO STOCK—RIGHTS OF STOCKHOLDERS.

A subscriber to the stock of a corporation whose contract was to take stock as an original subscriber could not be compelled to accept stock which had been subscribed for by, issued to, and was then owned by other persons.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 219-231, 420-424, 429-434; Dec. Dig. § 78.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Harry Gray against George B. Ellis and another, copartners doing business as Ellis & Church, and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Denis & Loewenthal, Cedric E. Johnson, Thomas O. Toland, and T. F. Welch, all of Los Angeles, for appellants. Hatch & Lloyd and Hatch, Lloyd & Hunt, all of Los Angeles (Harvey D. Cheney, of Los Angeles, of counsel), for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendants' motion for a new

trial. The case was tried with a jury, which rendered a verdict in favor of plaintiff for the full amount claimed.

The action is one to recover \$2,250 paid by plaintiff to Ellis & Church on account of a subscription for the purchase of certain corporate stock, which money, it is substantially alleged, was diverted by Ellis & Church to payment on account of a subscription for stock in another and a different corporation from the one for whose stock he had subscribed, viz., the defendant Northern Investment Company, which diversion he promptly repudiated. The memorandum of agreement for such purchase executed by plaintiff is set forth in the complaint, the same being as follows:

"We, the undersigned, hereby severally agree to pay to Ellis & Church, agents, the sums set after our names respectively, on the following terms and conditions:

"Fifteen per cent. (15%) in cash, and the balance as called for, being payments on account of purchase of stock of the Northern or Western Trust Companies, said Northern or Western Trust Companies' stock representing bonds and stock of the Home Telephone Company of San Francisco:

Names.	Amounts to be Paid.
S. W. Clark.....	\$ 3,000
C. C. Ames.....	15,000
F. C. Hornby.....	35,000
H. H. Barstin.....	10,000
Harry Gray.....	15,000
By H. D. L.	
John T. Bill.....	5,000"

Treating this contract as giving the plaintiff the right to elect or direct to which of the two corporations referred to his subscription should be made (the "Northern" or "Northern Trust Company" referred to therein being the defendant Northern Investment Company), it was alleged in the complaint that at the time of the payment of the money plaintiff elected and directed that the same should be applied upon the purchase of stock in the Western Trust Company, and that said election and choice was agreed to and acquiesced in by said Ellis & Church, they so acknowledging in their receipt given for such money. It is further substantially alleged that Ellis & Church paid said money to the Northern Investment Company on account of a subscription by plaintiff for stock of the last-named company, said company receiving the same and sending plaintiff a certificate for 150 shares therein, which he at once returned, repudiating the action of Ellis & Church in the matter, and declining to be considered a subscriber for any stock of said corporation. Defendant Northern Investment Company has ever since retained plaintiff's money, insisting that it is entitled to retain the same as on account of a subscription for its stock. It is further alleged that Ellis & Church have steadily refused to apply said money on account of a sub-

scription for Western Trust Company's stock. We think the allegations of the complaint sufficiently show that Ellis & Church were the agents of both corporations in the matter. The answer clearly and definitely acknowledges that they were the agents of both corporations for the sale of the stock thereof, and that they were soliciting and receiving subscriptions from the public at large for the stock of both corporations, and for such subscription purposes were circulating agreements in the form set out in the complaint. It further appears from the answer and from the evidence that said corporations were formed solely to purchase and hold certain stocks and bonds of the Home Telephone Company of San Francisco, and the stock of both was of precisely equal value, share for share, and was based upon the said assets, to wit, stocks and bonds of said Home Telephone Company, and nothing else, and each share of stock of the Northern Investment Company represented the same number of stock and bonds of said telephone company, as did each share of stock of the Western Trust Company. The only differences appear from the evidence to have been that the principal place of business of the Western Trust Company was the city of Los Angeles, while that of the Northern Investment Company was San Francisco, and that the officers of the two corporations, with the exception of the president, were different, the same person being president of each corporation. The theory of plaintiff's complaint may fairly be said to be that both defendants are liable to him as for money had and received to his use. The money paid by him for a subscription for stock in one corporation to the agents of such corporation having been diverted by such agents to another corporation of which they were also agents, and attempted to be applied by such other corporation for and on account of a subscription for its own stock, he seeks to recover the amount thereof on the ground that the law implies a promise on the part of both Ellis & Church and the Northern Investment Company to refund it.

[1, 2] If there was an unauthorized diversion of this money to the Northern Investment Company by Ellis & Church, its agents, we see no reason to doubt the liability of such corporation on this theory, regardless of whether or not it had knowledge at the time it received the money of the terms on which Ellis & Church received the money from plaintiff. It cannot profit by reason of the unauthorized act of its own agents in the matter of obtaining subscriptions for its stock, and must be held to hold plaintiff's money without right and under an implied promise to repay the same. And, of course, if Ellis & Church have devoted plaintiff's money to a purpose not authorized by him, they are liable therefor upon the same the-

ory. All this is certainly true if, as the evidence shows without conflict, it is no longer possible to apply the money on account of a subscription for stock of the Western Trust Company, all of the stock of said company having been subscribed for prior to the date of plaintiff's subscription, and plaintiff's subscription clearly being solely for original stock.

[3] We think that the amended complaint sufficiently states a cause of action against both defendants on the theory we have stated, and that the demurrers thereto were properly overruled. The various counts in which plaintiff has attempted to state his case, there being four, are not materially different in their effect, the allegations of the first count being made a part of each of the others.

[4] It is obvious that it is no answer to plaintiff's claim, if in fact his contention as to an unauthorized application of his money is sustained, that there was no difference in the value of the stock of the two companies, and that the property of one corporation was the same in character and value as that of the other. Plaintiff had a perfect right to insist that this subscription, if he made one, should be for the stock of one corporation rather than the other, and that his money under no circumstances should be devoted to the purposes of a subscription for the stock of such other corporation. It may be that we can see no good reason why he should prefer one to the other, but that is no concern of the courts or of any one other than himself.

The memorandum of agreement did not clearly indicate who was to determine in which corporation, the Western Trust Company or the Northern Investment Company, plaintiff's subscription was to be placed, whether the matter was left to the discretion of Ellis & Church, or their principals, or was to be subsequently determined by plaintiff. Plaintiff's claim is that he had the right to determine this matter, and his evidence is squarely to the effect that, when he paid the \$2,250, he directed that it be applied upon the purchase of stock in the Western Trust Company, and that this election and determination was agreed to and acquiesced in by Ellis & Church. The receipt given by them to plaintiff at said time indicates by its recitals that such was the case. There can be no doubt that there was sufficient evidence to support a conclusion that there was such an election and direction on the part of plaintiff, and that Ellis & Church agreed thereto and received the money with such an understanding.

[5] The question whether the written agreement gave to plaintiff the right to elect which stock his money was to be applied on was left to the jury by the instructions. It is urged that there was no such uncertainty as to make this a question for the jury, and that the court should have determined as

matter of law what the agreement meant in this respect. We may so concede for all the purposes of this decision. The difficulty with defendants' position in this regard is that they joined in requesting instructions to the effect stated. For instance, one of their requested instructions, which was given, was in part as follows: "You must then determine from the evidence whether the subscription of Mr. Gray to the stock of the Northern Investment Company or Western Trust Company meant that he was to choose the company in which the stock was to be purchased, or whether the defendants Ellis & Church had a right to put him as a subscriber in either of said companies as they might elect." Another of defendants' requested instructions, also given, was in part as follows: "You are to determine from the evidence whether or not at the time of the issuance of said receipt, or prior thereto, it was agreed between Ellis & Church and plaintiff that stock of the Western Trust Company was to be delivered, and what the arrangement was between said parties, as to the delivery of stock, whether of the Western Trust Company or the Northern Investment Company." Another instruction requested by defendants and given by the court was to the effect that if the jury found that the right to place plaintiff's subscription in either the Northern Investment Company or the Western Trust Company was in Ellis & Church, and they elected the Northern Investment Company, the verdict should be for defendants. These requested instructions were all along the same lines as those given at the request of plaintiff on this branch of the case, and show the theory upon which all the parties proceeded on the trial of the cause. Defendants are not at liberty to complain here of action by the trial court which was entirely in accord with their own requests. The point here sought to be made in this regard is based entirely on instructions given to the jury, no objection having been made by defendants, so far as appears, to the introduction of any of the evidence bearing on the question.

[6] The evidence without conflict shows that all of the Western Trust Company stock had been subscribed for prior to the time of plaintiff's subscription, and that at no time thereafter could such company have accepted the subscription of plaintiff or delivered him any stock thereon. The company's stock had been fully subscribed for. Plaintiff's contract was simply to take stock from the company as an original subscriber. If by reason of his election his subscription was for Western Trust Company's stock, as the jury has in effect found, and the stock of that company had then been fully subscribed for by others, he could not be compelled to accept from others, in satisfaction of his rights under such contract, any stock that had been subscribed for by, and issued to, other persons, and that was then owned by

other persons. Under such circumstances, it appears to be entirely immaterial whether Mr. Ellis or the president of the Northern Investment Company, at any time tendered to plaintiff stock of the kind above described, owned by them, in lieu of the original Northern Investment Company's stock for which it was claimed that he had subscribed, and it follows that instruction H given by the court on its own motion, which is the instruction most seriously complained of by defendants, was not erroneous.

In view of what we have said, we find no prejudicial error of which defendants may here be heard to complain in the action of the trial court in regard to any other instruction.

There is no other matter requiring notice. The judgment and order denying a new trial are affirmed.

### FITZGERALD v. MODOC COUNTY et al. (Sac. 1,953.)

(Supreme Court of California. Jan. 14, 1913.  
Rehearing Denied Feb. 13, 1913.)

1. DEEDS (§ 155\*)—CONDITIONS SUBSEQUENT. Conditions subsequent, tending to restrict and defeat an estate, are not favored, being construed strictly against the grantor, and can only be created by apt language, which of itself creates such conditions.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

2. DEEDS (§ 155\*)—CONDITION SUBSEQUENT. The appropriate words evidencing a condition subsequent in a deed are usually found in a provision for forfeiture and right of re-entry; but a clause of re-entry is not necessary, if a forfeiture is imported.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

3. DEEDS (§ 155\*)—CONDITION SUBSEQUENT. A provision in a deed immediately following the description, "to be used as and for a county high school ground and premises," did not create a condition subsequent, but merely declared the purpose for which the grantor expected the land to be used.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

4. DEEDS (§ 100\*)—CONSTRUCTION.

The facts and circumstances surrounding the execution of a deed cannot enlarge or restrict the estate granted, but merely aid in determining the intent of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.\*]

5. DEEDS (§ 93\*)—CONSTRUCTION—INTENT OF PARTIES.

The actual intent of the parties to a deed must be adequately expressed in the deed itself.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

Department 2. Appeal from Superior Court, Modoc County; N. P. Arnot, Judge.

Action by M. L. Fitzgerald against Modoc County, T. F. Dunaway, and others. From a judgment for plaintiff, Dunaway appeals. Reversed and remanded.

Dodge & Barry, of New York City, for appellant. Charles R. Holton, of Whittier, for respondent.

HENSHAW, J. In its form, this is a simple action to quiet title, brought against the county of Modoc and T. F. Dunaway; the complaint alleging title in plaintiff to nine acres of land in the county of Modoc, and asserting that the defendants set up some claim of right or title thereto. The county of Modoc disclaimed. Defendant Dunaway answered, alleging title in himself. The findings declare plaintiff to be the owner of the land; that Dunaway's claim is without right; and judgment followed accordingly. Defendant Dunaway appeals.

By the evidence, it appears that the actor is in fact one to enforce a forfeiture upon breach by the grantee, the county of Modoc, of an asserted condition subsequent, contained in a deed to the land made by plaintiff to the county of Modoc. Preliminarily appellant urges that, such being in fact the nature of the action, wherever plaintiff relies upon a forfeiture, he must plead it. We will not pause, however, to enter into a discussion of this question, since, under the circumstances, it is better for all of the litigants that the controversy should be settled upon its merits.

Plaintiff made a deed to the county of Modoc, which conveyed, by appropriate description, the land here in controversy, and contained immediately following the description the following clause: "To be used as and for a county high school ground and premises, for the county of Modoc, state of California." Evidence is lacking as to whether or not the land was ever used for the indicated purpose; but the breach of the asserted condition subsequent rests upon the fact that admittedly the county of Modoc did convey this land to the defendant Dunaway.

[1] It is fundamental that conditions subsequent, tending to restrict and defeat an estate, are not favored. They can be created only by apt and appropriate language, which *ex proprio vigore* establishes that only a conditional estate was conveyed; and, when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate.

[2] Generally speaking, the apt and appropriate words, evidencing that the grant is on condition subsequent, are found in a provision for forfeiture and right of re-entry. "Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture." 2 Washburn, Real Property, 4, 8; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. Of course, where the language employed declares a condition and imports a forfeiture, a clause of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

re-entry is not necessary. *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10; *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295; *Hawley v. Kaftitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

[3] Under no decision of this or any other court, within our knowledge, has language such as is here used ever been construed to create a condition subsequent. At the least, it is but a declaration of the purpose for which the grantor expected the land would be used. At the most, it is but a covenant. The cases from this court, which respondent contends support his argument that this language created a condition subsequent, are far from sustaining him. In *Parsons v. Smille*, 97 Cal. 647, 32 Pac. 702, the language of the deed was: "This deed is given and accepted on the following conditions, which are to be binding on the party of the second part, his heirs and assigns forever, to wit, \* \* \* and a failure to comply with the same will render this conveyance null and void, and said premises shall revert to said first party." Here was a clear and complete condition subsequent. In *Papst v. Hamilton*, supra, the conveyance was "upon the conditions, however, that the premises shall be used solely," etc., "and for no other purpose whatever." The indicated purpose was for the maintenance of a college or academy. There had been a failure and abandonment of the premises, and the grantor had re-entered and taken possession of them. It was clear that the estate was created upon condition. There had been an actual re-entry, and the decision of this court was simply to the effect that, under these circumstances, plaintiff is "in a position to maintain his action for the cancellation of the deed and the quieting of his title." In *Liebrand v. Otto*, 56 Cal. 242, an action to have declared and enforced a forfeiture, the declaration of this court is that the plaintiff had granted certain lands to the Santa Cruz Railroad Company upon certain expressed conditions to be performed by the latter. The railroad company had failed to perform, and plaintiff had re-entered. It was held that his re-entry and continued possession excused his delay in resorting to equity to remove the cloud from his title. In *Quatman v. McCray*, supra, the deed declared as follows: "And this conveyance is made upon the following express condition, namely," etc. The defense was merely that there had been no breach of the condition. We have thus briefly considered the California cases upon which respondent relies. Upon the other hand, such cases as *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741; *Packard v. Ames*, 16 Gray (Mass.) 327; *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509; *Faith v. Bowles*,

86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489; *Rawson v. School Dist.*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Page v. Palmer*, 48 N. H. 385; *Cunningham v. Parker*, 146 N. Y. 29, 40 N. E. 635, 48 Am. St. Rep. 765; *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Thornton v. Trammell*, 39 Ga. 202; *Rainey v. Chambers*, 56 Tex. 17; and *Owsley v. Owsley*, 78 Ky. 257—are all cases to which many more might be added, which construe language, much more pertinent than that employed in the case at bar, as being insufficient to create a condition subsequent. Here the grantor did no more than to indicate his purpose in making the deed, and the use to which he expected the land to be put. But such language is entirely inadequate to create a condition. *Mauzy v. Mauzy*, 79 Va. 537.

[4] We are not forgetful of the principle which holds in mind the circumstances under which such a deed is made, and the fact whether or not an adequate consideration has been paid therefor by the grantor. *Ecroyd v. Coggeshall*, supra; *Faith v. Bowles*, supra. These facts and circumstances, of course, cannot tend to enlarge or restrict the estate actually granted. They are of value only as an aid in arriving at the actual intent of the parties.

[5] But, whatever that actual intent may have been, it must have found adequate expression in the deed itself before it can be given either legal or equitable efficacy.

The judgment appealed from is therefore reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

In re BECKER'S ESTATE. (Civ. 1,221.)  
(District Court of Appeal, First District, California. Dec. 5, 1912.)

# 1. STATUTES (§ 77\*)—"SPECIAL LAW"—CLASS LEGISLATION.

A statute creating a class, and operating on all of the class alike, is not a special law prohibited by Const. art. 4, § 25, where there exists a natural or extrinsic reason, or some constitutional ground for the classification, but a statute creating a class not so founded is prohibited.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.\*

For other definitions, see Words and Phrases, vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

# 2. STATUTES (§ 82\*)—SPECIAL LAWS—CLASS LEGISLATION.

The amendment to Code Civ. Proc. § 1349, requiring the court admitting a will to probate after the same is proved and allowed to issue letters thereon, by St. 1907, p. 312, providing that in the order granting letters the court must ascertain and determine whether the estate is worth more or less than \$10,000, which determination is conclusive for the purpose of giving notice to creditors, applies only to cases of testacy, and is invalid as special legislation prohibited by Const. art. 4, § 25.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 91; Dec. Dig. § 82.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Marie Antoinette Becker, deceased. Certiorari by the executors of deceased to procure the annulment of an order of the superior court vacating notice to creditors. Demurrer to petition sustained, and petition dismissed.

E. H. Rixford, of San Francisco, for petitioner. Gustav Gutsch, of San Francisco, for respondent.

HALL, J. Although this matter is entitled in this court as above indicated, it is really an original proceeding in certiorari, brought in this court by the executors of the last will of said decedent to procure the annulment of an order of the superior court of the city and county of San Francisco vacating and setting aside the notice to creditors given in the matter of said estate, together with the publication of said notice and the decree establishing the due publication thereof, and ordering the publication by said executors of a notice to the creditors of said deceased to present their claims within ten months from the first publication thereof.

Upon the filing of the petition for the writ of review in this court, such writ, by order of this court, was issued directing the superior court and Hon. J. V. Coffey, judge thereof, to certify to this court a transcript of the record and proceedings in the said matter. In reply to such writ the respondent presented to, and filed with, this court a demurrer to the petition as not stating facts sufficient to entitle petitioners to any relief, and also what respondent denominates an answer, which simply raises questions of law arising upon the face of the petition. As the proceedings in the lower court, which culminated in the order attacked by petitioners, are quite fully set forth in the petition, it can be very conveniently determined upon the demurrer thereto whether or not the court acted in excess of its jurisdiction in making such order.

From the petition it appears that upon the admission of the will of deceased to probate the court made an order, in accordance with section 1349 of the Code of Civil Procedure, as amended in 1907 (St. 1907, p. 312), ascertaining and determining that said estate was worth less than \$10,000. Thereupon the executors gave the usual notice to creditors to present their claims within four months, and in due time, upon proof of publication thereof, the court made the usual order or decree, establishing the due publication of notice to creditors. Subsequently and after the expiration of the four months, upon motion of certain persons claiming to be creditors of decedent, made upon the ground that the value of the estate of decedent was in excess of \$10,000, the court made the or-

der now attacked. This order was made after notice to the executors of the motion therefor and upon a hearing upon such motion.

The contention of petitioners that the order of the court vacating and setting aside the notice to creditors and the decree establishing the due publication thereof, and ordering the publication of a new notice giving 10 months to creditors to present their claims, is in excess of its jurisdiction, is predicated upon that part of section 1349 of the Code of Civil Procedure added by the amendments thereto of 1907. The section as it was amended, and as it now reads, is as follows: "If no objection is made as provided in section thirteen hundred and fifty-one, the court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have renounced their right to letters. In the order the court must ascertain and determine whether said estate is worth more or less than ten thousand dollars, which determination is conclusive for the purpose of giving notice to creditors, but for no other purpose." It is the last sentence of the section which was added by the amendment adopted in 1907.

The contention of respondent is that the added portion of the section is void and unconstitutional as not being a subject indicated by the title of the amendatory act (article 4, § 24, Const.); and also as being special legislation prohibited by both subdivisions 12 and 33 of section 25 of article 4 of the Constitution. The title of the amendatory act is, "An Act to amend sections thirteen hundred and forty-nine, thirteen hundred and fifty, and thirteen hundred and fifty one of the Code of Civil Procedure, and to add a new section thereto to be numbered thirteen hundred and fifty a, all relating to letters testamentary and of administration with the will annexed." It is claimed by respondent that the portion of section 1349 added by the amendment does not relate to letters testamentary nor to letters of administration with the will annexed, but concerns only the matter of notice to creditors, and that it is therefore a matter not embraced within the title of the amendatory act. We do not think it necessary to determine this point; for, in any event, we think the portion of section 1349 of the Code of Civil Procedure relating to fixing the value of the estate is special legislation, such as is prohibited by section 25 of article 4 of the Constitution.

It was frankly conceded by petitioners at the oral argument, and very properly so, that the provision of section 1349 of the Code of Civil Procedure, relating to the fixing of the value of the estate for the purpose of giving

notice to creditors, applies only to cases where the decedent died testate. It has no application to estates where the decedent leaves no will. A different rule is thus established by which the rights of creditors of decedents leaving a will are governed from the rule governing the rights of creditors of persons dying intestate.

[1] It is true that the creation of a class to be affected by any particular law does not necessarily make such law a special law prohibited by section 25 of article 4 of the Constitution. Such a law is a general law if it operates upon all of the class alike, and there exist some natural or intrinsic reason or some constitutional ground for the classification. *Rode v. Siebe*, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342, and *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782, are cases illustrative of this principle. On the other hand, a law that creates a class, to be affected by the law, not founded upon some natural, intrinsic, or constitutional distinction, is special and prohibited by the Constitution of this state. Of this type are the classes created by the laws declared invalid in *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, and *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438. In *Pasadena v. Stimson*, supra, the law requiring cities of the fifth and sixth classes to make an effort to purchase from the owner before condemning under the law of eminent domain was held to be special and invalid for that reason. *Shaughnessy v. American Surety Co.*, supra, holds a law requiring one contracting for the erection of a building to give a bond to protect mechanics and materialmen to be special, and invalid for that reason. This case overrules *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369, cited by petitioner, distinctly upon this ground. In *Krause v. Durbrow*, supra, it was held that a law making special requirements to entitle stockholders to vote for directors of mining corporations was special and invalid, as not founded upon any natural or intrinsic differences between mining and other corporations. This case discusses and reviews quite fully the California cases upon the subject.

[2] The amendment to the section of the Code relied upon by petitioners lays down a rule that affects the rights of creditors of persons who die testate only. As to such persons and in such estates only is the determination of the value of the estate, made by the court at the time of admitting the will to probate, conclusive for the purpose of giving notice to creditors. As to estates generally the value of the estate for the purpose of giving notice to creditors is not conclusively or at all established by the order granting letters of administration. The cred-

itors of estates other than of persons dying testate are not conclusively bound by the determination of the value of the estate made under section 1349 of the Code of Civil Procedure. We cannot conceive of any natural or intrinsic differences between creditors of persons dying testate and creditors of persons dying intestate, which will justify a different rule controlling their rights in the matter of presenting their claims.

For these reasons, we think the amendment to section 1349 of the Code of Civil Procedure, making the determination of the value of the estate made by the court when granting letters testamentary, conclusive for the purpose of giving notice to creditors, is void, and the court had jurisdiction under section 1490 of the Code of Civil Procedure to make the order complained of.

The demurrer to the petition is sustained, and the petition is dismissed.

We concur: LENNON, P. J.; KERRIGAN, J.

#### HIBERNIA SAVINGS & LOAN SOCIETY v. BRITTAN. (Civ. 904.)

(District Court of Appeal, Third District, California. Dec. 5, 1912.)

#### 1. MORTGAGES (§ 543\*) — DECREE OF FORECLOSURE — PROVISIONS FOR POSSESSION BY PURCHASER.

A provision in a mortgage foreclosure decree that the purchaser at the sale shall be let into the possession of the premises, and that any person who may be in possession thereof, or who, since the commencement of the action, has come into the possession, shall deliver possession to the purchaser on production of the deed, and that in case the purchaser is refused possession a writ of assistance shall issue without notice, merely means that the purchaser shall be entitled to and put into possession, on production of the deed, when, under the law, he is entitled to possession, and does not require surrender of possession within the time during which the premises may be redeemed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1562; Dec. Dig. § 543.\*]

#### 2. MORTGAGES (§ 543\*) — FORECLOSURE — RIGHTS OF PURCHASER.

A purchaser at a mortgage foreclosure sale does not acquire the right to the possession of the premises until the time for redemption has expired.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1562; Dec. Dig. § 543.\*]

#### 3. MORTGAGES (§ 494\*) — FORECLOSURE — DECREE—REQUISITES—POSSESSION.

A decree foreclosing a mortgage and directing a sale need not direct that the possession thereof shall be delivered to the purchaser; and whether a decree contains such a direction, or is silent thereon, does not affect the jurisdiction of the court to enforce the decree and put the purchaser in possession, though there is no impropriety in inserting in the decree such a direction.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1441-1445; Dec. Dig. § 494.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.**

**Action by the Hibernia Savings & Loan Society against Nathaniel J. Brittan. From a judgment for plaintiff, defendant appeals, Affirmed.**

**Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. Tobin & Tobin, of San Francisco, for respondent.**

**HART, J.** This is an appeal, upon the judgment roll alone, from a decree foreclosing a mortgage upon certain real property of the defendant.

The decree directs the sale of the mortgaged premises by a commissioner named by the court, and further adjudges and decrees that the purchaser or purchasers of said premises at such sale be let into the possession thereof, and that any person or persons who may be in the possession of said premises or any part thereof, or "who, since the commencement of this action, has come into the possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, *on production of the commissioner's deed for such premises, or any part thereof.* And it is further ordered, adjudged, and decreed that, in case the purchaser of said premises or any part thereof at said commissioner's sale shall be refused possession thereof, a writ of assistance shall forthwith issue without further notice or order of this court, requiring the sheriff \* \* \* to place and maintain said purchaser in the quiet and peaceful possession of said premises, and every part thereof."

It is objected that the foregoing provisions of the decree are erroneous, because the purchaser at the commissioner's sale could, by virtue thereof, be let into the possession of the mortgaged premises before the expiration of the time within which said premises may be redeemed.

[1, 2] We do not think the provisions of the decree to which criticism is thus directed should be subjected to the construction which the appellant here gives them. To the contrary, we think they mean, and were clearly intended to mean, that the purchaser of the mortgaged premises at the commissioner's sale should be entitled to and put into the possession thereof upon the production of the commissioner's deed, showing title in him, only when, under the law, he was rightfully entitled to possession. In other words, since it is true that a purchaser of property at a sale under the foreclosure of a mortgage does not acquire the right to the possession of such property until the time for the redemption from such sale has expired (*Purser v. Cady*, 120 Cal. 214, 52 Pac. 489; *Mau, Sadler & Co. v. Kearney*, 143 Cal. 506, 77 Pac. 411), it must be assumed that it was not intended by the decree in the case at bar that the pur-

chaser at the commissioner's sale should be put into the possession of the premises until such possession could be legally given, or that the writ of assistance therein provisionally authorized should be issued until its execution would possess legal efficacy; and certainly it would have none if attempted to be invoked in execution of the decree of foreclosure prior to the expiration of the time within which the property may, under the law, be redeemed from the sale.

[3] While, perhaps, it may be the usual practice to insert in a decree foreclosing a mortgage a direction that the possession of the mortgaged premises be delivered to the purchaser thereof at the foreclosure sale, it is not necessary to do so under our system; nor where such a clause is included in or is omitted from such a decree can it add to or detract from the jurisdiction or power of the court to enforce its decree, and so put in possession, at the proper time, the purchaser of the property at the foreclosure sale. *Montgomery v. Tutt*, 11 Cal. 190; *Horn v. Volcano Water Co.*, 18 Cal. 141; *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220; *Hibernia S. & L. Socy. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *California Mortgage & Sav. Bank v. Graves*, 129 Cal. 649, 62 Pac. 259. But there is no impropriety in making provision in the decree or judgment, in an action to foreclose a mortgage, for the issuance of the writ to compel any party concluded by such decree or judgment to deliver the possession of the premises to the purchaser at the mortgage sale, and such a provision would obviously mean, as before declared, that the writ would issue only when the exigencies of the situation required it, and the purchaser was legally entitled to possession. See footnote to *Wilson v. Polk*, 51 Am. Dec. 154.

The judgment is affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

#### **OPPENHEIMER v. RADKE & CO.** (Civ. 1,112.)

(District Court of Appeal, First District, California. Dec. 5, 1912.)

#### **1. BILLS AND NOTES (§ 356\*) — BONA FIDE PURCHASERS—PAYMENT OF VALUE.**

A bank, by discounting a note and passing its amount to the credit of its indorser, does not become a purchaser for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 908; Dec. Dig. § 356.\*]

#### **2. BILLS AND NOTES (§ 356\*) — BONA FIDE PURCHASERS—PAYMENT OF VALUE.**

A bank discounting a note and placing its amount to the credit of its indorser becomes a purchaser for value if, before notice of any infirmity in the note, it pays out the amount for which credit was given to the depositor, or to his order, even though the depositor, by sub-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sequent deposits or discounts, preserves a constant balance to his credit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 908; Dec. Dig. § 356.\*]

**3. BILLS AND NOTES (§ 525\*)—SUFFICIENCY OF EVIDENCE—GOOD FAITH AND PAYMENT OF VALUE.**

In an action on a note, evidence *weld* to show that a bank which discounted it without notice of any defenses thereto subsequently paid out the amount of the credit on its indorser's checks before notice of any defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

**4. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.**

Where the meaning of a witness' testimony is uncertain, its uncertainty is to be resolved by the trial court; and on appeal such reasonable interpretation as will support the trial court's finding will be accepted as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Leopold Oppenheimer against Radke & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry C. Schaertzer, of San Francisco, for appellants. Lillenthal, McKinstry & Raymond, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment rendered against defendants as the makers of two promissory notes aggregating the principal sum of \$2,206.87, for which amount and interest thereon judgment was rendered for plaintiff as the indorsee of said notes.

The two notes are in terms payable to Ciner & Seeleman, who, before maturity thereof, indorsed them to the State Bank of New York, which passed the amount of the two notes, less the discount therefor, to the credit of Ciner & Seeleman. This transfer to the bank occurred in the spring of 1910, and the bank took the notes without notice of a defense that existed against the payees of said notes and in favor of defendants, the makers; and it is conceded by defendants that plaintiff was entitled to recover, unless, as is contended by appellants, the finding made by the court that the State Bank was a purchaser for value is not supported by the evidence.

The bank received no notice of the facts constituting the defense as between the payees and appellants until after the maturity of the notes.

[1] That the mere passing of the amount of a note, by a bank discounting the same, to the credit of the payee thereof is not a purchase for value is established by the great weight of authority. *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Central Bank v. Valentine*, 18 Hun (N. Y.) 417; *Manufacturers' Nat. Bank, etc., v. Newell*, 71

Wis. 309, 37 N. W. 420; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063.

[2] The same authorities also establish the rule that the discounting bank does become a purchaser for value if, before notice of an infirmity in the note, it pays out the amount for which credit was given to the depositor, or to his order. This rule obtains, although the depositor, by subsequent deposits or discounts, preserves a constant balance to his credit; for, in the absence of special facts demanding a different rule, payments are applied to the oldest debts. *Fox v. Bank of Kansas City*, supra.

[3, 4] We think there is sufficient evidence in the record to justify the conclusion that the payees checked out the amount of the notes before the bank learned of any infirmity therein. Arnold Kohn, the officer of the State Bank who represented the bank in its dealings with Ciner & Seeleman, was examined under a commission issued out of the court. In his deposition there occurs the following: "Q. Now, your procedure was, on taking this commercial paper, I presume, to simply pass the amount of the discount to the credit of Ciner & Seeleman? A. The account. Q. Then they checked against it as they pleased? A. Then they checked it out; yes."

There is some uncertainty whether or not the witness, in his answers above quoted, meant simply to speak of the general course of business in the bank's dealings with Ciner & Seeleman, or as to what occurred in respect to the particular notes sued on. Any uncertainty in this regard was a matter to be resolved by the trial court; and upon this appeal we must accept as correct such reasonable interpretation as will support the finding of the trial court. If the witness meant to say that Ciner & Seeleman had checked out the amount of the credit given for the discount of the notes in suit, there can be no doubt but that the bank gave value for the notes in suit before learning of any infirmity therein. The condition of the record is such that we cannot say that the court was not justified in believing from the evidence of Kohn that Ciner & Seeleman had checked out the credit given on the discount of the notes in suit. Especially is this true in view of the further fact that Ciner & Seeleman had, before the notes in suit fell due, failed and made a composition with their creditors, and subsequently settled and took up other notes, referred to in the testimony as the Deutsch notes, aggregating about \$1,100, that they had discounted with the State Bank, and which had gone to protest. If the credit given on the discount of the notes in suit in the spring of 1910 had not been checked out or otherwise exhausted, the bank could have applied such balance to the settlement of the Deutsch notes, and there would have been no necessity for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Ciner & Seeleman settling and taking up such notes. The fact that they did so supports an inference that at that time there was no balance to their credit to offset the claim against them on the Deutsch notes.

We think the judgment must be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

**REEVES et al. v. FIRST NAT. BANK OF OAKLAND.** (Civ. 1,074.)

(District Court of Appeal, First District, California. Dec. 4, 1912.)

**1. BANKS AND BANKING (§ 143\*)—PAYMENT OF CHECKS—SIGNATURE.**

A bank was not justified in refusing to pay a check drawn on a deposit by a copartnership and signed by both of the persons known to the bank to comprise the partnership, even though the signature card delivered to the bank when the account was opened gave the name of the partnership and of the members, and provided that "both signatures" were required, especially where other checks signed in the same way had previously been paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 517; Dec. Dig. § 143.\*]

**2. BANKS AND BANKING (§ 143\*)—PAYMENT OF CHECKS—SIGNATURE.**

Where a bank has customarily paid checks signed in a particular way, it cannot change this custom without express notice to the depositor, and refuse to pay checks so signed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 417; Dec. Dig. § 143.\*]

**3. BANKS AND BANKING (§ 143\*)—REFUSAL TO PAY CHECK—DAMAGE.**

The wrongful dishonor of a check drawn by a party established in business raises the presumption that the drawer has sustained substantial damage, even though the dishonor was not the result of ill will or malice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 417; Dec. Dig. § 143.\*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by R. E. Reeves and another, copartners, doing business as R. E. Reeves & Co., against the First National Bank of Oakland. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Reed, Black & Reed and E. Nusbaumer, all of Oakland, for appellant. Philip M. Walsh, of Oakland, for respondents.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs for \$300 damages, and also from an order denying defendant's motion for a new trial. The action was brought to recover damages claimed to have been sustained by the plaintiffs because of the defendant's failure to pay on presentation two certain checks, aggregating approximately \$100, there being

on deposit to the credit of plaintiffs sufficient funds to meet them.

Defendant contends that there is no evidence to support the findings of the court (1) that the checks were in form entitling them to be accepted and paid; and (2) if they were in form, that the plaintiffs had suffered any substantial damage by reason of the dishonor of the checks.

[1, 2] Upon opening the account, the plaintiffs, according to a well-established custom, made and delivered to the bank what is termed a signature card, which set forth the manner and form in which checks upon the account should be signed. It was as follows: "The First National Bank, Oakland, Cal. Below please find duly authorized signatures which you will recognize in the payment of funds or the transaction of other business on our account. Both sigs. required. R. E. Reeves Co. R. E. Reeves. J. A. Wadsworth." The checks in question were signed "R. E. Reeves" and "J. A. Wadsworth," and defendant asserts that this was not in the manner and form required by the bank in accordance with its agreement with plaintiffs, and that, therefore, the bank was warranted in refusing to pay them.

We do not agree with this contention. First of all, it is not clear what is meant by "both signatures required." It may have been intended that checks should bear the copartnership name, or perhaps the signatures of each of the two individuals composing the copartnership, or of the copartnership and the individuals. In any event, we do not see what harm could have come to the bank by paying these checks, bearing as they did the signatures known to the bank, of the persons comprising the copartnership. Moreover, every check drawn on the bank by this concern from the time the account was opened until the presentation of these checks was signed as they were, and the bank promptly paid them, as indeed it paid these when its attention was called to the circumstance of their dishonor. This shows how the parties had interpreted the contract, and this course of conduct may be regarded as having established a general usage between the bank and the plaintiffs, which the bank could not suddenly and without express notice to the plaintiffs change. *Hotchkiss v. Artisans' Bank*, 42 Barb. (N. Y.) 517.

[3] Second. As to the next question raised by the defendant, we do not agree with it that the evidence does not show that the plaintiffs were entitled to substantial damages. It is true that no special damages were sought, and that there was no claim that the refusal to pay the checks was the result of ill will or malice, but it does appear that the plaintiffs were established in business, and, where this is so, the great weight of authority is to the effect that the wrongful dishonor of a check raises the pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

sumption that the drawer has sustained substantial damage, the amount of which it is the duty of the court or the jury to fix. Many of the adjudicated cases like this sort of suit to an action for slander of a person in business, regarding it as a slander by acts, and hold that since the improper refusal to pay the check of a depositor will invariably injure him in his business, and that, as a rule it will be impossible to prove the amount of the damage, the law must of necessity—fitting itself to conditions—presume that he is entitled to reasonable compensation for the injury. The text-writers and the decisions of nearly all the states where this question has arisen sustain this view. The author of *Morse on Banks and Banking* (volume 2, § 457), after referring to two cases in New York, which hold that where, upon a wrongful refusal of a bank to pay the check of a customer, no tangible or measurable injury is shown, only nominal damages may be recovered, says: "But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check shall be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit it indeed closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world. Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temporary damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted, according to the ordinary course of human events."

In the case of *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192, in answer to the question what is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor, the court said: "Authorities seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. In *Rosewater v. Hoffman*, 24 Neb. 222, 230 [38 N. W. 857, 861], is found the following expression: 'It is a well-settled rule \* \* \* that punitive, vindictive, or exemplary damages cannot be allowed. The only damages recoverable are denominated compensatory, which are a satisfaction for the injury sustained'"—citing many cases, in all of which it is held that the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover gen-

eral compensatory damages. In the case of *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857, the court, after holding that the action is one *ex delicto*, growing out of a breach of duty or an implied contract of the bank to honor plaintiff's checks as long as he had money to his credit said: "It alleged that plaintiff was a trader, and as such engaged in the mercantile or commission business in the city of Memphis, but, as may be seen, averred no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal. The authorities are uniform that the averment that plaintiff is a trader is sufficient, and he is entitled in such case to recover substantial damages, though special damage is not alleged. \* \* \* Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury, under proper instructions, to fix. \* \* \* The rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact. And, if this customer is a merchant or trader, its natural effect is an injury to his business standing, as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages, measured by all the facts in the case." This action was one for tort, and hence does not fall within section 2468 of the Civil Code, requiring persons doing business under a fictitious name to file a certificate with the county clerk, showing the names of the persons interested as partners in such business. *Ralph v. Lockwood*, 61 Cal. 155; *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181, 139 Am. St. Rep. 273. Besides, this suit did not grow out of any contract made or transaction had in plaintiffs' partnership name. Section 2468, Civ. Code.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

COOK v. SUBURBAN REALTY CO.  
(Civ. 1,011.)

(District Court of Appeal, Third District, California. Dec. 5, 1912.)

1. APPEAL AND ERROR (§ 356\*)—ENTRY OF JUDGMENT—TIME—DISMISSAL.

An appeal from a final judgment not taken within six months after entry of such judgment, as provided by Code Civ. Proc. § 939, subd. 1, and section 941b, must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

## 2. APPEAL AND ERROR (§ 867\*)—REVIEW—DISMISSAL OF APPEAL—PLEADINGS.

On appeal from an order denying a motion for a new trial, the ruling on a demurrer to the complaint cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

## 3. PLEADING (§ 258\*)—DISCRETION OF COURT—AMENDMENTS.

Where the answer virtually admitted the allegation of the complaint of plaintiff's ownership of the land involved, and such admission was allowed to stand for 10 months until the day of trial before attempting to controvert it, and then only by a denial of information or belief sufficient to enable him to answer such allegation, the court's denial of a proposed amendment was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 253.\*]

## 4. NEW TRIAL (§ 123\*)—GROUNDS—NOTICE—REFUSAL TO PERMIT AMENDMENT.

The refusal to allow a party to amend after issue joined can only be reviewed on a motion for a new trial, the notice of intention for which sets forth as a ground that the court has "abused its discretion by which the party was prevented from having a fair trial," under Code Civ. Proc. § 657, which specifies the four grounds on which a motion for a new trial may be made.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.\*]

## 5. APPEAL AND ERROR (§ 542\*)—REVIEW—RECORD—BILL OF EXCEPTIONS.

Affidavits charging plaintiff with misconduct as to the jury in the transcript following the certificate of the clerk to the record or the bill of exceptions, and not incorporated in a bill of exceptions as required by rule 29 (119 Pac. xiv), are not properly authenticated, and cannot be regarded as part of the record, or be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2408, 2462; Dec. Dig. § 542.\*]

## 6. APPEAL AND ERROR (§ 928\*)—RECORDS—PRESUMPTIONS—INSTRUCTIONS—EVIDENCE.

Where the record does not contain the evidence, the instructions given must be assumed to be applicable to the proof, and that those refused were properly disallowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Joseph Cook against the Suburban Realty Company. Judgment for plaintiff, and defendant appeals from the judgment and an order overruling a motion for new trial. Appeal from judgment dismissed, and order affirmed.

W. D. Grady and A. J. Treat, both of San Francisco, for appellant. Lee D. Windrem, of Pt. Richmond, and M. R. Jones, of Martinez, for respondent.

HART, J. This is an action to recover damages for injuries alleged to have been inflicted upon the real property of the plaintiff by the wrongful acts of the defendant. The complaint avers that at the time the plaintiff purchased the lands described in the complaint, and which, it is alleged, were damaged

by the acts of the defendant, "there was a natural drain which carried off all the waters and drained all" said lands, and that, "without the consent, and against the protest of this plaintiff, the defendant caused the said natural drain to be filled up, and failed and refused to provide ways and means by which the waters, during the rainy season, could be carried away from the premises of this plaintiff"; that, by reason of such wrongful acts on the part of the defendant, "a large portion of this plaintiff's property has on numerous occasions been submerged by the overflow of water from the higher ground, and this plaintiff has been unable to raise anything, or to derive any benefits from his said property," etc. The cause was tried by a jury, who returned a verdict in favor of plaintiff for the sum of \$800, and thereupon the court ordered judgment to be entered in said sum for the plaintiff. The defendant attempted to appeal from said judgment, and appeals from the order denying it a new trial.

[1] The judgment from which the defendant attempted to take an appeal was entered on the 5th day of April, 1910, but the notice of appeal states that the appeal is "from the judgment therein entered in said superior court on the 16th day of March, 1910, in favor of plaintiff in said action and against said defendant," etc. We presume that the judgment referred to in the notice was the one entered on the 5th day of April, 1910, and that the date of its entry as given in said notice was due to an inadvertence. However that may be, the appeal from the judgment will have to be dismissed because of not having been taken within the time prescribed by law. Section 939, subd. 1, of the Code of Civil Procedure, provides that an appeal from a final judgment must be taken, if at all, under the older method of taking such appeals within six months after the entry of such judgment. Under section 941b of the same Code, which prescribes a new method of appealing from final judgments, the appeal must be taken within 60 days after the notice of entry of judgment, or, if no notice thereof be given, not later than six months after the entry of such judgment. In the case at bar, the appeal from the judgment was not taken until the 24th day of July, 1911, some days beyond 15 months after the entry of said judgment. It therefore follows, as before stated, that the appeal from the judgment must be dismissed. *Robinson v. Eberhart*, 148 Cal. 495, 83 Pac. 452; *County Bank v. Jack*, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285; *Roney v. Reynolds*, 152 Cal. 323, 92 Pac. 847; *Allen v. Allen*, 159 Cal. 197, 113 Pac. 160.

[2] It also follows that the objections to the complaint urged under the demurrer cannot be reviewed, since such objections can be considered only upon an appeal from the judgment. *Tompkins v. Montgomery*, 123

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Cal. 219, 220, 55 Pac. 997; County Bank v. Jack, 148 Cal. 438, 83 Pac. 705, 118 Am. St. Rep. 285.

[3] The defendant complains that the court erred to its prejudice by refusing it leave to amend its answer. The application for permission to amend its pleading was made by the defendant on the opening of court for the purpose of taking up the trial of the cause, and more than 10 months after the original answer was filed. Counsel had not previously given the plaintiff or his counsel notice of an intention to ask permission to amend, nor had he prepared a draft of the proposed amendment. He, however, stated to the court the nature of said amendment, the purpose of which was to tender an issue upon the plaintiff's ownership of the lands described in the complaint, and thereafter, on his request, the court adjourned the trial of the cause until the hour of 1:30 p. m. of the same day in order to enable counsel to put his proposed amendment in concrete form. The amendment as thus prepared and proposed reads as follows: "As to the allegations contained in paragraph 2 of plaintiff's complaint, defendant alleges that he has no knowledge or information upon the subject sufficient to enable him to answer the same, and, placing his denial upon that ground, denies that the plaintiff is now or that he has been ever since the 28th day of February, 1907, the owner in fee simple of all those certain lots, pieces, or parcels of land \* \* \* set out and described in the complaint." Conceding, for the present, that, under the notice of intention to move for a new trial as filed and served by the defendant, the alleged error of the court in disallowing the foregoing proposed amendment may properly or legally be reviewed by this court, and waiving the point that the denial involved in the proposed amendment is not, strictly speaking, the statutory denial in such case, since it is not based upon information and belief, or upon a want of information or belief upon the subject sufficient to enable the defendant to reply to the fact to which it is addressed (section 437, subd. 2, Code Civ. Proc.), we think the allowance or refusal of the amendment was, under the circumstances under which the privilege of so amending the answer was asked, a matter entirely within the discretion of the court.

The general rule is that, in the exercise of the discretion confided to trial courts in that regard, great liberality should be indulged by such courts in the matter of allowing amendments to pleadings. This salutary rule is fostered by the desire that in all actions at law or suits in equity the pleadings shall be in such condition with respect to all the issues which ought to be litigated and adjudicated thereby as that full and complete justice may be done between the parties. But where, as here the defendant has, by his answer, virtually admitted a material allegation of the complaint, and has allowed such

admission to stand for nearly a year and until the trial was about to proceed before attempting to controvert it, and then by a denial in its nature not positive and involving an allegation in the complaint, as to the truth or falsity of which the defendant, through the public records, had available to it means of ascertaining some positive knowledge, upon which his denial could have been put in positive terms, it cannot be held that the court's denial of a proposed amendment constitutes an abuse of discretion.

[4] But, assuming that the proposed amendment was timely and necessary and in all respects in proper form, it is clear, from an examination of the defendant's notice of intention to move for a new trial, that the alleged error of the court or the alleged abuse of its discretion in disallowing said amendment cannot be reviewed by this court. The first subdivision of section 657 of the Code of Civil Procedure specifies four separate and distinct grounds upon which a motion for a new trial may be made, viz.: (1) Irregularity in the proceedings of the court; (2) irregularity of the jury; (3) irregularity on the part of the adverse party; (4) "any order of the court or abuse of discretion by which either party was prevented from having a fair trial." The action of a trial court refusing a party leave to amend his pleading after issue joined can only be reviewed on a motion for a new trial, and in such case, in order that a review of such action may be had, the notice of intention must set forth the fourth of the several grounds, as above given, enumerated in the first subdivision of said section 657—that is, that the court has thus abused its discretion, whereby the complaining party was prevented from having a fair trial. 1 Hayne on New Trial and Appeal (2d Ed.) §§ 24, 52. In other words, the alleged error complained of here cannot be reviewed on any of the several other grounds for a new trial specified in said section.

The notice of intention in the case at bar does not set forth, among those relied upon for a new trial, the ground that the court abused its discretion by its disallowance of the proposed amendment, but merely charges, so far as are concerned the grounds embraced within the first subdivision of said section, "irregularity in the proceedings of the court," "irregularity in the proceedings and conduct of the jury," and "irregularity and misconduct upon the part of the plaintiff." It is very clear that the alleged abuse of discretion cannot be reviewed upon either of the foregoing grounds (Hayne on New Trial and Appeal [2d Ed.] § 28; Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540), and it therefore follows, as before declared, that there is no record before us authorizing a review of the action of the court in denying the defendant's application to amend its answer.

[5] There appear in the transcript, following the certificate of the clerk to the rec-



ord or the bill of exceptions, several affidavits charging that the plaintiff was guilty of misconduct in connection with the jury while the latter, under the order of the court, were engaged in viewing the property of the plaintiff alleged to have been damaged. These affidavits were presumably designed to further the ends of the motion for a new trial on the ground of the "irregularity and misconduct of the plaintiff" and perhaps on the ground of the "irregularity in the proceedings and conduct of the jury." But the affidavits are not incorporated in a bill of exceptions, and they are not, therefore, authenticated as required by rule 29 of this court (119 Pac. xiv). Obviously, under these circumstances, they cannot be regarded as any part of the record or be considered on this appeal for any purpose. *Melde v. Reynolds*, 120 Cal. 237, 52 Pac. 491; *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Skinner v. Horn*, 144 Cal. 279, 77 Pac. 904, 1 Ann. Cas. 850; *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588; *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463; *Higgins v. L. A. Ry.*, 5 Cal. App. 748, 91 Pac. 344; *Blodgett v. Scott*, 11 Cal. App. 312, 104 Pac. 842; *Fisher v. Western Fuse Co.*, 12 Cal. App. 304, 107 Pac. 332; *Willow Land Co. v. Goldschmidt*, 11 Cal. App. 297, 104 Pac. 841.

[8] The appellant contends that the court's charge to the jury was in a number of particulars pointed out in its brief not pertinent to the issues made by the pleadings and as developed by the evidence. It is further claimed that error prejudicial to the rights of the defendant was committed in the refusal by the court to allow certain instructions requested by it. The record does not contain the evidence, nor any portion thereof, and therefore we must assume that the instructions given were applicable to the proofs, and that those refused were properly disallowed. The instructions do not appear to be obnoxious to criticism in so far as they may be regarded as abstract statements of law, nor do they appear to be inapplicable to the issues made by the pleadings. There are, it is true, some references therein to an artificial drain and a few other matters which are not specifically referred to in the complaint, yet we must assume that those matters were brought out by the evidence, and that a view of the whole record, including the evidence, would disclose their relevancy to the issues and the propriety of the instructions relating to them.

We see no merit in this appeal.

For the reasons stated in the foregoing, the appeal from the judgment is dismissed, and the order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

# WINKLER v. JERRUE. (Civ. 1,174.)

(District Court of Appeal, Second District, California. Dec. 9, 1912.)

## 1. FRAUDS, STATUTE OF (§ 129\*)—SALE OF LAND—PARTIAL PERFORMANCE.

A partial performance of an oral contract to convey by paying part of the price and the taking of possession under the contract took the contract out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.\*]

## 2. VENDOR AND PURCHASER (§ 75\*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT.

Under Civ. Code, § 1657, providing that if an act be, in its nature, capable of being done instantly, it must be immediately performed upon the thing to be done being exactly ascertained, where a contract to convey specified no time for making deferred payments, they were to be deemed payable upon delivery of the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 113-118, 126; Dec. Dig. § 75.\*]

## 3. VENDOR AND PURCHASER (§ 128\*)—WARRANTIES.

Every executory contract for the sale of land contains an implied condition that the vendor's title is good, and that he will transfer an unencumbered title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 234-237; Dec. Dig. § 128.\*]

## 4. VENDOR AND PURCHASER (§ 144\*)—CORRECTING DEFECTS IN TITLE—TIME.

A vendor who was not required, under the terms of the contract, to convey until tendered the purchase money, had until that time to acquire a good title such as he contracted to convey.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 271-275; Dec. Dig. § 144.\*]

## 5. FRAUD (§ 25\*)—INJURY—NECESSITY.

Fraud is not actionable unless injury results, so that a fraudulent misrepresentation made to the vendee that a mortgage on the land only drew 6 per cent. interest, when the mortgage on its face was in excess thereof, did not injure the vendee, when he could deduct from deferred payments the amount of excess interest.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. § 25.\*]

## 6. FRAUD (§ 11\*)—ASSERTION OF OPINION.

An assertion of something not true must be of a fact not warranted by the information of the person making the assertion in order to be a fraudulent representation, and not merely the opinion of such person, however positively asserted.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

## 7. FRAUD (§ 11\*)—MISREPRESENTATIONS—STATEMENT OF VALUE.

A statement of value of itself is merely a matter of opinion, but representations as to value may be representations of fact depending on the circumstances.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

## 8. VENDOR AND PURCHASER (§ 36\*)—MISREPRESENTATIONS—STATEMENT OF OPINION.

When plaintiff purchased realty from defendant, he had been in the state but a short time, and was ignorant of realty values, which defendant knew, and defendant stated the mar-

ket value of the property, and falsely stated that similar property in the vicinity had been sold for approximately the same sum. Defendant also conspired to induce another to make a pretended offer in plaintiff's presence to induce plaintiff to accept defendant's statement of values as correct, and plaintiff relied on such representations in purchasing. *Held*, that the false representations as to value were fraudulent, so as to authorize plaintiff to rescind the sale and recover the money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 52, 53; Dec. Dig. § 36.\*]

**9. MONEY RECEIVED (§ 8\*)—RIGHT OF ACTION.**

Both at common law and under the Code, money paid under fraudulent misrepresentations may be recovered on the common count for money had and received.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 30; Dec. Dig. § 8.\*]

**10. VENDOR AND PURCHASER (§ 339\*)—REMEDIES OF PURCHASE—RESCISSION OF CONTRACT.**

An offer by the vendee to restore everything of value received under the contract for the purchase of land, and to tender possession, made the rescission of the contract complete, so as to entitle him to sue for the purchase price paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

**11. VENDOR AND PURCHASER (§ 116\*)—RESCISSION—TENDER OF RENT—WAIVER.**

Under Civ. Code, § 1501, providing that all objections to the mode of an offer of performance which the creditor had an opportunity to state at the time to offerer, and which then could have been obviated are waived by the creditor, if not stated where a vendor made no demand for rent for the time the premises were occupied by the vendee when the latter tendered back the premises as a condition to rescinding the contract and did not question the amount of the tender, a tender of rent was waived.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by O. E. Winkler against Frank Jerrue. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Hatch, Lloyd & Hunt, of Los Angeles (Harvey D. Cheney, of Los Angeles, of counsel), for appellant. Amend & Amend, of Los Angeles, for respondent.

ALLEN, P. J. This action is for money had and received by defendant for the use and benefit of plaintiff. The answer is a denial of the allegations of the complaint, and, further alleging that the money so paid was on account of a cash installment of the purchase price of certain real property, alleged to have been sold by defendant to plaintiff; and, further that in such purchase plaintiff assumed a certain mortgage lien and agreed to make further and additional payments at a specified time, aggregating the sum of \$5,300; that pursuant to such agree-

ment plaintiff took and retained possession of said premises; further, that defendant is ready, willing, and able to convey good title upon payment of the balance due upon the purchase price.

The court finds that the money sought to be recovered was in fact paid on account of said purchase, but that the contract of purchase was procured through fraudulent representations in this: that defendant misrepresented the value of the property, of which value plaintiff was ignorant; that the representations made by defendant were that the property was of the value of \$5,500; that, in fact, at the time of the making of such representations said property had no value in excess of \$4,400; that, in addition, defendant represented to plaintiff that certain other residence property in the vicinity had been sold for \$4,800 in cash, whereas in truth the same had been sold for \$3,800, all of which defendant well knew, and which representations were made for the purpose of inducing plaintiff to buy said premises at the price of \$5,300; that defendant falsely stated that he had been offered \$5,300 for the property by other persons, and that defendant falsely represented that the mortgage lien upon said premises drew but 6 per cent. interest, when, in fact, the rate of interest was 8 per cent.; that defendant was not the owner of the premises and never had any title thereto, but, on the contrary, the same was the separate property of the wife of defendant; that defendant was never offered \$5,300 for said premises, as by him represented to plaintiff; that, while such offer was made to defendant in the presence of plaintiff, it was made by a person procured by defendant to make such offer for the purpose of inducing plaintiff to pay said price therefor; that plaintiff, by reason of these misrepresentations and relying thereon, was induced to make said purchase. The court further finds that the contract of purchase was oral and that no time was agreed upon between the parties for making deferred payments, other than the assumption of the mortgage; that plaintiff took possession of said premises under said agreement, but on the 21st day of June, 1910, after learning of the false representations, plaintiff refused to complete said transaction and tendered to defendant the possession of the house and lot and all things which he had received under said oral agreement, and demanded the return of the cash payment. Judgment was accordingly rendered in plaintiff's favor for \$1,050, with interest thereon from June 21, 1910. From this judgment, and from an order denying a new trial, defendant appeals upon a bill of exceptions.

[1-3] It is contended by appellant that the fact that defendant was not the owner of the premises at the time when he made the contract, and that the rate of interest specified

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the mortgage assumed was in excess of the rate represented, do not of themselves constitute such fraudulent representations as would entitle plaintiff to rescind or to avoid the contract upon the grounds of fraud. With reference to these two representations we are inclined to agree with appellant. There being a partial performance of the oral contract to the extent of the payment of part of the purchase price and the taking of possession thereunder takes the case out of the statute of frauds (*Hill v. Den*, 121 Cal. 44, 53 Pac. 642); and, no time having been agreed upon for making deferred payments, such money is to be deemed payable upon delivery of the deed. Civ. Code, § 1657; *Tutt v. Davis*, 13 Cal. App. 715, 110 Pac. 690. The rule in this state is that in every executory contract for the sale of land there is an implied condition that the title of the vendor is good and that he will transfer to the purchaser by his deed of conveyance a title unincumbered and without defect, but the vendor sufficiently complies with this obligation if he is able to give good title at the time when by the terms of his contract of sale he is required to make a conveyance.

[4] Under this rule the defendant, while not the owner of the premises, was not required under the terms of the contract to make a conveyance until tendered the amount of the purchase money, until which time he possessed the right to acquire a good title such as he contracted to convey. *Backman v. Park*, 157 Cal. 611, 108 Pac. 686, 137 Am. St. Rep. 153, and cases cited.

[5] As to the misrepresentations with relation to the rate of interest specified in the mortgage, we think it sufficient to say that fraud is never actionable except there be a resultant injury. It is obvious that, if a misrepresentation were made with reference to this rate of interest, plaintiff only assumed and agreed to pay \$2,300 with interest at 6 per cent. as shown by the mortgage, and that if the mortgage upon its face was in excess of this amount, in principal or interest, he possessed the right to deduct from the deferred payments the amount of such excess, and we can conceive of no injury which would result.

[6] This leaves, then, for consideration solely the effect which should be given the other misrepresentations as found by the court. It is a rule that "the assertion of that which is not true must be of some fact not warranted by the information of the person making it, and cannot be held to include an opinion of the person, however erroneous such opinion may be, or with what degree of positiveness it may be asserted." *Estate of Johnson*, 134 Cal. 663, 66 Pac. 848.

[7] Standing alone, we are not inclined to the opinion that a mere statement of value can be accepted otherwise than as an opinion. However, representations as to value may be representations of fact or represen-

tations of opinion, depending largely upon the manner in which the representations are made. If, as a matter of fact, they are made by one assuming to have knowledge of the value based upon other declared statements of fact, to one ignorant thereof, it may be said that the representations under such circumstances become representations of fact.

[8] In the case at bar plaintiff is shown to have been but a short time within this state, entirely ignorant as to values of which defendant had knowledge; that defendant stated the market value of the property and supported the same by a false statement that other property of like character in the vicinity had been sold for approximately the same sum, and, in addition, had entered into a fraudulent conspiracy with another through which this third party was to make, and did make, a pretended offer of \$5,300 for the premises, which offer, made in the presence of plaintiff, was not one in good faith, but was made solely for the purpose of inducing plaintiff to accept defendant's statement of value to be correct. Plaintiff relied upon these statements, representations, and inducements and accepted them as statements of fact, and we are of opinion that such statements under such circumstances amounted to a positive fraud. As said in *Bank of Woodland v. Hiatt*, 58 Cal. 237: "Appellant had a right to rely upon Strong's representations as to facts that were not within his (appellant's) knowledge, and Strong cannot escape responsibility by showing that appellant might have ascertained that such representations were untrue."

[9] Appellant further contends that, assuming the fraud, no action of the character here sought could be maintained; that the common count for money had and received can be used to recover money by pleading fraudulent representations, was recognized at common law (1 Chitty on Pleadings, § 364); that such practice is permissible under our Code is declared in *Minor v. Baldrige*, 123 Cal. 190, 55 Pac. 783.

[10] The finding of the court that plaintiff offered to restore everything of value received under the contract and tendered possession made the rescission complete, and entitles plaintiff to the aid of a court of competent jurisdiction in securing the results and fruits of the rescission. *Loalza v. Superior Court*, 85 Cal. 31, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197.

[11] It is insisted by appellant that the record disclosing that plaintiff had been in possession of the premises for more than a month under the contract, the rental of which was \$35 per month, such tender to be effectual should have included also a tender of the amount of rent. Assuming this to be true, defendant had full opportunity at the time to state his objections to the tender and made no demand for rent, nor did he question the amount of the tender when made,

and we think that under section 1501 of the Civil Code he waived the same. *Kofoed v. Gordon*, 122 Cal. 320, 54 Pac. 1115.

Reviewing the record, then, we are of opinion that the judgment is supported by the findings, and that there is evidence in the record in support of the material findings, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

**SHEA-BOCQUERAZ CO. v. HARTMAN.**  
(Civ. 1,004.)

(District Court of Appeal, Third District, California. Dec. 5, 1912.)

**1. NEW TRIAL (§ 71\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.**

Where there is a conflict in the evidence, it is within the discretion of the court to grant a new trial on the ground of the insufficiency of the evidence to support the findings.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

**2. APPEAL AND ERROR (§ 854\*)—REVIEW—REASONS FOR DECISION—NEW TRIAL.**

Where the notice of motion for new trial, in an action on a note, stated that the motion would be made on the grounds of the insufficiency of the evidence, that the decision was against law, and for errors of law occurring at the trial, an order granting a new trial in general language, without qualifying the scope thereof, would not be disturbed on the ground that there was no necessity for a new trial, granted for the single reason that the court had failed to allow interest on the note for a specified period.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3408, 3404, 3408-3430; Dec. Dig. § 854.\*]

**3. APPEAL AND ERROR (§ 854\*)—REVIEW—REASONS FOR DECISION—NEW TRIAL.**

Where the court granting a new trial does not limit the order in any way, the court, on appeal, must uphold it if it can be sustained on any ground embodied in the notice of intention.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Shea-Bocqueraz Company against Ferris Hartman. From an order granting a motion for new trial after judgment for defendant, he appeals. Affirmed.

J. W. Cochrane, of San Francisco, for appellant. J. C. Meyerstein and J. V. Filippini, both of San Francisco, for respondent.

**HART, J.** This is an action by the plaintiff against the defendant on a promissory note for the sum of \$3,000.

The court awarded judgment to the defendant, and thereafter granted the plaintiff's motion for a new trial. This appeal is by the defendant from the order granting a new trial.

It appears from the testimony that the

plaintiff was a creditor of the Schroeder-Hartman Company, of which corporation Hartman is a member. It likewise appears that the defendant and John D. Schroeder, also a member of the Schroeder-Hartman Company, made and delivered the note involved here jointly and severally as a personal obligation; that is to say, that said note constituted their individual obligation, and not that of the corporation bearing their names, and of which they were members. The note, which was dated July 25, 1906, and made payable "one day after date," was, as shown, for the sum of \$3,000, and the defendant had paid thereon the sum of \$1,000. On the 19th day of March, 1910, a payment of \$2,000 was made to the plaintiff by John D. Schroeder. The plaintiff claims that the understanding was that the sum so paid was to be applied to and credited on its book account against the Schroeder-Hartman Company, and not to be applied toward the extinguishment of said promissory note. Schroeder insists that he made said payment with the specific request and understanding that it be credited on the note, and not on the book account of the plaintiff against the Schroeder-Hartman Company; and that, having expressed such desire to the plaintiff when making such payment, he was entitled to have the money so paid applied accordingly. Section 1479, subd. 1, Civ. Code.

It is not thought to be necessary to examine or reproduce here the testimony in detail, it being regarded as sufficient to say that Schroeder's testimony, as is true of the testimony of some other witnesses testifying in behalf of the defendant, harmonizes with and would sustain, if accepted by the trial court or a jury, his contention as to the circumstances of the transaction as above indicated; while, on the other hand, the testimony of the witness O. E. Bozlo, assistant secretary of the plaintiff, and by whom the transaction was conducted in behalf of the latter, was in direct contradiction to that presented by the defendant and, if believed, sufficient to support a finding in favor of the plaintiff's contention as to the circumstances of the transaction. In brief, this witness testified that, prior to the time at which the payment was made, he had a conversation with Schroeder, in which the latter spoke of the proposed payment of the \$2,000, and expressed the desire that it be applied on the note in preference to applying it to the book account against his corporation; that he (Bozlo) then said that he preferred to place the money to the credit of the book or merchandise account. "I said," proceeded Bozlo, "I didn't care to take the note up first and wanted the merchandise account settled first, on account of the fact that the note was a personal matter between him and Mr. Hartman, and I considered it much better security than the open account of the corporation that was virtually out of business. He said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

'All right;' if that was the way I felt about it, it was all right; and after that he paid me the \$2,000. He didn't ask me for the note. I have it still."

[1] There is, as will, of course, be noted, a conflict in the evidence; and therefore, under the well-settled rule, it was within the discretion of the court to grant a new trial upon the ground of the insufficiency of the evidence to support the decision. *Domico v. Cassassa*, 101 Cal. 413, 35 Pac. 1024; *Mills v. Oregon Ry. & Navigation Co.*, 102 Cal. 357, 36 Pac. 772; *Warner v. Thomas Dyeing & Cleaning Works*, 105 Cal. 409, 38 Pac. 960; *In re Martin*, 113 Cal. 480, 45 Pac. 813; *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25; *McCarthy v. Morris*, 17 Cal. App. 723, 121 Pac. 696.

[2] But the point upon which the appellant solely relies for a reversal of the order is founded upon the claim that there was no necessity for a new trial, since, as is the contention, the motion for a new trial was granted for the single reason that the court, in and by its judgment, failed to take into account and allow interest, which the evidence indisputably discloses had accrued upon the note at the rate of 6 per cent. per annum from the 1st day of January, 1910, to the 19th day of March, 1910, the date of the payment of the \$2,000. Whether, were it true that the motion was granted merely to adjudicate the question as to the interest referred to, the condition of the findings is such as that that omission could have been supplied by a mere modification of the judgment, or without a new trial upon said question, we need not express any opinion. It is very clear, however, that there is nothing in the record which will justify us in adopting the appellant's conception of the scope of the order from which this appeal is prosecuted.

The notice of motion for a new trial stated that the motion would be made upon the following grounds: (1) Insufficiency of the evidence to justify the decision; (2) that the decision is against law; (3) errors in law occurring at the trial and excepted to by said plaintiff.

In the specification of the particulars in which the plaintiff claimed that the evidence was insufficient to support the findings, it is charged that "the evidence is insufficient to sustain finding No. 3, to wit: 'That it is not true that no part of said note has been paid, except the sum of \$1,000';" that "the evidence is insufficient to sustain finding 4, which is as follows: 'That it is not true that the sum of \$2,000, with interest thereon from the 1st day of January, 1910, is wholly unpaid; but, on the contrary, that said defendant has paid to plaintiff therein all the money due upon said promissory note, and all the money demanded in the complaint herein.'"

[3] Thus the plaintiff challenged all the

findings of the court essential to the support of the judgment, and upon the exceptions thus registered against the findings and supported by the statement the court made the order granting the new trial in general language, or without in any manner or degree qualifying or restricting the scope thereof. In other words, it does not appear from the record that the order was based upon any one particular ground, or because of any particular reason. And in this connection it may be remarked that, had it been the intention of the trial court to limit the new trial to the single issue as to the interest which had accrued upon the note during the period mentioned, it would undoubtedly have made it to clearly so appear in its order granting the motion. The court not having limited in any way the effect of the order, this court is compelled to view it by the light of the settled rule in this state and hold that, if it can be upheld upon any ground embodied in the notice of intention, it is the duty of an appellate court to sustain it. *Kaufman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Newman v. Lassing*, 141 Cal. 175, 74 Pac. 761; *Bouchard v. Abrahamsen*, 4 Cal. App. 480, 88 Pac. 383; *Briggs v. Hall*, 129 Pac. 288.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

ZIERATH v. McCANN et al. (Civ. 1,176.)  
(District Court of Appeal, Second District, California. Dec. 9, 1912.)

1. INJUNCTION (§ 46\*)—IMPOSSIBILITY OF ESTIMATING DAMAGES.

Injunction will lie against closing the gates and otherwise obstructing the right of way to plaintiff's dwelling, and cutting and otherwise obstructing the water pipes thereto, the character of the damages making it impossible to estimate their amount, so that an action at law was not an adequate remedy.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.\*]

2. INJUNCTION (§ 35\*)—OBSTRUCTING WAY—OWNERSHIP.

Plaintiff being in the peaceable possession, as occupant, of a house in the rear of one fronting on a street, reached by a walk extending from the street, it is immaterial, as regards his right to injunction against obstruction of his way of ingress and egress and the water pipes leading to his house, whether, as alleged in the complaint, his lessor, not a party to the suit, is the owner of both properties.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 77; Dec. Dig. § 35.\*]

3. INJUNCTION (§ 18\*) — SOLVENCY OF DEFENDANTS.

As regards right to injunction, where the injury is irreparable and the damages of such a character that it is impossible to estimate them, it is immaterial whether defendants are solvent.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 17; Dec. Dig. § 18.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. C. Zierath against Mary McCann and others. Judgment for plaintiff; defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel, of Los Angeles, for respondent.

**SHAW J.** As shown by the complaint, plaintiff with his family occupied, as a residence, a house located in the rear of one fronting upon a street in Los Angeles, both of which were inclosed by a fence, through which, by gates and over a walk extending from the street, plaintiff and his family had means of egress and ingress to said dwelling. The means of obtaining a supply of water for use by the occupants of the house and land connected therewith was by pipes and hydrants, through which it was conveyed. Plaintiff's use of the house and appurtenances thereto was under and by virtue of a lease whereby one William F. McCann, alleged to be the owner of the entire property, demised the same to him for a term of one year. Defendants nailed up and closed the gates, obstructed the right of way extending from the street to the house, and cut and obstructed the pipe line through which the supply of water was furnished plaintiff for domestic use. Upon these facts, all of which, except the alleged ownership of McCann, were found by the court, judgment was entered, restraining defendants from a further commission of the alleged acts.

[1] Defendants appeal from the judgment, claiming that the complaint fails to state facts entitling plaintiff to equitable relief, in that he had an adequate remedy at law in an action for damages; and, further, that an injunction will not be granted to prevent merely threatened or repeated naked trespasses. Conceding the other positions, there is no merit in the contention that an action at law would constitute an adequate remedy. Closing the gates and otherwise obstructing the right of way, thus depriving plaintiff of the right of ingress and egress to the dwelling, and cutting and otherwise obstructing the water pipes, thus depriving him of a supply of water for domestic use, are allegations of facts from which damages, the amount of which cannot be ascertained, must necessarily follow.

[2, 3] Other errors assigned are that the court failed to find upon the issue of ownership, alleged in the complaint, to have been in McCann, plaintiff's lessor, and likewise failed to find upon the question of defendants' solvency, put in issue by the pleadings. Since plaintiff was shown to have been in the peaceable possession, as occupant, of the property, it was immaterial in whom the title was vested. Moreover, McCann was not a party to the suit, and the title was not a

subject to be litigated therein. Since the injury was irreparable and the damages, as found by the court, of such a character that it was impossible to estimate the same, it was likewise immaterial whether or not defendants were solvent. In no case could the findings have affected the judgment given; and hence the failure to find thereon, even if error, was harmless.

Judgment affirmed.

We concur: ALLEN, P. J.; JAMES, J.

**DUTCHER v. SANDERS et al.** (Civ. 1,183.)  
(District Court of Appeal, Second District, California. Dec. 9, 1912.)

**1. FORCIBLE ENTRY AND DETAINER (§ 9\*)—“OCCUPANT” OF LAND.**

One who, being in peaceable possession of land, leased it is, on the rights of his tenant terminating by expiration of the lease, “occupant” of it, though not residing on it, within Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender it to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 37-51; Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4904-4906.]

**2. FORCIBLE ENTRY AND DETAINER (§ 4\*)—“UNLAWFUL ENTRY.”**

Entry without consent of the occupant is “unlawful,” within Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5-22; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7189, 7190.]

**3. FORCIBLE ENTRY AND DETAINER (§ 12\*)—ISSUES — DEFENDANT’S RIGHT OF POSSESSION.**

Defendant's right of possession, where his entry is based on an alleged right obtained from another than the occupant, and not on consent of the occupant, is not involved, and so is immaterial, in an action based on Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 57-63; Dec. Dig. § 12.\*]

Appeal from Superior Court, Imperial County; F. J. Cole, Judge.

Action by Gordon L. Dutcher against Louis N. Sanders and another. From an adverse order, said defendant appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, Frank E. Dunlap, of Stockton, and Dan V. Noland, of El Centro, for appellant. Conkling & Brown, of El Centro, for respondent.

**SHAW, J. Action of forcible detainer. Judgment for plaintiff. Defendant moved for a new trial, and from an order denying his motion, prosecutes this appeal.**

The action grows out of the following facts: The land, consisting of 160 acres in Imperial county, was in 1903 unoccupied government land. In February of said year, one Johnson made a desert land entry thereon, and in July, 1905, made final proof of occupation and reclamation thereof. In June of said year she assigned and transferred her title and interest therein to plaintiff, who, on June 28, 1907, after doing considerable work in improving the same, leased it to one Williams, at an annual rental of \$4 per acre, for a term of three years, and he in turn sublet to other tenants, who cropped the same or a portion thereof. In January, 1908, defendant Sanders attacked the entry of Johnson and that of plaintiff, as her assignee, by filing in the United States Land Office at Los Angeles a contest based upon alleged fraud in the making of the entry. Upon trial, this contest was decided against plaintiff, and defendant Sanders was awarded the preferential right of entry upon the land, which decision was upon appeal affirmed by the Secretary of the Interior. Thereafter, within 30 days of the notice granting to him the right of entry upon the land, defendant Sanders filed in the United States Land Office his application for entry of the same as a homestead, which application was duly allowed, and about September 1, 1910, he, without consent or knowledge of plaintiff, entered upon the land. At the time when Sanders took possession, the term for which plaintiff had leased the land to Williams, and that of the subtenants, had expired, though the crops grown the last year had not been removed therefrom by the tenants. These tenants, considering that their lease had expired, made no objection to Sanders' entry, and plaintiff, who was not present at the time, did not know of the entry until some time thereafter, when, upon learning of it, he brought this suit.

[1, 2] The action was brought under subdivision 2 of section 1160 of the Code of Civil Procedure, which provides that "every person is guilty of a forcible detainer \* \* \* who, \* \* \* during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant." The answer admitted the demand for possession and defendant's refusal to comply therewith, and the court found "that on the 1st day of September, 1910, and for more than three years previous thereto, plaintiff was in the peaceable and actual possession and occupation" of the land; "that on or about the 1st day of September, 1910, during the absence of plaintiff therefrom, Louis N. Sanders unlawfully entered upon said land and took

possession thereof;" "that said Louis N. Sanders unlawfully holds and continues in possession of the said premises." That at the time of defendant's entry plaintiff was, and for several years had been, subject to the rights of his tenants, in the peaceable possession of the land, and that he had during such period fenced, leveled, and prepared it for irrigation and caused annual crops to be grown thereon, admits of no controversy. While plaintiff did not reside upon the land, nevertheless, since admittedly the rights of the tenant had terminated with the expiration of the lease, he was the occupant in the peaceable and actual possession thereof, and exercised exclusive control and dominion over it. *McCormick v. Sheridan*, 77 Cal. 253, 19 Pac. 419. Nor, in our opinion, is there any doubt as to the evidence showing the entry to have been unlawful. Plaintiff being the occupant and in the peaceable possession of the property, defendant's entry thereon during his absence and without his consent, followed by refusal to make restoration thereof for a period of five days after service upon him of a demand in writing that he do so, was as to plaintiff unlawful, within the meaning of the term as used in the statute. The entry being unlawful, the act of withholding was likewise unlawful. *Treat v. Forsyth*, 40 Cal. 484.

[3] Conceding all this to be true, appellant's contention is that the effect of these findings was nullified by the court finding, in accordance with an allegation of the answer, "that on or about the 16th day of May, 1910, the Commissioner of the General Land Office, Department of the Interior of United States, in the case of Louis N. Sanders v. Orpha C. Johnson and Gordon L. Dutcher, Assignee, canceled a previously existing desert land entry upon said land, under which desert land entry the said Gordon L. Dutcher was claiming said land, and awarded a preference right of entry to said Louis N. Sanders; that on or about the 1st day of August, 1910, the defendant Louis N. Sanders made homestead entry of said land at the United States Land Office at Los Angeles, Cal., and paid the required fees thereon, and was given homestead receipt therefor." The allegation had no proper place in the answer; and evidence in support thereof should have been excluded. Had the court given the finding the effect contended for by appellant the error would have been ground for reversal upon an appeal prosecuted by plaintiff. Such facts, so found, did not warrant the action of defendant in retaining possession of the land; and, by its conclusion of law based upon the findings, the trial court so held. We are in full accord with this ruling. Appellant's claim finds apparent support in the case of *Goldstein v. Webster*, 7 Cal. App. 705, 95 Pac. 677, where the court, speaking through Justice Hall, says: "The owner, with a right of entry, of lands unlawfully in the possession

of another may, during the absence of such occupant, peaceably and without force or violence, take possession thereof, and his subsequent refusal to deliver possession to such occupant does not make him guilty of either a forcible entry or forcible detainer." In support of the proposition, the learned writer of that opinion cites *Potter v. Mercer*, 53 Cal. 667, and *Powell v. Lane*, 45 Cal. 677. The language used was not necessary to a determination of the facts in that case, as it was there held that the plaintiff, who claimed to have been ousted, was not the occupant, and never had been in possession of the property. It appears from the facts of this case, and those in the cases cited in the opinion, that the questions there presented involved alleged contractual relations between the parties with respect to the entry made. Not so, however, in the case at bar.

Under the provisions of the Code heretofore cited, where entry is made upon the actual possession of another without his consent, the retaining of possession for a period of five days after demand therefor is unlawful (*Voll v. Hollis*, 60 Cal. 569); and, in an action brought upon such provision, defendant's right to possession, unless based upon a claim that the entry was made with consent of plaintiff, is not in issue, and hence immaterial. In the case last cited, the court quotes with approval the language used in *McCauley v. Weller*, 12 Cal. 500, wherein it is said: "Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous." In *Voll v. Hollis*, supra, counsel insisted that "in an action for statutory forcible detainer, when the question of actual force is not in issue, but the only question to be determined is whether the entry was unlawful, if made during the absence of the occupant, the defendant should be permitted to show his right of entry. If he has the right of entry, it cannot be unlawful; and, if he enters in good faith under the belief that he has the right of entry, such entry is not unlawful within the meaning of the statute;" in response to which the court there said: "Whether the cases in which it was held that a defendant, charged with an unlawful entry and forcible detainer, might introduce a conveyance to him of the premises as evidence that his entry was in good faith, and therefore not unlawful within the peculiar meaning given to that word by the decisions referred to by counsel for respondents, be correct or not, under the statute as it then was, such conveyance is not admissible under the provisions of the Code of Civil Procedure, which treats only of forcible and peaceable entries.

Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith, on the part of the defendant, no longer affects the right of the recovery in this form of action." In line with *Voll v. Hollis* is *Giddings v. Land & Water Co.*, 83 Cal. 96, 23 Pac. 196, *Bank of California v. Taaffe*, 76 Cal. 630, 18 Pac. 781, and *Carteri v. Roberts*, 140 Cal. 166, 73 Pac. 819, where it is said: "There can be no doubt as to the correctness of the doctrine established by those cases." From all of which we conclude that, where a defendant in an action of forcible detainer, brought under the provisions of subdivision 2 of section 1160 of the Code of Civil Procedure, claims that his entry was made with the consent of the occupant of the land, he may prove such fact as tending to show that his entry was lawful; but, where the entry is based upon an alleged right obtained from another than such occupant, such fact is not a proper issue in the trial of the case. The word "unlawful," as used in the section, means unlawful with respect to the relations between plaintiff and defendant. *Carteri v. Roberts*, supra.

If A. procure from B. a contract whereby the latter agrees to convey to the former a tract of land, and B. place him in possession thereof, and thereafter B., claiming the contract to have been obtained by fraud, conveys the land to C., who, in the absence of A., enters upon the land without A.'s consent, he cannot, in an action of forcible detainer, justify the refusal to surrender to A. by a showing of the alleged fraud and subsequent grant by B. to him. We do not understand the position of the government, in such cases to be different from that of the individual. Plaintiff's entry and continued peaceable possession of the land in question for a period of more than three years was with the consent of the government. The fact that a department of the government, having power to ascertain the facts constituting the alleged fraud, decided that such consent was procured by fraud, and gave defendant a homestead entry thereof, did not warrant him in taking possession against the will of plaintiff, thus depriving plaintiff of the property without according to him a day in court, where the legality of the departmental decision could be determined.

The order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

#### IN RE LIEUTENANT GOVERNORSHIP.

(Supreme Court of Colorado. Jan. 24, 1913.)

#### 1. COURTS (§ 208\*)—QUESTIONS SUBMITTED BY SENATE—NECESSITY OF OPINION.

Under Const. art. 6, § 3, providing that the Supreme Court shall give its opinion upon important questions upon solemn occasions when

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



required by the Governor, the Senate, or the House of Representatives, the duty rests finally upon the court to determine for itself whether the occasion is solemn, and the questions important.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.\*]

**2. COURTS (§ 208\*)—QUESTIONS SUBMITTED BY SENATE—IMPORTANCE.**

Under Const. art. 6, § 3, requiring the Supreme Court to give its opinion upon important questions upon solemn occasions when required by the Governor, the Senate, or House of Representatives, the questions must relate to purely public rights, be propounded upon a solemn occasion, and possess a peculiar or inherent importance not belonging to all questions of the kind, and executive questions must be exclusively publici juris, and legislative ones must be connected with pending legislation, and relate either to its constitutionality or to matters connected therewith of purely public right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.\*]

**3. COURTS (§ 208\*)—QUESTIONS SUBMITTED BY SENATE—HOLDING OVER BY OFFICER.**

The death of the Lieutenant Governor elect, a statement by the Lieutenant Governor to the Senate in answer to an inquiry that he considered it his duty to hold over until a successor was elected and qualified or until such time as it was legally determined otherwise, and the election by the Senate of a president pro tempore, all of which occurred prior to the second Tuesday in January when the Lieutenant Governor's term would have expired, if his successor had not died, did not create an occasion of such solemnity as authorized the Supreme Court to express its opinion as to the right of the Lieutenant Governor to so hold over, under Const. art. 6, § 3, requiring it to give its opinion upon solemn occasions when required by the Governor, Senate, or House of Representatives, it not appearing that the orderly procedure of the Senate had been affected thereby, or that the Lieutenant Governor's claimed right to perform the duties of the office had been legally questioned, since the court can only act upon solemn occasions, and not for the purpose of preventing solemn occasions arising.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.\*]

**4. STATES (§ 49\*) — DE FACTO OFFICERS — HOLDING OVER.**

Whether or not a Lieutenant Governor is entitled to hold over where his successor dies before the commencement of his term, if he does hold over, he is at least Lieutenant Governor de facto, and his acts as Lieutenant Governor are valid.

[Ed. Note.—For other cases, see States, Cent. Dig. § 54; Dec. Dig. § 49.\*]

**5. COURTS (§ 208\*)—QUESTION SUBMITTED BY SENATE—HOLDING OVER BY OFFICER.**

Under Const. art. 6, § 3, requiring the Supreme Court to give its opinion upon important questions upon solemn occasions when required by the Governor, Senate, or House of Representatives, the court cannot, in answer to questions propounded by the Senate, determine the right of the Lieutenant Governor to hold over, where his successor dies before the commencement of his term, since it involves the right of the Lieutenant Governor, and of other possible claimants of the office, to the salary and emoluments thereof, which private rights cannot be determined in an ex parte proceeding to which they are not parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.\*]

Hill and Scott, JJ., dissenting.

En Banc. Questions propounded in a communication from the Senate concerning the Lieutenant Governorship. Questions not answered.

The opinion of the court is in response to the following communication from the Senate:

"To the Honorable Supreme Court of the State of Colorado:

"Pursuant to the provisions of the Constitution of the state of Colorado in that behalf made and provided, the Senate, one of the Houses of the Nineteenth General Assembly, now in session, does hereby respectfully submit certain questions hereinafter propounded, and does respectfully request that you furnish and deliver your opinion thereon at the earliest possible moment, and the court is hereby advised of the following facts necessary to be stated for the rendition of judicial opinion upon said questions, viz.:

"A general election was held in the state of Colorado on the 5th day of November, A. D. 1912, pursuant to the Constitution and laws of said state. That at said election one Benjamin F. Montgomery was a candidate upon the Democratic ticket for the office of Lieutenant Governor of said state for the term beginning on the second Tuesday of January, A. D. 1913. That at the canvass of the votes duly held by the joint session of both Houses of the Nineteenth General Assembly, on the 3d day of January, A. D. 1913, it appeared from said canvass that Benjamin F. Montgomery, candidate for Lieutenant Governor on the Democratic ticket, received a plurality of all votes cast.

"That on the 30th day of December, and prior to the canvass of said votes, the said Benjamin F. Montgomery departed this life. That at the general election held on the 7th day of November, A. D. 1910, one Stephen R. Fitzgarrald was duly elected Lieutenant Governor of the state, took the oath of office, and has been and now is the duly elected, qualified, and acting Lieutenant Governor of the state of Colorado, and was such at the time of the death of said Benjamin F. Montgomery, and at the time of the canvass of said votes. That it also appears, and is a fact, that at the time of the death of the said Benjamin F. Montgomery the said vote had not been canvassed, and no certificate of election had been issued to said Benjamin F. Montgomery, or to any other person for the office of Lieutenant Governor, and none has yet been issued. That Benjamin F. Montgomery or no other person voted upon at the election held in November, 1912, for the office of Lieutenant Governor, has taken and filed the oath of office as Lieutenant Governor of the state of Colorado, pursuant to said election and canvass.

"That at a session of the Senate held on the 3d day of January, A. D. 1913, the said

Stephen R. Fitzgarrald, Lieutenant Governor and President of the Senate, made the following statement in reply to a request made by Senator Burris from the Second District:

"Senator from the Second, and Gentlemen of the Senate: I first want to say that the death of Col. Montgomery has made no greater wound in any heart in this state than in mine, outside of his own family. He was a splendid citizen, and our state has lost a grand character. His record is an open book, and he has left as a heritage to the people of this state and to his friends something that we would all be proud to leave for ourselves. His voice was always lifted for the betterment of the people of this state, and Colorado is much poorer to-day than it was before he died. But the good old man is gone, and this situation presents itself to me personally. It has given me a great deal of concern as to what was my duty in the premises. I have had the advice and counsel of a great many good friends, and have had the assistance of some of the very best lawyers of the state, who have volunteered their services to look up the matter for me. I have consulted a great many authorities myself, in order that I might come to a conclusion befitting a gentleman and a member of the executive department of this state. I am glad that you have asked this question at this time, so that the record may show my position in the matter. I have come to this conclusion: That it is my duty to hold this office until my successor has been elected and duly qualified as provided by the Constitution of this state. After having arrived at this conclusion, no one could do more, and no one would want to do less, so that you may know that after the 14th of this month I shall consider it my duty to exercise the duties of this office until my successor has duly qualified, and I want to say to this Senate that I am not going to object to whatever action you may take, only to preserve my legal rights. I am just as anxious to know whether I will be the Lieutenant Governor after January 14th as you are. Nevertheless I desire to preserve my legal rights, and that it is only upon legal grounds that I have stated somewhat my reasons, so the Senate may take their own course, and I will take mine. I have been advised by my friends and counsel that it is my duty to hold the office until it is determined who is my legal successor, so you may take whatever action you please, and I thank you for this opportunity of expressing myself, and I don't think any good citizen would do differently than I have determined to do in this matter."

"That on Tuesday, the 7th day of January, A. D. 1913, the Senate of the Nineteenth General Assembly elected William H. Adams President pro tem. of the said body, and thereafter said Adams took the oath of office as President pro tem., and entered upon his duties as such officer."

"Now, therefore, in view of said existing conditions and to enable the Senate of the Nineteenth General Assembly of the State of Colorado to discharge its legal and constitutional duties in the premises.

"Be it resolved by the Senate of the state of Colorado that the following questions be submitted to the Supreme Court of the state of Colorado for its opinion in the premises, which said questions are as follows, to wit:

"Interrogatory 1. Does said Stephen R. Fitzgarrald, the present duly elected, qualified, and acting Lieutenant Governor of the state of Colorado, continue to hold the office of Lieutenant Governor on and after the second Tuesday of January, A. D. 1913, under the provisions of sections 1, 3, 6, 14, and 15 of article 4, and sections 1 and 10 of article 12 of the Constitution of the state of Colorado?

"Interrogatory 2. If the said Stephen R. Fitzgarrald does not hold the said office of Lieutenant Governor of the state of Colorado, who, under the provisions of the Constitution above referred to, or what officer, is entitled to perform the duties of the office of Lieutenant Governor on and after the second Tuesday of January, A. D. 1913?

"Be it resolved that said court is hereby respectfully advised and informed that in the opinion of the said Senate the questions, and each of them, so submitted are important questions upon a solemn occasion, and that the situation is so grave and serious that the highest public interest requires that the said honorable Supreme Court shall, at the earliest possible moment, render and deliver its opinion to the said Senate upon each, every, and all of the foregoing questions."

W. H. Malone, Stephen R. Fitzgarrald, John D. Milliken, and Benjamin Griffith, all of Denver, amici curiæ.

WHITE, J. [1, 2] In considering interrogatories propounded under section 3 of article 6 of the Constitution, this court, soon after the adoption of the constitutional provision, established certain rules governing the practice to be observed in the exercise of the jurisdiction conferred. As the authority conferred and duty imposed upon the court to give its opinion is "upon important questions, upon solemn occasions," and not whenever required by the Governor, the Senate, or the House of Representatives, it was held that the duty rested finally upon the court to determine for itself as to the solemnity of the occasion and the importance of the question propounded. Moreover, that the question must relate to purely public rights, be propounded upon a solemn occasion, and possess a peculiar or inherent importance not belonging to all questions of the kind, that executive questions must be exclusively publici juris, and legislative ones be connected with pending legislation,

and relate either to the constitutionality thereof or to matters connected therewith of purely public right. In the Matter of the Constitutionality of Senate Bill No. 65, 12 Colo. 466, 471, 21 Pac. 478; In the Matter of Senate Resolution on the Subject of Irrigation, 9 Colo. 620, 21 Pac. 470; In re Appropriations, 13 Colo. 316, 321, 22 Pac. 464; In re Speakership, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241; In re Fire and Excise Com., 19 Colo. 482, 36 Pac. 234; In re House Bill No. 99, 26 Colo. 140, 56 Pac. 181; In re Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009.

At an early date, speaking through Chief Justice Helm, this court in the Matter of the Constitutionality of Senate Bill No. 65, 12 Colo. 466, 471, 472, 21 Pac. 478, 480, said: "We feel constrained to repeat and emphasize the thought heretofore expressed, that the utmost vigilance and caution be exercised by both the General Assembly and the court in acting under this novel constitutional authority. There cannot well be too much moderation in the premises. We note that in those states which permit consultation with the justices the privilege seems to be less often invoked than it has been here. The Attorney General is the natural as well as the statutory legal advisor of the executive and legislative departments. His counsel should be solicited; and only as a dernier ressort, upon the most important questions and the most solemn occasions, should the court be requested to act."

He further therein said that: "While the question must be one relating to purely public rights, it can only be propounded upon solemn occasions, and it must possess a peculiar or inherent importance not belonging to all questions of the kind. \* \* \* Upon mature investigation and reflection, we are of the opinion that executive questions must be exclusively *juris publici*, and that legislative questions must be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right. We believe that the accuracy as well as the wisdom of this interpretation will commend themselves alike to the legislative judgment and the legal mind."

And in referring to that decision Mr. Justice Elliott, speaking for the court in *Re Appropriations*, supra, said: "The latter opinion was announced after much consideration, and is authority for saying that this court must decide for itself, as to any given question, whether or not it should exercise the jurisdiction of answering the same; and that only questions of law *publici juris*, and not questions affecting private or corporate rights, should be thus answered. That decision was based upon the fundamental doctrine that for this court to answer questions of the latter class *ex parte* would in-

evitably result in disposing of the rights or claims of litigants without due process of law, without counsel, and without allowing them their day in court."

And in *Re Fire and Excise Commissioners*, supra, it is said: "While we concede to the Governor full liberty to submit such questions as he may deem consistent with his executive powers, this court reserves for itself the right to express its opinion freely, in whole or in part, or not at all, as it shall deem consistent with its judicial powers and constitutional obligation." It is further therein said: "Were it not for the threatened dangers by force, military and otherwise, the question propounded would not be important nor the occasion solemn." And in the same opinion on page 499 of 19 Colo., on page 240 of 36 Pac., upon the question of an incumbent of an office attempting to hold over in opposition to an executive order of removal, it is said: "\* \* \* If the executive order of removal is questioned by the incumbent, the courts have the power, and it is exclusively within their province, to pass upon such objections and determine as between the respective claimants the right to the office in question, and the law provides a plain and adequate procedure for that purpose, and a speedy determination of such question is assured by express statute. *Mills' Ann. Stats.* p. 830. All law-abiding citizens will, and all others should be required to, submit such controversies to these tribunals for settlement."

And in *Re Senate Resolution No. 10*, supra: "Private rights, the title to an office, or the construction of an existing statute will not be determined in an *ex parte* proceeding in answer to a question from either the legislative or executive departments."

These rules have been applied, and such has been the practice in this state, for a fourth of a century. Occasionally, it may be, as pointed out in *Re House Bill No. 99*, supra: "There was a departure from it, but an examination of those cases shows that it was for reasons held conducive to the public welfare, and because the cases were of extreme emergency. \* \* \* When we thus made answer, we deviated somewhat from the established practice to which, at the first opportunity, we now return. In doing so we are satisfied that we are pursuing the only safe course, and one that commends itself to the judgment of the thoughtful and earnest legislator, as well as to the members of the bar and publicists who have given to the subject careful attention."

Those cases, nevertheless, it should be observed, carefully avoided determining any private rights. There was involved in *Re Speakership* the legality of the organization of the House of Representatives, each of two rival organizations claiming to constitute that body. Incidentally the court was asked,

among other things, to say who was then the Speaker of the House of Representatives. We did not give a direct answer to the question. On the contrary, we held substantially that as the Constitution invests the House of Representatives with the power to judge of the election and qualification of its members, and likewise invests it with the power to elect its own speaker, and such power is continuing and no other department of the government has any voice in the matter, such branch of the General Assembly "must assume and bear the responsibility for the exercise of their powers," and that it could remove and elect another speaker at its pleasure.

In *re Fire and Excise Commissioners*, supra, involved the right of the executive to remove certain fire and excise commissioners from office in the city of Denver, appoint others in their stead, and induct the latter into office by force. As the court had previously held that the power of removal and appointment in that respect was vested in the executive, it therein reaffirmed the holding, and declared that the constitutional oath of the executive to "take care that the laws be faithfully executed" imposed no obligation upon him to enforce his order of removal, and that a proper regard for the reputation and peace of the community would dictate that the appointees institute proper proceedings in court to determine their rights to the office. In other words, the *Speakership Case* declared that the House of Representatives was the tribunal to ascertain and determine who was its speaker. While the *Fire Commissioners Case* declared that the Governor was the person invested by law to hear charges against and remove for cause the fire and excise commissioners of the city of Denver and to appoint their successors. This was in effect saying only that whatsoever person, body, or tribunal invested by law with the power to appoint or remove from public office has the exclusive right to exercise the power, and it is the duty of good citizens to accept and abide by that which is so done in the premises.

The matters involved in *Re Senate Resolution No. 10*, supra, concerned a contest for the governorship, pending before the General Assembly. It was therein pointed out that the contestor and the contestee were actual litigants before the General Assembly, having submitted their respective claims to the determination of that body, and, as the questions submitted to the court for answer arose out of that contest, the parties litigant were necessarily before the court as to the matters involved, and it was not an *ex parte* proceeding.

[3, 4] Testing the questions propounded by the rules established, it is evident that we should not assume jurisdiction in the premises. The occasion is not of sufficient solemnity, and private rights are involved. It is conceded that, when the Nineteenth General

Assembly convened, it was the duty of Stephen R. Fitzgarrald to appear in, and preside over, the deliberations of the Senate during the term for which he was elected. Section 14, article 4, Constitution. It is likewise conceded that it was the duty of the Senate, at the beginning of its session, to elect one of its members president pro tempore. Section 10, article 5, Constitution. We are advised by the resolution that such duties were duly performed, and the only circumstance in addition thereto is that on the 3d day of January, during the time Fitzgarrald was unquestionably the Lieutenant Governor, he stated to the Senate, in answer to some inquiry made, that he had concluded it was his duty, under sections 1 and 10 of article 12 of the Constitution, to hold the office of Lieutenant Governor after the 14th of January until a successor appeared, elected, and qualified as such officer, or until such time as it was legally determined otherwise. This is the extent of the controversy as disclosed by the resolution and questions propounded. If Montgomery had lived, qualified for the office, and assumed the duties thereof, the Senate would, nevertheless, have elected a president pro tempore. So it does not appear that the orderly procedure of the Senate has been affected by that which has occurred, or that Fitzgarrald's claimed right to perform the duties of Lieutenant Governor been legally questioned. Whether Fitzgarrald is rightfully entitled to hold over, his acts as such officer are necessarily valid. If he be not the *de jure* Lieutenant Governor, he is unquestionably such officer *de facto*. This is elementary. 29 Cyc. p. 1392. He was legally in the office. He is still therein, actually performing the duties thereof. Under these circumstances, surely the occasion is not one of solemnity, and we are not authorized under the constitutional provision to answer questions propounded, to the end that solemn occasions may not arise. It is only upon solemn occasions that we are authorized to act. Moreover, it is not to be presumed that either public officials or private citizens will disregard the orderly procedure of the law, but, on the contrary, when claimed rights are questioned, or sought to be questioned, resort will be had to the proper tribunals established for the purpose of determining such matters.

[5] Furthermore, to answer the questions propounded would, as hereinbefore stated, involve a determination of private rights in an *ex parte* proceeding. It would necessarily determine the title to the office of Lieutenant Governor and to whom the salary pertaining to such office properly belongs. If Stephen R. Fitzgarrald is the Lieutenant Governor, entitled to perform the duties of that office, he is likewise entitled to receive the emoluments thereof, but if he is not the Lieutenant Governor, and some other person is entitled to perform the duties of such office, the latter person is entitled to receive the emolu-

ments of the office. *People ex rel. v. Cornforth*, 84 Colo. 107, 81 Pac. 871.

Such private rights cannot be determined in an *ex parte* proceeding to which such possible claimants of the office, and the salary pertaining thereto, are in no wise parties. If any public official or tax-paying elector desires to question the right of Mr. Fitzgerald to hold the office of Lieutenant Governor, the law has provided a tribunal and adequate procedure for that purpose, wherein both private and public rights may be properly considered and protected. Such was the case and procedure in *People ex rel. v. Cornforth*, supra, wherein this court assumed original jurisdiction.

We shall continue, as heretofore, to observe the requirements of all constitutional provisions, including the one now under consideration, and take pleasure in rendering such assistance to every department of government as shall be consistent with our duty and in harmony with a sound exposition of the Constitution. To adhere to the rules established by this court we deem wiser and more seemly than to place a different interpretation upon a constitutional provision that would necessarily bring confusion and uncertainty. We are persuaded that this course will commend itself to both the legislative and the legal mind.

In view of the foregoing considerations, we respectfully ask the honorable Senate to recall the questions propounded.

HILL, J. I cannot concur in the conclusion reached by the majority. As I read the resolution from the Senate, it discloses that the candidate who received the highest number of votes for the office of Lieutenant Governor at the election held in November, 1912, departed this life after the election; that he never qualified as such officer; that the present Senate, pursuant to the provisions of section 10 of article 5 of the Constitution, elected one of their number as president pro tempore; that the Lieutenant Governor elected in November, 1910, claims the right to the office for the present biennial term, or the right to hold over, as it is termed, until his successor is elected and qualifies. Section 14 of article 4 of the Constitution reads: "The Lieutenant Governor shall be President of the Senate, and shall vote only when the Senate is equally divided. In case of the absence, impeachment, or disqualification from any cause of the Lieutenant Governor, or when he shall hold the office of Governor, then the President pro tempore of the Senate shall perform the duties of the Lieutenant Governor, until the vacancy is filled or the disability removed." Upon account of the above and other sections of the Constitution, and the circumstances above set forth, it is evident that the Senate is in doubt as to the proper person to be recognized as its presiding officer after Jan-

uary 14, 1913, when both the Lieutenant Governor elected in 1910 and the President pro tempore of the Senate elected at the beginning of the present regular session are present and claim the right to so act. Under such circumstances, this becomes an important question, and to my mind presents a solemn occasion.

The Senate, in order to be advised as to the proper interpretation to be given the different sections of the Constitution upon this subject, so that they may act advisedly, and thus avoid any attack upon, or criticism pertaining to, their proceedings, have submitted the interrogatories. As I view the questions, they are, in part, publici juris, and in my opinion should be answered to the extent of placing an interpretation upon these different sections of the Constitution sufficient to cover the question concerning the presiding officer of the Senate. In my judgment this position is supported by the following opinions of this court: *In re Senate Resolution No. 10, Concerning Governorship Contest*, 33 Colo. 307, 79 Pac. 1009; *In re Fire and Excise Commissioners*, 19 Colo. 482, 36 Pac. 234; *In re Speakership of the House of Representatives*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241.

SCOTT, J. I cannot concur in the conclusion of the court to refuse in this instance to give its opinion upon the questions propounded by the Senate. The provision of section 8, art. 6, of the Constitution of Colorado, is as follows: "The Supreme Court shall give its opinion upon important questions, upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives; and all such opinions shall be published in connection with the reported decisions of said court." I am not unmindful of the fact that this court has assumed to itself in such cases the absolute right to determine whether or not a question is important or the occasion solemn. I cannot agree that this was the intentment of this constitutional provision. Such power of the court is in my judgment unwarranted, either by the language or purpose of this provision. The language is distinctly mandatory upon the Supreme Court, and there is not even a suggestion of discretion upon its part. The word "require," as used in this connection, can have no meaning other than the right to demand as by right and authority. This right to demand is specifically conferred upon two of the co-ordinate branches of the government, and the duty of the other branch of the government to obey is to my mind clear. It is true that this court has said in *Re Senate Resolution No. 10*, 33 Colo. 312, 79 Pac. 1010, "The department propounding the question in the first instance determines whether an occasion exists which justifies its submission;" but qualifies this declaration by asserting,

"But it remains for the court to finally determine that proposition." I regard this qualification as a clear assumption of power, in no way to be reconciled with the language of the section of the Constitution or the essence of the proposition stated by the court. The right to propound the question rests, necessarily, upon the right to determine that the occasion exists, and only after such determination. That question having been determined by the department having the declared right, it is illogical and incongruous to say that such determination may be reviewed and set aside by another department to which the question is addressed, having no express authority to do so. This would reduce the constitutional enactment to an absurdity. The people through their Constitution have the same power to command courts, and Legislatures or executives are commanded, and it is not for the former to complain or attempt to decree otherwise. Certainly where the right to thus determine a given state of facts is conferred upon one department of the state government, it is not within the province of another department to assume to be the sole arbiter as to its importance. But the power to determine that an occasion is important or solemn is not such an unusual or extensive power as to justify the assumption of doubt as to its meaning. Greater and entirely exclusive powers have been conferred upon both the executive and the Legislature charged with the responsibilities of government. It would therefore seem that executives and legislators have at least equal opportunities and equal judgment with courts, as to the importance or solemnity of problems presented to them. It is not necessary to recite the many grave questions which the Legislature alone may determine. The same may be said as to the executive. This court has said that he may even declare a state of insurrection and suspend the writ of habeas corpus without consulting any other department of the state government. Surely, then, he may be trusted to determine when such an important or solemn occasion is presented to him as to require the legal advice of the court. Likewise either branch of the General Assembly. Courts should not impute to executives or Legislatures the doing of foolish or useless acts. These should be regarded as expressing their solemn conviction within their respective spheres. To refuse to answer the questions in this instance is to refuse to obey that which I regard as an imperative constitutional mandate, or, on the other hand, to assume a power neither expressed nor reasonably implied.

In the case of *Opinions of Justices*, 95 Me. 564, 51 Atl. 224, cited by counsel, while the majority of the court held to the view now expressed by the majority here, yet the argument of the dissenting justices is so convincing and so replete with judicial author-

ity as to appear unanswerable. This case was decided as late as 1902, and it is there said: "Against this long and unbroken array of precedents for more than a century (40 years under the Massachusetts constitution and 80 years under our own similar Constitution), and against the opinions of the eminent jurists cited, we have in this state but the one late solitary instance where the justices refused to answer a question duly propounded, that in 1891, when the justices refused to answer the inquiry of the Governor as to his power to remove a county attorney. [In re Opinion of the Justices] 85 Me. 545, 27 Atl. 454." And again: "The early practice under any constitutional provision is admittedly of very great, and even controlling, force when such practice does not conflict with the express words of such provision. It is well known as matter of history that members of the convention drafting the Constitution afterward became Governors, legislators, and judges under it. They best knew the scope and purpose of its provisions. The people who themselves voted upon the adoption of the Constitution would more quickly notice any departure from its letter or spirit. If, therefore, we find a comparatively uniform practice under a constitutional provision by the earlier incumbents of office, acquiesced in by the persons or officers unfavorably affected by it, and not opposed to clear, express language of the Constitution, such practice is a better, safer guide to the real meaning and scope of the provision than any verbal, grammatical, or even philosophical interpretation by subsequent generations in after years. *Broom. Leg. Max.* 658, 884; *Cohens v. Virginia*, 6 Wheat. 418, 5 L. Ed. 257; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Rogers v. Goodwin*, 2 Mass. 475; *Gray, C. J.*, in *Opinion of Justices*, 126 Mass. 594. In obedience to the Constitution as thus authoritatively interpreted by the unvarying practice of more than a century—40 years in Massachusetts to the time of the separation, and then in Maine for 70 years more until 1891—we give our opinion upon the questions submitted briefly as follows." But, if the view of the majority of the court be admitted, still, under the decisions of this court, the questions here should be answered. While the form of the questions submitted may be unfortunate, yet these, in fact, simply ask the court for an interpretation of certain constitutional provisions, seemingly necessary for guidance of the Senate.

It is urged that these should not be answered because the questions involve a private right; that is to say the title to an office, that of Lieutenant Governor, and that under the rule of the court such title can only be determined in another and different proceeding. It must be admitted that to an extent, a private right is involved, but it likewise involves a question of grave public

concern, compared with which the private right sinks into insignificance.

In the Speakership Case, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241, the question propounded by the House of Representatives was as to the power of that body to declare the office of speaker vacant, and the court answered that it had such power. Plainly this involved a constitutional private right, to wit, title to the office of speaker, which, like the office of Lieutenant Governor, carries with it the right of succession to the governorship.

In the case *In re Senate Resolution No. 10*, 33 Colo. 307, 79 Pac. 1009, the question as to whether or not the joint assembly had the power to declare the office of Governor vacant was answered by this court. This was a contest for the office of Governor, was purely a political matter over which this court could have no control, and it would be difficult to understand how the office of Lieutenant Governor can involve a clearer case of private right.

In *re Fire, etc.*, Commissioners, 19 Colo. 482, 36 Pac. 234, involved the power of the Governor under the law as it then stood to remove the fire and police commission of the city of Denver. These were offices carrying salaries, and the court in that case admits the existence of private right, but declares that the gravity of the situation demands an answer to the question propounded.

This case clearly illustrates the unsoundness of the rule adopted by the majority in the matter before us, and makes clear the reasoning in Opinion of Justices, *supra*, having reference to the dissenting opinion as follows: "Whether the questions submitted are important, or whether there be sufficient occasion for their solution, is not itself a question of law or a judicial question. These are rather political questions in the broad sense of that term. When the requirement is made by the House of Representatives, they are pre-eminently questions for the house itself to consider and determine. The house is a political agent of the people. It has the sole power of impeachment. It is the grand inquest. With the Senate and the Governor, it is the judge of what is for the people's welfare, is charged with the duty of seeking out abuses, disorders, and irregularities in the public service, and is also charged with the duty of their reform or removal. The justices are by the Constitution (article 3, § 2) excluded from that sphere of duty and action, and limited to judicial questions. Even in cases where all the facts and conditions are public, and known to all the justices, it is certainly doubtful, if they are to override the judgment of the representatives of the people, that those acts and conditions render the questions of law important and the occasion solemn. But the justices can never be sure they know all the facts and conditions. There may be—perhaps in this case—many facts and conditions

known to the House, and not known to the justices, clearly showing the given question to be important, and the occasion sufficiently solemn. It has never been the practice, nor is the house obliged by anything in the Constitution, to state facts affirmatively showing the question to be important and the occasion solemn. We do not think the justices should treat the house as a suitor, nor its order like a petition demurrable for want of sufficient allegation of facts." But, if we are to assume the exclusive right to determine whether or not the question is important and the occasion grave, we cannot escape the conclusion that such is the case before us.

The questions by the Senate presuppose a desire upon its part to obey the Constitution, and we cannot doubt that the several constitutional provision, under the state of facts presented, admit of serious question. The Lieutenant Governor is not a member of the Senate. That body under the Constitution consists of 35 members, elected from districts, created by law, and of which membership the Lieutenant Governor cannot be one. He presides over the Senate simply by virtue of his office as Lieutenant Governor, and which duty is simply incidental to his office. If he is not Lieutenant Governor, can he preside, or exercise any of the powers and duties of the presiding officer? The actual official duties of this officer as such are limited, Micawber like, to simply waiting for something to turn up, and, when this something does turn up, he no longer performs the duties of Lieutenant Governor, but rather the duties of Governor.

It is suggested that, even though he may not be the Lieutenant Governor, in fact, yet his acts are valid as a *de facto* official. From what I have said of the duties of the Lieutenant Governor as such, it would seem that as a *de facto* official he would have as much substance and power as the proverbial hole in a doughnut. Can he preside and give validity to his acts as the President of the Senate, unless he is the actual Lieutenant Governor? He cannot preside as President *pro tem.*, for the Senate may elect only one of its members to such position.

It is urged that, in permitting him to preside, the Senate thus recognizes the validity of his acts. Does the mere recognition by the Senate validate an invalid vote? Can the Senate be said to be charged and bound by mere recognition, when in the exercise of all its power it cannot elect or place in authority the official so said to be recognized?

The Constitution confers upon the President of the Senate the power to cast the deciding vote when the Senate is equally divided. Thus, while he is not a member of the Senate, yet in this particular he is given certain powers of a legislator. Will this court say that there can be such a thing as a *de facto* legislator, casting votes and making laws? To my mind this is inconceivable. Again, it is the constitutional requirement

that the presiding officer of the Senate shall in the presence of the Senate sign all bills and joint resolutions passed by the assembly. This seems to be clearly mandatory. Are we ready to say that one who is not the Lieutenant Governor, and who is not eligible to election by the Senate as President pro tem., may sign them? Are we ready to say that, if such bills are not signed by the proper officer, they are not for such reason invalidated?

The questions are purely legal, and the members of the Senate are not presumed to be learned in the law, yet all these legal questions which may vitally affect the whole people of the state are before them. Are these matters not important, and can this court say that the occasion is not sufficiently grave as to require its advice when requested?

I am clearly convinced that the matter is of such importance as to make the refusal of the court to answer a serious error. Beside, I do not understand that the answer requested is anything but advisory, and may be reviewed or changed upon a more formal and complete investigation. I regard the constitutional mandate binding on the court, and against which we may not interpose a rule of procedure, a precedent, or the convenience of the court. The Senate is entitled to know and the whole people are entitled to know the view of the court upon so serious a legal question.

# STATE BANK OF CHICAGO v. PLUMMER et al.

(Supreme Court of Colorado. Jan. 6, 1913.)

## 1. PLEADING (§ 248\*) — AMENDMENT — NEW CAUSE OF ACTION.

Where the cause of action originally alleged was to foreclose a mechanic's lien upon property against which defendant claimed a prior lien, an amendment to the complaint covering items included in plaintiff's lien statement, but leaving the total amount for which a lien was sought less than under the original complaint, did not state a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

## 2. MECHANICS' LIENS (§ 271\*)—PLEADING—BILL OF PARTICULARS.

As a general rule, no bill of particulars is necessary in actions to foreclose mechanics' liens, where the work was agreed to be done for a fixed price.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494-513; Dec. Dig. § 271.\*]

## 3. MECHANICS' LIENS (§ 271\*)—PLEADING—BILL OF PARTICULARS—NECESSITY.

Defendant, in proceedings to enforce a mechanic's lien for services under an agreement to pay plaintiff a certain amount a month "and his expenses," and for services rendered "and material furnished," could require a bill of particulars giving the details as to items quoted.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494-513; Dec. Dig. § 271.\*]

## 4. MECHANICS' LIENS (§ 271\*)—PLEADING—BILL OF PARTICULARS—STATUTES APPLICABLE.

If plaintiff, in mechanics' lien proceedings, ought to furnish a bill of particulars of the items of labor and material claimed for, it is immaterial whether it be secured under Rev. Code 1908, § 63, authorizing the court to require pleadings to be made more specific, or requiring a bill of particulars when they are too general to be readily understood, or under section 69, authorizing the court on motion to order a further account when that filed by a party in support of his pleading is too general.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494-513; Dec. Dig. § 271.\*]

## 5. RAILROADS (§ 159\*)—LABORER'S LIEN—ITEMS INCLUDED.

Where plaintiff was employed as superintendent in the construction of a tunnel at an agreed price per month and his expenses, the expenses incurred in the construction were a part of his compensation, so as to be the subject of a mechanic's lien.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 477, 486-504; Dec. Dig. § 159.\*]

## 6. RAILROADS (§ 171\*)—MATERIALMEN'S LIEN—PROPERTY ATTACHABLE.

Where a railroad tunnel and its laterals was to be constructed as one structure for railroad purposes when plaintiff commenced work thereon as superintendent, and contracted by separate contracts to construct several parts of such tunnel, the work done under each contract is not a separate structure, but each contractor, and plaintiff for each of his several contracts, is entitled to a lien upon the entire tunnel, under Rev. St. 1908, § 4027, providing that, when the lien is for material furnished for any entire improvement, it shall attach to the improvement in preference to any prior incumbrance, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554-578; Dec. Dig. § 171.\*]

## 7. MECHANICS' LIENS (§ 182\*)—TIME OF FILING.

Rev. St. 1908, § 4033, providing that all lien statements for labor and work, without furnishing materials, must be filed after the last labor for which the lien is claimed was performed, and within 30 days after completion of the building, and that all other liens must be filed after the last labor or material is furnished, and before the expiration of two months after the completion of the improvement, does not require claimants to wait until the improvement is completed before filing a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190-207; Dec. Dig. § 132.\*]

## 8. MECHANICS' LIENS (§ 173\*)—ESTABLISHMENT—TIME EFFECTIVE.

Under Rev. St. 1908, § 4030, making mechanics' liens relate back to the time of the commencement of work under a contract between an owner and the first contractor, and have priority over every subsequent incumbrance, mechanics' liens in favor of the companies doing the work would relate to the time of the commencement of the work, through their superintendents.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 304; Dec. Dig. § 173.\*]

## 9. MECHANICS' LIENS (§ 291\*)—ESTABLISHMENT—ADMISSION OF EVIDENCE—JUDGMENT AGAINST OWNERS.

In order to enforce a mechanic's lien for material furnished, as against a mortgagee of the property, it must be shown that the owners were indebted to the materialmen, and hence, in such proceedings, default judgments against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the owners in favor of the materialmen would be admissible to show that claimants had established their claims against the owners.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 599-611; Dec. Dig. § 291.\*]

#### 10. MECHANICS' LIENS (§ 263\*)—PARTIES.

In an action by subcontractors or materialmen to foreclose a lien, the original contractor must be made a party, as the claim must be adjudicated against him in favor of the subcontractors or materialmen.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 471-481; Dec. Dig. § 263.\*]

#### 11. MECHANICS' LIENS (§ 291\*)—JUDGMENT—CONCLUSIVENESS.

The owners were estopped from denying the validity of default judgments against them by materialmen in an action brought by a materialman to enforce a mechanic's lien against the owners and a mortgagee of the property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 599-611; Dec. Dig. § 291.\*]

#### 12. MECHANICS' LIENS (§ 277\*)—PROCEEDINGS—ADMISSION OF EVIDENCE.

In proceedings to foreclose a mechanic's lien against the owners and a mortgagee, the complaint alleged the furnishing of services and materials for which the owners agreed to pay a certain sum, which was unpaid, and that complainant was entitled to a lien, without pleading any default judgment against the owners, and the mortgagee's answer alleged payment by the owners to plaintiff of a part of the indebtedness, which was denied, in the reply. *Held*, that the mortgagee could show that a part of the owners' indebtedness was paid before the institution of the suit in which judgment was entered against the owners, notwithstanding such judgment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.\*]

Gabbert, J., dissenting in part.

En Banc. Error to District Court, Teller County; James Owens, Judge.

Action by John T. Plummer and others against the State Bank of Chicago, as trustee, and another. Judgment for plaintiffs, and the bank brings error. Affirmed in part, and reversed and remanded in part for new trial as between plaintiff named and the bank.

Charles J. Hughes, Jr., deceased, Henry C. Cassidy, of Colorado Springs, and Barnwell S. Stuart, of Denver, for plaintiff in error. Henry Trowbridge, of Denver, for defendants in error.

HILL, J. The defendants in error, John T. Plummer, the Morrell Hardware Company, and J. M. Parfet, instituted separate suits in the district court of the city and county of Denver to foreclose mechanics' liens against certain property of the Cripple Creek & Pueblo Railway Company and the Gold Exploration & Tunnel Company. This property is in Teller county. To these actions the above-named owners, the State Bank of Chicago, as trustee, and W. H. Spurgeon, were made parties defendants.

Personal judgments by default were procured against the owners of the property before answer by the bank and before the time for it to answer had expired; it being a non-resident. After its appearance, and upon its application, the cases were transferred to the district court of Teller county, where they were consolidated for trial, pertaining to the issues raised by the bank, which included the amount and validity of the liens, and, if valid, the question of priority between them, and the bank's lien evidenced by a mortgage upon the same property executed by the railway company in favor of the bank as trustee for certain bondholders. The judgments were in favor of the several lien claimants decreeing the liens of Plummer and the Morrell Hardware Company superior to that of Parfet, and all three superior to the lien of the bank to the property. Foreclosure was ordered accordingly. The bank, as trustee, brings the case here for review upon error.

One hundred and thirty-two assignments of error are presented. Those necessary to consider can be grouped into a few general contentions, and will be disposed of accordingly.

[1] It is claimed that the court erred in allowing the plaintiff Parfet to make certain amendments to his complaint during the trial. We cannot agree with counsel that the amendments added new causes of action. The action as against the bank was to foreclose a mechanic's lien for a certain amount upon certain property in which it claimed an interest. The amounts covered by the amendments were included in this plaintiff's lien statement. The amount for which the lien was sought was greater in the original complaint than it was after the amendments were added. The amendments are now a part of the complaint; and, as the case must be reversed for reasons hereafter stated, prior to a new trial the bank will have had ample time to make any preparation for any defense it may have thereto. This will eliminate any question concerning surprise or necessity for delay. Prior to the trial the bank made a written demand upon the plaintiff Parfet for a bill of particulars covering each and every cause of action set forth in his complaint. This demand was not complied with, upon account of which the bank objected to the introduction of any testimony on Parfet's behalf. It also moved to strike all of his testimony. The objection and motion were overruled. The bank alleges that his failure to furnish a bill of particulars was prejudicial error, upon account of which it was greatly handicapped in presenting its defense; that the provisions of general section 69, Revised Code 1908, are applicable, as well as mandatory. Upon behalf of Parfet it is claimed that, while the demand was made upon the entire cause of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

action, the objection was limited to the first three causes concerning which, by order of the court, he had previously been required to subdivide upon the bank's motion; that the motion to strike was too broad, because it jointly attacked both first and sixth causes; that the complaint as amended, as to the first three causes, contained as particular an itemized statement as could be required; also that section 69, *supra*, does not apply; that the bank's relief, if any, should have been by motion under general section 66, Revised Code 1908.

[2] It appears to be the general rule in actions to foreclose mechanics' liens, where the work was to be for a certain contract price, that no bill of particulars is necessary. *Montpellier Light, etc., Co. v. Stephenson*, 22 Ind App. 175, 53 N. E. 444; *Stephenson v. Ballard*, 50 Ind. 176; *White v. West*, 27 Misc. Rep. 397, 58 N. Y. Supp. 841; *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

[3] This general rule applies to part of Parfet's causes of action; but, as to a part of the first and sixth, we are of opinion that the bank was entitled to more definite information. The first is based upon an agreement that he was to be paid a certain amount per month and his expenses. The sixth is for services rendered and material furnished. These expense and material items fall within the rule calling for detailed information.

[4] We see no necessity for determining whether it should be secured under section 66 or 69, Revised Code 1908, for in either event, in view of a new trial, opportunity should be granted to plaintiff Parfet to furnish this information and to introduce evidence to support it. It is claimed that no lien can attach for the so-called Parfet expense account of \$1,500, which it is alleged was allowed under his first cause of action. The total amount allowed Parfet was much smaller than claimed. Much evidence was admitted under the statement that, as the trial was to the court, it would admit the evidence and consider only that which it deemed competent. For these reasons, it is impossible to ascertain the items which went to make up the \$27,909.17, for which Parfet was decreed a lien. We might assume that this amount was awarded for other items than this expense account; there is evidence to sustain this assumption; but in view of a new trial, for other reasons, we think it competent to pass upon the contention concerning this claim.

[5] The complaint alleges, and the evidence discloses, that plaintiff Parfet was employed as superintendent, engineer, and draftsman, in the construction of the property, at an agreed price of \$250 per month and his expenses. Under these circumstances, the expenses were part of the compensation to be paid him for his work while act-

ing as superintendent, engineer, and draftsman; therefore it is just as much a part of his compensation as the \$250 per month was. *Lybrandt v. Eberly*, 86 Pa. 347. In considering the items that are proper to be included in this expense account as lienable (in view of the different views of counsel), it is proper to state that they should be limited to his expenses as superintendent, draftsman, or engineer in the construction of the property. *R. A. G. & S. M. Co. v. Bouscher*, 9 Colo. 385, 12 Pac. 433.

It is claimed that none of the plaintiffs are entitled to a lien against the property involved; or, if they are, they are inferior to the rights of the bank. The facts presenting these propositions are substantially as follows: Upon December 3, 1902, the railway company gave a mortgage to the bank upon all of its property to secure its bonds in the sum of \$250,000. This mortgage was filed for record in the office of the county clerk and recorder of Teller county December 13, 1902; the bonds were sold; the money realized was used principally in paying the expenses of extending a tunnel and laterals and placing railroad tracks therein, which one or both of the defendants (the tunnel and railway companies) were engaged in doing. This was to be a part of a railroad to be constructed by the railway company. The prospective terminal points of the railroad were Cripple Creek and Pueblo. The tunnel was to be utilized for railroad purposes.

Prior to the execution and recording of the mortgage, Parfet was employed as superintendent of the work by the railway company. In this capacity he performed services in superintending the work of extending the tunnel, in connection with the construction of the railroad commencing in November, 1902, continuing to March 10, 1904. This was at an agreed price of \$250 per month and his expenses. During this period, he incurred considerable expenses, which were unpaid, as well as the greater amount of the \$250 per month agreed upon. On March 10, 1904, he entered into a written agreement with the railway company to construct 300 feet of tunnel at a specified sum per foot. Between that date and July 1, 1905, he entered into similar contracts to construct other portions of the tunnel, including several laterals connecting with the main tunnel, during which period, at the request of the railway company, he furnished materials and supplies which were used. In addition, he also performed labor and services in constructing the railroad and tunnel in the way of superintending such work. To secure and enforce a lien for the amount still due him for services rendered and material furnished during this entire period, the plaintiff Parfet, on July 3, 1905, filed a lien statement in the office of the county clerk and recorder of Teller county. There is abundant testimony

to the effect that there was no cessation of labor on the tunnel and railroad for a period of 30 days from prior to December 1, 1902, to July 1, 1905.

The Morrell Hardware Company's account is for material and supplies furnished at different stages in the progress of the work of constructing the tunnel, laterals, and railroad; some furnished to the railway and tunnel companies direct and some furnished Parfet under some of his contracts. The last of these materials appears to have been furnished about July 6, 1905, at which date the company filed its lien statement therefor in the office of the county clerk and recorder of Teller county.

The Plummer claim is for ore cars sold and delivered to the defendant the railway company during the period the companies were doing work under the direction of Parfet, as superintendent, between January 7, 1903, and March 11, 1903. The last item was delivered March 10, 1903. This plaintiff's lien statement was filed July 6, 1905, for the amount claimed to be due him. Both these materialmen introduced testimony to the effect that there was no cessation of labor for the period of 30 days between the commencement of the work on or before December 1, 1902, down to July 1, 1905. Neither the railroad nor tunnel had been completed up to this last-named date, nor at the time of the trial. The plaintiff in error contends that each of the several items which go to make up the amounts included in the lien statements can only be regarded as having been rendered or furnished under separate and distinct contracts; that for lien purposes each of such contracts must be considered separate and distinct; that the work provided to be done under each must be considered as a separate and entire structure within itself for the purposes of our lien act; that, when thus considered, the time within which to file a lien statement for the amount due under each contract began to run from the date each contract was completed—for which reasons none of the items can be made a basis for a lien against the property of the railway and tunnel companies, except those contracted for in 1905, and that, when they are thus considered as standing alone, they cannot be made liens superior to that of the mortgage executed December 3, 1902, and recorded December 13th same year.

[8] As previously stated, the evidence discloses that the work of constructing the tunnel and railroad was practically continuous from the time the work commenced on or before December 1, 1902, down to July 1, 1905, although under sundry different contracts and arrangements. But the agreed statements of fact and the evidence are conclusive of the fact that it was all in furtherance of one general design and intention on the part of the railway and tunnel companies, viz., to complete as one structure a railroad and

tunnel, which tunnel was to be a part of the railroad system; that the entire structure, when completed, was to be a railroad between Cripple Creek and Pueblo. This was what the railway company was incorporated for. It was agreed that this was the object of its incorporation; but even if we ignore this general design and intention of the parties, and limit our consideration to the tunnel itself (in which practically all this work was done), we are driven to the same conclusion. It was not planned, as mining tunnels are, to be run for a certain distance at one time, with the possibility that it might be run a further distance at some future time, if desired by its owners, depending upon many conditions and circumstances; but, to the contrary, the completion of this tunnel in its entirety was planned for at the time this work was commenced by Parfet. It was to be constructed for railroad purposes in order that a railroad could run between certain points passing through it. Without its completion, the objects for which it was being constructed could not be accomplished; the laterals in connection therewith were also thus planned as a part thereof, as Parfet states in his testimony when asked: "Q. Mr. Parfet, what was this drift and laterals run for, if anything, aside from the construction of the railroad? A. Run as feeders for the main line, to get business for the main line of the railroad." This line of testimony stands uncontradicted; when the facts are summed up in their entirety, if we apply the rule to the entire proposed railroad or limit it to that portion included in the tunnel and its laterals, the result is the same. They were all planned and being constructed as an entirety, as one structure; the lesser included in the greater. The facts are quite similar to those in *Brooks v. Burlington & Southwestern R. Co.*, 101 U. S. 443, 25 L. Ed. 1057, where a similar conclusion was reached. When the property is thus ascertained to be one structure or identity, we find nothing in our mechanics' lien act which requires that the work done under each contract be considered as a separate structure for the purposes of the act; but, to the contrary, the act throughout contemplates that different portions or parts of the work will be done by different contractors, and that each may have a lien upon the entire property for the amount of his claim, for the work done upon or material furnished for a portion of the whole. Section 4027, R. S. 1908.

This court has heretofore held, under section 4027, supra, that where the contract is for the construction of a part of a railroad or for materials furnished, used in constructing a part only, the claimant is entitled to a lien upon the entire road. *Barnes et al. v. C. S. & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. 570. We also held under the former act, which was quite similar to section 4027, supra, where the contract was for the construc-

tion of a flume along the line of a canal, that this gave a lien upon the entire canal as between the lien claimant and the owner. *Jarvis et al. v. State Bank of Fort Morgan et al.*, 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129. These principles are applicable here. As between the lien claimants and the owners, the liens, if valid, attach to the entire property. *Brooks v. Burlington & S. W. R. Co.*, 101 U. S. 443, 25 L. Ed. 1057; *Steger v. Arctic Refrigerating Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580; *Creer v. Cache Valley Canal Co.*, 4 Idaho, 280, 38 Pac. 653, 95 Am. St. Rep. 63; 2 Jones on Liens, § 1619; *Boisot on Mechanics' Liens*, § 190; *Phillips on Mechanics' Liens* (3d Ed.) § 202; *Nelson et al. v. Iowa Eastern Railroad Co.*, 51 Iowa, 184, 1 N. W. 434, 33 Am. Rep. 124.

[7] Section 4033, R. S. 1908, in part reads: " \* \* \* All such lien statements claimed for labor and work by the day or piece, but without furnishing material therefor, must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of one month next after the completion of the building, structure or other improvement; all lien statements of all other subcontractors and of all materialmen whose claims are either entirely or principally for materials, machinery or other fixtures, must be filed for record after the last labor is performed or the last material furnished for which the lien is claimed and at any time before the expiration of two months next after the completion of such building, structure or other improvement, and the lien statements of all other principal contractors must be filed for record as aforesaid after the completion of their respective contracts and at any time within three months next after the completion of the building, structure or other improvement." This section (which is different from the former act) is self-explanatory of the fact that the liens were not filed too early or too late. They were filed after the contract was performed or the material furnished for which the lien was claimed, and before the completion of the structure. As previously stated, there had been no cessation of labor thereon from the time the first work commenced under Mr. Parfet until the date the liens were filed. This section does not require that they wait until the property is completed; that time might never arrive. *Rice v. Rhone*, 49 Colo. 41, 111 Pac. 585; *Lookout Lbr. Co. v. Mansion Hotel & Belt Railway Co.*, 109 N. C. 653, 14 S. E. 35; *Levert v. Reed*, 54 Ala. 529; *Young v. The Orpheus*, 119 Mass. 179; *Davie v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Baldridge v. Morgan et al.*, 15 N. M. 249, 106 Pac. 342, Ann. Cas. 1912C, 337.

[8] Section 4030, R. S. 1908, reads in part: "All liens, established by virtue of this act shall relate back to the time of the commence-

ment of work under the contract between the owner and the first contractor, or, if said contract be not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any and every lien or incumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which, the lienor, under this act, did not have actual notice."

The first contract with Parfet, as superintendent, is not shown to have been in writing. None of the contracts are shown to have ever been recorded; and none of the provisions of section 4029, R. S. 1908, were ever complied with. If the first contract with Parfet is to be construed as a contract with a contractor within the meaning of section 4030, supra, then he commenced construction under it in November, 1902, or at least on or before December 2, 1902. If we accept this position as correct, all these liens would relate back to, and take effect as of, that date. If this construction of his contract is not correct, and it was not a contract with a contractor within the meaning of this section, but while acting as superintendent he was the agent of the companies, and they were in this manner engaged in the construction of the work, then, under this section, the liens would relate back to and take effect as of the date of the commencement of the work by the companies, under him as superintendent. This was on or before December 2, 1902, and prior to the date of the execution or recording of the mortgage, hence, accepting either position as correct, the result is the same; and, under section 4030, the liens antedate the date of the execution of the mortgage, which, by stipulation, is shown to have been December 3, 1902; the date when it was filed for record was December 13, 1902—for which reasons the liens became prior in time upon this property. This conclusion, which is in harmony with the findings of the trial court, makes unnecessary any consideration of the contention pertaining to the after-acquired property clause in the mortgage, where the property was partially brought into existence by the lien claimants.

[9] Over the objections of the defendant, the plaintiffs were allowed to introduce in evidence their judgments secured by default against the railway and tunnel companies. It is claimed that this was prejudicial error. We cannot agree with this contention.

[10] In an action by a subcontractor or materialman to foreclose his lien, the original contractor must be made a party to the suit. The claim must be adjudicated and established against the contractor in favor of the subcontractor or materialman. *Charles v. Hallack Lbr. Co.*, 22 Colo. 283, 43 Pac. 548; *Davis v. Mouat Lbr. Co.*, 2 Colo. App. 381, 31 Pac. 187; *Estey v. Lumber Co.*, 4 Colo.

App. 165, 84 Pac. 1113; *Marean v. Stanley*, 5 Colo. App. 335, 88 Pac. 395; *Clayton v. Farrar Lbr. Co.*, 119 Ga. 37, 45 S. E. 723; *Vreeland v. Ellsworth et al.*, 71 Iowa, 347, 32 N. W. 374. Where there is a mortgage upon the property, and the mortgagee is made a party, the same rule would apply in requiring that the owner be made a party to the suit. In order for these plaintiffs to recover, it was necessary for them to show, in order to bind the mortgagee, not only that the owners were indebted to them in the amount alleged in the petition, but that the same was the kind of indebtedness which would sustain a lien against the property sought to be held, and both facts must be established against the owners. It must be adjudicated in this, or have been in some other case as between them. Where, as in this case, the contention is between two rival claimants to the property, to wit, lien claimants and mortgagee, it was necessary for the plaintiffs to establish their claims against the owners. The judgments were competent evidence to show that the claims had been established against the owners.

[11] They were estopped from denying their validity. It was conclusive against them that the personal liability had been established. This estops them from thereafter disputing the claim. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991; *Batchelder v. Rand*, 117 Mass. 176. There are reasons for the rule which requires this. To illustrate: Suppose that service had not been made upon the railway company and no adjudication had against it; that the action had proceeded against the mortgagee; that the liens were established as against it, and, in order to prevent foreclosure, it paid the indebtedness, and upon foreclosure of its mortgage it then sought to have the amount paid the lien claimants added to its lien, and in this manner be subrogated to the rights of the lien claimants; that, in answer to such petition, the owner denied the indebtedness or alleged that a part of the indebtedness had been paid prior to the entry of the judgment; and that it had never had its day in court concerning it. In such case it could not be estopped from so doing, for the reason that the claim had never been established against it. This reason for the general rule is apparent in most all cases, if a subcontractor establishes his lien against the property, and the owner is compelled to pay it (if not owing the principal contractor the amount), he has recourse upon him, but must be furnished with an adjudicated claim between the two contractors, and not with a mere open account. We think the judgments competent for the purpose of showing that such claims had been established against the owners of the property. It was conclusive against the owners, and was likewise conclusive against the mortgagee of that fact, to wit, that the claim had been adjudicated against the owner.

[12] In presenting its alleged defenses, the bank attempted to prove that a part of the alleged indebtedness covered in the Parfet default judgment had been paid prior to the time the judgment was secured, and prior to the date that his suit was instituted. All this line of testimony was excluded upon the theory that the judgment was conclusive of these facts, and could not be impeached by the bank, except upon allegations and proof of fraud and collusion between the parties to the judgment. Many authorities are cited to show that judgments cannot be otherwise attacked. In considering this question, it is necessary to take into consideration the parties, the pleadings, and record as they existed at the time this testimony was offered. The plaintiff Parfet instituted his action to foreclose a mechanic's lien, making as parties defendants the owners of the property and the mortgagee representing an interest therein. His complaint alleges that he performed services and furnished materials in the construction of the property, for which the owners owed him a certain amount which had not been paid; that he was entitled to a lien therefor, etc. These were the allegations in the complaint which the bank was summoned to answer, and which it did within the time allowed. In its answer, it pleaded, as a defense, payment by the owners to Parfet of a part of this indebtedness. In his replication to this answer, Parfet denied the allegation of payment. This was the condition of the pleadings when the evidence was offered. It will be observed that no judgment against the owners was pleaded; hence the mortgagee had no opportunity by answering any pleading to attack, for fraud or collusion, the validity of the judgment between Parfet and the owners; but if counsel are correct, regardless of these facts, upon account of the owners allowing a default judgment to be taken against them, the bank is precluded from presenting a defense which is made a direct issue by the pleadings between it and Parfet. If this is the correct rule, in this class of cases a portion of the issues, as made up by the pleadings, might or might not be issues upon which evidence could be received at the time of the trial, depending upon whether certain other defendants might or might not allow default judgments to be taken against them. We do not think this reasoning sound, but are of opinion that the fact that the owners allowed judgments to be taken by default against them did not preclude the mortgagee from showing that a part of this alleged indebtedness had been paid prior to the time the suit was brought. If the bank could show this, then the judgment was in law a fraud as against it. The issues, as made up, involved the payment of a part of the indebtedness; the ruling was that, upon account of the default judgment against the owners, the bank was not entitled to offer evidence to sustain this defense, for the rea-

son that the owners had not seen fit to defend the action, although the bank had sought to do so.

In *Brooks v. Burlington & Southwestern R. Co.*, 101 U. S. 443, 25 L. Ed. 1057, it was held that judgments in favor of subcontractors against the owners are not conclusive as to the validity of the lien against a mortgagee not a party to the action. We gather this from the following language in the opinion: "It is also to be observed that O'Hara & Co. and Wells, French & Co. had both commenced legal proceedings in the proper courts of the state to establish their liens before the present foreclosure suit was begun by appellants, and that in those courts, after a contest with the railway company, judgments were rendered establishing their liens, and it was after this that they were made defendants to the present foreclosure suit. To these proceedings, Barnes, the principal contractor, and the railway company were parties; and we take it for granted that as against them the judgment of the state court establishes the validity of the lien. The appellants, being no party to these proceedings, are not bound by that judgment, and both the validity of the lien as against them, and whether the lien, if valid, is paramount to that of the mortgage, are the questions for consideration here."

In *Sargent v. Salmond et al.*, 27 Me. 539, at page 547, it was held that a judgment is evidence of the amount of indebtedness between the parties to it, but is not binding as to third persons not parties or privies thereto. A creditor of Salmond, after having obtained a judgment against him, sought to recover, in satisfaction of his judgment, certain real estate which it was alleged belonged to the defendant Salmond, but was held in the name of Mary P. Salmond. In the latter action she sought to attack the validity of the indebtedness upon which the judgment was rendered. It was held she had that right. In commenting upon this phase of the case, the court said: "The judgment is evidence against William Salmond, the debtor therein, of the amount of indebtedness; but it is not binding against the other defendant, who was not a party to the judgment or the suit in which it was rendered. She is entitled to impeach it in this suit, commenced for the purpose of affecting her personally, or the interest in the property, which she claims as belonging to her. If she has received property of the other defendant fraudulently as against the creditors of the latter, she cannot be bound to restore it beyond an amount sufficient to cover the just and legal claims of creditors. When the bill, answers, and proof are considered, it satisfactorily appears that the complainant took judgment against William Salmond for a sum larger than that to which he had a just and legal claim, and it does not conclude the defendant Mary P. Salmond."

In *Montgomery et al. v. Rich et al.*, 3

Tenn. Ch. 660, at pages 663, 664, it was held that a bona fide purchaser of land may successfully contest a claim of the creditor of the vendor by virtue of mechanics' liens fixed by attachment and judgment by showing that the lien debt had been paid before the sale and judgment. In commenting upon this subject, the court in part said: "The case before us is that of a third person, who is seeking to avoid the effect of the judgment of a justice on realty, the title to which was acquired by such third person previous to the rendition of the judgment. It is not exactly a collateral attack on the judgment. It is rather the assertion of a right which, the bill insists, should not be affected by the judgment. And the question is not so much the invalidity of the judgment, as of the complainant's right to contest with the defendants, as between them, facts which the defendants may claim as settled in their favor, against Long, by the judgment. As a general principle, a transaction between two parties in a judicial proceeding will not be binding on a third party. \* \* \* 'It would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.' \* \* \* Accordingly, it has been held that a mortgagee of land is not estopped by a judgment, in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but may litigate the amount due upon the mortgage, notwithstanding the prior judgment. *Campbell v. Hall*, 16 N. Y. 575. \* \* \* The complainants have the right, therefore, to contest with the successful litigant those matters which bear upon their rights, just as if no such judgment had been rendered. And they have proved by Long himself that the defendants' debt, so far as it could claim to be a mechanic's lien on their land, was paid before the attachment suit was instituted. \* \* \* The burden of proof is thus thrown upon the defendants, as between them and complainants, to show affirmatively the existence of a mechanic's lien for any portion of the debt claimed."

In *Clark et al. v. Moore*, 64 Ill. 273, it was held that where certain lien claimants had not been made parties to a foreclosure under mechanics' liens by others, and where property had been sold thereunder at an inadequate price, on application by them the court was justified in setting the former sale and decree aside; that by the decree and sale the other lien claimants had acquired no right that barred or precluded those not made parties from asserting their rights; that, when the decree and sale were set aside, the

other lien claimants were then at liberty to contest the amount or validity of any or all of the liens being asserted against the property precisely as they could have done had they been parties to the first proceeding; that if the allowance was too large in favor of any one of the plaintiffs, and endangered any portion of the other claims, they, for their own protection, had the unquestioned right to resist and have it reduced to its just and fair amount just the same as though the former judgment had not been rendered; that the finding of the court in the first decree was not conclusive against those not then parties to the action. The same rule is announced in *Bolsot on Mechanics' Liens*, § 670.

In *Early v. Albertson*, 2 Wkly. Notes Cas. (Pa.) 369, it was held that terre tenants should always have an opportunity to defend against the validity of lien claimants.

In *Field v. Oberteuffer*, 2 Phila. (Pa.) 271, at page 273, it was held that the amount of a judgment confessed on mechanics' lien claims is not conclusive against an auditor of the court in making his report for its distribution, where the defendant's real estate had been sold at sheriff's sale, and the funds paid into court. In passing upon this subject, the court said: "We agree with the auditor that the judgment confessed upon the claim filed ought not to have been deemed conclusive evidence of the sum due; but no case could better illustrate the propriety of this decision than that which has given rise to the exception. For it appears plainly, on the auditor's investigation, that the judgment had been advisedly confessed for a much larger sum than was due as a mechanics' claim under the Acts of Assembly."

Without approving or disapproving, as a whole, the rulings in the cases last cited, we think, as stated in the last case, that the facts here are also of that class which gives rise to the exception. This record discloses that Mr. Parfet was one of the promoters, as well as one of the original stockholders, of the railway company; that he was its first superintendent of construction; he testified that certain gentlemen would become interested therein only on condition that he be selected in such capacity; that, as the representative of the company, he disbursed in construction a large amount of the money received from the sale of the bonds represented by the plaintiff in error. Under such circumstances, without making intimation that there is anything wrong with the amount of Mr. Parfet's claim, or that there is any fraud or collusion, where, as here, it is made an issue by the pleadings, we think that the bank should have the opportunity to defend against any and all portions of the claim; and if payments have been made, as its pleadings alleged, it should have the right to show these facts, regardless of the default judgment entered against the owners. This

principle is recognized in *Gordon-Tiger Co. v. Loomer*, 50 Colo. 409, 115 Pac. 717. A purchaser had acquired from the decedent's heirs certain real estate which might be jeopardized by the allowance of certain claims against the estate; for that reason we held that he had the right to intervene and defend against the claims.

That portion of the decree fixing the amount of their claims and declaring them liens upon the property, including the order of their rank or class in favor of the plaintiffs John T. Plummer and the Morrell Hardware Company, as between themselves and the plaintiff Parfet, and as against the defendants, is affirmed. For the reasons stated, the judgment in favor of the plaintiff J. M. Parfet is reversed, and the cause as between him and the bank is remanded for a new trial, upon the questions only of the amount due him, including the question of payments, and what items are lienable under his expense account, in harmony with the views herein expressed; the ultimate decree rendered to include an order of foreclosure in favor of the plaintiff Plummer and the Morrell Hardware Company, similar to the former decree in this respect. The plaintiff in error will recover one-half of its costs for this writ of error against the defendant in error Parfet; the defendants in error Plummer and the Morrell Hardware Company will recover their costs upon this writ of error against the plaintiff in error.

Affirmed in part. Reversed and remanded in part.

CAMPBELL, C. J., not participating.

GABBERT, J. (dissenting in part). I concur in the reversal of the judgment of the trial court, but dissent from so much of the opinion as holds that the lien claimants are, or may be, entitled to any relief giving them rights in the property involved superior to that of the mortgagee. The liens of claimants cannot relate back to the inception of the work in December, 1902, except it be upon the theory that the work done and materials furnished between that date and July, 1905, was in furtherance of one general design on the part of the railway and tunnel companies to complete, as one structure, so much of the tunnel and railway as was completed on the latter date. There is not the slightest testimony to indicate any such design. On the contrary, in my opinion, it is clear from the testimony, pleadings, and agreed statement of facts that the work of constructing a railroad and tunnel, during the period for which the respective liens are claimed, was not one entire undertaking, continuously and uninterruptedly followed up as one piece of work, and carried on in furtherance of one general design; but that the work prosecuted during this period was on a series of disconnected, separate, and distinct

structures or improvements, constructed either by the owners or by contractors under separate and distinct contracts; and that the materials furnished were under separate and distinct contracts, corresponding in point of time with the periods during which these separate and disconnected portions of the tunnel and railway were constructed. Such being the facts, it follows, on principle and authority, that where labor or materials are furnished under separate and distinct contracts, for the construction of separate and distinct portions of a tunnel or railway, a lien statement must be filed for what was done or furnished under each contract, within the statutory period after its completion. 27 Cyc. 144; Sweet et al. v. James, 2 R. I. 270; Hobkirk v. Portland B. B. Club, 44 Or. 605, 76 Pac. 776; King et al. v. Ship-Building Co., 50 Ohio St. 320, 34 N. E. 436; Nye et al. v. Berger, 52 Neb. 758, 73 N. W. 274; Livermore v. Wright, 33 Mo. 31.

Applying this rule, it is apparent that neither of the liens claimed can be enforced as superior to the mortgage lien of the bank.

#### LOTH v. LOTH'S ESTATE.

(Supreme Court of Colorado. Feb. 3, 1913.)

**DIVORCE (§ 320\*)—RIGHT TO MARRY.**

Under Rev. St. 1908, § 2122, providing that, during a period of one year from the granting of the divorce decree, neither party shall be permitted to remarry, and section 4165 providing that all marriages contracted without the state, which are valid by the laws of the country in which they are contracted, shall be valid in all the courts within this state, a marriage contracted in New Mexico, where it was valid between residents of this state within one year from the granting of the decree of divorce between one of such parties and a third person, is valid in this state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.\*]

Min Banc. Error to County Court, City and County of Denver; John R. Dixon, Judge.

Petition by Alice G. Loth for letters of administration on the estate of Carl L. Loth. From a judgment denying the petition and appointing another administrator, the petitioner brings error. Reversed and remanded, with directions.

Paul De Laney and James A. Harris, both of Denver, for plaintiff in error. Robert H. Kane, of Denver, for defendant in error.

HILL, J. Carl L. Loth departed this life at the city and county of Denver about September 1, 1911. He was possessed of certain real and personal property situate in said county. Upon September 18th following, Alice G. Loth filed her petition in the county court, setting forth the matters above stated, with the further facts that she was his wife and sole and only heir at law, upon account of which she prayed that letters of administration be granted to her. This petition was

resisted by a sister of the deceased, under the claim that the petitioner was not the widow of the deceased; that she was never legally married to him. The court denied the petition of the alleged wife, and appointed Henry B. Teller as administrator. The wife brings the case here for review upon error.

If the plaintiff in error was the lawful wife of the deceased (no other objection having been presented), it is agreed that she was entitled to the appointment; if not, the order of the court was correct. The record discloses that the plaintiff in error was formerly the wife of Daniel D. Hayne; that on June 16, 1911, while she was a resident of Denver, she was granted a decree of divorce from Hayne by the county court of said county; that no application has ever been made to set the decree aside. This decree is absolute in form, and is not shown to be irregular or void. It contains the usual clause concerning remarriage within a year, as follows: "That, until the expiration of the full period of one year from after the day of the date hereof, neither of said parties be permitted to remarry to any other person." Thereafter, upon July 21st following, the plaintiff in error and Carl L. Loth, since deceased (while both were residents of Colorado), at the county of San Juan, in the territory of New Mexico, secured a marriage license and were married in full conformity with the laws of that territory. The sole question necessary for determination is the validity of the marriage contract entered into in New Mexico within one year from the date of the decree of divorce dissolving the bonds of matrimony theretofore existing between the plaintiff in error and her first husband. Its determination depends upon the construction of section 2122, Revised Statutes of 1908, and its effect upon marriage contracts in another state (recognized as valid there), when considered in connection with section 4165 of said statutes.

This identical question was recently passed upon by our Court of Appeals in case No. 3,591, Adam H. Griswold v. Hattie E. Griswold, 129 Pac. 560, wherein, for the reasons stated, it was held that such a marriage was valid in this state. We have given that opinion careful consideration, and have reached the conclusion that it states the correct rule upon the subject. We add our approval thereto. The reasoning and conclusion are applicable here. We think it unnecessary to add anything to the reasons given. They cover the question in its entirety. It follows that the marriage contract solemnized in New Mexico is valid in this state, upon account of which plaintiff in error was the lawful wife of the deceased at the time of his death, and should have been appointed administratrix of his estate.

The judgment is reversed, and the cause remanded, with instructions that the former

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



administrator be discharged, and that the plaintiff in error be appointed administratrix of said estate.

Reversed.

### MARKS v. MORRIS.

(Supreme Court of Colorado. Feb. 8, 1913.)

#### 1. ADVERSE POSSESSION (§ 93\*)—COLOR OF TITLE—PAYMENT OF TAXES.

Under Rev. St. 1908, § 4090, providing that payment of taxes on vacant and unoccupied land for seven successive years, by one holding color of title made in good faith, shall vest title in him according to his paper title, where suit to recover vacant land was brought against the holder of a tax deed, void on its face, within seven years from his first payment of taxes thereon, payment of taxes for seven years was no defense, though more than seven years had passed since the record of the tax deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 525-527; Dec. Dig. § 93.\*]

#### 2. ADVERSE POSSESSION (§ 82\*)—TAX DEED—"COLOR OF TITLE"—NECESSITY OF RECORD.

Until a tax deed is recorded, it is not "color of title," within Rev. St. 1908, § 4090, providing that a person having color of title to vacant and unoccupied land shall acquire the legal title thereto by paying all taxes thereon for seven successive years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. § 82.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

Appeal from District Court, Logan County; H. P. Burke, Judge.

Action by Nellie S. Morris against William Marks. From judgment for plaintiff, defendant appeals. Affirmed.

McConley & Hinkley, of Sterling, for appellant. John F. Mall, of Denver, for appellee.

GARRIGUES, J. [1, 2] This is a code action for the possession of real property. Defendant has a tax deed, void on its face, which he claims vests the legal title in him under the following statute: "Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title." Section 4090, Rev. Stats. 1908. The tax deed was recorded April 19, 1900. First payment of taxes thereunder was December 18, 1901. This action was commenced May 16, 1908.

This statute was no defense unless seven years had elapsed between the date of the first payment of taxes and the date of bringing the action (Empire Co. v. Howell, 22 Colo. App. 585, 128 Pac. 1096); and a tax deed is not color of title until recorded. Sayre v. Sage, 47 Colo. 559, 108 Pac. 160.

In a case of this character, where conflicting titles are involved, before the seven years' statute can operate as a limitation, there must not only be seven years between the date the suit is brought and the first payment of taxes, but there also must be that length of time between the date of record of a tax deed and the commencement of the action. In this case, while more than seven years elapsed between the date the deed was recorded and the commencement of the action, less than seven years had expired between the first payment of taxes and the bringing of the suit.

The judgment is therefore affirmed.  
Affirmed.

MUSSER, C. J., and SCOTT, J., concur

### EMPIRE RANCH & CATTLE CO. v. ZEHR. (Supreme Court of Colorado. Feb. 8, 1913.)

#### LIMITATION OF ACTIONS (§ 39\*)—LIMITATIONS APPLICABLE.

Rev. St. 1908, § 4073, providing that bills of relief in all other cases not herein provided for shall be filed within five years after the cause of action accrues, the cases therein provided for being bills for relief against fraud, etc., does not apply to actions affecting realty, such as one to quiet title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 190-211; Dec. Dig. § 39.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Peter Zehr against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. Munson & Munson, of Sterling, for appellee.

GARRIGUES, J. 1. This action was commenced by the patent owner to quiet his title against a tax deed; each party claiming title in fee simple. Defendant's adverse claim was a tax deed, void on its face. It was admitted on the trial that the land was patented to the plaintiff. Defendant, in support of its title, relied upon and offered in evidence a tax deed, which the court excluded, because it was void upon its face, and, defendant offering no further evidence, entered judgment for the plaintiff.

2. Defendant pleaded the five-year equity statute of limitations, which in part is as follows: "Bills of relief \* \* \* in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after." Section 4073, Rev. Stats. 1908. The "other cases" therein provided for are: "Bills for relief on the ground of fraud," and "the existence of a trust not cognizable by the courts of common law." While the tax deed was not admitted in evidence, the pleadings admitted it was recorded January 5, 1903, and the complaint

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was filed December 28, 1908. Defendant's contention is that as soon as the tax deed was recorded it became a cloud on plaintiff's title, that his cause of action then accrued, that this is a bill for relief to remove the cloud, and, inasmuch as it was not brought until almost six years after the cause of action accrued, that it is barred by this statute.

There is no doubt, if the tax deed was a cloud upon plaintiff's title, that the cause of action to quiet it accrued as soon as it was filed for record, and, as the suit was not brought until almost six years thereafter, the action was barred, if the statute applies to a case of this kind; but the case of *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187, is decisive of the question. It is there held that this statute is a limitation upon personal actions only, and was never intended to apply to actions affecting real estate. The judgment will therefore be affirmed.

Affirmed.

MUSSER, C. J., and SCOTT, J., concur.

#### WEAVER v. RICHARDSON.

(Supreme Court of Wyoming. Feb. 11, 1913.)

TRIAL (§ 143\*)—QUESTIONS OF LAW OR FACT.

Where there is a substantial conflict in the evidence, it is for the jury to determine on which side the evidence preponderates; and it is improper for the court to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.\*]

Error to District Court, Albany County; Carroll H. Parmelee, Judge.

Action by Annie F. Richardson against Adelaide J. Weaver. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

N. E. Corthell and V. J. Tidball, both of Laramie, for plaintiff in error. F. E. Anderson, of Laramie, for defendant in error.

BEARD, J. The defendant in error, Annie F. Richardson, brought this action in the district court of Albany county against the plaintiff in error, Adelaide J. Weaver, to recover the possession of certain real estate situated at Tie Siding in said county, and for damages for the alleged unlawful detention of the possession of the same by plaintiff in error. The cause was tried to a jury; and at the conclusion of the evidence, at the request of the plaintiff below, the court instructed the jury to return a verdict in favor of said plaintiff. Judgment was entered on said verdict, and defendant below brings the case here on error.

For convenience, the defendant in error will be referred to as plaintiff, and the plaintiff in error as defendant. The answer denied the allegations of the petition; and for a second defense alleged, in substance, that

about October 28, 1909, the plaintiff and defendant entered into an agreement by which the plaintiff agreed to sell to defendant said premises for the sum of \$500, and that defendant deposited with one Ada Ulen, the agent of both parties, \$20 in escrow, as part of the purchase price of said premises; that said \$20, together with the balance of said purchase price, was to be paid to plaintiff when she should execute and deliver to defendant a good and sufficient warranty deed conveying to defendant a clear title to said premises; that defendant should take immediate possession and hold the same until such deed was executed and delivered; that relying on said agreement, and with the consent of plaintiff, the defendant entered into the possession of the premises, and has since been in the quiet possession thereof, believing the same to be her property, and with the knowledge and consent of plaintiff has made valuable and lasting improvements thereon; and alleged that plaintiff had failed to keep and perform said agreement on her part. The reply admitted that defendant entered into possession of the premises at the time stated in the answer, and denied the other allegations therein contained.

For the trial of the issues of fact thus joined, the plaintiff demanded a jury. On the trial it appeared that the agreement, if any, was made between the defendant and Mrs. Nally, the daughter of plaintiff, and her authority to enter into any contract as agent for her mother, as well as what the agreement was, was in dispute. Also under what conditions or agreement the defendant entered into possession of the premises; what improvements defendant had put thereon; whether the same were made in good faith, relying on the contract; whether the plaintiff with knowledge of what her daughter had done in the matter had been ratified by her—were all controverted questions of fact upon which the evidence was in direct conflict. It would serve no useful purpose, and would unnecessarily lengthen this opinion, to set out herein the evidence showing such conflicts. We deem it sufficient to say that, upon each of the questions above stated, there was a direct conflict in the testimony of one or more witnesses on each side, with more or less corroborating or contradictory evidence in letters introduced in evidence, and in the substance of other correspondence which it was testified had been destroyed and could not be produced. The case being tried to a jury, it was not for the court to determine on which side the evidence preponderated or which witnesses were most worthy of credence. Had the case been tried to the court without a jury, and the court had found for the plaintiff on the conflicting evidence, an entirely different question would be presented. But when a case is tried to a jury, it is the duty of the court to submit to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the jury, for its determination, controverted questions of fact upon which there is a substantial conflict in the evidence. In this case it is not claimed that, if the facts are as the evidence on the part of the defendant tends to prove, they would not constitute a good defense to the action, and that for that reason it was proper for the court to take the case from the jury.

The motion made in the district court for an instruction directing the jury to return a verdict for plaintiff was: "The plaintiff moves the court to instruct the jury to return a verdict for the plaintiff upon the ground that no contract for the sale of said property has been shown, and that there has been an absolute failure on the part of the defendant to show any agency authorized by the plaintiff, Mrs. Richardson, or which could in any wise be binding upon her." That motion was sustained by the court; and counsel for defendant in error says in his brief: "The court sustained the motion, holding that the burden shifted to the defendant below to show a contract of sale, and that she had failed to do this." This we think was clearly an invasion by the court of the province of the jury. It was for the jury, and not the court, to weigh the conflicting evidence and determine whether or not the defense was established by a preponderance of the evidence.

For the error in directing a verdict for the plaintiff, the judgment of the district court is reversed, and the case remanded for a new trial.

SCOTT, C. J., and POTTER, J., concur.

#### ERATH v. GLENN.

(Supreme Court of Kansas. March 8, 1913.)

##### (Syllabus by the Court.)

#### 1. EXECUTION (§ 472\*)—SALE—REVERSAL OF JUDGMENT—RIGHTS OF DEFENDANT.

In an action against a judgment creditor to recover damages for lands sold under a judgment obtained upon service by publication, where the judgment was afterwards vacated under section 77 of the former Code of Civil Procedure (Gen. St. 1901, § 4511), the measure of damages is the value of the land at the time the bona fide purchaser acquired the right to a sheriff's deed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1403, 1404; Dec. Dig. § 472.\*]

#### 2. EXECUTION (§ 455\*)—SALE—REVERSAL OF JUDGMENT.

Section 467 of the old Code of Civil Procedure (Gen. St. 1901, § 4913), which authorized restitution by the judgment creditor of the money for which the lands were sold, applied only in cases where the judgment was afterwards reversed by a superior tribunal.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1385; Dec. Dig. § 455.\*]

Appeal from District Court, Greeley County.

Action by Emma Erath against W. M. Glenn. Judgment for plaintiff, and defendant appeals. Reversed.

Lee Monroe, of Topeka, for appellant. D. R. Beckstrom, of Tribune, for appellee.

PORTER, J. On January 6, 1905, the appellant, Glenn, procured a tax deed on a quarter section of land in Greeley county, belonging to Emma Erath, who was a non-resident of the state. Immediately thereafter he recorded the deed and conveyed the land to one Rogers, and took from him a note and mortgage for \$6,000, covering this and other lands. The note matured in 10 days, and at once after its maturity a foreclosure suit was brought in Glenn's name as plaintiff against Rogers and Mrs. Erath as defendants. The only service upon her was by publication. A default judgment was taken; and on June 5, 1905, the land was sold at sheriff's sale for \$100 to the Quinter Town & Land Company. The sheriff's deed issued December 21, 1905. Subsequently Mrs. Erath had the judgment vacated under section 77 of the old Code (Gen. St. 1901, § 4511). Upon a retrial the tax deed was held void and Glenn was given a tax lien amounting to \$120.91.

R. H. Merrick, who acquired the title of the purchaser at the sheriff's sale, brought a suit against Mrs. Erath to quiet title, and on January 11, 1911, recovered a judgment barring her of any interest in the land. On March 8, 1911, she commenced this action against Glenn to recover the value of the land. The court found the value to be \$800, and, after deducting therefrom the amount of the tax lien, rendered judgment in appellee's favor for the difference. Glenn appeals.

Neither laches nor any statute of limitations furnished a defense to the action. By his appeal from the order vacating the judgment, Glenn delayed the appellee in obtaining a judgment setting aside the deed until April, 1910. It was necessary to have the tax deed declared void before this action could be maintained.

[2] It is argued that she had no cause of action against appellant for the reason that she could only recover, in any event, the amount for which the land sold at sheriff's sale, which was several dollars less than Glenn's lien for taxes. The contention is that section 467 of the former Code (section 4913, Gen. Stat. 1901) applies to cases where lands have been sold at judicial sale under a judgment rendered upon publication service and afterwards vacated. Section 467 of the former Code read as follows: "If any judgment or judgments in satisfaction of which any lands or tenements are sold shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such cases restitution shall be made by the judgment creditors of the money for which such lands or tenements were sold, with lawful

interest from the day of sale." This is now section 461 of the Code, but there has been added a provision which in express terms declares that the section shall not apply in cases of sales under judgments rendered without personal appearance, and without service other than by publication, when the sale is made within six months from the date of the judgment. We think it never was meant to apply to sales under a judgment afterwards vacated. It purports to deal with judgments only that are reversed after sales have been made under them, and no reference of any kind is made to judgments vacated. In *Daleschal v. Gelser*, 36 Kan. 374, 13 Pac. 595, it was said in the opinion: "Its operation seems to be confined solely to titles acquired through judicial sales, intermediate the rendition of a judgment, and its reversal by a superior tribunal." 36 Kan. 378, 13 Pac. 597.

[1] The true measure of damages is the value of the land at the date at which the purchaser became entitled to a sheriff's deed, less the lien for taxes. There was evidence tending to show an increase in the market value between December 21, 1905, when the sheriff's deed was executed, and February 23, 1907, when Merrick took the title.

The judgment will be reversed, and a new trial ordered, with directions to find the value as of the date of the sheriff's deed, unless the parties agree upon the value. When the value is determined, judgment is to be rendered accordingly. All the Justices concurring.

#### MAYER COAL CO. v. STALLSMITH.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

#### ACCOUNT STATED (§ 18\*)—PLEADING—EVIDENCE.

An account stated must be of a subsisting debt, and, in an action upon an account stated, the defendant may show, under a general denial, any fact which destroys the plaintiff's cause of action, including payment of the indebtedness claimed to be the subject of the account stated.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 85-90; Dec. Dig. § 18.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 93-98; vol. 8, p. 7561.]

Appeal from District Court, Cherokee County.

Action by the Mayer Coal Company against Joe Stallsmith. Judgment for defendant, and plaintiff appeals. Affirmed.

Morgan & Burr, of Galena, and Glasse & Burton, of Parsons, for appellant. S. C. Westcott, of Galena, for appellee.

BURCH, J. The plaintiff was defeated in an action against the defendant for the recovery of money, and appeals.

The charging part of the petition reads as follows: "Plaintiff states that the defendant is indebted to it in the sum of two hundred and fifteen dollars and ninety-three cents (\$215.93) upon an account for goods, wares, and merchandise sold and delivered to the defendant at his special instance and request; that on May 13, 1911, an agreement was had between the said plaintiff and defendant, which said agreement was oral, and was, in substance, that the balance due on said account from the defendant to the plaintiff, inclusive of interest, was two hundred and fifteen dollars and ninety-three cents (\$215.93), which said sum is past due, and the defendant wholly fails and refuses to pay the same upon demand."

No copy of the original account was attached to the petition. The answer was a general denial. The plaintiff's evidence was directed to the latter part of the petition. From this evidence it appeared in a general way that the defendant had been indebted to the plaintiff on an open account, that subsequently he made several payments, and that on the day stated in the petition the plaintiff's agent and the defendant got together and agreed upon a balance due in the sum stated in the petition. The defendant testified that he had owed the plaintiff on account for coal sold and delivered to him, and that the amount of his indebtedness to the plaintiff had never been in dispute; that he indorsed to the plaintiff three promissory notes, which were accepted by the plaintiff in payment pro tanto of the account; that he paid the balance of the account by a check, and that a statement of the account showing these credits was receipted in full and returned to him in a letter, which acknowledged the check as payment of the balance due, and expressed gratification at the closing of the account. The defendant testified, further, that the plaintiff expressed satisfaction with the notes which it received because of the defendant's indorsement upon them; that he fully recognized his liability as an indorser of the notes, and had actually taken up two of them, but that he refused to take up the remaining note because the plaintiff neglected and refused to take the necessary steps to charge the estate of the maker. The defendant denied positively that there was ever any talk of liability on the open account after he received the receipted statement, and that he did not agree with the plaintiff's agent on any sum due from him either on the notes or on the account. In addition to those already stated, other facts and circumstances were given in evidence tending to show that the notes were taken in settlement of the account, and not merely as collateral security.

The plaintiff insists that evidence of payment of the original account by the defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant was not admissible under the general denial. This contention is plainly opposed to the theory of the petition and to the theory of the proof offered to sustain the petition. The first sentence of the petition, alleging indebtedness upon an account, is immediately followed by the allegation that the amount due on such account was fixed and determined by an agreement between the parties to be a certain sum, "which said sum"—which agreed sum—was past due and unpaid. It is elementary that this agreement, if made, took the place of the obligation arising under the previous account. Such an agreement constitutes an account stated (Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878), and the clear purpose of the pleader was to rely upon the new cause of action arising upon this new obligation instead of upon the previously existing account. The character of the plaintiff's proof confirms this theory.

An account stated may be impeached for fraud, accident, or mistake, but in such cases the facts warranting the desired relief must be pleaded. Unless it be set aside, an account stated is conclusive. It forecloses inquiry respecting the items of the previous account and precludes the defendant from opening the merits of the transactions embraced in the previous account for the purpose of impeaching items covered by the stated balance due. An account stated, however, must be of a subsisting debt (27 L. R. A. 814, note), and in an action upon an account stated the defendant may show, under a general denial, any facts which destroy the plaintiff's claim. If there were no previous account, or if there were no agreement respecting the balance due upon a previous account, the plaintiff must fail. 1 Cyc. 392; 1 Enc. Pl. & Pr. 89; Barr v. Lake, 147 Mo. App. 252, 259, 126 S. W. 755. Very clearly the existence of an indebtedness upon which an account stated could be predicated is negated by showing payment before the claimed agreement was made. Being unable to sustain a cause of action upon an account stated, the plaintiff now wishes to go back of the agreement pleaded, to rely upon the original account, and to convict the district court of error in the admission of testimony tending to show payment. The plaintiff, however, failed to apprise the district court of any desire to withdraw the issue of an account stated tendered by the petition and to shift to another basis of recovery. The evidence of payment was relevant to that issue, and no error was committed in receiving and in considering it. If the petition be regarded as stating two causes of action, one upon an account, and the other upon an account stated, the same result follows. The first sentence of the petition does no more than to allege an indebtedness generally and to invite an issue upon its existence. In such cases the issue is

raised by a general denial, and is met by proof of payment. Marley v. Smith, 4 Kan. 183; Parker v. Hays, 7 Kan. 412.

The judgment of the district court is affirmed. All the Justices concurring.

## BOWEN v. CITY OF LA HARPE et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

### 1. APPEAL AND ERROR (§ 1005\*)—REVIEW—CONFLICTING EVIDENCE.

The issues of fact in this case are stated, the conflicting evidence thereon referred to, and the finding sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

### 2. APPEAL AND ERROR (§ 1057\*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where considerable testimony is admitted tending to show that the disposition of a horse was unruly and unsafe before an occurrence in which the horse ran away, the rejection of other testimony offered to show the disposition of the horse after that occurrence is not material error, although the excluded evidence related to a fact in issue, and was competent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4206; Dec. Dig. § 1057.\*]

Appeal from District Court, Allen County.

Action by Cedora T. Bowen against the City of La Harpe and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. F. Florence, of Iola, for appellants. F. J. Oyler, of Iola, for appellee.

BENSON, J. This is an action to recover damages for personal injuries suffered at a street crossing. Two questions of fact are presented: (1) Was the crossing defective and dangerous as alleged? (2) Was the defective condition the proximate cause of the injuries? The plaintiff contends that the street crossing where she was hurt and the adjacent ditch or gutter parallel with it were defective because the crossing was elevated about 10 inches above the surface of the ground, and the bottom of the ditch was so far below the surface as to cause an offset or decline so great and abrupt and so uneven as to be dangerous. On the other hand, the defendant insists that the crossing was properly constructed connecting with the sidewalk along the intersecting street in the usual manner, and that the depression along the side of it was the gutter of this intersecting street, of reasonable depth, with an easy and safe incline. Testimony was offered by each party in support of these conflicting claims. The evidence of the plaintiff tended to show that the ditch was in a rough and uneven condition, and the descent into it abrupt and dangerous. Gas retorts had been used in filling the slope and left only

partially covered, some having been pounded in and some left with sharp edges projecting. These conditions had existed since the crossing was constructed about five years before the trial. Some witnesses said the crossing had never been finished. The depth of the ditch or gutter was variously stated by the plaintiff's witnesses at from 8 to 16 inches, and its distance from the foot crossing at 6 to 7 feet. Some filling was done soon after the accident. Evidence of the defendant tended to show that the gutter was not unnecessarily deep, abrupt, or dangerous; that the descent from the crossing was about an inch to the foot for 7 or 8 feet to the bottom of the gutter, sloping thence upward to the center of the street.

The injuries occurred while the plaintiff was driving east in a one-horse vehicle. Nearing the crossing which extends north and south on the west side of an intersecting street her horse became frightened at an object by the roadside. The testimony on her part tended to show that the horse ran straight ahead over the crossing, when the front wheels dropped into the ditch or gutter, causing the buggy to be upset, and throwing her and her children out, and injuring her. Evidence on the part of the defendant tended to show that the horse shied at the object referred to, the plaintiff then struck him with a whip when he started into a gallop and went over the crossing and ditch, but, when near the middle of the intersecting street, the plaintiff pulled the horse suddenly to the south which cramped the vehicle, and caused it to be upset thus throwing her to the ground.

[1] Upon this conflicting evidence the jury returned a general verdict for the plaintiff. Special findings were not requested. The jury by this verdict necessarily found that the street was defective as alleged, and that the defect was the proximate cause of the injuries suffered, the nature and extent of which are not disputed. Upon principles long settled in the jurisprudence of this state findings so made and approved by the district court cannot be disturbed here if supported by competent evidence. If the place in question was in the condition testified to by the plaintiff's witnesses or some of them, it cannot be held as matter of law that the city was not negligent. That question was properly submitted to the jury.

[2] Error is alleged in excluding evidence offered by the defendant that the horse was wild and in the habit of running away. Here, again, the testimony was conflicting. That of the plaintiff tended to prove that the horse was safe and gentle; while that of the defendant tended to prove the contrary. The court limited the proof of the disposition of the horse to the time before the accident. The defendant produced several witnesses tending to show that the horse was unruly and unsafe before that event,

and then offered other witnesses to prove his disposition afterward, but this testimony was excluded. While the offered proof ought to have been received within reasonable limitations, its exclusion is not sufficient grounds for reversal. The jury appear to have been reasonably informed of the habits and disposition of the horse by the evidence admitted and the error in excluding further testimony is not considered material. Code Civ. Proc. § 581 (Gen. St. 1909, § 6176).

The judgment is affirmed. All the Justices concurring.

REVELL et al. v. CITY OF MUSKOGEE.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977\*) — ORDER GRANTING NEW TRIAL—REVIEW.

When the trial judge grants a motion for new trial, his ruling will not be reversed, unless it appears to have been based upon an error of some pure question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

2. EMINENT DOMAIN (§ 131\*) — VALUE OF LAND TAKEN—PARTICULAR USE.

In ascertaining the value of land taken under eminent domain, its market value is the test, and not its value for some particular use to which it might be subjected, although its adaptability to this use may be considered as one of the factors in ascertaining its market value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Wagoner County; John H. King, Judge.

Action by the City of Muskogee against O. D. Revell and others. From a judgment for defendants, and from an order granting plaintiff's motion for a new trial, defendants bring error. Affirmed.

Hutchings, Murphey & German, of Muskogee, for plaintiffs in error. Bailey & Wyand and Owen & Stone, all of Muskogee, for defendant in error.

AMES, C. This is a proceeding by the city of Muskogee against O. D. Revell et al. to condemn an alley between and parallel with Broadway and Okmulgee avenues, and running from Third Street West; a part of the ground taken being a part of lot 2 of the block and the remainder a part of lot 3. Lots 2 and 3 belonged to different owners, although some of the number were owners of undivided interests in both lots. Upon the trial the jury returned a verdict against the city for \$7,500. The city filed a motion for new trial, which was granted. The appeal is taken by the owners from this order granting a new trial.

[1] The decision of the trial court must be affirmed, as it is the well-settled rule of this

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—53

court that an order granting a new trial will not be reversed here, unless it is apparent that the court erred upon some question of law. It is not so apparent upon this record, as it may be that the trial court was of the opinion that the judgment was not supported by the evidence. It is stated by the plaintiffs in error that the trial court's reason for granting a new trial was because of error which he thought had been committed in giving an instruction to the jury; but the defendant in error does not concede this statement, and the record does not disclose the exact reason which moved the court, and, as we cannot say that the court erred on any pure question of law, the judgment must be affirmed. *Sharp v. Choctaw Ry. & Lighting Co.*, 126 Pac. 1025, not yet officially reported, and the cases therein cited.

[2] As the case, however, is here, and as it must be tried again, and as the correctness of the instruction complained of is argued at length by counsel for both sides, we will examine it. The instruction is as follows: "When only a part of defendants' property is taken by condemnation for public use and the residue is left, as in this case, it is proper for you to consider the use to which it is adapted in connection with the part so left, if it is shown by the evidence it possessed any higher value by reason of such use. In this case, if you find from the evidence that the portion of the block sought to be condemned by the city for public use, through the block owned by the defendants, was adapted to the use of an elevator or heating plant, for the use of a building erected or to be erected on the entire block of ground owned by defendants, and by the taking of such strip of ground for an alley through said block the defendants were deprived of its value for such purpose or purposes, then I instruct you that you should consider the value of such property for said specific use in arriving at the damages the defendants have suffered, if any, by the taking of such property for an alley."

If the trial judge concluded that there was error in this instruction and granted the new trial on that ground, we think he was correct, as the instruction might have led the jury to believe that they should fix the value of the property for some specific use, rather than at its market value. The rule is well stated in 2 *Lewis on Eminent Domain* (2d Ed.) para. 478 and 479, as follows:

"All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. Of course, circumstances and conditions tending to depreciate the property are as competent as those which are favorable. Facts affecting the value of the property may be shown, though they have become known since the taking or since the commencement of the

proceedings. Where land was available for both mining and town lot purposes, it was held error to compel the owner to elect whether he would prove its value for one or the other. If property has no market value, then it is a question of real or actual value, and every fact bearing upon such value may be shown, and those acquainted with the property and its surroundings may give their opinion of its value, though not experts in the strict sense.

"The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is: What is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?"

The authorities supporting this rule are collected in the notes to the sections quoted, and it is unnecessary for us to repeat them here.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. RADFORD.  
(Supreme Court of Oklahoma. Jan. 7, 1918.)

*(Syllabus by the Court.)*

1. FALSE IMPRISONMENT (§ 7\*)—ARREST OF PASSENGER—TICKETS.

One entering a passenger train of a railroad company, claiming the right of transportation on a nontransferable ticket issued to another, cannot lawfully be arrested for refusal to pay cash fare upon the train auditor taking up the void ticket.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.\*]

2. CARRIERS (§ 363\*)—PASSENGERS—REFUSAL TO PAY FARE—REMEDY—EJECTION—STATUTES.

Section 1894, Comp. Laws 1909, provides that a passenger who refuses to pay his fare may be ejected from the vehicle by the carrier at any usual stopping place, or near some dwelling house.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1445, 1446; Dec. Dig. § 363.\*]

3. FALSE IMPRISONMENT (§ 15\*)—ARREST OF PASSENGER BY TRAIN AUDITOR—SCOPE OF AUTHORITY—CARRIERS' LIABILITY.

A railroad company is liable for the acts done by a train auditor acting within the scope of his general authority, in furtherance of the company's business, and for the accomplishment of the object for which the auditor was employed; and where the act done arises out of a controversy over the payment of fare, and consists in procuring an officer to make an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

arrest of one aboard the train on which the auditor is employed, and such arrest is wrongful, the company is liable in damages for the injuries sustained.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.\*]

**4. FALSE IMPRISONMENT (§ 34\*)—DAMAGES—ELEMENTS OF DAMAGE.**

In an action for false arrest, the injured party is entitled to recover for the suffering, both bodily and mental, which the wrong may have occasioned. The injury done by being restrained of one's liberty is akin to that suffered from assault and battery.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 111; Dec. Dig. § 34.\*]

**5. TRIAL (§ 259\*)—INSTRUCTIONS—REQUEST TO CHARGE—FORM.**

Where a special instruction is requested, it is the duty of counsel to prepare and submit to the court such desired instruction in writing, properly numbered and signed, and, upon timely delivery to the court, request that it be given. Upon a failure so to do, where the court has given general instructions applicable to the issues and the evidence, this court will not consider as error the court's failure to instruct of its own motion upon any given proposition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. § 259.\*]

**6. FALSE IMPRISONMENT (§ 36\*)—EXCESSIVENESS—FALSE IMPRISONMENT OF PASSENGER.**

Same as syllabus 12 in *Choctaw, etc., Ry. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. § 36.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action for damages by Hugh O. Radford against the Chicago, Rock Island & Pacific Railway Company. From a judgment in plaintiff's favor, defendant brings error. Affirmed.

C. O. Blake and H. B. Low, both of El Reno, and F. L. Boynton, of Kingfisher, for plaintiff in error. John T. Bradley, Jr., and G. L. Callaway, both of Kingfisher, for defendant in error.

SHARP, C. On December 3, 1908, plaintiff purchased of a ticket scalper in the city of Enid, for transportation to El Reno, the unused portion of a nontransferable ticket issued by the Southern Pacific Railway Company at Santa Barbara, Cal., on November 26, 1908, to one R. L. Denton, authorizing certain railroads therein named, including defendant, to carry the said Denton over their respective lines between said city of Santa Barbara and Oklahoma City, Okl. Upon plaintiff's presentation of said ticket to the train auditor, it was taken up and the regular fare to El Reno demanded. This plaintiff at the time refused to pay, and shortly afterwards was placed under arrest by a deputy sheriff who was on board the train. It was charged by plaintiff that the arrest was procured by defendant company acting by and through its auditor. The

petition further charged that said auditor, representing said defendant company, "without any right, cause, or excuse, unlawfully and wrongfully abused the plaintiff, and said in a loud tone of voice, which could be and was heard by all passengers in the coach in which plaintiff was riding, that the plaintiff had committed the crime of forgery, and said to plaintiff, 'I will see that you get two years for forgery for this' (meaning by such language to inform the plaintiff that the defendant, the Chicago, Rock Island & Pacific Railway Company, was going to have the defendant imprisoned for a term of two years on the charge of committing the crime of forgery), and said auditor, acting as the agent of the defendant, and for and on behalf of defendant, immediately, after using said language to plaintiff above set forth, informed one Ike Hawkins, a deputy sheriff of Kingfisher county, Okl., who was on said train returning to Kingfisher in charge of a prisoner, that said plaintiff had committed the crime of forgery, and maliciously, wrongfully, and unlawfully commanded and requested the said deputy sheriff to arrest the plaintiff for forgery, and to take him to Kingfisher and lock him up; that said deputy sheriff, acting for and under the instructions of the defendant, without the consent of the plaintiff, and without any cause or excuse, arrested the plaintiff, handcuffed him, restrained him of his liberty, and confined him in the seat with another prisoner that he (the said deputy) had in charge at said time; that, because of such wrongful and malicious conduct of the defendant, the plaintiff was, without his consent, kept under arrest by said deputy sheriff, and was by said deputy sheriff wrongfully and unlawfully handcuffed, confined, restrained, deprived of his liberty, and compelled to ride in a seat with said other prisoner from the village of Hennessey to Kingfisher; that, just before the train reached the station of defendant at the said city of Kingfisher, the said defendant, through its said auditor, caused said deputy sheriff to release the plaintiff from restraint and imprisonment, and to unhandcuff him and give him his liberty." It was further charged that the plaintiff had not committed or attempted to commit the crime of forgery or any other crime on said train, or at any other time or place, and that his arrest and imprisonment was maliciously, wrongfully, and unlawfully caused by the defendant without excuse, and that thereby he was greatly injured and hurt, deprived of his liberty, injured in his health, caused great mental pain and suffering, and subjected to great ridicule, contempt, shame, humiliation, indignity, and disgrace. That the plaintiff was arrested by the deputy sheriff, and while in charge of the officer was taken from his seat to another seat in the rear of the coach

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and there kept for a time, handcuffed to another prisoner, was not denied. There was a conflict in the testimony as to the immediate cause of the arrest. Some of the witnesses testified that plaintiff was arrested by the officer, under the direction of the train auditor, on the charge of forgery; others testified that his arrest was on account of his having committed, or being about to commit, an assault on the auditor; while there was still other testimony tending to show that the arrest was caused on account of plaintiff's refusal to pay his fare. No formal charge for any offense was ever preferred against plaintiff; and, after he had complied with the auditor's demand and paid his fare, he was discharged from further custody.

It is urged by the plaintiff in error that it is not responsible for the wrongs committed by its auditor; and counsel cite in support of their position the case of *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. The rule announced in the *Lake Shore Case* was followed by this court in *Atchison, T. & S. F. Ry. Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. 499; *Moore v. Atchison, T. & S. F. Ry. Co.*, 26 Okl. 682, 110 Pac. 1059; and *Chicago, R. I. & P. Ry. Co. v. Newburn*, 27 Okl. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432. The *Chamberlain Case*, as well as the *Moore Case*, arose in Oklahoma Territory prior to statehood, while the *Newburn Case* was begun in the courts of the Indian Territory in January, 1907. Therefore the rule announced in the *Lake Shore Case* was controlling upon the courts in both territories, and upon this court. Section 1, Schedule, *Williams' Ann. Const.* par. 365.

The facts charged in the *Lake Shore Case* were similar, in many of their material aspects, to the case at bar. There the plaintiff, his wife, and a number of persons were passengers holding excursion tickets on a regular passenger train of the defendant railroad from Norwalk, Ohio, to Chicago, Ill. While en route, the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train learning this, and knowing that plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer employed by the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff and rudely searched him for weapons in the presence of other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the

cause of his arrest or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating plaintiff with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where is your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and in the presence of passengers and others ordered him to be taken to the station house, to which he was subsequently taken and detained until the conductor arrived, when a false charge of disorderly conduct was preferred against him. Plaintiff gave bond and was released; and on appearing before the justice of the peace for trial on the day following, and no one appearing to prosecute him, he was finally discharged. A verdict of \$10,000 was returned by the jury, and the plaintiff, by leave of court, remitted the sum of \$4,000, and judgment was rendered for \$6,000. Referring to the liability of the company for damages, it was said by the court: "The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent as an individual is responsible under similar circumstances. *Philadelphia, W. & B. R. R. Co. v. Quigley*, 62 U. S. (21 How.) 202, 210, 16 L. Ed. 73, 75; *First Nat. Bank of Carlisle v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750, 751; *Salt Lake City v. Hollister*, 118 U. S. 256, 261 [6 Sup. Ct. 1055] 30 L. Ed. 176, 177; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 608 [7 Sup. Ct. 1286] 30 L. Ed. 1146, 1148. A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Philadelphia & R. R. Co. v. Derby*, 14 How. (55 U. S.) 468, 14 L. Ed. 502; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637 [7 Sup. Ct. 1039] 30 L. Ed. 1049; *Howe v. Newmarch*, 12 Allen [Mass.] 49; *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117 [6 Am. Rep. 200]. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (62 U. S.) 202, 211, 16 L. Ed. 73, 75; *Salt Lake City v. Hollister*, 118 U. S. 256, 262 [6 Sup. Ct. 1055] 30 L. Ed. 176, 178; *Reed v. Home Savings Bank*, 130 Mass. 443, 445 [39 Am. Rep. 468], and cases cited;

*Krulevitz v. Eastern R. Co.*, 140 Mass. 573 [5 N. E. 500]; *McDermott v. Evening Journal Ass'n*, 43 N. J. Law, 488 [39 Am. Rep. 606]; *Id.*, 44 N. J. Law, 430 [43 Am. Rep. 392]; *Bank of New South Wales v. Owston*, L. R. 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the, malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages. *Lothrop v. Adams*, 133 Mass. 471, 480, 481 [43 Am. Rep. 528].'" The judgment of the lower court, however, was reversed for the reason that it was not contended, nor was there any evidence introduced tending to show, that the conductor was known to the railroad company to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff, and therefore plaintiff could not recover punitive damages. However, as to such damages as were compensatory, the case is one that strongly supports the contention of the defendant in error here, and announces the very general rule that a corporation, like an individual, is liable to make compensation for any tort committed by its agent in the course of his employment, even though the act is done wantonly and recklessly, or was against the express orders of the company. Upon the question, however, of exemplary damages, the authorities are conflicting, as was observed by the court in the course of the opinion in the above case.

In the *Chamberlain Case* our own court approved an instruction authorizing the recovery of compensatory damages in the language following: "You are further instructed that, if you find for the plaintiff, it is your privilege to find any sum which, in your judgment, will compensate the plaintiff for injuries sustained, not exceeding the amount claimed. \* \* \*" It was held that there was no testimony to authorize a verdict for exemplary damages, and that the instruction submitting to the jury that issue was erroneous.

[2] It is provided by statute (section 1394, Comp. Laws 1909) that, if any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars; but that his eviction must be done with as little violence as possible, and at any usual stopping place or near some dwelling house. *Moore v. Atch-*

*ison, T. & S. F. Ry. Co.*, 26 Okl. 682, 110 Pac. 1059; *St. Louis & S. F. Ry. Co. v. Johnson*, 25 Okl. 833, 108 Pac. 378. But this right to evict for refusal to pay fare confers upon the conductor or employes no authority to procure the arrest of the passenger thus refusing.

There is a sharp conflict in the testimony as to the reason for plaintiff's arrest; some of the witnesses testifying that it was done at the instance of the auditor, who had charged plaintiff with forgery and publicly proclaimed that he would get two years in the penitentiary; by others, that the arrest was made on account of plaintiff's attempt to commit an assault, in the officer's presence, on the auditor; while the officer at one time testified that he was asked by the auditor to arrest the plaintiff for failure to pay his fare, providing he did not pay it before the train reached Kingfisher, and this testimony is supported, not only by the evidence of the plaintiff, but of the defendant's witness Boling. The question was one for the jury, and was resolved in favor of plaintiff.

[1] The refusal to pay cash fare is not an offense against the law that alone will subject one to arrest or imprisonment. The jury were properly instructed that, if the plaintiff attempted or made an assault upon the auditor, the arrest was lawful; and that, in such event, their verdict should be for the defendant. The court further submitted to the jury the issue of plaintiff's honest intent and good faith in proffering the ticket for his transportation, and also instructed that, if plaintiff knew that the ticket contained a provision making it nontransferable, and signed thereon the name of the original holder to secure a gain and benefit therefrom, then such act would be criminal. From this it must have followed, had the jury so found, that the arrest was lawful; and, if lawful, no liability could attach. Upon these conflicting issues, covered by proper instructions, the verdict of the jury is conclusive of the fact that the arrest was unlawful.

[3] As to the defendant company's liability, we believe the rule, supported by the great weight of authority and the best reasoning, to be that the master is liable for the acts done by a servant within the scope of his general authority, in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. *Birmingham Ry., etc., Co. v. Baird*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43; *Brennan v. Fair Haven & Westville Ry. Co.*, 45 Conn. 284, 29 Am. Rep. 679; *Western & Atlantic Ry. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *McKinley v. Chicago, etc., Ry. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Birmingham Waterworks Co. v. Hubbard*, 85 Ala. 179, 4 South.

607, 7 Am. St. Rep. 35; Lake Shore, etc., Ry. Co. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; Evansville, etc., Ry. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Evansville, etc., Ry. Co. v. Baum, 26 Ind. 70; Atchison, T. & S. F. Ry. Co. v. Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Southern Kansas Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512; Lafitte v. New Orleans City & Lake R. Co., 43 La. Ann. 34, 8 South. 701, 12 L. R. A. 337; Kansas City, etc., Ry. Co. v. Kelly, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson v. European & N. A. Ry. Co., 62 Me. 84, 16 Am. Rep. 404; Sherley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; New York, P. & N. R. Co. v. Waldron, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502; Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Howe v. Newmarch, 12 Allen (Mass.) 49; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Ramsden v. Boston & Albany R. Co., 104 Mass. 117, 6 Am. Rep. 200; Wilton v. Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11; Hull v. Boston & Maine Ry. Co., 210 Mass. 159, 96 N. E. 58, 36 L. R. A. (N. S.) 406, Ann. Cas. 1912C, 1147; Morier v. St. Paul, etc., Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Ephland v. Missouri Pacific Ry. Co., 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 35 L. R. A. 107, 59 Am. St. Rep. 498; Brown v. Hannibal, etc., Ry. Co., 66 Mo. 588; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Eckert v. St. Louis Transfer Co., 2 Mo. App. 36; Richberger v. American Express Co., 73 Miss. 161, 18 South. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522; New Orleans, etc., Ry. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Haver v. Central R. R. Co., 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; Palmeri v. Manhattan El. Ry. Co., 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; Mott v. Consumers' Ice Co., 73 N. Y. 543; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Molloy v. New York, etc., Ry. Co., 10 Daly (N. Y.) 453; Rounds v. Delaware, etc., Ry. Co., 64 N. Y. 129, 21 Am. Rep. 597; Mulligan v. New York & H. R. Ry. Co., 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; Penney v. New York Central & H. R. R. Co., 34 App. Div. 10, 53 N. Y. Supp. 1043; Jackson v. American Tel. & Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Harriman v. Pittsburgh, etc., Ry. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Duggan v. Baltimore & O. R. R. Co., 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep.

672; International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Kansas City, M. & O. Ry. Co. v. Walsh (Tex. Civ. App.) 148 S. W. 347; Burnett v. Oechsner, 92 Tex. 588, 50 S. W. 562, 71 Am. St. Rep. 880; Nashville, etc., Ry. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; Gillingham v. Ohio River Ry. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 799, 29 Am. St. Rep. 827; Flick v. Chicago, etc., Ry. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878; Craker v. Chicago, etc., Ry. Co., 36 Wis. 657, 17 Am. Rep. 504.

That the plaintiff's arrest was procured by the auditor, in furtherance of the company's business, is abundantly shown by the testimony. It occurred contemporaneously with the auditor's effort to enforce collection of a cash fare. The entire transaction occurred within a very short space of time, and was one continuous and unbroken occurrence. Publicly charging plaintiff, in the presence of a number of passengers, with being a forger, and threatening to have him imprisoned, and procuring the officer to make the arrest, were all acts done in connection with the effort to secure payment of the fare. In fact, it was the very act of signing the ticket tendered as fare that first brought down upon plaintiff the auditor's wrath. Certainly we cannot say that such an act is so dissociated from, or independent of, the auditor's duty as to absolve the defendant company from liability. It is a matter of common knowledge that train auditors, when employed, are intrusted with the duty of the collection of fares, and it was in the discharge of this particular employment that the auditor was engaged when the trouble arose. Richberger v. American Express Co., supra; Moore v. Louisiana & Ark. Ry. Co., 99 Ark. 233, 137 S. W. 826, 34 L. R. A. (N. S.) 299; Goodloe v. Memphis & Charleston R. Co., 107 Ala. 237, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67; West Chicago Street Ry. Co. v. Luleich, 85 Ill. App. 643. Whether a particular act of a certain servant was or was not in the line of his duty is a question of fact to be determined by the jury from surrounding facts and circumstances. St. Louis, I. M. & S. Ry. Co. v. Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220; Dwinelle v. New York Central & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.

In Chicago, R. I. & P. Ry. Co. v. Holliday, 30 Okl. 680, 120 Pac. 927, 39 L. R. A. (N. S.) 205, we held that a private corporation, like an individual, is liable for the acts of its agent in instituting a malicious prosecution, if the same was done while acting within the scope of his authority. It was there observed that there was a marked distinction between an act done for the purpose of protecting the property of the company, by preventing a felony or recovering it back,

and an act done for the purpose of punishing an offender for that which he had already done.

A similar question was before the Court of Appeals of New York (*Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141), where it was said by Earle, J., referring to the right of the railroad company to make reasonable rules and regulations for the management of its business and the conduct of its passengers: "The defendant had such a regulation, and no complaint can be made of that. But it had no regulation, and could legally have none, that a passenger, before leaving its cars or premises, should produce a ticket or pay his fare, and, if he did not, that he should then and there be detained and imprisoned until he did so. At most, the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for 10 minutes, it could detain him for one hour, or a day, or a year, or for any other time, until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will, until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gatekeeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare. This is not like the cases to which the learned counsel for defendant has called our attention, where railroad conductors have been held justified in ejecting passengers from cars for refusing to produce tickets or pay their fares. A passenger has no right to ride in a car without payment of his fare; and, if he refuses to pay, the railroad company is not bound to carry him, and may at a proper place, and in a proper manner, remove him from the car; but it could not imprison him in a car until he paid his fare, for the purpose of compelling payment. These views have the sanction of very high authority. In *Sunbolf v. Alford*, 3 M. & W. 248, it was held that an innkeeper could not detain the person of his guest in order to secure the payment of his bill. Lord Abinger said: 'If an innkeeper has a right to detain the person of his guest for the nonpayment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that, by the common law, a man who owes a small debt for which he could not be imprisoned by legal process may yet be detained by an innkeeper for life. The proposition is monstrous. \* \* \* Where is the law that says a man shall detain

another for his debt without process of law?' In *Chilton v. London, etc., R. Co.*, 16 M. & W. 212, the defendant was organized under an act conferring much broader powers than are possessed by the defendant in this case; and yet it was held that it could not arrest a passenger for refusing to pay his fare which it was entitled to demand." That no one may be deprived of his liberty without due process of law, and that imprisonment for debt shall never be undertaken in such cases, will not be controverted. But it was effectively resorted to in the case at bar; and for this invasion of plaintiff's rights, defendant company must respond in damages.

In *Kansas City, M. & O. Ry. Co. v. Walsh*, supra, decided during the present year, it appeared that the plaintiff's son, a boy of 10 years of age, entered defendant's passenger train without any money or ticket, and the conductor ordered the brakeman to lock him in the water-closet, where he was held until the train passed the station at which the boy lived, when he was taken out of the closet and put off without any harsh words or physical injury. The conductor intentionally carried him past the station to break up a habit which the boys had of stealing rides between the boy's home station and another station. It was held that the conductor's act was a continuous one, in doing which he acted in furtherance of the railroad company's business, and within the scope of his authority so as to make the company liable.

In *Krulvitz v. Eastern R. R. Co.*, 143 Mass. 228, 9 N. E. 613, opinion by Holmes, J., the passenger on a railroad train had refused to pay his fare. On arrival of the train at the place where the passenger intended to leave it, and before he left, he was arrested at the request of the conductor, who was a railroad police officer, by a local police officer without a warrant. It was held that the arrest was not necessarily, as a matter of law, an arrest by the conductor as a railroad police officer, and further that, if the conductor, in making the request for the arrest, acted merely as conductor and within the scope of his authority, the arrest was not authorized by the statute, and constituted an assault and false imprisonment, for which the passenger could maintain an action against the company. Many authorities on the liability of a railroad company for the willful acts of its employes are collected in section 1265, *Elliott on Railroads* (2d Ed.).

[4] We do not think that the court erred in refusing to give the defendant's requested instruction No. 9, and in giving instruction No. 8. Plaintiff was entitled to recover for both physical and mental suffering, or for either, endured by him and for any shame, disgrace, or humiliation to which he had wrongfully been subjected. We know of no case, and counsel has not attempted to cite

any, where, in an action to recover damages for false arrest, it was held necessary to prove, in addition to mental suffering, a physical injury, before a recovery would be authorized. The decisions of this court in *Butner v. Western Union Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *Long v. Chicago, R. I. & P. Ry. Co.*, 15 Okl. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, 6 Ann. Cas. 1005; *Western Union Tel. Co. v. Foy*, 32 Okl. 801, 124 Pac. 305; *Western Union Tel. Co. v. Reeves*, 126 Pac. 216—announce no such rule. The injury done by being illegally restrained of one's liberty is akin to that suffered from assault and battery; the injured party in such cases, even though the act complained of be done without malice, is entitled to recover for the suffering, both bodily and mental, which the wrong may have occasioned; and, if the defendant has acted wantonly, oppressively, or maliciously in causing the arrest, he may, in the discretion of the jury, be liable for exemplary damages, but not otherwise. *Sutherland on Damages*, §§ 1257, 1258.

In *Chicago, R. I. & P. Ry. Co. v. Holliday*, supra, it was said: "The damages assessed doubtless exceed the injury done to the goods; but the jury, as it had the right to do, assessed the damages with reference to the feeling of plaintiff and the disturbance of his family." See, also, *Sutherland on Damages*, §§ 942, 943; *Elliott on Railroads*, § 1816.

[5] No instruction was asked by defendant upon the question of probable cause for the arrest; hence, even though such an instruction had been proper, which we do not undertake to decide, the court's failure to submit such an instruction of its own motion is not ground for reversal. If proper, a requested instruction covering the law desired to be submitted should have been prepared and presented to the court by counsel, with its other instructions. *Huff v. Territory of Oklahoma*, 15 Okl. 370, 85 Pac. 241; *Chicago, R. I. & P. Ry. Co. v. Baroni*, 32 Okl. 540, 122 Pac. 926; *First Nat. Bank of Muskogee v. Tevis*, 29 Okl. 714, 119 Pac. 218.

[6] In conclusion, it is urged that the verdict of the jury for \$625 is excessive. To grant new trials on the ground of excessive damages is a function that appellate courts will sparingly exercise, and only when it appears that the verdict is so excessive as per se to indicate passion or prejudice, as was held in *Choctaw, O. & G. Ry. Co. v. Burgess et al.*, 21 Okl. 653, 97 Pac. 271. This we cannot say in the case under consideration.

Finding no error warranting a reversal of the case, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

# WALTER REALTY CO. v. JONES.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

## 1. PUBLIC LANDS (§ 39\*) — TOWN SITES — RIGHTS OF PRIOR OCCUPANT.

When a town site is entered by the probate judge under sections 2387 and 2388, Revised Statutes (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas extended to and put in force in Oklahoma by Act March 3, 1891, c. 543, § 17, 26 Stat. at Large, 1026, he takes the title in trust for the benefit of the occupants; and when a lot is continuously in the actual possession and occupancy of one party, who is shown to be a prior settler thereon, he is not deprived of his right thereto by an award of the town-site commissioners and a subsequent deed from the probate judge to another party.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 83-99; Dec. Dig. § 39.\*]

## 2. PUBLIC LANDS (§ 39\*) — TOWN SITES — FINDINGS OF COMMISSIONERS—REVIEW.

The town-site commissioners appointed by the probate judge are not judicial officers, and their findings are not conclusive, but only advisory; and a court may, on a proper showing, re-examine the questions passed on by them.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 83-99; Dec. Dig. § 39.\*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the Walter Realty Company against N. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

Stevens & Myers and T. B. Orr, all of Lawton, for plaintiff in error. Hussey & Japp and Hudson & Whalin, all of Lawton, for defendant in error.

KANE, J. This was an action, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover possession and quiet title to certain lots in the town of Walter. Upon trial there was a verdict for the defendant, upon which judgment was duly rendered, to reverse which this proceeding in error was commenced.

The town site of Walter was proved up under sections 2387 and 2388, Rev. Statutes of the United States, and the town-site laws of the state of Kansas extended to and put in force in the territory of Oklahoma by the act of Congress of March 3, 1891 (26 Stat. at Large, 1026, c. 543). The findings of the jury are to the effect that on the day of the opening the defendant settled upon the lots in controversy and made improvements thereon, and claimed them as his own; that one Crawford, through whom the plaintiff claimed title, and to whom the town-site commissioners awarded the certificate and the probate judge issued a deed, did not enter upon the lots until one day after defendant had occupied and made settlement thereon. As there was sufficient evidence to support the findings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the jury, the verdict and judgment based thereon cannot be disturbed. If, as the jury found, the defendant was an occupant of the lots in controversy at the time the town site was entered, and made settlement and improvements thereon, and his occupancy was prior to his adversary's, and he complied with all the proper rules and regulations of the probate judge and town-site commissioners pertaining to proving up such town site, the deed ought to have been issued to him, instead of to Crawford, the grantor of the plaintiff. *Winfield Townsite Co. v. Maris*, 11 Kan. 128.

[1] It is well settled that when a town site is entered by the probate judge under sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of the state of Kansas extended to and put in force in Oklahoma by the act of March 3, 1891 (26 Stat. at Large, 1026), he takes the title in trust for the benefit of the occupants; and when a lot is continuously in the actual possession and occupancy of one party, who is shown to be a prior settler thereon, he is not deprived of his right thereto by an award of the town-site commissioners and a subsequent deed from the probate judge to another party. *Rathbone v. Sterling*, 25 Kan. 444.

[2] The case of *King v. Thompson*, 3 Okl. 644, 39 Pac. 468, is cited by counsel for plaintiff in error to support his contention that the court had no jurisdiction collaterally to review any question decided by the town-site commission appointed by the probate judge. That case, however, is not in point, for the reason that it involves the power of a court of equity to review the decisions of a town-site board appointed by the Secretary of the Interior, under a different statute, which provided for appeals from the action of the town-site board to the Commissioner of the General Land Office, and thence to the Secretary of the Interior. It has been held by the Supreme Court of the territory of Oklahoma that the town-site commissioners appointed by the probate judge under the town-site laws of the state of Kansas are not judicial officers, and their findings are not conclusive, but only advisory; and a court may, on a proper showing, re-examine the questions passed on by them. *Downman et al. v. Saunders*, 3 Okl. 227, 41 Pac. 104. Mr. Justice Blierer, who delivered the opinion of the court in the *Downman Case*, says: "Under the law regulating the administration of the trust, where lands are entered by the probate judge, for the use and benefit of the occupants of such land, as a town site in this territory, as adopted by Congress from the state of Kansas, the commissioners appointed by the probate judge to set off lots to occupants of a town site are not a judicial tribunal, and their award is not a judicial determination; and it is unnecessary, in the petition

of one who seeks to recover lots by virtue of occupancy as against one who holds the deed from the probate judge, to allege fraud in the making of such award, in order to state a cause in his petition."

In support of this proposition *Rathbone v. Sterling*, 25 Kan. 444, *Brown v. Parker*, 2 Okl. 258, 39 Pac. 567, and *Biddick v. Kobler*, 110 Cal. 191, 42 Pac. 578, are cited.

Finding no error in the record, the judgment of the court below is affirmed. All the Justices concur, except DUNN, J., absent.

#### BLEDSOE v. WORTMAN et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

#### (Syllabus by the Court.)

#### 1. INDIANS (§ 15\*)—CONVEYANCE BY ALLOTTEE—VALIDITY—SELECTION OF AN ALLOTMENT.

F., an adult, not of Indian blood, but a member of the Cherokee Tribe of Indians, on January 27, 1906, but prior to the time of the selection of his allotment, conveyed a certain 40 acres of land, which was then a part of the public domain of the Cherokee Nation, but which was afterwards selected by him as a part of his surplus allotment. *Held*, that Act April 24, 1904, c. 1402, 33 Stat. 204, removing "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian blood, except minors," except as to homesteads, had no application to him until after he had selected his allotment.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

#### 2. INDIANS (§ 15\*)—CONVEYANCES—INVALIDITY—SUBSEQUENT TITLE.

Section 642, c. 27, Mansf. Dig. Ark. (1884), providing that: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance"—has no application to said conveyance, the same being at the time of execution invalid.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

Error from District Court, Mayes County; T. L. Brown, Judge.

Action by C. S. Wortman and R. W. Canfield against I. P. Bledsoe. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. H. Langley, of Pryor Creek, for plaintiff in error. C. S. Wortman and J. I. Howard, both of Claremore, for defendants in error.

WILLIAMS, J. On June 17, 1908, the defendants in error, hereinafter referred to as plaintiffs, commenced an ejectment action in the district court of Mayes county against plaintiff in error, hereinafter designated as

defendant, for the possession of the N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 26, township 20 N., range 18 E., situated in said county. After issue was framed, the cause was submitted to the court upon the following agreed statement of facts:

"It is agreed by and between the parties to the above-entitled cause, by their respective attorneys, that the defendant has a deed from Jess Fulsom to the lands in controversy, dated January 27, 1905, the lands being the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 26, township 20, range 18, situated in Mayes county, state of Oklahoma, which said deed was filed for record in the office of the clerk of the United States Court for the Northern District of the Indian Territory, at Pryor Creek, on the 25th day of April, 1905, and duly recorded in Book C, at page 382, and which was the proper office for the recording of a deed upon said lands at the time said deed was executed, and at the time of its recording; said lands being situated in the Fifth recording district for the Indian Territory.

"It is further agreed: That the grantor, Jess Fulsom, at the time of the execution of said deed, was a Cherokee freedman, and was entitled to an allotment of lands in the Cherokee Nation, and that the lands therein conveyed and in controversy in this case were his surplus lands, and that said deed was executed subsequent to the act of Congress removing the restrictions on the alienation of surplus land of Cherokee freedmen. At the time of said conveyance the said grantor, Jess Fulsom, had not selected the lands described in said deed at the time of the execution thereof, as aforesaid, and did not select said lands as a portion of his allotment until the 6th day of March, 1905, and subsequent to the execution of said deed of conveyance to the defendant herein. That said deed, in addition to conveying the lands above described, also includes other lands not in controversy herein, to wit, the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 32, township 20, range 20, in what is now Mayes county, Okl.

"It is further agreed that thereafter, to wit, on the 1st day of February, 1908, and subsequent to the date of the selection and allotment of the land therein conveyed, the said Jess Fulsom, by proper warranty deed, conveyed to the plaintiffs herein, O. S. Wortman, and R. W. Canfield, the land in controversy herein, to wit, the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 26, township 20, range 18, and that said grantees now hold and claim title under said deed as aforesaid. It is further agreed that in case plaintiffs herein are entitled to a judgment for \$50 as the reasonable value of the land in controversy for the year 1908 and up to this time," etc.

At the time the deed of January 27, 1905, was executed by said Fulsom to the defendant, he had not selected said lands as a part of his allotment, and did not so select the

same until after he had executed the deed to the plaintiffs.

The sole question for determination in this case, under the record, is whether said Fulsom could execute a valid conveyance to his surplus allotment prior to the time of his selection of the same. In *Goat et al. v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841, it is said: "The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed. Their equitable interest was one which, in the absence of restriction, they could convey. \* \* \* " In *Mullen et al. v. United States*, 224 U. S. 457, 32 Sup. Ct. 498, 56 L. Ed. 834, it is said: "There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. \* \* \* "

Under the authority of said cases after land has been allotted to members of the Five Civilized Tribes by the United States government, unless some restriction has been imposed against alienation, such land then becomes alienable. Act Cong. April 21, 1904, c. 1402, 33 Stat. pp. 189, 204, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes," provides: "And all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe." The allotment having been selected, the fact that no patent had issued did not prevent the conveyance of the allottee's equitable estate therein. *Goat et al. v. United States*, supra; *Godfrey v. Iowa Land & Trust Co.*, 21 Okl. 293, 95 Pac. 792; *McWilliams Inv. Co. v. Livingston et al.*, 22 Okl. 884, 98 Pac. 914. But, when the first deed was executed by the said Fulsom, he was not an allottee, not having selected his allotment, and therefore had no equitable estate which he could then convey. *Goat et al. v. United States*, supra; *McKee v. Henry*, 201 Fed. 74. At that time such land was a part of the public domain of the Cherokee Nation, and he was not permitted to convey any part thereof. *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041. Section 11 of the Cherokee Agreement (Act of July 1, 1902, c. 1375, 32 Stat. 717) provides that: "There shall be allotted by the Commission to the Five Civilized Tribes, and to each citizen of the Cherokee

Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements." In *McLaughlin v. Ardmore Loan & Trust Co.*, 21 Okl. 173, 95 Pac. 779, section 2118 of the Revised Statutes of the United States, which is as follows, is applied: "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take measures and employ such military force as (he) may judge necessary to remove any such person from the lands." In that case the plaintiff in error, a member of the Choctaw Tribe of Indians, holding possession of lands in excess of that permitted by section 16, c. 1366, Act Cong. July 1, 1902, 32 Stat. at L. 643, sold such excessive holding to a person not a member of said tribe. In the opinion it is said that, as the contract of sale "had for its object the violation of law, it is illegal and cannot be enforced." The same holding was made in *Combs et al. v. Miller*, 24 Okl. 576, 103 Pac. 590. See, also, *Howard et al. v. Farrar*, 28 Okl. 490, 114 Pac. 695.

The Cherokee Agreement (Act Cong. July 1, 1902, 32 Stat. 716, c. 1375) provides:

"Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act. \* \* \*

"Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent. \* \* \*

"Sec. 18. It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor."

Said sections 14 and 15 were construed by this court in *Allen v. Oliver*, 31 Okl. 356,

121 Pac. 226, wherein it was held that: "Under sections 14 and 15 of the Cherokee Agreement, approved July 1, 1902 (Act July 1, 1902, c. 1375, 32 St. 717), all lands allotted to members of the said tribe, except homesteads, were alienable in five years after issuance of patent, and not prior thereto." This holding by this court was approved by the Eighth Circuit Court of Appeals in *Trusket et al. v. Closser* (C. C. A.) 198 Fed. 835. Not only were noncitizens and corporations prohibited by said section 2118 of the Revised Statutes of the United States from making a settlement on any lands belonging to the Cherokee Tribe or from surveying or attempting to survey such lands or designating any of the boundaries by marking trees or otherwise, independent of the performance of official duties under direction of the United States government or tribal government, but also after the passage of Act July 1, 1902, c. 1375, 32 Stat. p. 716, and the expiration of 90 days from said date, it was not permissible for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself, or through another, directly or indirectly, more lands in value than that of 110 acres of average allottable lands of the Cherokee Nation, either for himself or his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of 90 days after the date of ratification of said act, was to be deemed guilty of a misdemeanor.

Obviously *Jess Fulsom*, a Cherokee citizen, to which the land in controversy was allotted, had no authority to alienate said land, except by virtue of said Act April 21, 1904, removing the restrictions upon the alienation of the lands of all allottees of either of the Five Civilized Tribes, who are not of Indian blood, except minors and except as to homesteads. The limitation or prohibition under said section 14 is that lands allotted to citizens shall not be alienated by the allottee or his heirs, and under said section 15 the grant, which also operated as a limitation or restriction against alienation to such date, is that lands allotted to members of said tribe shall be alienable in five years after issuance of patent. The restriction removal provision of Act April 21, 1904, c. 1402, 33 Stat. 189, harmonizes with said sections 14 and 15, as restrictions upon the alienation of the lands of allottees of the Five Civilized Tribes, who are not of Indian blood, except minors and as to homesteads, are removed. Prior to April 21, 1904, the lands of the Cherokee Nation were absolutely inalienable until allotted to members of said tribe. Said Act April 21, 1904, sought to take off this restriction as to certain lands of allottees, not to remove restrictions upon the distributive share of any members of the



tribe even prior to allotment; that is, the restriction which had been imposed upon the allottees by said sections 14 and 15 was only in part removed. Such parties became allottees only after the land had been allotted to them.

In *McKee v. Henry*, 201 Fed. 74, decided by the United States Circuit Court of Appeals, Eighth Circuit, at its September, 1912, term, that court said: "The Muskogee or Creek Tribe was in the nature of a dependent nation, and, as our national public buildings belong to the nation, the citizen, while he has an interest in them has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment, and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640 [32 Sup. Ct. 580, 56 L. Ed. 928], that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress. The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and, until allotment was made, no inheritable right vested in the individual Indian. \* \* \*" In the opinion it is further said: "When the allotment was made for the first time, the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided." If no such interest had vested that could be inherited until after the allotment, certainly no equitable title to the land in controversy vested until allotment. It was upon the theory that an equitable estate had vested before the issuance of patent that conveyances prior to the issuance of patent were sustained. *Goat et al. v. United States*, supra; *Godfrey v. Iowa Land & Trust Co.*, supra; *McWilliams Inv. Co. v. Livingston et al.*, supra. This holding confirms our construction of the provision from Act April 21, 1904, above set out. If prior to allotment the members of the tribe had no such vested interest as could be inherited, obviously Congress did not remove the restrictions against alienation, so as to permit such member to alienate his land before it was allotted to him; for in the exercise of its guardianship over the Indians it was certainly the contemplation of the federal government that in the alienation of his land he should receive a consideration there-

for commensurate with its reasonable value. If by removal of restrictions he were permitted to sell his prospective allotment when "it was a mere float—giving him the right to no specific property"—such a policy would not be conducive to bring about salutary results in favor of the member of the tribe, to the end that he should receive his equal share in the allotment of lands, and the same be alienated under conditions that would reasonably bring him a consideration commensurate to its reasonable value. *Gann v. Ball*, 28 Okl. 26, 110 Pac. 1067, is not in any event an authority against this conclusion, as the validity of the contract was not attempted to be raised, but treated by all parties to said litigation as valid. As to its validity no intimation is here made.

The title to the public domain or tribal lands of the Cherokee Nation was in the Cherokee Nation, and not in the individuals. *Godfrey v. Iowa Land & Trust Co.*, supra; *Gritts v. Fisher*, supra; *Cherokee Trust Fund*, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880; *Cherokee Nation v. Journeycake*, 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120. Article 20 of the Treaty with the Cherokees of July 19, 1866 (14 Stat. p. 799), provides: "Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." Section 706, art. 23, p. 351, Laws of the Cherokee Nation, provides: "It shall not be lawful for any citizen of the Cherokee Nation to sell any farm, or other improvement in said nation, to any person other than a bona fide citizen thereof; nor shall it be lawful to rent any farm or other improvements in this nation to any person other than a citizen of the Indian Territory; and every person who shall offend herein shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall suffer punishment by fine, in any sum not less than ten dollars, nor exceeding five hundred dollars, or in default of payment, by imprisonment for any term not exceeding one year." Said section of the Cherokee Laws was superseded by the Cherokee Agreement or Act Cong. July 1, 1902 (32 U. S. Stat. 716), and section 18 of said agreement, when considered in connection with sections 14 and 15 thereof under the rule of construction, "expressio unius exclusio alterius," has the effect of confining members of the Cherokee Nation to the possession of land not exceeding that of 110 acres of average allottable lands of the Cherokee Nation, either for himself or for his wife or for each of his minor children that are members of said tribe. Following up this rule of construction, it would follow that said sections had the effect of prohibiting such members from selling any part of the public domain. From the treaties be-

tween Congress and the Cherokee Tribe and the legislation enacted by Congress affecting the Cherokee Nation in the light of the tribal laws herein set out, it is obvious that it was the intention of Congress that members of said tribe should not convey any interest in the public domain and that such conveyance when made is void as against public policy. Section 642, c. 27, Mansfield's Digest of Arkansas (1884), provides: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." Said section of the Statute of Arkansas was extended in force in the Indian Territory on February 19, 1903. Act April 28, 1904, c. 1824, 33 Stat. 573; 10 Fed. Stat. Anno. 138. Section 642 merely announces by statute the general rule of estoppel. "Where a grantor conveys land with warranty in which he has nothing at the time, he is not only estopped from claiming in opposition to his deed, but the estate which subsequently vests in him is bound by the estoppel and is transferred by the operation of the estoppel to the grantee." 2 Herman on Estoppel and Res Judicata, § 658, p. 793.

Said Fulsom not being an allottee at the time he executed the first deed, to wit, the one of January 27, 1908, section 642 does not apply to him as to said deed. Said section 642 was intended to apply to conveyances where the land covered by such conveyance was subject to be conveyed, but where the grantor had not the title vested in him according to his covenant. Said land prior to the time of its being selected by Fulsom as a part of his allotment being a part of the public domain of the Cherokee Nation, though he was a member of said tribe, he could not execute any lawful conveyance thereto as such conveyance was void (1) on the ground that restrictions had not been removed as to such land, and (2) further because it was against public policy for him to execute a conveyance to a part of the public domain of said nation. The rule of estoppel as declared by said section 642 has no application to conveyances executed in the face of the law. Such conveyance being void when executed, said section 642 was not intended to breathe life into it. The question of a constructive allotment or where the party had done everything reasonably within his power to select his allotment by making application, etc., but being wrongfully refused, etc., is not in this

case. As to such possible exceptions we express no opinion.

This holding does not affect the owner of the improvements upon town lots in the townsites of the Five Civilized Tribes. Act May 31, 1900, c. 598, 31 Stat. 221; Act July 1, 1902, c. 1361, § 45, 32 Stat. 652. There the town-site commissioners were required to survey and lay out the townsites, and prepare correct plats thereof, one to be filed with the Secretary of the Interior, one with the clerk of the United States Court, one with the authorities of the tribes, and one with the town authorities. All town lots were to be appraised by said commission, and then the owner of the improvements was to deposit in the United States treasury at St. Louis, Mo., one-half of said appraised value as follows: Ten per cent. within two months; 15 per cent. within six months; and the remainder in three equal annual installments thereafter. The Supplemental Chickasaw and Choctaw Treaty (32 Stats. at L. 641) in certain instances provided for the payment of all the appraisement by the owner of the improvements, but did not change the manner. No provision of the town-site laws prevented the owner of the improvements on such lot, after the same was appraised and he had made the first payment, from conveying or contracting for sale the lot or his equity therein, and under such event said section 642 would apply. *Goat et al. v. United States*, supra. The question of the adverse holding of the defendant at the time of the execution of the deed to plaintiffs, not being raised, is not passed on. *Martin v. Cox et al.*, 31 Okl. 543, 122 Pac. 511; *Miller v. Fryer*, 128 Pac. 713, not yet officially reported.

The judgment of the lower court is affirmed. All the Justices concur.

#### COACHMAN v. SIMS et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

##### (Syllabus by the Court.)

#### 1. INDIANS (§ 15\*)—WILLS—DISPOSITION OF LANDS.

A full-blood Creek Indian, who died in March, 1900, could not dispose, by will, of lands subsequently allotted to his heirs.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

#### 2. MARRIAGE (§ 40\*)—PRESUMPTIONS.

When a man and woman have been living together as husband and wife for many years, and it appears that at the time of marriage the former wife was still living, in the absence of further evidence on the subject, it will be presumed that there had been a lawful separation or a divorce between the husband and the former wife.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 85; Dec. Dig. § 40.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; John Caruthers, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Nancy Coachman against B. O. Sims and Louisa Harjo. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Lewis C. Lawson, of Holdenville, for plaintiff in error. Warren & Miller, of Holdenville, for defendants in error.

AMES, O. The first question for decision is whether a full-blood Creek Indian, who died in March, 1900, could dispose, by will, of lands subsequently allotted to his heirs.

[1] This question must be answered in the negative.

In 1900 the lands of the Creek Nation constituted their public domain, and they were not subject to disposition by any individual citizen of the tribe. *Barnett v. Way*, 29 Okl. 780, 119 Pac. 418; *Cochran v. Hocker*, 124 Pac. 953; *Hayes v. Barringer*, 168 Fed. 221, 93 C. C. A. 507. It is true that at that time allotments were being selected under the act of June 28, 1898. But this act was never ratified by the Creeks (*Barnett v. Way*, supra), although such allotments were subsequently confirmed by the original Creek treaty. Act of March 1, 1901, c. 676, 31 Stat. at L. 861. Such allotments were governed by the laws of descent and distribution of the Creek Nation. *Barnett v. Way*, supra. By section 7 of the act of March 1, 1901, c. 676, 31 Stat. at L. 861, it was provided that " \* \* \* such lands shall not be alienated by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior." This section further provided that "each citizen shall select from his allotment forty acres of land as a homestead; \* \* \*" and, further, that "the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

As, in this case, the testator died in 1900, before the passage of the original Creek treaty, the homestead quality did not attach to any part of his allotment. *Parkinson v. Skelton*, 128 Pac. 181, decided November 16, 1912, citing *Hancock v. Mutual Trust Co.*, 24 Okl. 391, 103 Pac. 566, and *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834. The provision, therefore, of section 7 of the Creek treaty, with reference to the disposition of the homestead by will, does not govern in this case; and it follows that it is subject to that portion of the provision prohibiting alienation, if a disposition by will is an alienation. That such a disposition is an alienation, and is consequently prohib-

ited by the treaty, has been held in *Hooks v. Kennard*, 28 Okl. 457, 114 Pac. 744; *Taylor v. Parker*, 126 Pac. 573, decided May 14, 1912; *Hayes v. Barringer*, 168 Fed. 221, 93 C. C. A. 507 (8 C. C. A.), which affirms the same case as decided by the Indian Territory Court of Appeals, and reported in 7 Ind. T. 697, 104 S. W. 937. This disposes of the first question raised.

[2] The remaining question is whether or not the plaintiff was the widow of the deceased. As has previously been stated, under the original Creek treaty the lands descended according to the laws of descent and distribution of the Creek nation. *Barnett v. Way*, supra; *Sanders v. Sanders*, 28 Okl. 59, 117 Pac. 338; *Morley v. Fewel*, 32 Okl. 452, 122 Pac. 700; *Shellenbarger v. Fewel*, 124 Pac. 617. If, therefore, the plaintiff was the widow of the deceased, she inherited an interest in the land involved, and the issue of fact which was tried was whether or not she was the widow. The evidence disclosed that the deceased had been married several times. His first wife was Mohoskey. After her death he married Folotchole. After her death he married Mitter. While Mitter was still alive, he married Millie. After Millie's death, but while Mitter was still alive, he married Nancy, the present plaintiff. This marriage occurred about 1877 or 1878, and something like five years after his marriage to Mitter. The evidence, without contradiction, disclosed that the plaintiff and the deceased had lived together as husband and wife for approximately 23 years; that during this time they had one child, which died; that they attended camp meetings together, where they occupied a tent as husband and wife, and mingled with their friends and neighbors in that capacity; that they were regarded as husband and wife in the community. The plaintiff also offered evidence tending to prove a marriage ceremony according to the customs and usages of the Creek Indians, but the court excluded this, either on the ground that it was incompetent, or, if competent, the plaintiff had not pleaded the Creek law with reference to marriage. The plaintiff thereupon asked leave to amend the petition, which the court denied, on the ground that it was too late, and that he did not see how the custom of marriage would be competent. The plaintiff also offered evidence tending to show the custom of the Creek Indians at that time with reference to separation of husband and wife, and this was likewise excluded. If the pleading was insufficient to justify this evidence, the application to amend should have been granted, and if the amendment was not necessary the evidence should have been admitted, so, in either event, there was error; but it seems to us that, in the absence of any proof of a marriage ceremony, there was abundant proof that the marriage existed, as the fact of their living together as husband and wife

for so many years would raise a prima facie presumption of marriage.

The only question, therefore, which is not elementary, is whether or not the mere fact that the plaintiff's third wife was living at the time of his marriage to his fifth wife is sufficient proof that the fifth marriage was in its inception adulterous and bigamous. It will be observed that the evidence is entirely silent as to whether the third wife had been divorced, and whether there had been a separation according to the laws and usages of the Creek Nation. It will also be observed that between the third and the fifth marriage there had been a fourth, and that the fourth wife was dead at the time of the fifth. Under the facts of this case, we are satisfied that, in order to uphold the validity of this marriage, in the absence of an affirmative showing that there had been no lawful separation, the presumption will be that a divorce had been secured. Marriage should not be destroyed on presumption. The law is astute to preserve the sanctity of the marriage relation, the legitimacy of children, and stability of descent and distribution, and therefore presumes innocence and virtue, in the absence of proof. The wisdom of this presumption is rendered apparent by the facts in this case. This rule is well established by the authorities. *Alabama & Vicksburg Railway Co. v. Beardsley*, 79 Miss. 417, 30 South. 660, 89 Am. St. Rep. 660; *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; *Banks v. State*, 96 Ala. 78, 11 South. 404; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *In re Rash's Estate*, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649.

*Clark v. Barney*, 24 Okl. 455, 103 Pac. 598, in no way conflicts with this conclusion, as in that case it affirmatively appeared that the living wife had not been divorced at the time of the second marriage.

The judgment of the trial court should be reversed and remanded.

PER CURIAM. Adopted in whole.

#### NEILSON v. ALBERTY.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

#### (Syllabus by the Court.)

#### 1. INDIANS (§ 15\*)—INDIAN LANDS—OSAGE ALLOTMENT—ALIENATION—RESTRICTION.

By the fourth paragraph of section 2 of Act Cong. June 28, 1906, c. 3572, 34 Stat. 539, known as the Osage Allotment Act, all lands allotted to the members of the Osage Tribe were made inalienable for a period of 25 years from date of selection.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

#### 2. INDIANS (§ 15\*)—OSAGE ALLOTMENT—CERTIFICATES OF COMPETENCY—EFFECT.

Under the provisions of paragraph 7 of section 2 of said act (Act June 28, 1906, c. 3572, 34 Stat. 540), adult members of the Osage Tribe, to whom certificates of competency were issued by the Secretary of the Interior, could sell and convey, manage, control, and dispose of their surplus allotted lands, but could not sell the oil, gas, coal, or other mineral covered by said lands.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

#### 3. INDIANS (§ 20\*)—INDIAN LANDS—ALIENATION—LIENS.

Said last above provision of the act applies only to voluntary conveyances by the allottee, such as were effected by the personal will of the owner, and not to the creation of liens or transmissions of title by operation of law, unless arising out of the further provision, making the surplus lands subject to taxation.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 53; Dec. Dig. § 20.\*]

#### 4. INDIANS (§ 27\*)—INDIAN LANDS—OSAGE ALLOTMENT—SURPLUS LANDS—JUDGMENT LIEN.

A judgment was rendered in the United States Court in the Indian Territory against an Osage Indian on the last day of December, 1903. July 30, 1909, the Secretary of the Interior approved a patent to said Indian's surplus allotment of Osage Indian lands, and on the 30th day of October following issued to said allottee a certificate of competency as authorized by Osage Allotment Act June 28, 1906, c. 3572, 34 Stat. 539. On the 29th day of January, 1910, a transcript of said Indian Territory judgment was filed with the clerk of the district court of Osage county, in which county the judgment debtor's surplus lands were situated. *Held*, that the issuance of the certificate of competency did not remove the restrictions on alienation so as to subject said lands to a judgment lien.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.\*]

#### (Additional Syllabus by Editorial Staff.)

#### 5. INDIANS (§ 20\*)—OSAGE ALLOTMENT—CERTIFICATE OF COMPETENCY—"MANAGE"—"CONTROL"—"TO DISPOSE OF."

Osage Allotment Act June 28, 1906, c. 3572, § 2, par. 7, 34 Stat. 540, authorizes the Secretary of the Interior to issue certificates of competency to allottees who shall then have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States. *Held*, that the word "manage," as so used, means to have under control, under direction, to conduct, to guide, to administer, to treat, to handle, while "control" means to exercise restraining or governing influence over, to check, to counteract, to restrain, to regulate, to govern, to overpower, and "to dispose of" means to exercise finally one's power of control over, to pass over into the control of some one else, as by selling, to alienate, to part with, relinquish or get rid of, and such words did not contemplate either a sale of underlying mineral or of the surplus lands by a judgment lien.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 53; Dec. Dig. § 20.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1549-1552; vol. 8, p. 7617; vol. 3, pp. 2114-2118; vol. 5, pp. 4316, 4317.]

Commissioners' Opinion, Division No. 1. Error from District Court, Osage County; John J. Shea, Judge.

Action by Cynthia Alberty against F. A.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Nellson. Judgment for plaintiff, and defendant brings error. Affirmed.

Grinstead, Mason & Scott, of Pawhuska, for plaintiff in error. R. B. Boone and Leahy & MacDonald, both of Pawhuska, for defendant in error.

SHARP, C. February 17, 1910, Cynthia Alberty filed her petition in the district court of Osage county, alleging that she was a citizen of the Osage Tribe of Indians, and the owner of an allotment of land situated in the Osage reservation, consisting of 160 acres homestead and 498.28 acres surplus allotment, which lands were allotted to her under the provisions of an act of Congress of June 28, 1906, commonly known as the Osage Allotment Act; that deeds or patents therefor had been duly issued and recorded; that, pursuant to a provision of said act, the Secretary of the Interior on the 8th day of October, 1909, issued to said plaintiff a certificate of competency, by virtue of which she was authorized to sell, dispose, or incumber her surplus allotted lands; that on the 1st day of December, 1903, in an action wherein said F. A. Nellson was plaintiff and said Cynthia Alberty was defendant, brought in the United States Court for the Northern District of the Indian Territory, at Claremore, said plaintiff recovered a judgment against said defendant for the sum of \$1,139.97. Thereafter, and on the 29th day of January, 1910, the plaintiff in said action caused a certified copy of said judgment to be entered upon the judgment docket in the district court of Osage county, and that said judgment was at the time of the institution of the latter action unsatisfied. The petition further charged that said judgment, being of record, constituted a cloud upon the title to her surplus lands, and was a bar to her ability to dispose of or incumber them; that under the law then in force said lands were not liable to the satisfaction of any debt contracted prior to the issuance of the final patent in fee (the dates of the various acts being set forth in the petition); and that said judgment did not constitute a lien upon said lands, but that, notwithstanding said fact, it appeared as a prima facie lien, and operated to her great damage and detriment, and would so continue to do. Plaintiff asked that the court decree that said judgment was not a lien upon her surplus land, and that said judgment should not stand as a prima facie cloud upon her title to her surplus allotment. Defendant's demurrer to the petition being overruled, and defendant electing to stand on his demurrer, judgment was rendered for plaintiff according to the prayer of her petition.

[1, 2] A determination of the case involves a consideration of various sections of the act of Congress authorizing the division of the land of the Osage Indians of Oklahoma Ter-

ritory, approved June 28, 1906. This act authorizes first, second, and third selections or allotments of 160 acres each, with a provision that the allottee may share in the remaining unallotted lands. It provides in the fourth paragraph of section 2 that of such selections the allottee shall be permitted to designate which shall be a homestead, and that his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The remaining selections shall be known as surplus lands, and shall be inalienable for 25 years, except as thereafter provided. In the seventh paragraph of said section 2 it is provided that the Secretary of the Interior in his discretion, at and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of the act, except his homestead, which shall remain inalienable and nontaxable for the period of 25 years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business, and caring for his or her own individual affairs, provided, that, upon the issuance of such certificate of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as therein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States, provided, that the surplus lands shall be nontaxable for the period of three years from the approval of said act, except where certificates of competency are issued, or in case of the death of the allottee, unless otherwise provided by Congress.

[3] Further inhibitions are contained in said section against the sale of oil, gas, coal, or other minerals covered by said lands, which are reserved to the use of the tribe for a period of 25 years, and the royalties on which are to be paid to said tribe as thereafter provided. It will thus be seen that the homestead allotment shall be and remain inalienable and nontaxable for a period of 25 years, or during the life of the homestead allottee, while the surplus lands are made inalienable for 25 years except as in said act provided; the provision referred to being the issuance to the allottee of a certificate of competency. In other words, that without the issuance of a certificate of competency no alienation, voluntary or involuntary, could be made of said lands, at least during the lifetime of the allottee; that the lands were not subject to either alienation or incumbrance of any kind or in any form. Any authority, therefore, for the transition of title, the creation of a lien or

incumbrance, or any act of commission or omission that would in any wise affect the title of the living allottee, must be found in the seventh paragraph of said section, authorizing the Secretary of the Interior to issue certificates of competency to adult members of the tribe. This certificate, it is provided, shall be issued at the request and upon the petition of such member, and if, upon investigation, consideration, and examination of said request, such member shall be found to be fully competent and capable of transacting his or her own business, and caring for his or her own individual affairs, the Secretary may in his discretion issue a certificate authorizing the allottee to sell and convey any of his surplus lands; that upon the issuance of such certificate, by express enactment, the surplus lands became subject to taxation, and such member was given the right to manage, control, and dispose of his surplus lands the same as any citizen of the United States.

[4] Does, therefore, this statute contemplate the attaching of a judgment lien to the surplus lands of such citizen upon the issuance of such certificate? If not, the judgment of the court below should be affirmed. Obviously the first provision authorizing a member of the tribe to whom a certificate of competency has been issued to sell and convey her surplus lands cannot be construed to mean that said lands may be subjected to a lien created by operation of law. The latter clause, which provides that, upon the issuance of the certificate of competency, a member shall have the right to manage, control, and dispose of her lands the same as any citizen of the United States, it is contended by plaintiff in error, placed the defendant in error upon exactly the same footing in respect to her surplus allotment as any United States citizen owning land. We are unable to agree with this contention, and submit that the words employed cannot be extended by any known rule of construction so as to authorize the attaching to the lands of a lien created by statute, not the result of the voluntary act of the allottee. It is a familiar rule in the interpretation of statutes that words in common use are to be construed in their natural, plain, and ordinary signification. *Regents of University v. Board of Education*, 20 Okl. 809, 95 Pac. 429. In *Board of Lake County Commissioners v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1061, the rule of construction mentioned was expressed by the court in the following language: "To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, then that meaning, apparent on the face of the instrument, must

be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. *Newell v. People*, 7 N. Y. 97; *Hills v. Chicago*, 60 Ill. 86; *Denn v. Reid*, 35 U. S. (10 Pet.) 524, 9 L. Ed. 519; *Leonard v. Wiseman*, 31 Md. 204; *People v. Potter*, 47 N. Y. 375; *Cooley, Const. Lim.* p. 57; *Story, Const. § 400*; *Beardstown v. Virginia*, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States v. Fisher*, 6 U. S. (2 Cranch) 358, 399, 2 L. Ed. 304, 317; *Doggett v. Florida R. Co.*, 99 U. S. 72, 25 L. Ed. 301."

[5] "Manage" means to have under control, under direction, to conduct, to guide, to administer, to treat, to handle; while "control" means to exercise restraining or governing influence over, to check, to counteract, to restrain, to regulate, to govern, to overpower. *Webster's International Dictionary*. The words "manage" and "control" are synonymous. *Youngworth v. Jewell*, 15 Nev. 45; *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087; *Gray v. Parke*, 162 Mass. 582, 39 N. E. 191. To manage, or to control, does not confer upon one thus invested with authority the right to sell. *Blanton v. Mayes*, 58 Tex. 422; *Anderson v. Stockdale*, 62 Tex. 54; *Porter v. Thomas*, 23 Ga. 467; *Wolfe v. Loeb*, 98 Ala. 426, 13 South. 744; *Randall v. Josselyn*, 59 Vt. 567, 10 Atl. 577; *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; *Duncan v. Hartman*, 143 Pa. 595, 22 Atl. 1099, 24 Am. St. Rep. 570. Are, then, the remaining words, "And such member \* \* \* shall have the right to dispose of," sufficiently comprehensive to warrant the construction contended for? "To dispose of" means to exercise finally one's power of control over; to pass over into the control of some one else, as by selling; to alienate, to part with, to relinquish, to get rid of. *Webster's International Dictionary*; *Stark et al. v. Duvall et al.*, 7 Okl. 213, 54 Pac. 453; *Jenckes v. Court of Probate of Smithfield*, 2 R. I. 255; *Harty v. Doyle*, 49 Hun, 410, 3 N. Y. Supp. 574; *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Gould v. Head (C. C.)* 41 Fed. 240. It is an active, not a mere passive, quality, and implies volition, the act of forming a purpose and executing the will. Such were the powers, and none other, that were conferred. They are not the legal equivalent to a removal of restrictions as used in contemporaneous Indian legislation as we shall see.

Counsel for plaintiff in error cite in support of their contention *Goudy v. Meath, Assessor*, 38 Wash. 126, 80 Pac. 295, affirmed on appeal to the United States Supreme Court, and reported in 203 U. S. 146,

27 Sup. Ct. 48, 51 L. Ed. 130, and Beall et al. v. Graham, 75 Kan. 98, 88 Pac. 543. In the Washington case a patent to an Indian was made subject to a treaty which provided that the lands should not be alienated, and should be exempt from levy, sale, or forfeiture, and that such restrictions should remain in force until removed by the state Legislature with the consent of Congress. Afterwards Congress provided by Act March 3, 1893, c. 209, 27 St. at L. 612, that Indian allottees should not have the power of alienation for the period of 10 years after the passage of the act, and the state Legislature by Act March 22, 1890 (Laws 1889-90 [Wash.] p. 499), provided that Indians holding lands by virtue of treaties between them and the United States should have the power to lease, incumber, grant, and alien the same, and that all restrictions in reference thereto were thereby removed. It was held that the provision that lands were not subject to levy, sale, or forfeiture was removed, so that, after the expiration of the 10-year period, the lands were subject to taxation. It will be noticed that section 1 of the act of the state Legislature, in addition to conferring power to lease, incumber, grant, and alien, any lands taken in severalty, provided further: "And all restrictions in reference thereto are hereby removed." It was held that, after the expiration of the 10-year period, restrictions upon the alienation and sale of lands were removed, and that the land was thereupon subject to taxation. On hearing in the Supreme Court of the United States the authority of Congress to grant the power of voluntary sale and to withhold the land from taxation or forced alienation was conceded by the court, who held, further, that the language employed was sufficiently comprehensive to remove all restrictions by alienation so as to subject the land not only to voluntary but to involuntary alienation. In the Kansas case of Beall v. Graham, supra, it was held that a judgment of the district court against an adult Kickapoo Indian was not a lien upon his inherited lands situated in the county where such judgment was rendered.

Act April 21, 1904, c. 1402, 33 Stat. 204, removing restrictions on the alienation of certain lands theretofore allotted to members of the Five Civilized Tribes of Indians, was in the following language: "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and the restrictions upon the alienation of all other allottees of said tribes except minors and except as to homesteads, may with the approval of the Secretary of the Interior be removed," etc. Act May 27, 1908, c. 199, 35 Stat. 312, removing restrictions from part of the lands of allottees of the Five Civilized Tribes,

used equally as comprehensive language. It is difficult to conceive how broader language could have been used. Here the lands in the first place were made inalienable for 25 years; but upon certain conditions the Secretary of the Interior was authorized to do what? To remove all restrictions upon alienation? No. Simply to issue a certificate of competency whereby an adult member of the tribe might have the right to manage, control, and dispose of his surplus lands, except as otherwise therein provided. Section 7 of the act required that the leases given by the allottee should be subject to the approval of the Secretary of the Interior. This restriction was one of those removed, as was that of the right to sell as we have already seen. A case to our minds which fully sustains our contention is that of *Love v. Pamplin* (C. C.) 21 Fed. 755, the opinion being by Justice Matthews at circuit, and concurred in by Hammond, J. There the language of a part of article 4 of the Chickasaw Treaty of 1834 (7 Stat. 450) provided for the allotment of lands which should not be permitted to be sold, leased, or disposed of unless it appeared by the certificate of at least two of seven persons named therein that the party owning or claiming the same was capable to manage and take care of his or her affairs. The contest arose between the heirs at law of the allottee and the purchasers through mesne conveyance of certain judgment creditors, who had procured the sale of the allotted lands in the state courts of the state of Tennessee. It was admitted that the court proceedings were in all respects regular and in conformity with the laws of Tennessee. It was said by the court in the opinion: "It becomes a question, therefore, in the first instance of the true meaning of the treaty, and, looking at its provisions in the light of the circumstances, and of the natural and obvious meaning of the language in which they are expressed, and of the context, it appears to be clear that the intention of the instrument limits the clauses restrictive of alienation, as to the lands reserved to individuals, to cases of voluntary conveyances. The language of the prohibition is that the reservations shall not be 'sold, leased, or disposed of,' and, although the words last used, 'disposed of,' might seem to embrace other dispositions than those of sale and lease, yet they cannot upon the principle noscitur a sociis be extended so as to include any other than those of a character like those specially named; that is, of a voluntary nature, effected by the personal will of the possessor." There the words employed in the treaty were "sold, leased, or disposed of," here, "and such member, except as herein provided, shall have the right to manage, control, and dispose of," thus conclusively establishing that it only intended conveyances of in-

cumbrances of a voluntary nature. The judgment obtained against defendant in error was rendered on the 1st day of December, 1903, or about 5½ years before the issuance of the surplus patent, and over 3 years before the conclusion of the allotment treaty. That it was the purpose of the general government in the allotment of these lands to protect the individual allottee, in view of the long course of dealing between it and the various Indian tribes, cannot be considered an open question, and while the original Osage Treaty contains no express provision exempting allotted lands for debts and obligations contracted by its members, created prior to the issuance of patent, it sufficiently provides that it shall be inalienable except by the voluntary act of the allottee. *Western Investment Co. v. Kistler*, 22 Okl. 222, 97 Pac. 588; *In re Davis' Estate*, 32 Okl. 209, 122 Pac. 547; *Redwine et al. v. Ansley et al.*, 32 Okl. 317, 122 Pac. 679; *In re Washington's Estate*, 128 Pac. 1079, recently decided, and not yet officially reported. When we stop to consider that in all its dealings with the members of the Five Civilized Tribes the government has thrown around those highly civilized and enlightened people a protection such as that named, and to then conclude that it was the intention of Congress to subject the lands of the Osages, a tribe yet maintaining their own tribal form of government, to an enforced alienation for the payment of debts, is to accuse Congress of a willful and gross neglect of duty toward these dependent people, who, while not financially dependent, are in a governmental sense helpless, and who look to the general government for protection of their landed estates. Construing the act as we have done, no such hardship and discrimination in legislation follows.

While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United States for more than 100 years must be resolved in favor of the defendant in error. *Tiger v. Western Investment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. Ed. 738; *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195. We do not believe the statute authorizing the issuance of certificates of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands, and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is de-

fined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained.

The judgment of the trial court should for the reasons given be affirmed.

PER CURIAM. Adopted in whole.

ADAMS et al. v. COON et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 45\*)—STOLEN PROPERTY—ABSENCE OF CONCEALMENT.

The statute of limitations, as to lost personal property, or personal property in the hands of a thief, begins to run from the time of the wrongful taking or possession, and not from the time when the owner first had knowledge thereof, provided there was no fraud or attempt at concealment; and if such fraud or concealment exists it must, in order to avail the owner, be the act of the thief or finder of the property.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 233-239; Dec. Dig. § 45.\*]

2. LIMITATION OF ACTIONS (§ 1\*)—STATUTES OF REPOSE.

Statutes of limitation are statutes of repose, the object and purpose of which is to suppress and prevent fraudulent and stale claims from springing up at great distances of time and surprising parties, or their representatives, when all the proper vouchers and evidences are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

3. TRIAL (§ 143\*)—DIRECTING VERDICT—CONFLICTING EVIDENCE.

Where issues of fact are presented by the pleadings and supported by evidence, and the facts are disputed, or the credibility of witnesses is drawn in question, or a material fact is left in doubt, or there are inferences to be drawn from facts proven, the case, under proper instructions, should be submitted to the jury; and it is reversible error in such case to sustain a motion to direct a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.\*]

Commissioners' Opinion, Division No. 1. Error from Atoka County Court; J. H. Linebaugh, Judge.

Action by Rhoda Coon and A. D. Coon against F. E. Adams and T. F. Horne. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Winfield S. Farmer, of Atoka, for plaintiffs in error. D. H. Linebaugh, of Atoka, for defendants in error.

ROBERTSON, C. This is an action in replevin for the possession of a horse. The



evidence shows that Mrs. Coon, one of the defendants in error, in 1901, was the owner of a young colt. This colt, with other live stock belonging to her father's family, ran loose upon the prairie near their home, which was in the neighborhood of Lehigh. In 1903 defendants in error moved to Roff, 50 or 60 miles away. They claim the colt at that time had become lost or stolen, and could not be found, and that they offered a reward for the same, in the hope of recovering it. It was also shown that Joe Marshall, the stepfather of Mrs. Coon, and with whom Mrs. Coon lived prior to her marriage, had a lot of live stock, including horses, running at large on the range at that time, and that the colt in question ran with his stock, and was branded in his brand by his son, who, however, testified at the trial that he branded the animal at his sister's request, it being her property; the whole family owning live stock and using the brand in common. Tom Brown testified: That he knew the animal. That he owned it once, having obtained it from Joe Marshall, by trade, six or seven years before the trial. He lived in the same neighborhood and kept the animal nearly two years, when he sold it to John Meadows, who also lived in the same neighborhood, and who also kept the animal for nearly two years, when he sold it to a Mr. Catz, who also owned it for two years, who kept the animal in a pasture near Lehigh a part of the time, and also drove it around over the country; his business being that of a peddler. Catz sold the horse to Charley Kilgore, who, 10 days prior to the commencement of this action, sold the same to plaintiffs in error.

The evidence shows, without dispute, that each of these gentlemen, who had owned the animal, held it in open, notorious, exclusive, and peaceable possession, and that their right to it was never questioned, and that the animal was never secreted nor run out of the country, but, on the contrary, was kept, practically all the time (six or eight years) in the very neighborhood in which it was foaled.

The defendants admit that they had not seen the animal for six or seven years; that it was but a colt when they moved away; that it was branded, when they left the neighborhood, in Joe Marshall's brand, but allege that said brand was in common use among all members of the family (Rhoda Coon being a stepdaughter of Joe Marshall). After the testimony was all in, the defendants below moved the court to direct a verdict in their favor, for the reason that the cause of action was barred by the statute of limitations. This request was denied, and defendants excepted. Thereupon plaintiffs moved for a directed verdict in their behalf, which motion was, by the court, sustained, and to which defendants excepted, and bring this appeal to reverse the judgment entered on the verdict.

Two questions are raised in the assignment of error: First, the statute of limitations; and second, the court erred in directing a verdict for plaintiffs, for that, the evidence on the question of ownership being conflicting, the question should have been submitted to the jury, instead of being decided by the court. In our opinion, both points are well taken. As a general proposition, the statute of limitations, as to replevin actions for the recovery of lost or stolen property, begins to run from the time of the wrongful taking or possession, and not from the time when plaintiff first had knowledge thereof, if there was no fraud or attempt at concealment; and if such fraud or concealment exists it must, in order to avail plaintiff, be the act of defendant himself. 34 Cyc. 1423.

It must be admitted that all the evidence in this case shows that the possession of all the various owners of the horse in question was open, peaceable, exclusive, and notorious. This is true even as to Joe Marshall, the stepfather of Rhoda Coon, one of the defendants in error, who had possession of the animal after defendants in error moved away, and whose stock brand the animal in question bore. There was no attempt on the part of any of the various vendors or vendees to conceal the animal, or to remove the same from the immediate neighborhood where it was foaled; and the mere fact that defendants removed from the neighborhood six or seven years prior to the bringing of the action did not suspend the bar of the statute. This principle of law is thoroughly discussed in an able opinion by Mr. Justice Clayton, in *Gatlin v. Vaut*, 6 Ind. T. 254, 91 S. W. 38, in which he says: "If he had held the property openly and notoriously in the community where the larceny occurred, he could undoubtedly do so [plead the statute], not so much because he was entitled to the protection afforded by the statute, but because of the laches of the plaintiff. But where he conceals the property, and removes both it and his person from the jurisdiction of the court, and so long as such acts continue, as against him, the running of the statute is certainly suspended. \* \* \* The statute says that if any person, by any improper act of his own, prevents the bringing of an action, the statute shall not operate until such act ceases; and where a person innocently obtains stolen property it will require some active act of concealment or fraud on his part to further suspend the statute. \* \* \* We therefore hold that the statute of limitations, as to personal property in the hands of a thief, who has removed it from the vicinity of the owner or secreted it from him, does not begin to run until he returns the property to that vicinity, or openly and notoriously holds it, so that the owner may have a reasonable opportunity of knowing its whereabouts and of asserting his title. And when he

does this the statute begins to run, although the proof may show it to have been stolen property, not on the theory that the thief is to be protected, but because of the laches of the owner in not asserting his title for so long a period as the statute gives him."

[1] The above case, in principle, is decisive of the question under consideration. Here the colt, having been branded in Marshall's brand, ran free on the range with Marshall's stock. It is not denied but that Marshall traded the animal to Brown, or that Brown was in the peaceable, exclusive, and notorious possession of the same for nearly two years, and in the immediate neighborhood where the colt was foaled, or that he sold it to Meadows, who likewise held it for two years, and sold it again in the same neighborhood; this buying and selling continuing for a period of seven or eight years. No attempt was made on the part of any of the owners to conceal the animal, or to prevent the owner from finding and recovering it. We do not know on what theory plaintiffs below followed the horse, whether as stolen or lost property; but in either event, under the facts of this case, the above law is applicable.

In *Dee v. Hyland*, 3 Utah, 308, 3 Pac. 388, it was held that the plaintiff's cause of action was barred, because the defendant, although having obtained possession of stolen property, had been in such possession openly and notoriously for more than three years. See, also, *Hicks v. Fluit*, 21 Ark. 463.

[2] Statutes of limitation are statutes of repose, the object and purpose of which is to suppress and prevent fraudulent and stale claims from springing up at great distances of time and surprising parties, or their representatives, when all the proper vouchers and evidences are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. 25 Cyc. 985. The defense of the statute of limitations in this action in the court below is a shining example of the usefulness and wisdom of the rule above enunciated. Without such a law there would be injected into almost every transaction, such as is related in the history of this case, an element of uncertainty that would noticeably interfere with the stability of ordinary business affairs. To guard against this statutes of limitation have been called into existence, to the end that those who have a wrong will speedily pursue their remedy, and to prevent innocent parties from being called upon to defend against actions, the evidence to defeat which has been lost or forgotten.

[3] We are also of opinion that the trial court erred in directing a verdict for plaintiffs, for that the evidence of ownership on which they relied in order to recover was not as plain or convincing or consistent as would justify the court in taking the issue from the jury. Ownership in this case was

primarily one of fact. In replevin the plaintiff must recover on the strength of his own, and not on the weakness of defendant's title. The evidence in this case, in some particulars was inconsistent, and in other ways of doubtful value. The credibility of the witnesses, and the effect to be given inconsistent testimony, are for the determination of the jury. *Moore v. First Natl. Bank*, 30 Okl. 623, 121 Pac. 626. "Where issues of fact are presented by the pleadings and supported by the evidence, and the facts are disputed, or the credibility of witnesses is drawn in question, or a material fact is left in doubt, or there are inferences to be drawn from facts proven, the case, under proper instructions, should be submitted to the jury; and it is reversible error in such case to sustain a motion to direct a verdict. *Brown & Bridgeman v. Western Casket Co.*, 30 Okl. 144, 120 Pac. 1001." Such a case is the one under consideration. The question of ownership should have been submitted to the jury. It is not enough to say that the evidence on the subject preponderated in favor of the plaintiffs. The issue was primarily one for the jury to decide.

For the reasons hereinbefore given, the judgment of the county court of Atoka county should be reversed and the cause remanded, with instructions to enter judgment for defendants in accordance with the prayer of their answer.

PER CURIAM. Adopted in whole.

GRISSOM et al. v. BEIDLEMAN et al.

(Supreme Court of Oklahoma. Dec. 31, 1912.  
Rehearing Denied Jan. 28, 1913.)

(Syllabus by the Court.)

1. INFANTS (§ 50\*)—ACTIONS TO PROTECT REAL ESTATE — SERVICES OF ATTORNEY — "NECESSARIES."

Where suit was brought in the name of a minor, who was under the age of 18 years, by direction of her next friend, to protect the infant's title to certain real estate, held, that the counsel could not recover in an action at law against the minor for services in such suit.

(a) Such services are not regarded as necessities, and may be avoided by the infant, even under express promise.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 114, 115, 117-127; Dec. Dig. § 50.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4693-4703.]

2. INFANTS (§ 58\*)—DISAFFIRMANCE OF CONTRACT.

The disaffirmance of a contract made by an infant nullifies it, and renders it void ab initio; and the parties are returned to the same condition as if the contract had never been made.

(a) After the infant has disaffirmed the contract, any one may take advantage of such disaffirmance.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. § 53.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. INFANTS (§ 58\*)—AVOIDANCE OF CONTRACT.**  
An infant may avoid his act or contract by different means, according to the nature of the act and the circumstances of the case.

(a) Any act showing unequivocally a renunciation of, or a disposition not to abide by the contract made during minority is sufficient to avoid it.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. § 58.\*]

**4. APPEAL AND ERROR (§§ 193, 248\*)—SUFFICIENCY OF PETITION—ERRORS APPARENT OF RECORD.**

Upon a petition in error to reverse a judgment by default, such defects in the petition as could have been taken advantage of under general demurrer may be brought under review; and, if the allegations of the petition are insufficient to sustain the judgment, the same will be reversed.

(a) Where an error is apparent on the judgment roll or record of the trial court, the same will be considered on review here, although no exception was taken thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1226-1238, 1240, 1432, 1435-1439, 1443, 1447-1452, 1454-1459; Dec. Dig. §§ 193, 248.\*]

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by George C. Beldleman and others against Joseph M. Grissom and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

George James, of Okmulgee, for plaintiff in error Grissom. A. S. McRea, of Okmulgee, for plaintiff in error Green. Merwine & Newhouse and George C. Beldleman, all of Okmulgee, for defendants in error.

**WILLIAMS, J.** [The only question to be determined in this proceeding is whether the contract entered into, on which the action was based, to wit, that between Leah Gresham, a minor, under 18 years of age, by Vassie Gresham, as next friend, and George C. Beldleman, an attorney, in which the latter was employed as attorney to prosecute an action in her name by said next friend to recover her interest in certain lands, was voidable. "A minor cannot give a delegation of power, nor under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." Section 5035, Comp. Laws of Okla. 1909; section 3912, Wilson's Rev. & Anno. Stat. 1903. A minor may make any other contract, with certain exceptions; the exception including section 5035, supra, subject only to his power of disaffirmance, and subject to the provisions of the law on marriage and on master and servant. Section 5036, Comp. Laws of Okla. 1909; section 3913, Wilson's Rev. & Anno. Stat. 1903. "A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them." Section 5038, Comp. Laws of

Okla. 1909; section 3915, Wilson's Rev. & Anno. Stat. 1903. "A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute." Section 5039, Comp. Laws of Okla. 1909; section 3916, Wilson's Rev. & Anno. Stat. 1903.

In all cases other than those specified in said sections 3915 and 3916, Wilson's Rev. & Anno. Stat. 1903 (sections 5038 and 5039, Comp. Laws of Okla. 1909) the contract of a minor, made by him whilst he is under the age of 18, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards, or in case of his death, by his heirs or personal representative; and if the contract be made by the minor while he is over the age of 18 years, it may be disaffirmed in law only upon restoring the consideration to the party from whom it was received, or paying its equivalent, with interest. Section 5037, Comp. Laws of Okla. 1909; section 3914, Wilson's Rev. & Anno. Stat. 1903. See *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; *Hall v. Butterfield*, 50 N. H. 354, 47 Am. Rep. 209; *International Land Co. v. Marshall*, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056.

The English law, from the earliest period, has thrown the mantle of protection around the minor or infant on account of his ignorance and inexperience. *International Land Co. v. Marshall*, supra. The federal government, in exercising its guardianship over the Indians as its wards, carrying out this same policy, has put certain limitations upon this state as to the lands of said wards. *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755; *Bell v. Cook* (C. C.) 192 Fed. 597; *Truskett et al. v. Closser* (C. C. A.) 198 Fed. 835.

In *N. H. Mutual Fire Ins. Co. v. Noyes*, 32 N. H. 345, it is said: "In *Phelps v. Worcester*, 11 N. H. 51, it was holden that the services and expenses of counsel, in carrying on a suit to protect the infant's title to his estate, could not be regarded as necessities, and that the infant's liability for them might be avoided, even under an express promise to pay for them. Upham, J., in pronouncing the opinion of the court, remarked: 'The inquiry has been made, if there had been no guardian, and the infant were without aid, whether he might not employ others to protect his rights to his property, and be legally holden, notwithstanding the interposition of his minority. We think clearly not. Though such services may promote the sound interests of the ward (infant?), they are not of such assistance as comes within the term "necessaries." Lord Coke considers the necessities of the infant to include victuals, clothing, medical aid, and good teaching or instruction whereby he may profit himself afterwards. Coke Lit. 172a. Such aid concerns the person and not the estate, and we know

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

of no authority which goes beyond this. Now, if the services and expenses of counsel, in protecting the property of an infant, are not necessities, on what principle can it be contended that the insurance of that property against loss by fire can be? The object is the same in both cases—the protection and security of the infant's property—and instances can readily be conceived where the services of learned and experienced counsel might be quite as valuable and important as any contract of insurance. The test of beneficiality, then, cannot be relied on as determining whether or not a thing is to be reckoned among necessities. But it seems to us the suggestion in the case last cited, that necessities concern the person and not the estate, furnishes the true test on this subject. Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be that those things, and those only, are properly to be deemed necessities which pertain to the becoming and suitable maintenance, support, clothing, health, education, and appearance of the infant, according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances under which he may be placed as to profession or position. *Coke Lit.* 172a; *Whittingham v. Hill*, *Cro. Jac.* 494; *Ive v. Chester*, *Oro. Jac.* 560. If this be so, then matters which pertain only to the preservation, protection, or security of the infant's property are excluded from the list of necessities, however beneficial. Whatever relates to his property is the legitimate business of a guardian, and, if transacted by the infant, may be avoided at his election."

In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, this holding is adhered to, but counsel fee for defending the minor in a bastardy proceeding is classed as "a necessary"; the action concerning his person and liberty.

In *Thrall v. Wright*, 38 Vt. (Book 12, Anno. Ed. 188) 494, it is said: "The defendant was a minor, had a note against his father, and employed the plaintiff, an attorney, to bring a suit on it against his father. The suit was afterwards discontinued. The boy told the attorney, when he applied to him to bring the suit, that he did not reside with his father, and that his father had given him his time. The father was a man of property, willing and able to support his son, and desired that he should remain at home. This suit is brought by the attorney to recover of the minor for his services and disbursements in the suit. The minor pleads infancy. The court below have found that the son's interest in the note, not beneficial to the minor, and not proper and expedient under the circumstances. (1) The plaintiff insists that in this finding there was error, and that, upon the facts disclosed in the case, the suit was necessary. Why? Not because the evidence did not tend to prove the fact

that the suit was unnecessary, nor because the court exceeded their duty in finding the fact from the evidence, for the trial was by the court. If there was error in this finding, it must be because, as matter of law, in all cases where a father is indebted to his minor son, a lawsuit with the father is a necessary for the son. We are not prepared to establish such a rule. Prof. Parsons, in his work on Contracts, p. 248, enumerates in his list of articles not necessities for an infant: 'Horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles, balls and serenades, counsel fees, and expenses of a lawsuit'—citing *Phelps v. Worcester*, 11 N. H. 51. But the circumstances of each case must govern. Thus, a horse might be necessary if the infant's health required him to ride. So a lawsuit might be necessary."

In *McIsaac v. Adams*, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729, it is said: "In the aspect of the case most favorable to the plaintiff, he has no standing, unless the services were necessities. The plaintiff's testimony was the only evidence introduced at the trial; and we are of the opinion that there is nothing in it which warrants the finding in his favor. The services were rendered in connection with the settlement of an estate, in which the defendant's only interest was as a legatee who would receive a not very large sum if the will should be allowed, or as a descendant of his grandfather, who would take as an heir at law if the will should be set aside. Protection of such an interest of a minor does not come within the term 'necessaries,' as used in reference to the liability of minors. Ordinary rights of property are to be protected by a guardian, and not left to the care of the minor himself, or to the irresponsible action of third persons. \* \* \* When proceedings affecting the minor as a party are going on in a court, a guardian ad litem is appointed. \* \* \* A judgment against a minor, without a probate guardian or a guardian ad litem to represent him, is voidable upon a writ of error. *Johnson v. Waterhouse*, 152 Mass. 585, 28 N. E. 234 [11 L. R. A. 440, 23 Am. St. Rep. 858]. We can conceive of conditions such that a minor may be bound to pay a reasonable compensation for the services of an attorney, on the ground that they were necessary; but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection, or liberty. The cases of *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275 [60 L. R. A. 128, 96 Am. St. Rep. 721], *Barker v. Hibbard*, 54 N. H. 539 [20 Am. Rep. 160], *Munson v. Washband*, 31 Conn. 303 [83 Am. Dec. 151], and *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101 [5 L. R. A. 176], are illustrations of the application of this rule. In the first, the services were rendered in an action, brought by the next friend of a female minor, to recover for

an indecent assault upon her. In the second, the plaintiff had been employed to defend the defendant upon the charge of being the father of a bastard. In the third, the defendant had been seduced, and afterwards had been turned out of doors by her father, and the plaintiff had brought an action for the defendant against the seducer. In the fourth, the services were rendered in defending a minor upon an indictment for stealing. The cases recognize the general doctrine that legal services, rendered to a minor in regard to ordinary rights of property, are not necessities. See, also, as to this last proposition, *Phelps v. Worcester*, 11 N. H. 51; *Thrall v. Wright*, 38 Vt. 494; *Conant v. Burnham*, 133 Mass. 503 [43 Am. Rep. 532]; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 562 [46 Am. Dec. 704]. With the protection which the law gives minors in regard to their property, through its provisions for the appointment of guardians, it cannot be held that services of an attorney, without employment by a guardian, are necessary to a minor, in the settlement of the estate of a deceased person, in which he is interested."

There are other cases reported deciding that an infant is not liable in an action at law for legal services rendered relative to his estate or property. *Dillon v. Bowles*, 77 Mo. 603; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 28 L. R. A. 177, 42 Am. St. Rep. 665; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Houck v. Bridwell*, 28 Mo. App. 644.

In *Hanlon et al. v. Wheeler* (Tex. Civ. App.) 45 S. W. 821, it was held that: "Under a law which authorizes a minor to contract for necessities, he may engage an attorney to prosecute an action for a personal injury."

In Tennessee, in a damage suit for personal injuries, attorneys are entitled to a reasonable fee and to have a lien on judgment (*Smithson et al., Ex parte*, 108 Tenn. 442, 67 S. W. 864); but the amount was not entitled to be determined on *ex parte* hearing. A hearing at which the infant shall be represented by a guardian or guardian *ad litem* is essential.

In *People ex relatione Smith v. Mullin*, Commissioner, 25 Wend. (N. Y.) 698, the relator, imprisoned on execution for assault and battery, sought his discharge on compliance with the provisions of the statute relative to voluntary assignments by a debtor imprisoned in civil cases. It was held that he was entitled to a discharge, having complied with the provisions of said statute, and that such assignment was valid, notwithstanding his under age.

The undertaking of an infant, by bond or contract, to answer charge of bastardy, or to support his bastard child, may not be disaffirmed. *McCall v. Parker*, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; *Stowers v. Hollis*, 83 Ky. 544; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; *Gavin v. Burton*, 8 Ind. 70; *Inhabitants of Township of*

*Bordentown v. Wallace et al.*, 50 N. J. Law, 13, 11 Atl. 267. An infant having given security for the fine and costs to prevent being held in custody, and his surety having paid the same, on motion, judgment being rendered against the minor, it was held that the judgment, though arising out of a civil contract, was binding on the infant, and could not be disaffirmed. *Dial v. Wood*, 9 Baxt. (Tenn.) 296. An infant is bound on his recognizance or bail bond, not subject to be disaffirmed, for his personal appearance at court. *State v. Weatherwax*, 12 Kan. 463; *Commonwealth v. Semmes*, 38 Va. 665; *Attorney General v. Baker*, 9 Rich. Eq. (S. C.) 521; *Fagin v. Goggin*, 12 R. I. 398. A husband, though an infant, was held liable for the debts of his wife contracted before marriage. *Butler v. Breck*, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; *Roach v. Quick et ux.*, 9 Wend. (N. Y.) 237. An infant widow was held to be liable on a contract by her for her deceased husband's funeral expenses. *Chappel v. Cooper*, 13 M. & W. 252, 13 L. Jour. 286.

In *Helps v. Clayton*, 112 Eng. Com. Law Rep. 553 (17 C. B. [N. S.] 553), it is said: "The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage; it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place. The proper conclusion, therefore, is that the retainer is to be considered as that of the lady or her parent, as the case may be; but that usage makes the husband liable to indemnify whosoever, on the part of the wife, has properly incurred expense by retaining the solicitor to prepare a settlement in the propriety of which the latter has so large an interest."

\* \* \* Upon the remaining question—that of infancy—we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement; and the preparation of the settlement was therefore beneficial, as securing to her, at her election, a proper division, which may justly be considered a necessity suitable to her estate and condition. It would be a perversion of the law, for the protection of infants, to hold that, under these circumstances, an infant could not contract for the preparation of such a settlement."

These cases are within the principle that, when a contract comes within the term "necessaries," or that which he is under a legal obligation to do, or is made pursuant to statutory authority, the minor is bound

so that he may not disaffirm same. In the case of the infant female, the solicitor's bill for drawing a marriage settlement was reasonably incidental to her contracting marriage. An infant may contract marriage and do everything that is reasonably incidental and beneficial to her in carrying out or consummating the marriage contract.

In *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 435, the action of the chancery court in allowing, out of the ward's estate, counsel fees earned by the guardian for services for the ward in recovering property then being administered by the chancery court, such services being performed before his appointment as guardian, was under consideration. Under the Mississippi Code (Code 1871, § 976), which controlled that case, the chancery court had jurisdiction of the minor's business and all demands against his estate. This case is in harmony with the principle announced by this court in *Muskogee Development Co. v. Green et al.*, 22 Okl. 237, 97 Pac. 619, wherein it is held that an allotment of an infant without a legal guardian, living with his father, who is his natural guardian, having been leased by said natural guardian at the rate of 25 cents per acre per year for a period of five years, and for certain improvements to be made thereon, to consist of breaking land and building fences and houses, which benefited such estate, said contract having been entered into in good faith by all parties thereto (it being a fair contract), and believing it to be authorized under the law, said father afterwards having been appointed as legal guardian, repudiating said contract, the value of such improvements were allowed out of the rents in an accounting in equity; such improvements adding a value to the land in excess of their cost. This holding was in line with *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326.

In *Senseney, Trustee, v. Repp et al.*, 94 Md. 77, 50 Atl. 416, a bill in equity for partition was filed by the next friend of several infants. The solicitor who filed the bill and prosecuted the partition proceedings to final decree was allowed a fee out of the proceeds of the sale. In the opinion it is said: " \* \* \* He is seeking remuneration out of a fund which his services have produced, and produced for the benefit of the persons whose interests he in reality represented. His services were rendered for the benefit of the infants. Being infants, they were unable to contract with him. But the fund which those services realized were in court, and, after the debts due by the decedent had been paid, belonged to the widow and infants. It was entirely proper that out of what belonged to them the fee should be paid. \* \* \* "

In *Colgate v. Colgate*, 23 N. J. Eq. 372, it was announced that a court of equity may direct the guardian ad litem to employ counsel, approved by the court, to represent the infant, and that compensation may be

fixed by the chancery court and ordered paid out of the infant's estate.

In *Connor v. Ashley*, 57 S. C. 305, 35 S. E. 546, it was held that a solicitor for a minor, in a bill in equity, was entitled to a fee of compensation for his services, to be allowed under fees brought into court by proper decree, under the power of equity in its control of minors' estates.

In *Owens et al. v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130, it was held that where, in a suit in chancery involving the real property of infants, the chancellor, on account of the fact that the statutory guardian of the infants claims an adverse interest in the property, refuses to allow him to defend for the infants and appoints a guardian ad litem for that purpose, who employs attorneys to represent him, and the latter conduct the litigation for the infants to a successful conclusion, the infants are liable for reasonable attorney's fees; but the amount cannot be made a lien on their property. See, also, *Petrie v. Williams et al.*, 68 Hun. 589, 23 N. Y. Supp. 237.

In the following cases, at actions in law a recovery was sustained against the infant for legal services rendered in his behalf in relation to his property: *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 28 Am. St. Rep. 837; *Sutton v. Heinze et al.*, 84 Kan. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238; *Nagel v. Schilling*, 14 Mo. App. 576. But these cases hold that the contract is binding only to the extent of a reasonable compensation.

In *Searcy v. Hunter*, supra, it is said: "Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney who, at the instance of a next friend, has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed to protect. In such case, where the services have been beneficial to the infant, we are of the opinion that reasonable compensation should be allowed."

[2] The disaffirmance of a contract made by an infant nullifies it and renders it void ab initio; and the parties are returned to the same condition as if the contract had never been made. After the infant has disaffirmed the contract, any one may take advantage of such disaffirmance. Where an infant avoids his contract, it cannot thereafter be resuscitated or ratified. 22 Cyc. 616; *Peck et al. v. Cain et al.*, 27 Tex. Civ. App. 88, 63 S. W. 177, and authorities therein cited.

[3] An infant may avoid his contract by different means, according to the nature of the act and the circumstances of the case; but it may be that any act showing unequivocally a renunciation of, or a disposition not to abide by, the contract made during minority is sufficient to avoid it. 22 Cyc. 612. "Looking to the condition of affairs in

our state," a different conclusion to that attained in the Texas case should be reached by us.

[1] We believe that the rule in New Hampshire, followed in Massachusetts and other states, should prevail here. That is where the services pertain to the defense of the liberty or person of the minor, or the prosecution of actions for an injury thereto, that the same should be classed as a "necessary," and an action lie against the minor for a reasonable recovery for attorney's fees; but where the legal services are rendered in behalf of the minor in relation to his property, without the intervention of a legal guardian, no recovery for such services should be had in an action at law. As to whether a court of equity or probate court may allow for legal services rendered at the instance of the minor in the administration of the estate or fund or property in such chancery or probate court, without the party having first obtained the approval of the court to render such service, that question is not involved in this case.

It is a well-known fact that in the Five Civilized Tribes, Osage Nation, Quapah country, and other Indian reservations in this state, minors are possessed of valuable landed estates, and are continually coming into such inheritances. The estates of these Indians, though wards of the federal government, are administered by the probate courts of this state; it being done by the surrender of that jurisdiction to the state tribunals by the federal authority. The federal legislation, heretofore referred to, shows a policy on the part of the federal government of precaution to carefully guard the interests of these Indian minors. The best interests of this state demand the speediest settlement of all Indian estates to the end that as much Indian land as is reasonably possible may become developed and help bear the burdens of the state, county, township, and school district governments. This can be brought about in a most salutary way by the local courts. When it comes to a question as to which line of authorities we will follow, that which permits the next friend, who is often an irresponsible person, to engage counsel for a minor to prosecute a suit at law in his behalf relative to his land, often occasioning an action at law against such minor, thereby affecting his estate, or that which requires first the approval of the probate court, we feel that we should incline to the old rule, as announced by the Supreme Court of New Hampshire, when it was composed of Chief Justice Parker and Justices Upham, Wilcox, Gilchrist, and Woods, and afterwards reaffirmed by the same court, when Chief Justice Sargent and Justice Doe were members of it.

[4] Judgment was rendered by default against the defendants. The objection that the

petition does not state a cause of action may be raised on review for the first time in this court. *Leforce et al. v. Haymes*, 25 Okl. 190, 105 Pac. 644; *International Harvester Co. v. Cameron*, 25 Okl. 256, 105 Pac. 189; *Lewis et al. v. Clements*, 21 Okl. 167, 95 Pac. 769; *Guthrie v. Nix, etc., Co.*, 3 Okl. 136, 41 Pac. 343; *Farris v. Henderson*, 1 Okl. 384, 33 Pac. 380.

The judgment of the lower court is reversed, and the cause remanded, with instructions to grant a new trial in accordance with this opinion. All the Justices concur.

## LOVE v. KIRKBRIDE DRILLING & OIL CO.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

### 1. CONTRACTS (§ 187\*)—CONTRACT FOR BENEFIT OF ANOTHER—ENFORCEMENT BY BENEFICIARY.

A contract, made expressly for the benefit of a third person, may be enforced by such person at any time before the parties thereto rescind it. *Comp. Laws 1909, § 1044.*

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

### 2. CONTRACTS (§ 187\*)—TRANSFER OF CORPORATION—BENEFIT OF THIRD PARTY.

K., the president and general manager of the Kirkbride Drilling & Oil Company, entered into a verbal agreement with L., a stockholder in said company, who was also the manager and assistant treasurer of the Sachem Oil Company, whereby the beneficial interest of said first-named company and of K., theretofore claiming to be the owner of said interest in his own right, was transferred to the Sachem Oil Company, in consideration of a sum certain, to be paid by said last-named company into the treasury of the first-named company, and which amount was so paid, but subsequently appropriated by L. and J., owners of one-half of the stock of the Kirkbride Drilling & Oil Company, claiming ownership thereof. *Held*, that the agreement so made and entered into constituted a valid contract, supported by a good consideration, and that an action would lie to recover the purchase price by the first-named company.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

### 3. FRAUDS, STATUTE OF (§ 139\*)—EXECUTED CONTRACT.

The defense of the statute of frauds cannot be interposed against an executed contract.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 334-341; Dec. Dig. § 139.\*]

### 4. FRAUDS, STATUTE OF (§ 139\*)—OIL LEASES—TRANSFER—EXECUTED CONTRACT.

Where a parol contract for the sale of certain oil leases, unenforceable because within the statute of frauds, is executed, and the contract of sale fully performed by proper transfer of said leases, and nothing remains to be done except pay over the purchase price, the statute may not be invoked as a means of defeating a recovery. In such cases the rights of the parties are no longer affected by the statute.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 334-341; Dec. Dig. § 139.\*]

**5. APPEAL AND ERROR (§ 1039\*)—REVIEW—REVERSAL—VARIANCE.**

Though there be a variance between the allegations of a petition and the facts proved on the trial, yet, if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1089.\*]

**6. APPEAL AND ERROR (§§ 994, 1001, 1003\*)—REVIEW — JUDGMENT — REVERSAL — EVIDENCE.**

A judgment will not be reversed by this court on account of the insufficiency of the evidence, where the evidence reasonably tends to support the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906, 3922, 3928-3934, 3938-3943; Dec. Dig. §§ 994, 1001, 1003.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by the Kirkbride Drilling & Oil Company against B. L. Love. Judgment for plaintiff, and defendant brings error. Affirmed.

Hutchings & German, of Muskogee, for plaintiff in error. Samuel V. O'Hare and B. B. Wheeler, both of Muskogee, for defendant in error.

**SHARP, C.** This case presents error from the superior court of Muskogee county, where at the trial plaintiff recovered judgment against defendant in the sum of \$2,050. It is urged that the alleged contract entered into between T. E. Kirkbride and defendant Love, being for the benefit of the plaintiff corporation, cannot be enforced because the Kirkbride Drilling & Oil Company, defendant in error, was not a party to the contract, and that T. E. Kirkbride was under no obligation to it, and that the alleged contract, not being in writing, under the statute of frauds was null and void, and for these reasons defendant's demurrer to plaintiff's petition should have been sustained. Counsel for plaintiff in error cite in support of their contention *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, *Lorillard v. Clyde et al.*, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113, *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169, *German State Bank v. Northwestern Water & Light Co.*, 104 Iowa, 717, 74 N. W. 685, 9 Cyc. 380, and cases cited therein, as being decisive of the first above mentioned objection.

[1] When a contract, made for the benefit of a third person, may be enforced by him, is a question that has oftentimes been before the courts, and many of the authorities are collected in the notes to *Baxter v. Camp*, supra, and in *Jefferson et al. v. Asch*, 25 L. R. A. 257, and *Tweeddale v. Tweeddale*, 61 L. R. A. 509, as well as in *Anson on Con-*

*tracts* (American Ed.) § 284, and *Wald's Pollock on Contracts*, p. 237 et seq. With us it is provided by statute that a contract made expressly for the benefit of a third person may be enforced by such person at any time before the parties thereto rescind it. Comp. Laws 1909, § 1044; *Eastman Land & Investment Co. v. Long Bell Lbr. Co.*, 30 Okl. 555, 120 Pac. 276; *Staver Carriage Co. v. Jones*, 32 Okl. 713, 123 Pac. 148.

[2] That there was a contract between Kirkbride and Love, made for the express benefit of the Kirkbride Drilling & Oil Company, is, we think, supported by the evidence, and that the contracting parties, being stockholders and officers in the company, had authority to make such a contract for the company's benefit cannot be seriously controverted. Neither is the important fact, the necessity of a sufficient consideration, wanting. T. E. Kirkbride was the president and general manager of the Kirkbride Drilling & Oil Company. B. L. Love was the owner of one-fourth of the stock in said company, and, besides, was assistant treasurer and manager of the Sachem Oil Company. The Sachem Oil Company was the owner, the Kirkbride Drilling & Oil Company the drillers, of an oil well on the Julia Friday allotment. The leases taken by Carr Peterson for T. E. Kirkbride were located near this well. It was contended by Kirkbride that the leases obtained by Peterson belonged individually to said Kirkbride; while, on the other hand, it was contended by Love that the leases were for the benefit of the Kirkbride Company, and not for T. E. Kirkbride, in his individual right. The Sachem Oil Company wanted those leases, though it appears that said company, together with the Coody Oil Company and the Mid-West Oil Company, had taken other leases in that vicinity. In order to settle all differences, it was finally agreed that the Sachem Oil Company should have a one-fourth interest in the leases, taken by Peterson, for the consideration of \$6 per acre, upon the understanding, however, that the proceeds of the sale of the leases should be paid into the treasury of the Kirkbride Company. In procuring this adjustment, Love, while interested in both the Kirkbride Drilling & Oil Company and the Sachem Oil Company, represented the latter. As a result of the contract both T. E. Kirkbride and the Kirkbride Company (whichever in fact was the owner of said leases) surrendered and gave up their interest in 400 acres of leased land, acquired by Peterson, while the Sachem Oil Company by proper assignment received the title to 300 acres thereof, and through a subsequent arrangement made by Love, McFaddin, and Anderson received title to the remaining 100 acres. Aside from a question of pleading, it is a question of little importance whether these



leases in fact were held by T. E. Kirkbride in his own right or for the Kirkbride Company. If individually, by the terms of the agreement the proceeds of the sale were to be placed to the credit of the Kirkbride Company, while, if the leases in fact belonged to the Kirkbride Company, the proceeds of the sale thereof would as a matter of course belong to said company. True, it was contended by the plaintiff in error that, as a result of the controversy between the parties, the leases were divided, Kirkbride taking one-half interest and Love and Johnson one-fourth interest each, and that the sale to the Sachem Oil Company and McFaddin & Anderson, being for Love and Johnson's interest, they of right were entitled to the proceeds of the sale to the Sachem Oil Company. However, the fact that payment by the Sachem Oil Company was made by draft and voucher drawn in favor of the Kirkbride Oil & Drilling Company, and that at the time Love was manager of the former company, was conversant with the transaction, in fact, had actively participated in bringing it about, furnishes strong support to the claim that the funds derived from the sale of the leases were to be paid into the treasury of the drilling company for its use and benefit, and not to be paid out or appropriated by Love and Johnson. In other words, the drilling company became the sole beneficiary of the executed contract, and there can be no question of its right to maintain an action for the recovery of the money wrongfully diverted by two of its stockholders. We have read with care the authorities cited by counsel for plaintiff in error, and find nothing therein in conflict with the foregoing conclusion.

Was the contract within the statute of frauds? Comp. Laws 1909, § 1089, provides that an agreement for the leasing for a longer period than one year, or for the sale of real property, or an interest therein, is void unless the same or some note or memorandum thereof be made in writing, and subscribed by the party to be charged or his agent. The leases taken by Peterson were in writing, as were the assignments thereof. Payment of the purchase price by both the Sachem Oil Company and McFaddin & Anderson was made to the Kirkbride Company, and the proceeds appropriated by Love and Johnson under claim of ownership. The action is not one to enforce the terms of an executory contract concerning an interest in real property, but it is brought to recover a specific sum of money belonging to plaintiff, the sale price of certain oil leases. As individuals, Love and Johnson have not accounted for, but, on the contrary, held the moneys received by them, which according to plaintiff's contention was to be paid to the Kirkbride Company, and not to Love and Johnson individually. Were it true that the contract was unenforceable by reason of the statute of frauds, it having been performed,

the rights of the parties are no longer affected by the statute. This court in construing section 3371, Mansf. Dig. of Arkansas, in force in the Indian Territory prior to statehood, and which is similar in its provisions to the Oklahoma statute above referred to, in *Kuhn v. Poole*, 27 Okl. 534, 112 Pac. 962, said: "Plaintiff executed the contract. Defendant has at no time tried to revoke the contract, but has joined his building to the party wall, and is using same. Had plaintiff in error refused to carry out this contract, it could not have been enforced. However, as a parol executory agreement, it falls within the statute of frauds; but defendant cannot receive and accept the benefits of the contract fully performed by plaintiff and escape payment thereof"—citing *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748; *Rice et al. v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195. In *Atchison, T. & S. F. Ry. Co. v. English*, 38 Kan. 110, 16 Pac. 82, referring to the statute of that state, the court said: "The defendant further says that plaintiff cannot recover upon a verbal contract for the sale of lands. This was not a contract within the statute of frauds. It was not a contract for the sale of lands—it was the sale itself. The contract was perfected by giving the deed. This action is for damages sustained by plaintiff because the defendant refused to give him his pass for life over its road. The pass was promised to be given as the price of the land deeded. There is no provision of our statute which precludes a recovery for the price of lands actually conveyed, even though the agreement concerning the price be oral. *Reed on Frauds*, § 658; *Hodges v. Green*, 28 Vt. 358; *Bowen v. Bell*, 20 Johns. [N. Y.] 338 [11 Am. Dec. 286]; *Wilkinson v. Scott*, 17 Mass. 249; *Holland v. Hoyt*, 14 Mich. 238; *Tripp v. Bishop*, 56 Pa. 424; *Tuthill v. Roberts*, 22 Hun, 304."

[3] In *Bibb v. Allen et al.*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, it is said in the syllabus: "The defense of the statute of frauds cannot be set up against an executed contract." See, also, *Moore v. Chicago, R. I. & P. Ry. Co.*, 17 Kan. 242, 53 Pac. 775; *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 185; *McLure v. Koen*, 25 Colo. 285, 53 Pac. 1058; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *McClintock v. Thweatt*, 71 Ark. 326, 73 S. W. 1093; 20 Cyc. 302.

[4] Regardless of the fact that a contract is within the statute of frauds, the general rule may be said to be that after a sale of land, made pursuant to a parol contract, where the same has been fully executed, and nothing remains to be done except to pay over the purchase price, the statute may not be invoked as a means of defeating a recovery. In *Holland v. Hoyt*, 14 Mich. 238, the Supreme Court, speaking through Campbell, J., said: "The objections arising out of the statute of frauds require more attention. The entire transaction prior to the deeds was

verbal, and, of course, if no deeds had been made, could not have been the ground of relief at law or in equity. But, when a verbal contract is performed by the conveyance of land on the one part, there can be no difficulty in compelling the equivalent from the other contracting party. A court of equity can decree specific performance, if that is needed, and a court of law can allow a recovery of the purchase money, if that is all that is sought. *Thomas v. Dickinson*, 12 N. Y. 364." *Lanscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Pierce v. Weymouth*, 45 Me. 461; *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; *Gangwer v. Fry*, 17 Pa. 491, 55 Am. Dec. 578; *Freed v. Richey*, 115 Pa. 361, 8 Atl. 626; *Parrill v. McKinley*, 9 Grat. 1, 58 Am. Dec. 212; *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Swanzy v. Moore*, 22 Ill. 63, 74 Am. Dec. 134; *McCue v. Smith*, 9 Minn. 252 (Gil. 237), 86 Am. Dec. 100; *Patterson v. Hawley et al.*, 33 Neb. 440, 50 N. W. 324; *Huff v. Hall*, 56 Mich. 456, 23 N. W. 88; *Ascutney Bank et al. v. Ormsby*, 28 Vt. 721.

It is urged with much ability that there was a total failure of proof at the trial, and for that reason the judgment should be reversed, upon the authority of *Mulhall v. Mulhall*, 3 Okl. 304, 41 Pac. 109, and *Pringley et al. v. Guss*, 16 Okl. 82, 86 Pac. 292, 8 Ann. Cas. 412, and other cases cited in the brief of counsel. Sections 5673, 5674, 5675, and 5679, Comp. Laws 1909, are identical with the provisions of the statute before the court, and by it construed in *Mulhall v. Mulhall*, supra. The decision is one which reviews at length the Kansas decisions construing the Kansas statute, from which our statute was borrowed. Among other things, the court said: "The language of this section 135 of the Code of Procedure (Comp. Laws 1909, § 5675) does not say that allegations of the pleadings must be proved or else there is a failure of proof, but it is that the allegations of the claim or defense to which the proof is directed must be supported by the evidence. It matters not how informal or inaccurate the pleadings may be, if they pray the judgment which is rendered, and, if the proof supports the claim or defense to which it is directed, then there is no fatal variance." In *Pringley et al. v. Guss*, supra, the plaintiffs in error sought to introduce a carbon copy of the contracts, without any showing of diligence to procure the originals or one of them. The trial court excluded the carbon copy, the only proof of the contract upon which the plaintiff below relied. A demurrer to the evidence was sustained, and on appeal the case was affirmed, the court holding that without proving the contract the plaintiffs could not recover, and that they could not use an unsigned carbon copy without first showing diligence in attempting to procure the original. The case is not in point here.

But, on the other hand, the rule announced in *Mulhall v. Mulhall* is, we think, the correct rule. There was not a failure within the purview of section 5675, supra. Any variance that there may have been was immaterial. It is not contended that the plaintiff in error was misled by such variance. The controversy between the parties, growing out of the sale and transfer of the leases, was fully inquired into. No objection was offered that the testimony submitted was not within the issues. *Grandstaff et ux. v. Brown et al.*, 23 Kan. 176. The judgment rendered was according to the prayer of plaintiff's petition, and we have been unable, from a careful study of the entire record, to see wherein the rights of the plaintiff in error were in any wise prejudiced by the action of the trial court. When it is remembered that in *Mulhall v. Mulhall* the action was one for money loaned, while the special findings of the court showed that instead of being loaned, the money was invested in a partnership venture, during which the defendant agreed to take the plaintiff's interest in the cattle and repay him his original investment, and that the case was held to be one in which the pleadings could have been amended to correspond to the proof, we do not feel that the judgment of the court should for that reason be disturbed, though the question was raised upon a demurrer to the evidence.

[5] Where there is a variance between the allegations of the petition and the facts proved on the trial, yet, if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance. *Missouri Valley Ry. Co. v. Caldwell*, 8 Kan. 244; *Mitchell v. Milhoan*, 11 Kan. 617; *Hummer v. Lamphear*, 32 Kan. 439, 4 Pac. 865, 49 Am. Rep. 491. In such case, though no formal amendment was made, it will be considered as made by this court. *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183; *Tipton v. Warner*, 47 Kan. 606, 28 Pac. 712; *Loper v. State*, 48 Kan. 540, 29 Pac. 687.

[6] The third ground urged, upon which the judgment should be reversed, is that the verdict was contrary, not only to the decided weight of the evidence, but was not supported by any evidence entitled to the least credit. This court will not investigate the record to see whether or not the verdict of the jury is contrary to the weight of the evidence, or examine into the evidence to ascertain its credibility, the rule being that, where the evidence is conflicting, this court will not review it to ascertain where the weight of evidence lies; but, if there is evidence reasonably tending to support the verdict, it will not be set aside. *Loeb v. Loeb et al.*, 24 Okl. 384, 103 Pac. 570; *Bird v. Weber*, 23 Okl. 583, 101 Pac. 1052; *Burns v. Vaught*, 27 Okl. 711, 113 Pac. 906; *Great*

Western Mfg. Co. v. Davidson Mill & Elevator Co., 26 Okl. 626, 110 Pac. 1096; First National Bank of Guymon v. Arnold, 28 Okl. 49, 113 Pac. 719.

We are therefore of the opinion that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. DUNHAM.  
(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 474\*)—OPINION EVIDENCE—VALUE.

In an action for loss of household goods and wearing apparel, which have no market value, where the owner is familiar with the lost articles, has purchased them and used them in his family day after day, and knows the purpose for which they were used, he is competent to testify as to their value to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

2. CARRIERS (§ 127\*)—REFUSAL TO DELIVER FREIGHT—LIABILITY FOR CONVERSION.

Where the owner and consignee of freight is at the depot when his goods arrive, and sees them unloaded, and returns next day and demands them and is refused, and the goods are reshipped to some other destination, and the carrier is unable to account for their whereabouts and refuses to pay for them, the owner may maintain an action for conversion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 560, 562-564; Dec. Dig. § 127.\*]

3. CARRIERS (§ 185\*)—Loss of HOUSEHOLD GOODS—MEASURE OF DAMAGES.

In an action against a carrier for loss of household goods and wearing apparel, which have no fixed market value, the measure of damage is the value of the goods to the owner; not any fanciful value which he might place upon them, but such reasonable value as from the nature and condition of the goods and the purpose to which they were adapted and used they had to him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 599-604½; Dec. Dig. § 135.\*]

Commissioners' Opinion, Division No. 2. Error from Tillman County Court; T. E. Campbell, Judge.

Action by Samuel A. Dunham against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was originally brought in the justice court by Samuel A. Dunham against the St. Louis & San Francisco Railway Company for the loss of a shipment of household goods consisting of tableware, books, sewing machine, cooking utensils, bed clothing, and wearing apparel, of the total alleged value of \$187.90. Plaintiff obtained judgment in the justice court, and the company appealed to the county court. In October, 1908, a trial de novo was had, resulting in a judgment for Dunham for \$65. Whereupon the railway company was granted a new trial. Thereafter, in February, 1909,

the cause was again tried, and Dunham given judgment for \$93.55. From this judgment and order refusing a new trial, the railway company appealed to this court.

The facts were: That in September, 1907, plaintiff delivered to the Rock Island Railroad Company at Guymon, Okl., the household goods herein sued for for shipment to Davidson, Okl. The Rock Island lines do not run through Davidson and some time in November, 1907, said goods were delivered by the Rock Island Railroad Company to the St. Louis & San Francisco Railway Company, whose lines do run into Davidson. On November 12th the goods were delivered by the St. Louis & San Francisco Railway Company at Davidson. The plaintiff was present at the station, and saw them unloaded. Not being able to take them away on that evening, he returned for them the next morning, and found they were not there, but had been rebilled to Davidson, Ind. T. Being unable to get any further trace of the goods, in April thereafter, plaintiff brought suit for conversion. After the suit was brought, however, the goods were located by the railroad company and redelivered to Davidson in an apparently worthless or badly damaged condition, but refused to turn the goods over to plaintiff, unless plaintiff would pay certain extra freight charges.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt, of Oklahoma City, and W. H. Cloud, for plaintiff in error. Wilson & Roe, of Frederick, for defendant in error.

HARRISON, C. (after stating the facts as above). There are three material propositions presented by plaintiff in error as grounds for reversal: First, the incompetency and insufficiency of the testimony as to the value of the articles; second, that suit was brought for conversion, whereas it should have been brought for the damages done to the goods; third, that the court erred in instructing the jury as to the measure of damages.

[1] As to the first proposition, the rule seems to be fairly well settled that the owner of household goods with no fixed market value is competent to testify as to the value of his own goods to him. Underhill on Evidence, 294; Rodee v. Detroit F. & M. Ins. Co., 74 Hun, 146, 26 N. Y. Supp. 242; Hook v. Kenyon, 55 Hun (N. Y.) 598, 9 N. Y. Supp. 40; Rademacher v. Green Ins. Co., 75 Hun, 83, 27 N. Y. Supp. 155; Parmelee v. Raymond, 43 Ill. App. 609; 13 Enc. of Ev. 525, and authorities cited. In the case at bar plaintiff testified as to the value of the articles lost. His testimony was not denied, but was objected to on the ground of incompetency of the witness, or any of the witnesses, to testify as to the market value. As to the testimony of the expert witnesses introduced,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff in error's contention is probably well taken, but the plaintiff testified that there was no market, nor any set market value, for such goods, either at Guymon, Okl., or at Davidson, Okl. But the testimony shows that he well knew what the articles were, had had them in his family, had seen them and used them day after day, and knew what their value was to him, and, under the authorities cited, *supra*, was competent to testify as to their value to him.

[2] As to the contention that the suit was brought for conversion, instead of for damages sustained to the goods, the contention is not supported by the record. The facts are undisputed that plaintiff saw his goods unloaded at their proper destination on November 12, 1907, within a few days after they had been consigned for shipment. He went next day and demanded his goods, and could not get them, and was refused; the excuse offered for not letting him have his goods being that they had been reshipped to some other point. The railroad company was unable to locate the goods or to account for their whereabouts, and refused to pay the plaintiff for their loss. Under these circumstances, he had a right to assume that they had been converted, and to base and maintain his action on that theory. 5 Am. & Eng. Enc. of Law, 231; Louisville & N. W. Ry. Co. v. Lawson, 88 Ky. 496, 11 S. W. 511; Wright & Colton Wire Clothing Co. v. Warren, 177 Mass. 283, 58 N. E. 1082.

As to the third proposition, the court instructed the jury as follows: "Gentlemen of the jury, you are instructed that the measure of damages for loss of household goods where the goods have no market value is the value of such goods to the owner, not any fanciful price that he might place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of the articles so specifically adapted to use of himself and family." Plaintiff in error contends that this was not the measure of damages. In *Parmelee v. Raymond*, *supra*, the court said: "In the case of loss of personal wearing apparel the owner is entitled to recover its value to him, not what, as second hand or odd pieces, it would have sold for in the market. Any other rule would be most unjust"—citing *Fairfax v. N. Y. Central R. R.*, 73 N. Y. 167, 29 Am. Rep. 119; *Green v. Boston R. R.*, 128 Mass. 221, 35 Am. Rep. 370. "The value of such property to the owner may be shown—not any fanciful price he may put upon it, nor the price for which he could sell it, but his money loss if deprived of it." 13 Enc. of Ev. 525, and notes. "The owner of a silk quilt, family pictures, and like property having no market value may testify of their value to himself." *International & G. N. R. Co. v. Nicholson*, 61 Tex. 550.

[3] This rule seems to us to be a very just one. As stated in the opinion in 43 Ill. App., *supra*: "Any other rule would be an unjust one." The goods in question here had no market value, within the ordinary meaning of the term, but did have a peculiar and specific money value to the plaintiff. True, as stated in the authorities above cited, he should not recover for some fanciful price which he might place on the lost articles, but should recover such reasonable damage as from the nature of the articles and the nature of their use to him he had sustained by their loss, and from the record it clearly appears that no fanciful estimate was placed on the lost articles by the plaintiff in testifying as to their value to him, nor by the jury in reaching their estimate of the loss sustained.

Plaintiff brought suit for \$187.90. The list of lost articles and the value of each article was completely itemized in the record, their alleged aggregate value being \$187.90. The jury heard the testimony as to the character of the articles, their condition at the time of shipment, their peculiar use to the plaintiff, and gave him a verdict for \$93.55. We think under the record that the verdict is sustained by the evidence.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

LAKE v. WINSLOW et al.

(Supreme Court of Oklahoma. Jan. 21, 1918.)

(Syllabus by the Court.)

DIVORCE (§ 104\*)—AMENDMENT—PETITION—DISCRETION OF TRIAL COURT.

An amended petition in an action for divorce and alimony, filed at a time when plaintiff knew all the facts with reference to the title to property sought to be reached, alleged that plaintiff was the owner of certain property which her husband, the defendant, acting as her agent, traded for certain other property which he fraudulently caused to be conveyed to a third person, who was joined as defendant, and alleged that the third person colluded with the husband in the fraudulent design to cheat plaintiff. Two years later, plaintiff offered to file an amendment alleging that she acquired the property so traded by her labor and efforts, but that the legal title was in her husband, and that he traded the property for certain other property, promising to have the property received in exchange conveyed either to plaintiff or himself, but that he procured it to be conveyed to a third person, with the fraudulent design on the part of himself and the third person to cheat plaintiff, and praying that the third person be adjudged to hold the property in trust for plaintiff and her husband. Permission to file this amendment was refused. More than a year later she offered to file another amendment, in which the allegations were substantially the same as in the amendment she had been refused leave to file, but which prayed that the title be divested out of the third person and be vested in her husband. *Held*, that the court did not abuse its discretion in refusing leave to file the last offered amended

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

petition, and in dismissing the action as to the third person.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 328-339; Dec. Dig. § 104.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by L'Amie Lake (née Winslow) against Charles Winslow and another. From an order refusing leave to file an amended petition, and from a judgment dismissing the action as to defendant Grace A. Winslow, plaintiff brings error. Affirmed.

Embry & Hastings and Bennett & Pope, all of Oklahoma City, for plaintiff in error. Warren K. Snyder, of Oklahoma City, for defendants in error.

ROSSER, C. This is an appeal from a judgment of the district court of Oklahoma county refusing to permit the plaintiff to file a third amended petition in this cause, and dismissing the action as to the defendant Grace A. Winslow. The plaintiff brought this action for divorce on the 20th day of November, 1905. Her original petition stated a cause of action for divorce against defendant Charles Winslow, and alleged that he was the owner of certain lands and personal property which had been acquired by the joint efforts of herself and the defendant, and prayed that the defendant be enjoined from selling the property or incumbering it in any way, and also prayed for a divorce. On the 1st day of December, 1905, she filed an amended petition in which she alleged that on the 1st day of April, 1905, she was the owner of certain real estate in Oklahoma City, and that she employed the defendant Charles Winslow as her agent to exchange her property for the property described in her original petition, and requested him to cause the title to be taken in her name, but that he disregarded her instruction, and in fraud of her rights took the title in the name of Grace A. Winslow; that Grace A. Winslow never paid anything for the purchase price, and that she paid the entire purchase price; that the conveyance to Grace A. Winslow was made by collusion and fraudulent design between the defendants Charles Winslow and Grace A. Winslow, for the purpose of cheating the plaintiff. This petition prayed for a judgment declaring Grace A. Winslow a trustee for plaintiff of the land described, and vesting the title in the plaintiff.

On the 25th of April, 1906, the court rendered a decree of divorce in favor of the plaintiff, and continued the case, so far as it related to alimony and to the alleged fraudulent transfer of the property to Grace A. Winslow. On the 13th day of February, 1908, the plaintiff offered to file an amendment to her petition, which alleged, in substance, that through her management, ef-

forts, and labor she acquired certain property in Oklahoma City, but that the legal title to the property was in the defendant Charles A. Winslow; that about April 1, 1905, the defendant Charles A. Winslow induced the plaintiff to join with him in a conveyance of said real estate to one A. J. Vance in exchange for certain property now held by Grace A. Winslow; that, before the exchange was made, it was agreed by and between the plaintiff and Charles A. Winslow that the land received from Vance in exchange should be conveyed either to her or to him; that the said Vance executed a conveyance to the defendant Grace A. Winslow; that the conveyance was made to her with the purpose and intent of defrauding the plaintiff out of her rights and interest in and to said real estate; that no consideration passed from the said Grace A. Winslow to plaintiff, or to the said Charles A. Winslow, or to any other person interested in said real estate; that Grace A. Winslow received and accepted the conveyance with knowledge that it was made to defraud the plaintiff out of her rights. On the 27th day of April, 1908, the court denied the plaintiff's motion to be allowed to file this amended petition. On the 29th day of July, 1909, the plaintiff moved for leave to file another amended petition exactly the same as the last one above set out, except that it prayed that the court adjudge that the land was acquired by the joint efforts of the plaintiff and defendant. On the 22d day of December, 1909, the court overruled the motion and dismissed the action as to Grace A. Winslow, and continued the hearing for alimony against Charles A. Winslow.

The grounds upon which the court refused leave to file the second amended petition do not appear. The facts therein set out, if true, were known to the plaintiff when she filed her first amended petition. A court has some discretion as to allowing amendments. See *Alcorn v. Dennis*, 25 Okl. 135, 105 Pac. 1012; *Swope v. Burnham, Hanna, Munger & Co.*, 6 Okl. 736, 52 Pac. 924; *Tecumseh State Bank v. Maddox*, 4 Okl. 583, 46 Pac. 563; *Kuchler v. Weaver*, 23 Okl. 420, 100 Pac. 915, 18 Ann. Cas. 462. The amendment offered was inconsistent with the original and first amended petition. No showing was made as to why the allegations of the amendment offered were not made a part of the first amended petition. The action of the court in refusing to permit an amendment was acquiesced in for more than a year, and then another amendment was offered, in which the facts alleged were exactly the same as in the one rejected, and in which there was only a slight difference in the prayer, and that was inconsistent with the allegations of fact in the petition. Under these circumstances, it cannot be said that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the court abused its discretion in refusing to allow the amendment to be filed.

The refusal to allow the amendment left the case standing as against Grace Winslow in the first amended petition. Plaintiff in error admits that, under the allegations of that petition, the action against Grace A. Winslow cannot be joined with an action for divorce and alimony. The allegations of the rejected amendments, if true, show that plaintiff is the actual owner of the property, though the prayer is that the title be vested in the husband. If plaintiff paid the consideration for the property deeded to Grace A. Winslow, she can establish the trust in an independent action, and Grace A. Winslow is not a necessary party to the action for divorce and alimony. *Peck v. Peck*, 66 Mich. 586, 33 N. W. 893.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

#### SHAWNEE MUT. FIRE INS. CO. v. CANNEDY.

(Supreme Court of Oklahoma. Dec. 7, 1912.  
Rehearing Denied Jan. 28, 1913.)

(Syllabus by the Court.)

INSURANCE (§§ 349, 372, 392\*) — NOTES FOR PREMIUMS—PROVISIONS—VALIDITY.

Notes given for the premium on a policy of fire insurance provided that, if they were not paid at maturity, "the whole amount of the premium should be considered earned, and all notes given in settlement of said policy be due and the policy be null and void, and so remain until the same shall be fully paid and the policy be reinstated by the company." The notes were not paid at maturity, but the company retained them and continued to try to collect them, brought suit upon one of them, obtained judgment, and had the judgment docketed in the district court. *Held*: (1) That the provision that, if the notes were not paid at maturity, the whole amount should be considered earned, is a mere penalty which cannot be enforced. (2) That the provision that, if the notes were not paid at maturity, the policy should be null and void, is a valid provision, but the company may waive it. (3) That the company, by retaining the notes and endeavoring to collect them in full, waived the provision that the policy should be void if the notes were not paid at maturity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913, 941, 1041-1056, 1058-1070; Dec. Dig. §§ 349, 372, 392.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Love County; S. H. Russell, Judge.

Action by Georgia A. Cannedy against the Shawnee Mutual Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stanard, Wahl & Ennis, of Shawnee, for plaintiff in error. A. Eddleman and J. C. Graham, both of Marietta, for defendant in error.

ROSSER, C. This was an action by Georgia A. Cannedy against the Shawnee Mutual Fire Insurance Company on a policy of fire insurance issued by the company to recover for a building destroyed by fire.

The plaintiff gave two notes for the premium on the policy. They were dated April 22, 1908. One was for the sum of \$10, due May 1, 1908. The other was for \$22, and was due October 1, 1908. Each note contained the following provision: "If this note is not paid at maturity, the whole amount of the premium shall be considered earned, and all notes given in settlement of said policy be due, and the policy be null and void, and so remain until the same shall be fully paid, and the policy be reinstated by the company." This case was tried upon an agreed statement of facts. The substance of the material portion of the agreed statement is as follows: The plaintiff did not pay, or cause to be paid, either of the premium notes at the time they became due and payable, and there was no extension of time for the payment of same. On the 22d day of April, 1909, the dwelling house covered by the policy was totally destroyed by fire, and the plaintiff furnished proof of loss as required by the policy, but the company denied liability for the reason that the plaintiff had not paid the premium notes, as provided therein, and that, therefore, the policy was forfeited. On the 14th of December, 1908, prior to the time the house was destroyed by fire, the defendant filed suit against plaintiff on the premium note for \$10, and on the 26th day of December recovered judgment by default, and on the 12th day of March, 1909, an abstract of that judgment was filed in the office of the clerk of the district court of Love county. On the 1st day of January, 1910, after the fire, the plaintiff paid the judgment to the justice of the peace, and took his receipt. The justice forwarded his check for the amount of the judgment to the defendant at Shawnee, but the company refused the check and returned it. On the 2d day of March, 1909, the defendant placed the \$22 note in the hands of its attorneys at Marietta for collection, but they failed to collect it, and it was returned to the company on the 15th of March, 1909. On the 1st day of January, 1910, the plaintiff caused the Jordan Company, of Marietta, to send their check to plaintiff at its home office in Shawnee for the amount of the \$22 note, with interest. The company refused to receive the check, and gave as its reason for refusing the amount of the judgment and also the amount of the \$22 note that this suit had been brought in the district court at that time, and to accept the money due upon the note and judgment might complicate the case.

The question is whether by retaining the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes 129 P.—55

premium notes and endeavoring to collect them in full the company waived the forfeiture. It has been held that a condition such as contained in the notes given for premium in this case did not render the policy void until the company had by affirmative action declared the policy forfeited. *Mutual Life Ins. Co. v. French*, 30 Ohio St. 241, 27 Am. Rep. 443.

It has also been held that such a provision, as in the one before the court in this case, in a premium note, but not in the policy, is nugatory. *Dwelling-House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92. It has also been held, where the stipulation for forfeiture is contained in the note, that equity will relieve against it, for the reason that its object is merely to secure prompt payment of the note, and, as the breach of the agreement to pay promptly can be compensated, equity will relieve against the forfeiture. *St. Louis Mutual Ins. Co. v. Grigsby*, 10 Bush (Ky.) 310; *Montgomery v. Phoenix Ins. Co.*, 14 Bush (Ky.) 51; *N. W. Mutual Life Ins. Co. v. Fort*, 82 Ky. 269; *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343; *Manhattan L. Ins. Co. v. Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. Rep. 393.

It has also been held that the provisions for forfeiture, being for the benefit of the insurer, may be waived by it. *Bouton v. Am. Mut. L. Ins. Co.*, 25 Conn. 542; *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189. In *Buckbee v. U. S. Ins., etc., Co.*, 18 Barb. (N. Y.) 541, the policy contained a provision that, in case the quarterly premiums should not be paid on the days specified, the policy should be void, but that in such case it might be renewed at any time on the production of satisfactory evidence as to the health of the insured and the payment of back premiums. The premium due on the 10th of December was not paid until the 18th, when it was received by the insurer without objection, and entered to the credit of the insured, and a receipt given for it. No evidence was produced in respect to the health of the insured, and none was required. It appeared that it had not been the practice of the insurer to exact prompt payments of the premiums when due, and that they had been accepted a few days overdue without objection. The insurer was held to have waived a strict compliance with the conditions as to the literal punctuality of payments, that the policy did not lapse, hence required no renewal, and that the policy was in the same condition it would have been had the premium been paid on the precise day when it fell due. The first premium in this case was due on the 1st day of May, 1908, and eight days after the note was signed. If it had been paid on the 15th day of May, would any one have contended that the policy had become void, and that it would require ac-

tion by the company to have it reinstated in order to restore its validity? Suppose the premium due the 1st of May had been paid the 15th of that month, and accepted by the company, and the second note which was due the 1st of October had been paid the 15th of October, would the defendant be heard to say that the policy was forfeited, and that it remained so until reinstated by the company? If receiving the premium a few days after it was due would have waived the conditions of the note with reference to forfeiture, then the action of the company in attempting to collect and in taking judgment and having it filed so as to give a lien upon real property was likewise a waiver. The company takes an inconsistent position in the case. It was seeking to enforce the collection of the notes until the loss. As soon as the loss occurred, it refused to receive the premiums, although it had a judgment for the amount of one of the notes, taken after the time when, according to its contention, the policy was forfeited. This indicates that it did not have entire faith in its position that the policy was forfeited and the entire premium earned when the first note was not paid at maturity. It is believed to be the correct rule that a provision in a policy or a note given for a premium that a failure to pay the note at maturity will forfeit the policy is valid, but that this provision can be waived; that a provision that, if the note is not paid at maturity, the whole premium shall be considered earned, is a mere penalty, not capable of enforcement (*Snyder's Comp. L. §§ 1125, 1126*), and that the insurer can only recover the premium at the short rate for the time the policy was in force. To permit the company, when the note was not paid at maturity, to forfeit the contract, and also collect the entire consideration, would be to double the penalty, and allow it to keep something for nothing. It may be argued that the plaintiff having agreed to pay the premium is bound to do so, and that the company for the security of its business and the protection of other policy holders had the right to forfeit the policy. The latter proposition is correct. It had the right to forfeit, but, when it did so, it had no right to collect the entire premium. All it could possibly be entitled to would be the profit on a policy of this size and class. This could be and probably is taken care of by the short rate on canceled policies. If a man should agree to sell 20 horses for \$2,000, taking notes for the price, and should only deliver one of them and agree to deliver the others later, and the contract should also provide that, if the notes were not paid at maturity, the other horses should not be delivered, and the notes should be considered as the purchase price of the one delivered, and should be collectible, equity would relieve against such a provision. There is no difference in the principle. *Limerick v. Home Ins. Co.*, 150 Ky. 827, 150 S. W. 798. In

this case the first note was nearly one year overdue, and, if defendant's contention is correct, the policy was void during all that time, yet it was endeavoring to collect the full premium. It is in the same attitude as if it had actually collected it. It claimed the whole amount, and, if plaintiff owed the whole amount, she owed it as a consideration for the policy for five years. By retaining the notes and attempting to collect the full premium for the entire term, the company waived the forfeiture, and is liable for the amount of the policy.

The judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

### CITY OF ARDMORE v. ORR.

(Supreme Court of Oklahoma. Jan. 21, 1918.)

(Syllabus by the Court.)

#### 1. MUNICIPAL CORPORATIONS (§ 835\*)—STREET GRADING—SURFACE WATER—INJURY TO ABUTTING PREMISES—CITY'S LIABILITY.

Where a city in grading a street and its cross-streets causes the surface waters on said cross-streets, flowing into the same from adjacent territory, to be diverted from their natural course, and to be collected and carried together with the waters of the main street to a low point on said street, and negligently fails to provide sewers as an outlet for said waters, or in providing sewers, negligently provides sewers inadequate for an outlet for said waters, and thereby causes said waters so collected and conveyed to such point to back upon and overflow abutting premises which are four inches above the grade established by the city, and over which said waters did not theretofore flow, the city is liable to the owner of such abutting property for the damages caused thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1785; Dec. Dig. § 835.\*]

#### 2. TRIAL (§ 5\*)—TIME OF TRIAL—ISSUES.

Section 5834, Comp. Laws 1909, provides when actions are triable. Under its provisions, when a demurrer to a petition is overruled, but it is not adjudged frivolous and leave to answer is given, the case is not triable upon issues of fact until 10 days after the filing of the answer; and it is error to compel, over the objection of a party to the action, a trial of the case on the date such demurrer is overruled and the answer filed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 11, 12; Dec. Dig. § 5.\*]

#### 3. DAMAGES (§§ 109, 110\*)—REAL PROPERTY—PERMANENT AND TEMPORARY INJURIES.

For negligent injuries to realty which result from a cause susceptible of remedy or abatement, the owner is entitled to recover therefor only such damages as had accrued on account of the impaired or lost use of his property up to the time of the commencement of his action. For injuries resulting from permanent cause, the owner may recover in a single action his entire damages, to wit, that amount which represents the permanent depreciation of the realty in value in consequence of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273-278; Dec. Dig. §§ 109, 110.\*]

#### 4. DAMAGES (§ 109\*)—INJURIES TO REAL PROPERTY—TEMPORARY OR PERMANENT INJURY.

When a cause of an injury is abatable, either by an expenditure of labor or money, it will not be held permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273-278; Dec. Dig. § 109.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 845\*)—DEFECTIVE SEWERS—INJURY TO ABUTTING PROPERTY—DAMAGES.

The owner of a lot sued a city for damages resulting from the negligent construction of sewers inadequate to carry off storm and surface waters which the city had, by grading its streets, diverted from their usual course, and brought to a point near plaintiff's property. The volume of waters, being too great to be discharged through the sewers provided, were forced back upon plaintiff's property, thereby damaging and destroying certain personal property, and rendering less suitable for business the buildings thereon. The defect in the sewers being remedial by expenditure of money and labor, it was error for the court to authorize the jury by its instructions to consider as an element of plaintiff's damages future loss of rents and depreciation in the value of the real estate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.\*]

Error from District Court, Carter County; W. L. Barnum, Judge.

Action by J. T. Orr against the City of Ardmore. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Defendant in error, hereinafter called plaintiff, filed his petition in the district court of Carter county on the 17th day of October, 1908, against plaintiff in error, hereinafter called defendant or the city, in which he alleges that he is the owner of lot No. 20, in block 233, situated and fronting on what is known as Caddo street, in the city of Ardmore, an incorporated city of the first class, and that said property was damaged on account of certain acts of the city which, as alleged, are, in substance, as follows: Situated on plaintiff's lot are three buildings, one of which is a frame and the other two are brick. Prior to 1907 the surface waters falling and flowing on Caddo street were drained off through two stone sewers constructed under a railway track on the east side of Caddo street. The opening of one of the sewers was at a point about 150 feet from where Main street intersects Caddo street, and the opening of the other was at a point near where Fourth avenue intersects said street, and, until the acts of the city hereinafter mentioned, these sewers were sufficient to drain thoroughly all the waters flowing into Caddo street. Caddo street, prior to 1907, was so graded that the low point of said street is at a point where the first-named sewer opens into said street, and all the waters flowing from the south and for a number of blocks from the north on said street flow to that point. During the spring and summer of 1907 the city graded and paved Caddo street, and closed up the opening in the sew-



ers near Fourth avenue, and diverted the waters which naturally run through that sewer and turned them so they run down to the opening of the sewer near Main street. At the same time the city made the opening of the last-named sewer so small that it was not capable of conducting and carrying off all the waters that flowed thereto. During the same spring and summer the city graded various streets which cross Caddo street from east to west in such a way that it diverted all the waters which run down said cross-streets, and threw them into Caddo street. Prior to this time the natural drainage took care of the waters running down said cross-streets, but by reason of the grading of such streets the waters thereon were turned into Caddo street and forced to find their outlet through the above-mentioned sewers, which were not large enough for that purpose. As a result thereof, when a rain occurred in the early part of the year 1908, the waters accumulated on Caddo street at the low point, and overflowed plaintiff's property. Plaintiff had constructed his sidewalks and his buildings at a grade about four inches higher than the grade required by the survey of the city, but the waters nevertheless overflowed his property and damaged same. The municipal authorities of the city, after having been notified by plaintiff of the insufficiency of the sewers and the effect on the grading of the streets upon plaintiff's property, causing it to be overflowed and damaged, failed and refused to correct same. Plaintiff alleges that one of his buildings is occupied by himself for bottling works purposes, and that a considerable amount of his property situated in this building was either damaged or destroyed by the flood waters in the amount of \$50; that the other two buildings situated on said lot were rented by him to parties for business houses; that, on account of the constant danger of overflow, his tenants refused to remain in the property; that he lost rents on said buildings; and that the same have been rendered practically worthless, and he is unable to rent same at any price, and he prays for damages in the sum of \$2,500. After defendant's demurrer to this petition was overruled, it filed an answer, which, after admitting certain allegations of the petition, denies that prior to the grading of Caddo street and the construction of the improvements thereon named in plaintiff's petition there was sufficient culverts to carry off all the waters on that street during unusual rains and cloudbursts. It admits the paving of the streets, but denies it negligently and carelessly closed up or reduced the size of the sewers, as alleged in plaintiff's petition, or that the waters have so accumulated upon Caddo street as to exceed the capacity of said sewers. It alleges that the grading done by it was under the supervision of a skillful engineer, and that all said work was done in

a skillful manner; and that the city had not been guilty of negligence in the construction of the sewers or in the paving of its streets, and made other allegations of defense which are not necessary to be stated.

A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of \$465. It is to reverse that judgment that this appeal is prosecuted.

J. B. Moore, of Ardmore, for plaintiff in error.

HAYES, C. J. (after stating the facts as above). Defendant's first assignment of error complains of the action of the court in overruling its demurrer to plaintiff's petition. The gist of plaintiff's cause of action is summed up in his petition in the last paragraph as being the wrongful acts, negligence, and carelessness of defendant in closing up one of the storm sewers, and reducing the size of the other so as to make it too small to carry off the waters which the grading of Caddo street concentrated at that point, and which resulted from diverting a large part of the surface water from its natural drainage on the cross-streets into Caddo street.

[1] This court has had occasion to consider and discuss the right of a proprietor under the rule at common law to divert or fight back surface water from his premises, and the conclusion of this court is that the rule supported by the weight of the American authorities from states in which the common-law rule prevails, as well as by some of the recent English cases, is that one may not in diverting surface water from its usual and ordinary course collect and convey by embankments, ditches, or artificial channels such water to the premises of another and therefrom permit it to overflow the lands of such proprietor, which, before the construction of the roads, ditches, or artificial channels, it did not overflow. *Chicago, R. I. & Pac. Ry. Co. v. Johnson*, 25 Okl. 760, 107 Pac. 662, 27 L. R. A. (N. S.) 879; *Chicago, R. I. & Pac. Ry. Co. v. Davis*, 26 Okl. 434, 109 Pac. 214. In *Town of Norman v. Ince*, 8 Okl. 412, 58 Pac. 632, the act of the city complained of was that it had carelessly and negligently constructed a standpipe adjacent to plaintiff's property which overflowed and discharged water on plaintiff's premises, by reason of which the premises became worthless. The city defended upon the ground that as a municipal corporation it was acting under authority of the statute, and could not be subjected to liability for damages arising from the exercise of such authority, so long as such authority was properly exercised, and not exceeded. In the opinion a number of cases are cited, supporting the conclusion of the court that the city was liable, that are in point in the case at bar, among which are: *Field v. Inhabitants of West Orange Tp.*, 36 N. J. Eq. 118; *Inhabitants of West Orange Tp. v. Field*, 37 N. J. Eq. 600, 45 Am.

Rep. 670; *Ashley v. City of Port Huron*, 35 Mich. 301, 24 Am. Rep. 552; and Mr. Justice Hainer, delivering the opinion of the court, said: "Applying these well-settled principles to the case under consideration, it must follow that a municipal corporation, in the exercise of its corporate powers to construct and maintain public works, has no right to collect water by artificial means, and discharge it, or permit it to discharge or overflow upon the premises of an adjacent freeholder, so as to interfere with his possession. And in this respect a municipal corporation stands upon the same footing as a private individual, and incurs the same liability. Manifestly, for a municipal corporation to collect water by artificial means, such as a water stand-pipe, and conduct it in such a careless and negligent manner as to allow it to overflow and flood the premises of an adjacent lot owner, is such an invasion of private property as to constitute an appropriation of it to the public use, and the principle exempting municipal corporations from liability arising from damages occasioned by the exercise of their discretionary powers in the construction and maintenance of public works does not apply, and the corporation is liable for damages resulting therefrom. The same rule of law which protects the rights of the property of one citizen against the invasion of another citizen must protect it from similar aggressions on the part of municipal corporations. The petition of the plaintiff states a good cause of action, and the demurrer, therefore, was properly overruled." In the recent case of *City of Chickasha v. Looney*, 128 Pac. 136 (not yet officially reported), it is said in the syllabus: "It is an actionable wrong for a municipal corporation to negligently construct or maintain a sewer whereby surface waters are diverted and by artificial means collected in a body and discharged upon growing crops of a private individual to his detriment."

Measured by the rule established by the foregoing cases in this jurisdiction, plaintiff's petition states a cause of action. In support of his contention to the contrary, counsel for defendant has cited and relied upon *Adams v. Oklahoma City*, 20 Okl. 519, 95 Pac. 975. We think that the facts in that case distinguish it from the case at bar, in that the action complained of therein was not that the surface waters had been diverted from their usual course and brought to overflow upon plaintiff's premises, where they had not flowed before, but that the city in grading its streets to the established grade by elevating same turned back the surface water therefrom which subsequently overflowed the grade of the street and down over plaintiff's property. The exact question decided in that case is accurately expressed in the first syllabus as follows: "Where a city in the exercise of its lawful authority (section 443, *Wilson's Rev. & Ann. St. 1903*)

first establishes a grade on a street, and grades same with reasonable skill and care, it incurs no liability for consequential damages to abutting or adjacent proprietors." There was in that case no contention of negligence or lack of proper construction of the work by the city. The city in the instant case has done more than just turn back the surface waters that flowed upon and across its streets. It has collected the waters flowing into Caddo street and into some of its cross-streets from the adjacent territory, diverted such waters from their usual course, and carried them to a low point near plaintiff's premises and negligently failed to provide a sufficient outlet for them to escape, and by reason thereof such waters, unable to escape, backed upon plaintiff's premises which have been elevated by him above the grade prescribed by the city and effected the damages complained of.

[2] Upon overruling defendant's demurrer, the court ordered that defendant file its answer within 30 minutes, and the cause proceed to trial. After filing its answer, defendant moved the court for a continuance of the cause, upon the ground that the issues had not been made up until that date. Section 5834, *Comp. Laws 1909*, reads: "Actions shall be triable at the first term of court, after or during which the issues therein, by the time fixed for pleading are, or shall have been made up. When the issues are made up, or when the defendant has failed to plead within the time fixed, the cause shall be placed on the trial docket, and if it be a trial case shall stand for trial at such term ten days after the issues are made up, and shall, in case of default stand for trial forthwith. When any demurrer shall be adjudged frivolous the cause shall stand for hearing or trial in like manner as if an issue of fact had been joined in the first instance." This section authorizes a case to be set for trial at any time during a term, not earlier than 10 days after the issues are made up, whether made up within the time fixed to plead before the term or during the term. *Swope & Son v. Burnham, Hanna, Munger & Co.*, 6 Okl. 736, 52 Pac. 924. An issue of law may be tried at any time. But that it was not contemplated, when a demurrer shall be overruled, a defendant may be forced into trial immediately, unless such demurrer is adjudged to be frivolous, is indicated by different portions of the Code. The last sentence of the foregoing sections provides that, when any demurrer shall be adjudged to be frivolous, the cause shall stand for hearing or trial in like manner as if the issues of fact had been joined in the first instance. This sentence, following immediately the provision of the preceding sentence that the case shall stand for trial at the term for which it is set 10 days after the issues are made up, and, in case of default, shall stand for trial at once,

we think renders the meaning of the statute susceptible of little, if any, doubt. In addition thereto, section 5832 provides: "No witness shall be subpoenaed in any case while the cause stands upon issues of law; and whenever the court shall regard the demurrer in any case as frivolous, and put in for delay only, no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action." A party who has a demurrer pending under this statute is without power to prepare for trial, for he cannot have subpoenas issued for his witnesses; but the 10 days' time required to intervene by section 5834 between the date the issues are made up and the trial of the cause affords an opportunity for the parties to obtain the presence of their witnesses. The demurrer was not adjudged frivolous by the trial court. Defendant was permitted to file his answer without any condition as to payment of the costs incurred up to that time, which he should have been required to do if the demurrer had been frivolous, and under the state of the law as determined by the decisions in this jurisdiction at the time of the trial—for none of the cases except the Adams Case and the Town of Norman v. Ince, supra, had been at that time decided—defendant's demurrer should not be held frivolous, as the authorities from other jurisdictions are not harmonious upon the question which the demurrer presented. The cause, therefore, did not stand for trial on the date the demurrer was overruled, and could not under the statute, without agreement of the parties, be set for earlier than ten days after the time defendant filed its answer; and it was error to compel a trial of the case over defendant's objection on the date it was tried. *City of Eureka v. Ross*, 64 Kan. 372, 67 Pac. 849; *Harris v. Salt Co.*, 57 Kan. 24, 45 Pac. 58; *Rice et al. v. Simpson et al.*, 26 Kan. 143; *Rice v. Hodge*, 26 Kan. 164; *Gapen v. Stephenson*, 18 Kan. 140.

The allegations of plaintiff's petition as to the extent of damages sustained by him are substantially that personal property of the value of \$50, situated in the building at the time of the flood, was destroyed; that on account of said overflow and the probability of subsequent overflows the tenant in said building refused to remain therein, and that plaintiff has lost rents thereon; that his property had been rendered practically worthless, as a result of which he had sustained damages in the sum of \$2,500. There is evidence to sustain the allegation as to loss of the personal property. There is also evidence that at the time of the overflow one of the buildings was occupied by a tenant who paid as rents thereon \$35 per month; that this tenant vacated the building because of its being rendered unsuitable by the overflow waters, and because of the probable recurrence of such overflow in the future; that plaintiff was unable to secure

a tenant for said building for several months, after which he secured a tenant at the reduced rent of \$20 per month. There is also evidence that because of the overflow and the probability of subsequent overflows the property has depreciated in value, the exact amount of which is not established by the evidence. The instructions of the court, given over defendant's objection, authorized the jury to consider as a measure of plaintiff's damages all loss of rents sustained up to the trial of the cause and loss of rents that will result in the future, and all other damages that plaintiff has sustained, or may sustain in the future. The language of the instructions given is so comprehensive as to authorize a recovery of both the loss for rents in the past and in the future and for depreciation in the value of the property. In this the court committed error. To permit a recovery for both is to permit the recovery of double damages. It would be like permitting one to recover the value of property as for conversion and at the same time to recover the value of the use thereof during the time he is deprived of it.

[3] If the damages by plaintiff are permanent, then the measure thereof is the value of the property destroyed, or the depreciation in the value of the property injured. The loss of rental value does not constitute part of the damages where there is a permanent damage to the value of the property; and, where the damage is not permanent, only damages occurring up to the time of the action are recoverable, and all future damages that may occur must be recovered by subsequent actions, and it is the duty of the court to see that one does not overlap the other. *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *City of San Antonio v. Estate of Mackey*, 22 Tex. Civ. App. 145, 54 S. W. 33; *Sutherland on Dam.* § 1042. There is some confusion among the authorities upon the proper measure of damages in cases of the character of the instant case. The divergence arises in determining whether the particular nuisance or injury is permanent.

[4] If it is permanent, then the injured party may recover in one action all damages he has or may sustain as a result of the negligent construction of the improvements complained of; but, if it is not permanent, then he may recover only such damages as he has sustained up to the time of the institution of his action. *Section 1039, Sutherland on Dam.*; *Chicago, R. I. & Pac. Ry. Co. v. Davis*, 26 Okl. 434, 109 Pac. 214. Some of the authorities make the test of permanency whether the structure or improvement from which the injury flows may be abated. The test in *Troy v. Railroad Co.*, 3 Foster (23 N. H.) 83, 55 Am. Dec. 177, and a line of cases following that case is that: "Whenever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent

character, that will continue without change from any cause but manual labor, then the damage is an original damage, and may be at once fully compensated." But the soundness of this rule has been criticised as not being supported by the best reason or by the weight of authority. This rule has the effect to license the maintenance of a continuous nuisance by payment of damages as for an original damage. In *Uline v. N. Y. Cent. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661, where the damages were sustained from a diversion of surplus waters into the basement of plaintiff's house by a change in the grade of a street, it is said: "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation, under proper authority, may erect an embankment in a street; and, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property. But, if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced shall the defendant, in such a case, be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrongdoer forever by the payment of a recovery against it? Shall it have no benefit by discontinuing the wrong? And shall it not be left the option to discontinue it?" The Supreme Court of Alabama in a recent case, which was an action for damages for the overflow of plaintiff's land, caused by the defendant's obstructing the natural flow of the waters in a creek, said: "Further, if the proof shows with reasonable certainty a wrong by which the value of property is affected, permanent and unabatable in law or in fact, damages should be allowed for the whole injury, past and prospective; otherwise, successive actions are to be maintained. And this alternative the courts incline to favor, to the end that the defendant may not acquire the right to continue the wrong on the one hand, and, on the other, that he may have a locus poenitentiae, and be not compelled to pay for a permanent wrong to which he would put an end, perhaps, once it is adjudicated to be a nuisance. This conclusion is supported by the weight of reason and authority." *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 161 Ala. 278, 49 South. 851. In case of doubt respecting the character of the injury courts are inclined to favor the right to bring successive actions, and therefore hold that the

injury is not permanent. *Section 1039, Sutherland on Dam.; Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 380, 34 Am. St. Rep. 92; *City of Nashville v. Comar et ux.*, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465. In the last-mentioned case the opinion, which was delivered by Lurton, J., now Associate Justice of the Supreme Court of the United States, ably reviewing the entire question and the diverging cases thereon, concludes with this language: "It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the causing the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance." In that case, as in the case at bar, the damages sought to be recovered resulted from the negligent construction of a sewer, wherefrom, in times of unusual freshets, waters were discharged upon the premises of plaintiff. An instruction of the trial court authorizing a recovery for depreciation in the value of the freehold was held erroneous. In *Railway Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066, it is said: "If all damages that may ever result from the nuisance are in law the result of its construction as an original wrong, then everything that is a damage in legal contemplation, whether for past or prospective losses, is recoverable in one action; but if the wrong be continuing, and the injuries successive, the damage done by each successive injury may be recovered in successive suits, and the injury to be compensated in the original suit is only the damage that has happened."

[5] In the case at bar, the city in grading its streets and constructing the sewers was acting within its lawful authority. Its wrong consists in negligently constructing the sewers with a capacity inadequate to carry off the surface waters which are collected from the courses in which they have flowed heretofore, and are brought to the point where the sewers are constructed to be discharged. If said sewers are enlarged or additional sewers built to carry off these waters, then no further injury will result to plaintiff; and it cannot be presumed that the city, upon its having been determined that the collection of the waters at the point near plaintiff's property and the negligent construction of said sewers to carry it off is unlawful, will not remedy the same so as to prevent further injury. To permit plaintiff to recover for future loss, which will not occur if the defects in the construction of said sewer are corrected, would be unjust to the city. On the other hand, to measure

plaintiff's damages by only the depreciation in the value of his property that has occurred up to this time, when subsequent overflows may have the result to entirely destroy the value of his property, for which no action would lie to recover for such injury, because barred by the present action, would make the establishment of plaintiff's damages in the instant case a hazardous undertaking to him. The instructions of the court should have defined the measure of plaintiff's damages to be the value of the property destroyed by the waters, the loss of rent, resulting from his buildings being vacated for the period they were vacated, and the loss of rents occasioned by depreciation in the rental or usable value of the property accruing up to the time of the bringing of this action.

The judgment of the trial court is reversed and the cause remanded.

WILLIAMS, DUNN, and KANE, JJ., concur; TURNER, J., not participating.

**HARRELL v. PETERS CARTRIDGE CO.**  
(Supreme Court of Oklahoma. Jan. 21, 1913.)

*(Syllabus by the Court.)*

**1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—ACTIONS—"DOING BUSINESS."**

Where a domestic mercantile corporation enters into a contract with a foreign manufacturing corporation, whereby the domestic concern agrees to handle the manufactured products of such nonresident corporation, and where it is provided in such contract that the domestic corporation shall purchase such products in its own name upon orders to be filled in another state by such foreign corporation, and that, when so purchased, the goods become the property of the domestic corporation, and such domestic corporation sells such goods throughout the state through its traveling agents, *held*, that such transactions do not constitute "doing business" within the state by the nonresident corporation, but the transactions between the two corporations are purely interstate, and therefore service of summons upon the domestic corporation is not service on the foreign corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

**2. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—ACTIONS—"DOING BUSINESS."**

Where a foreign manufacturing corporation having such a contract sends its traveling agents into the domestic state for the purpose of advertising the goods, and pushing the sales by giving exhibitions and demonstrations of the merits of such goods, and by assisting the agents of the domestic corporation in getting customers and orders for such goods, such orders to be filled by the domestic corporation out of its stock, such acts or transactions on the part of such agents do not constitute "doing business" within the state by the foreign corporation, and service of summons upon the

Secretary of State is not valid service on the foreign corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Lafayette Harrell, by his next friend, Alice L. Nicum, against the Peters Cartridge Company. From an order setting aside a judgment for plaintiff, he brings error. Affirmed.

This is an action for damages alleged to have been sustained through the negligence of defendant at a shooting exhibition at which defendant was demonstrating the merits of its cartridges. One Murrelle, an expert marksman in the employ of defendant company, was giving an exhibition of the merits of defendant's cartridges by pitching up plates of steel, and shooting through them while in the air. From one of the shots either some pieces of steel or pieces of the bullet glanced or rebounded, striking plaintiff, Harrell, causing a flesh wound on his head, and one piece striking him in the eye, bursting the eyeball. Summons was issued and served on the Oklahoma City Hardware Company, a corporation, then handling some of defendant's products. Defendant appeared specially, and moved to quash the service on the ground that defendant was a foreign corporation, and that the Oklahoma City Hardware Company was not the agent of defendant. Motion was sustained setting aside the service of summons. Thereafter the cause was permitted to lie dormant for a period of about 19 months. On July 14, 1909, an alias summons was procured and served on the Secretary of State. In October thereafter the default judgment was rendered in favor of plaintiff in the sum of \$9,818.90. Some 23 days thereafter defendant appeared specially by attorneys, and moved to vacate such judgment on the principal ground that the service of summons was not sufficient to give the court jurisdiction over defendant. At a hearing of such motion, at which evidence in support of same was offered, the motion was sustained and judgment set aside. From the order of the court setting aside the judgment the plaintiff appealed to this court.

M. Fulton, of Oklahoma City, for plaintiff in error. Wilson & Harris and John Tomerlin, all of Oklahoma City, for defendant in error.

HARRISON, C. (after stating the facts as above). The decisive question involved is whether the service had upon the Secretary of State was valid and binding against defendant. This question depends wholly upon the fact whether or not this defendant was "doing business" within the state within the meaning of the term.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Plaintiff in error contends that the Peters Cartridge Company, although a foreign corporation, was doing business within the state of Oklahoma through the Oklahoma City Hardware Company as its authorized agent, and that, having an agent within the state transacting business for the defendant and making contracts within the state for defendant, brought it within the meaning of the term "doing business" within the state, and, having designated no agent on whom service of process might be made, that service of summons upon the Secretary of State was valid under section 3, art. 1, Sess. Laws 1909, c. 10. On the other hand, it is contended by defendant in error that the Oklahoma City Hardware Company was not defendant's agent; that it had no agent in Oklahoma; that the Oklahoma City Hardware Company had no authority from defendant to transact business for it and in its name within the state and had not transacted business for it, but that the relations between defendant and the Oklahoma City Hardware Company were that of a local jobber purchasing goods as it needed them in job lots from defendant, and that the transactions between them were purely interstate in character; that being a nonresident of the state, and having no agent within the state authorized to make interstate contracts, and having no knowledge of such default judgment until so informed by disinterested party after the rendition of same, such service was invalid, and such judgment void for want of jurisdiction.

The facts are: That the Oklahoma City Hardware Company was a domestic corporation under the laws of Oklahoma with its place of business in Oklahoma City, and that defendant company was a foreign corporation organized under the laws of the state of Ohio with its manufacturing plant and principal office at Kings Mills, Ohio; that prior to the date of the injury in controversy the defendant company and the Oklahoma City Company entered into a contract or agreement by which the defendant agreed to sell its products to the Oklahoma City Company on terms and under conditions set forth in the contract which is headed as follows: "Agreement by and between the Peters Cartridge Company of Cincinnati, Ohio, first party, and Oklahoma City Hardware Company of Oklahoma City, Oklahoma, second party." The first paragraph of section 1 of such contract reads as follows: "That said first party agrees to sell goods of its own manufacture to said second party for its current needs at prices and on terms and conditions as stated below." The contract then gives the prices at which the goods were to be sold and delivered, then gives the terms upon which they are to be sold, then the conditions, which are as follows: "Orders shall not be binding on said first party unless accepted in writing from the Cincinnati office and such

accepted orders shall be filled as promptly as possible after specifications have been received, subject to unavoidable accidents or hindrances. \* \* \* Said first party agrees that if all invoices of its goods purchased by said second party are paid promptly, in accordance with the terms and conditions named herein, to allow said second party, in remitting, to deduct from net amount of said invoices the following special discounts. \* \* \* " The contract then details different kinds of goods and discounts to be allowed on same for payment in cash or within the terms mentioned in the contract, some to be paid for in 60 days, some to be paid for on the 10th of the succeeding month, and provides further: "Second party agrees that it will pay for all goods purchased under this agreement in strict accordance with the terms and conditions stated herein. \* \* \* " It further provides that, on any invoice of goods remaining unpaid for 30 days after same became due, all unpaid invoices should thereupon become due, and all unfilled orders should be canceled; that the second party shall be protected against declining prices on any unsold goods shipped within 90 days immediately preceding such decline, provided the second party has complied with all the conditions of the contract, and, in consideration of the advantages of the terms and prices given, the second party agreed to push the sale of this line of goods, and further provided that the agreement might be terminated by either party upon written notice and that thereafter all unfilled orders should be null and void.

S. E. Clarkson, president of the Oklahoma City Hardware Company, being called as a witness in behalf of plaintiff, testified: "Q. They ship you the goods out here as you order them, or how? A. We simply send in our order the same as for any other merchandise item, and they ship to us, and we pay them in the usual way." The witness further testified that the Oklahoma City Hardware Company sent out its traveling salesmen to sell this and other lines of goods, and that the orders taken were sent in to the Oklahoma City Hardware house to be filled and were filled out of stock on hand the same as other orders, and in reference to orders taken by traveling salesmen sent out by the defendant company the same witness testified that such orders were also sent in to the Oklahoma City Hardware house to be filled by it out of its stock, and that such orders were so filled. The witness states: "We have our salesmen on the road, and they are covering the entire territory selling the goods for the Oklahoma City Hardware Company, and we are selling the Peters goods along with our other lines of stuff." The witness further stated that the profits to the manufacturer were outside of its retail profits; that the manufacturer's profits came out of the profits paid them for

the goods by the Oklahoma City Hardware Company.

F. C. Tuttle, of Cincinnati, Ohio, secretary and treasurer of the Peters Cartridge Company, testified to having charge of all contracts and correspondence of said company with its customers, and that it had no other contract or understanding with the Oklahoma City Hardware Company than the written contract referred to. On cross-examination the witness was asked: "Q. The Oklahoma City Hardware Company, under this contract, sent in orders in accordance with the terms of the contract with shipping directions, and those orders were filled from your works in Warren county, Ohio, and shipped to Oklahoma City; is that true? A. It is. \* \* \* Q. And there is no contract of commissions or anything of that sort between you and the Oklahoma City Hardware Company, and no contract other than this which you have produced? A. The contract produced is the only contract of any kind. \* \* \* Q. Have you any other connection with the Oklahoma City Hardware Company, or S. E. Clarkson, than that of seller on your part and purchaser on their part of your goods? A. None whatever. Q. Is there any officer, president, secretary, treasurer, member of the board of directors, managing agent, or any agent of any kind or character of the Peters Cartridge Company located in the Territory of Oklahoma, or has there been any such officer or agent at any time? A. None now, and there has been none." The witness further testified that, in order to boost the sale of their manufactured products, it was their custom to send experienced salesmen into the territory of their jobbers to assist and educate the traveling salesmen of such jobber in selling their goods. He also testified that it was their custom to send out expert marksmen who gave shooting exhibitions in order to demonstrate the merits of their manufactured products.

W. E. Kepplinger, vice president of defendant company, testified, in substance, to the same facts testified to by Tuttle. There was no evidence showing any other relation between the defendant company and the Oklahoma City Hardware Company than that of buyer and seller under the contract between them. This is the substance of the material testimony as to what relations existed between the Oklahoma City Hardware Company and the defendant. The question then is: Do these facts show such a relation as would constitute "doing business" within the state?

[1] Counsel for plaintiff in error cite numerous authorities in support of its contention, a number of which are cited in support of the validity of the statute authorizing service to be made on the Secretary of State, where the foreign corporation had neglected or refused to appoint an agent upon whom service might be had. These

authorities, however, are not decisive of any feature of the question involved in the case at bar. They merely uphold the validity of such statute on the assumption that the foreign corporations were in fact "doing business" within the state, and further cite a number of authorities in support of the contention that foreign corporations "doing business" in a state are held to impliedly assent to the laws of such state as to the modes of service upon a foreign corporation. These authorities are not pertinent to the question before us, for they likewise hold to the doctrine of implied assent on the assumption that the foreign corporations were actually "doing business" within the state. Counsel then cites a number of authorities on what constitutes "transacting business within the state." We have read all of the authorities cited by counsel on this question, and find that none are based upon a state of facts similar to those in the case at bar, and each is based upon a state of facts which shows conclusively that the foreign corporations were "doing business" within the state.

In *Van Dresser v. Oregon Ry. & Nav. Co.* et al. (C. C.) 48 Fed. 202, cited by counsel for plaintiff in error, section 2 of the syllabus discloses the facts upon which the decision is based, and reads as follows: "The Union Pacific Railway Company, having formed a combination under the name of the 'Union Pacific System,' with various other companies, including the Oregon Short Line Company, which operates a railroad in Washington, and being engaged in making contracts therein for freight and passenger service under the name of the system, must be considered as doing business in that state; and a service of summons upon an agent therein, who is authorized to act for all the companies of the system, is a service upon the corporation."

In *Swarts v. Christie Grain & Stock Co.* (O. C.) 166 Fed. 338, cited by plaintiff in error, the court held that the service was not good, for the reason that the facts did not disclose that the defendant was "doing business" within the state.

In *Central of Ga. R. R. Co. v. Eichberg*, 107 Md. 363, 68 Atl. 690, 14 L. R. A. (N. S.) 389, the suit was against two connecting lines of carriers, both having the same agent within the state.

In *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243, the court held: "The agent upon whom service may be made must be an agent in fact, not merely by construction of law. He must be one having in fact representative capacity and derivative authority." In this case the service was quashed.

In *Green v. C. B. & Q. Railway Co.* (C. C.) 147 Fed. 767, the facts were that the defendant had incorporated under the laws of Illinois; that it ran its lines through the state of Pennsylvania, and while operating such lines had designated an agent in such

state upon whom service might be had; that subsequently the company leased its lines to an Iowa corporation, which thereafter operated same. The designated agent of the lessor in Pennsylvania testified that he had thereafter performed the same services for the lessee that he had previously for the lessor. The court held that it did not appear that defendant was "doing business" in Pennsylvania, and that the federal court in that state did not acquire jurisdiction of defendant by service of process upon such designated agent of the lessor; it not appearing that it was, in fact, "doing business" in that state.

In *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248, was where a foreign corporation had been licensed to do business in Wisconsin, which license was subsequently revoked, but after the cause of action arose. The court in that case held the service to be good as long as any liability of the defendant remained outstanding in the state.

*Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, is a case where an agent was sent into the state duly authorized to transact business and make settlements in the name of the company.

In *Grant v. Cananea Consolidated Copper Co. et al.*, 189 N. Y. 241, 82 N. E. 191, the service was held to be good because it was had upon the president and manager of the defendant corporation residing in the state of New York. None of these decisions are applicable to the state of facts involved in the case at bar.

In determining the question whether the Peters Cartridge Company was doing business within the state, there are two features or two separate groups of facts to be considered and to be considered separately: First. Whether the relations between the Oklahoma City Hardware Company and defendant were such as to constitute the Oklahoma City Hardware Company the agent of defendant. Second. Whether the acts of the expert marksmen in demonstrating the merits of defendant's products were such acts as would constitute "doing business" within the state. As to the first proposition whether the Oklahoma City Hardware Company was acting as the agent of defendant, we have been unable to find any authority which held that similar relations to those between the Hardware Company and defendant constituted a domestic concern as the agent of a foreign corporation. The facts in this record show simply that the Hardware Company purchased these goods at stipulated prices, under stipulated terms and conditions, and paid for them itself and sold them in its own name. There is no provision in the contract between them which justifies any inference other than that all such goods after being purchased by the Oklahoma City Hardware Company belonged to said company, and, if they remained unsold, they re-

mained so as the property of the Oklahoma City Company, and not of defendant.

In 18 Am. & Eng. Enc. of Law (2d Ed.), under the head "What constitutes doing business in this connection," on page 870, the rule is announced as follows: "In regard to sales by foreign corporations in the domestic state, the following rulings have been made: The constitutional and statutory provisions are not violated by a sale of goods to citizens of the domestic state by a foreign corporation through traveling salesmen on orders approved at the home office, or by a shipment of goods by a foreign corporation into the domestic state on an order given outside of the state, or by a sale of goods in the domestic state by a foreign corporation through its itinerant salesmen, or by a shipment of goods by a foreign corporation to a citizen of the domestic state on an unsolicited order, or by the placing by a foreign corporation of its products in the hands of local merchants in the domestic state to be sold on commission, or by a consignment of goods by a foreign corporation to factors in the domestic state to be sold by the factors and the proceeds collected and accounted for by them, or by a contract by a foreign corporation with a citizen of the domestic state to furnish, deliver, and set up for him within the domestic state certain machinery, and an acceptance in payment therefor of the purchaser's notes secured by mortgage on real estate situated within the state. In all the cases enumerated it may be stated without fear of contradiction that even if it be conceded that these statutes were applicable to foreign corporations, they would still be inoperative as being in violation of the Interstate Commerce Act." See, also, notes and authorities cited. "Interstate commerce, or commerce among the several states of the Union, is commerce which concerns more than one state. Strictly considered, it consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." 17 Am. & Eng. Enc. of Law, 61, and authorities cited in notes 3 and 4. "The negotiation in one state of sales of goods which are in another state, for the purpose of their introduction into the former state, constitutes interstate commerce. Where parties in one state order goods from persons or corporations in another state, and the goods are shipped into the state, although with a draft attached to the bill of lading the transaction is one of interstate commerce." *Id.* 65, 66, and authorities cited in notes. Hence it is very clear from the above authorities that the relations and transactions between the Oklahoma City Hardware Company and the Peters Cartridge Company as shown by the evidence in the record were purely interstate transactions, and, being such, they constituted interstate commerce, and did not con-



stitute "doing business" within the state. It therefore follows that service on the Oklahoma City Hardware Company or S. E. Clarkson, its president, was not a valid service on defendant.

[2] The next question is whether the acts of H. A. Murrelle, the expert marksman who traveled through the state giving shooting exhibitions in order to advertise and demonstrate the merits of defendant's products, and who sometimes took orders, but under the evidence sent such orders to the Oklahoma City Hardware house to be filled out of its stock, whether his acts were such acts of an agent as would constitute "doing business" within the state by the Peters Cart-ridge Company. The sale of goods in the domestic state by a foreign corporation through its itinerant salesmen has almost universally been held to not constitute "doing business" within the domestic state. See 13 Am. & Eng. Enc. of Law, 870, and authorities cited in note 3. In *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 184, it was said: "The words 'doing any business,' as used in the act, should not be construed to mean taking orders or making sales by sample by agents coming into our state from another for that purpose. To hold otherwise would make the act offend against the Constitution of the United States as imposing unlawful restrictions on interstate commerce. \* \* \* A corporation of one state may send its agents to another to solicit orders for its goods or contract for the sale thereof without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, or like troublesome or expensive conditions." See, also, *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58; *De Witt v. Berger Mfg. Co.* (Tex. Civ. App.) 81 S. W. 334; *Brin v. Wachusett Shirt Co.* (Tex. Civ. App.) 43 S. W. 295; *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241, 54 S. W. 619; *Tallaposa Lbr. Co. v. Holbert*, 5 App. Div. 559, 39 N. Y. Supp. 432; *McNaughton Co. v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610. "Any law which provides that the sale of goods by a foreign corporation through soliciting agents, who take orders subject to approval at the home office, is doing business within the state, is void, because it is an interference with interstate commerce." *Davis & Rankin Mfg. Co. v. Dix* (C. C.) 64 Fed. 406. Also *Coit & Co. v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Boardman v. McClure Co.* (C. C.) 123 Fed. 614; *Cummer Lbr. Co. v. Ins. Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668, judgment affirmed 173 N. Y. 633, 66 N. E. 1106; *March-Davis Cycle Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683; *Havens & G. Co. v. Diamond*, 93 Ill. App. 557. In *Mearshon & Co. v. Pottsville Lbr. Co.*, 187 Pa. 12, 40 Atl. 1019, 67 Am. St. Rep. 560, Mr. Justice Green, delivering the opinion of the

court, said: "Mr. Justice Wickham, delivering the opinion of the court, said: 'All that is hereby alleged is entirely consistent with the conduct of a foreign corporation engaged in strictly interstate commerce. It may advertise its goods, take orders, make contracts of sale respecting the same, and ship them to customers in this state. It may also employ agents living in Pennsylvania to go from county to county, from town to town, and from person to person, to secure orders. Or the agent may never go outside of his own county, city, or town, thus being in one sense a local agent, and yet be doing a business which is not, and cannot be, reached under our act of 1874 [Act April 22, 1874 (P. L. 108)]. \* \* \* The words 'doing any business,' as used in the act, should not be construed to mean taking orders or making sales by sample by agents coming into our state from another for that purpose. To hold otherwise would make the act offend against the Constitution of the United States, as imposing unlawful restrictions on interstate commerce. *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739 [28 L. Ed. 1137]; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592 [30 L. Ed. 694]; *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829 [38 L. Ed. 719], and a number of other cases.'" See, also, *R. I. Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; also, 5 *Thompson on Corporations* (2d Ed.) § 6678; *Berger v. Pa. R. R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941, and *Chicago Crayon Co. v. Rogers*, decided by this court in an opinion by Rosser, C., November 18, 1911, 30 Okl. 299, 119 Pac. 630, wherein plaintiff, an Illinois corporation, sent agents into the Indian Territory and Arkansas to take orders for enlarging pictures. The orders, when taken, were sent to it at its home office in Chicago, where the pictures were enlarged, and the pictures with frames were shipped by it to agents different from those who took orders, who delivered them to patrons, and collected the money which they remitted to plaintiff. Held this was interstate commerce. "Statutes of the kind under consideration have no application to the case where a corporation sends into the restricting state its traveling agent who solicits orders for its goods and forwards them, subject to approval, to the home office, the orders being afterward filled by shipments to the customer. Such an application of the statute would be inadmissible in so far as state statutes are concerned, because, so applied, it would have the effect of imposing a restraint upon commerce between the states or with foreign countries." 19 Cyc. 1272, 1273, and authorities cited in notes. In *Wolff Dryer Co. v. Bigler*, 192 Pa. 466, 43 Atl. 1092, the court said: "Where the foreign corporation has no office or place of business within the restricting state, and no part of its capital is invested there, and the goods are shipped either directly from its

factory or upon its orders given to other factories, the fact that its agent came into this state and made contracts for machinery to be delivered here, did not bring it within the inhibition of the act of 1874."

In view of the fact that H. A. Murrelle was sent into the state by defendant merely for the purpose of advertising its goods, although he was permitted to take orders where he found demand for same and send such orders in to the Oklahoma City Hardware Company to be filled out of its stock, and in view of the further fact that he was not authorized to make any contracts for or in the name of the defendant company within the state, under the overwhelming line of authorities which hold that similar acts do not constitute "doing business" within the state, it is clear that the acts of Murrelle were not such as would bring defendant within the term "doing business" within the state, and that, therefore, the service upon the Secretary of State was void, and that the order of the court below in setting aside such judgment should be sustained.

Therefore the order and judgment of the court below is affirmed.

PER CURIAM. Adopted in whole.

WAT-TAH-NOH-ZHE et al. v. MOORE.  
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1153\*)—JUDGMENT—MODIFICATION.

Plaintiffs prayed, in the second count of their petition, for the cancellation of a certain lease. Defendant admitted the same was void, and also asked to have the same canceled. The court, through oversight, or other reason, failed to grant the relief prayed for. *Held*, that on appeal on the first cause of action, the entire record being presented to this court, and the aforesaid error being urged by plaintiffs in error and not opposed by defendant in error, plaintiffs in error are entitled to a cancellation, and this court will order the same canceled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4507-4512; Dec. Dig. § 1153.\*]

2. EQUITY (§ 377\*)—QUESTIONS OF FACT—SUBMISSION TO JURY.

In cases of equitable cognizance the judge may call a jury, or consent to one, for the purpose of advising him on questions of fact, and he may adopt or reject their conclusions, as he sees fit, for that the whole matter must eventually be left to him to determine; and instructions offered by the parties furnish no ground of error on appeal. It is not only the right, but the duty, of the court, in such cases, to finally determine all questions of fact as well as of law. *Barnes v. Lynch et al.*, 9 Okl. 191, 59 Pac. 1008.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-798; Dec. Dig. § 377.\*]

3. JURY (§ 14\*)—TRIAL BY JURY—ISSUES OF FACT.

All issues of fact arising in actions for the recovery of money, or for the recovery of specific real or personal property, shall be tried

by a jury, unless a jury is waived or a reference ordered. All other issues shall be tried by the court, subject to its power to submit the issues to a jury or direct a reference.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 14.\*]

4. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS BY COURT—CONCLUSIVENESS.

Where a cause is tried to the court, without the intervention of a jury, the court's findings of fact will be given the same weight as the verdict of a jury, and will not be set aside if there is any evidence reasonably tending to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

5. INDIANS (§ 15\*)—INDIAN LANDS—MINING LEASE—ASSIGNMENT OF ROYALTY—STATUTES—"ALIENATION."

An assignment of royalty due under a mining lease given by a Quapaw Indian on his allotment is not an "alienation" of a part of the real estate, in violation of the act of March 2, 1895, c. 188, § 1, 28 Stat. 907, making such allotments inalienable for 25 years.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 302-306; vol. 8, p. 7571.]

Commissioners' Opinion, Division No. 1. Error from District Court, Ottawa County; T. L. Brown, Judge.

Action by Wat-tah-noh-zhe and Francis Q. Goodeagle against James K. Moore to cancel a contract for the assignment of royalty, and to cancel a mining lease, etc. Judgment for defendant, and plaintiffs bring error. Corrected and affirmed.

J. J. Bulger, of Wichita, Kan., for plaintiffs in error. W. H. Kornegay, of Vinita, for defendant in error.

ROBERTSON, C. Wat-tah-noh-zhe is a full-blood Quapaw Indian, and the allottee of the land described in the record, under the provisions of the act of Congress, approved March 2, 1895, c. 188, § 1, 28 Stat. 907. Francis Q. Goodeagle, also a full-blood Quapaw Indian, is her husband. On June 7, 1897 (Act June 7, 1897, c. 3, p. 1, 30 Stat. 72), Congress enacted a law providing: "That the allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes. And said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him. All acts and parts of acts inconsistent with this are hereby re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pealed." Neither of these plaintiffs in error come within the proviso of the foregoing section as to age or other incapacity or disability. Prior to the 18th day of July, 1897, but subsequent to the passage of the foregoing statute authorizing the leasing of the land, these plaintiffs in error made and entered into a 10-year mining lease for a portion of their land to James F. Robinson and C. M. Harvey, and of the balance to the Baxter Royalty Company, all of whom agreed to pay them 5 per cent. royalty on all mineral taken from said land during the life of said lease. On July 18, 1907, they entered into a written contract with one James K. Moore, whereby, for and in consideration of \$1,000 in cash, they sold to said Moore an undivided one-half interest in and to the royalties which may be due them under the aforesaid mining leases. It also appears from the record that on August 7, 1908, plaintiffs in error made and entered into a written contract, whereby they leased to said Moore the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , all of section 1, township 28 N., range 22 E., of the Indian meridian in Ottawa county, for mining purposes, which lease, however, does not begin to run until June 14, 1917; the grantees agreeing in said lease to pay grantors 5 per cent. royalty on all minerals taken from said land.

On July 7, 1909, plaintiffs in error commenced an action in the district court of Ottawa county, the object of which was to cancel, set aside, and hold for naught both the assignment of royalty and the mining lease last above described, on the ground of fraud and deceit on the part of said James K. Moore in securing their execution. Defendant answered by general denial, and on the issues thus formed the cause was tried to the court before a jury, which the court called to advise him as to the disputed facts in the case. After the evidence was all in, the defendant moved for a peremptory instruction in his behalf, which motion was, by the court, sustained, and a directed verdict was returned by the jury, finding the issues in favor of defendant, on which verdict judgment was duly entered. Motion for new trial was filed, presented, and overruled, and plaintiffs in error appeal.

[1] Before considering the assignments of error raised in the petition in error, of and concerning the assignment of royalty and the direction of the verdict, it may be noted that prior to the trial and on April 11, 1910, the defendant filed the following motion, to wit: "James K. Moore, defendant, says that he is advised that the lease mentioned in the second paragraph of the petition as being made by plaintiffs to defendant, beginning June, 14, 1917, is void as against the 10-year limitation for the making of leases, and he asks that judgment be rendered accordingly. James K. Moore, by W. H. Kornegay, Atty."

This motion, for reasons not appearing in the record, was not passed upon by the court; nor was any order or judgment made or entered concerning said second cause of action, although the issue therein was pending properly before the court at the time. This lease, for reasons deemed sufficient by defendant, and which will not be inquired into at this time by us, should have been canceled by the court, and such failure on the part of the court was error; and the judgment herein, so far as the second cause of action in plaintiffs' petition is concerned, should be amended and enlarged so as to show the said lease to be null and void, and canceled of record.

As to the other phase of the case, plaintiffs in error rely on two points for a reversal, viz.: First, the court erred in directing a verdict in favor of defendant; and, second, the assignment of royalty, on its face, is void and unenforceable and should have been canceled by the court. Plaintiffs in error contend that, under the first assignment, they were entitled to a general verdict at the hands of the jury, and that the court erred in directing a verdict.

[2] This was an equity case, as distinguished by our statute from a law case, and one in which the parties were not entitled to a jury, as a matter of right, but one in which the court is authorized in calling a jury to assist in settling disputed questions of fact; its findings, however, to be advisory to the court only, and not in any sense binding upon it. After the evidence was all in, the court was of opinion that the advice of the jury on the facts was not needed; that under the law applicable to the facts, taken in their most favorable aspect to plaintiffs' contention, the defendant was entitled to a judgment. Such action was clearly within the province of the court. Thus, in *Barnes et al. v. Lynch et al.*, 9 Okl. 191, 59 Pac. 1008, it is said: "The law is, however, in cases of equitable cognizance, that, while the judge may call in a jury, or consent to one, for the purpose of advising him upon questions of fact, that he may adopt or reject their conclusions, as he sees fit, and that the whole matter must eventually be left to him to determine, and that the instructions furnish no ground of error upon appeal. It was not only the right, but the duty, of the court to finally determine all questions of fact as well as of law." See other cases there cited.

In *Hixon v. George*, 18 Kan. 256, it is said: "The court, of course, erred in holding that no general verdict could be rendered in the case. The court could, if it had so chosen, have ordered all the issues in the case to be tried by a jury, and could have done so by a general order, without the slightest mention of any particular issue; and then the jury could, unless the court had otherwise ordered, either on its own

motion, or at the request of one of the parties, have found a general verdict upon all such issues, without mentioning any particular fact or issue in the case. But the error was immaterial; for in an equity case like this, involving many issues as this does, the court has the power, without giving any reason therefor, to send any portion of the issues which it chooses to a jury to be tried, and to require the jury to make a separate finding upon each of such issues; and the court may try the other issues in the case itself, or it may send them, or any portion of them, to another jury, or to a referee, to be tried. Gen. Stat. 680, p. 267; *Carlin v. Donegan*, 15 Kan. 496, 497. In this case neither party required that the court should make separate findings, either of fact or of law; and therefore the court did not err in finding generally." See, also, in support of this principle, *Kimball v. Connor*, 3 Kan. 415; *Gillespie v. Lovell*, 7 Kan. 424; *Carlin v. Donegan*, 15 Kan. 495; *Hixon v. George*, 18 Kan. 253; *McCardell v. McNay*, 17 Kan. 433; *Williams v. Elliott*, 17 Kan. 523; *Rich v. Bowker*, 25 Kan. 12; *Keith v. Keith*, 26 Kan. 41; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262. Inasmuch as our statute is identical with the Kansas statute, which we adopted while a territory, and which was brought over by the Constitution, and which adoption also brought with it the construction placed on said statute by the Supreme Court of Kansas, the above authorities are binding on, and will be followed by, this court.

The sections of our statute governing this subject are: Section 5781, Comp. Laws 1909, which reads as follows: "Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. There are two kinds: First, of law; second, of fact." Section 5782: "An issue of law arises upon a demurrer to the petition, answer or reply, or to some part thereof." Section 5783: "An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or, second, upon new matter in the answer controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading." Section 5785: "Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as herein-after provided." Section 5786: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury, or referred as provided in this Code."

These sections have been construed in this court by Harrison, C., in *McCoy v. McCoy*, 30 Okl. 393, 121 Pac. 182, as follows: "Sec-

tion 5781 defines *how* issues arise. Section 5782 defines how issues at *law* arise. Section 5783 how issues of *fact* arise. Section 5785 prescribes what issues of fact *shall be tried by a jury*, unless a jury is waived, or a reference be ordered. Section 5786 provides that *all other issues of fact shall be tried by the court*, subject to its powers to order any issue or issues to be tried by a jury, or referred as provided in the Code. These statutes, viewed in the light of the authorities above cited, are susceptible of but one logical construction, viz., that all issues of fact arising in actions for the recovery of money, or for the recovery of specific real or personal property, shall be tried by a jury, unless a jury is waived or a reference ordered. They are mandatory, both in meaning and language, and to refuse a jury in such cases would constitute reversible error; and in section 5786 the language is equally strong, and the provisions equally mandatory, that all other issues shall be tried by the court, subject to its power (discretion) to submit the issues to a jury or direct a reference." See, also, *Apache State Bank v. Daniels*, 32 Okl. 12, 121 Pac. 237, 40 L. R. A. (N. S.) 901.

[3] It is thus seen that no error was committed by the court in taking the whole subject from the jury. Under the law it was the right, as well as the duty, of the court to determine the issues formed by the pleadings; and while it was the privilege of the court to submit either specific questions or the general issue to the jury, yet failure to do so is not error, and the assignment based thereon must therefore necessarily fail. In arriving at this conclusion we are not moved by the consideration of the general rule ordinarily observed by trial courts in directing verdicts. The nature of this case does not permit or require that we bring ourselves within the rule announced in *Solts v. Southwestern Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776, relating to directed verdicts, although we could easily do so in the instant case. This was originally a case of equitable cognizance, and the issues of fact therein, as well as the issues of law, were primarily for the determination of the court. Having concluded that the court was authorized in directing a verdict in this case, so far as the law itself in that particular is concerned, its finding on the issues must stand, unless, by an examination of all the evidence in the record, we can say, as a matter of law, that a different result should have been reached by the court in the consideration of the evidence. In other words, while the court was justified in passing upon and determining the facts in the case, yet, if error was committed in so doing, the same may be corrected here.

[4] This, of course, necessitates a review of all the evidence in the record. Counsel for plaintiffs in error have not aided us in this regard by a compliance with rule 25 of

this court (95 Pac. viii), which points out the manner in which such questions may be properly presented to the court. Neither does the case-made contain a certificate by way of recital, to the effect that it contains all the evidence introduced at the trial, and, on objection, we would be warranted in refusing to consider the evidence at all; but, inasmuch as defendant in error is satisfied with the condition of the case-made, and has offered no objection thereto, we will overlook the defect and proceed upon the theory that all the evidence is contained therein. The record contains 179 pages of testimony, mostly given by Indians, through an interpreter. As is usual in such cases, it is vague, contradictory, incomplete, and unsatisfactory. This criticism of the character of the testimony applies peculiarly to the witnesses offered by plaintiffs in error. A court, like a jury, in weighing evidence, is guided largely by the appearance and demeanor of the witness on the witness stand, and considers the interest or lack of interest, the intelligence or lack of intelligence, the bias or lack of the same, the relation and opportunities of seeing and knowing the matters and things of and concerning which the witness testifies, etc. On review of the testimony in this court, all these important criteria and details are wanting, and for that reason, unless it clearly appears in the record that the court erred in its conclusion, the finding of fact will seldom be interfered with on appeal. "Where a cause is tried to the court, without the intervention of a jury, the court's findings of fact will be given the same weight as the verdict of the jury, and will not be set aside if there is any evidence reasonably tending to support it." *Wrought Iron Range Co. v. Leach*, 32 Okl. 711, 123 Pac. 421; *In re Byrd*, Appeal of Floyd, 31 Okl. 549, 122 Pac. 516; *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694; *Seward v. Casler et al.*, 24 Okl. 275, 103 Pac. 740; *Lipscomb v. Allen*, 23 Okl. 818, 102 Pac. 86. And it is a rule so well established that citation of text or authority is unnecessary that where evidence is conflicting, and there is any testimony in the record reasonably tending to support the verdict of the jury, this court will not examine the same to determine where the weight lies, but will accept the finding of the court or the verdict of the jury as conclusive thereon. With these rules in mind, we have read the entire 179 pages of testimony in this case with care, and, after considering the same, we do not see how the trial court could have reached any other conclusion than that recorded in the judgment in this case. We are in thorough accord therewith, and have no disposition to interfere with it.

[5] As to the other question raised—i. e., that the contract of assignment of royalty is void for the reason that it, in effect, is an alienation of a restricted Indian allotment—we are also compelled to disagree with counsel. Whether the sale of one-half interest

in and to the 5 per cent. royalty, which the lessors paid plaintiffs in error for the mineral taken from the allotment in question, is a sale of the thing itself, and therefore void, because the land is inalienable on account of the restrictions placed thereon by Congress in the act ratifying the allotments, is not, in our opinion, open to discussion, for the reason that the act under which the lease was made, being a federal statute, and having been construed by the federal courts, their holding on the subject is highly persuasive and ordinarily binding on us.

The exact question involved was up for consideration in *United States v. Abrams et al.*, 181 Fed. 847, decided by Judge Campbell, of the Eastern District of Oklahoma, on September 19, 1910, wherein it was said, on page 855: "On August 16, 1902, the allottee entered into a contract with Charles F. Noble, purporting to 'grant, bargain, sell, assign, transfer and set over' to said Noble all his right, title, and interest in and to the royalty, rental, and proceeds of the mining lease executed by the allottee to defendant Abrams under date of January 11, 1902. We have seen that this lease provided for a cash payment of \$10 at date of execution, and 'a sum of money equal to five per centum of the market value at the place mined or produced' of all substances to be mined, except gas, for which lessee was to pay \$40 per annum for each paying well, and further provided for a minimum annual royalty of \$20. The royalty was to be paid in money, based upon a per centum of the market value of the ore produced. A one-half interest in this contract was later assigned by defendant Noble to defendant Cooper. It is further alleged that on February 21, 1906, the allottee entered into a contract with defendants A. S. and V. E. Thompson, whereby he assigned to them as a fee for their services in litigation arising out of the assignment to Noble one-half of the royalties recovered by the allottee in such litigation. The government seeks to cancel both the foregoing contracts assigning royalty, on the ground that the allottee cannot assign such royalties. The defendants have demurred to the bill, challenging the capacity of the government to sue, and asserting want of equity in the bill. The bill concedes that the lease upon which the royalties attempted to be assigned accrue is a valid lease. The law contemplates that the moneys representing the royalties arising therefrom shall become the absolute property of the allottee, to be disposed of as he may see fit. No provision is here made, as is done in many cases, by which payment shall be made to the Indian agent, and by him disbursed. Such a provision would have manifested an intention to extend the supervision of the government over the proceeds of these leases. The absence of such provision, on the other hand, manifest a congressional intent that the proceeds of such leases shall be

at the disposal of the Indian. It is his to handle as he may see fit. If it is fraudulently taken from him, he has his remedy, like any other citizen, to recover it. It appears from the recitations in the assignments to the defendants Thompson that he invoked that remedy through them as counsel, and assigned to them as their fee a portion of the royalties recovered. I can conceive no reason why such assignments of royalties cannot be legally made. It is true the Indian may make most improvident contracts relating to such assignments, but Congress has seen fit to intrust him with the disposal of the moneys accruing from these royalties; and if, for a consideration satisfactory to himself, he sees fit to realize upon this fund in advance by assigning it, I can conceive nothing in the transaction violating any governmental policy expressed by any legislation relating to these Indians, which has been brought to my attention. In the matter of receiving and disposing of these royalties, as he may see fit, as in the matter of agreeing upon the consideration which shall be paid to him for a lease, for a lawful purpose and term, Congress has seen fit to place the Indian upon his own responsibility; and I cannot escape the conviction that Congress in so doing intended that, to that extent, he should take his place as a citizen of the United States and of the state, together with all other citizens of whatever race or color." This case was appealed to the United States Circuit Court of Appeals, where, on May 23, 1912, in an opinion by Smith, Circuit Judge, the lower court was affirmed. *United States v. Noble*, 197 Fed. 202. On page 295 Judge Smith said: "It is true that at the time of the making of the assignments the ores were in the ground and part of the real estate; but the leases contemplated, as the law in authorizing mining leases must have contemplated, their separation from the real estate, and this far the leases were clearly legal. They provided, not for turning over to Blackhawk 5 per cent. of the metal mined, but that the party of the second part should pay to the party of the first part a sum of money equal to 5 per cent. of the market value of all minerals. It was the sum of money which was assigned, and this was not a violation of the prohibition of alienation for 25 years." This, in our opinion is conclusive on us, and no further consideration of the questions involved is necessary.

It therefore follows that the judgment of the district court, holding the assignment of royalty valid, should be affirmed, and in addition the judgment should be amended and enlarged so as to hold the lease made on August 7, 1908, by plaintiffs in error to defendant in error, and which does not commence to run until June 14, 1917, and which was recorded in Book 4, at pages 278, 279, in the office of the register of deeds of Ottawa

county, Okl, on November 20, 1909, null and void, and canceled of record. Costs to be equally divided.

PER CURIAM. Adopted in whole.

#### STATE v. DUERKSEN.

(Criminal Court of Appeals of Oklahoma. Feb. 1, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 753\*)—TRIAL—ADVISING ACQUITTAL.

When there is proof in the record tending reasonably to sustain the allegations of the information, a trial court has no right to advise the jury to return a verdict of not guilty, and especially is this true when there has been no testimony offered on the part of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1730; Dec. Dig. § 753.\*]

#### 2. EMBEZZLEMENT (§ 5\*)—WHAT CONSTITUTES —INTENT TO RETURN.

When a person, occupying the relation of agent to principal, comes into possession of funds belonging to the principal, and converts the same to his own use, without the knowledge or consent of the principal, the law implies the fraudulent intent contemplated by the statute; and section 2812, Comp. Laws 1909, specifically provides that the fact that the accused intended to restore the property embezzled is no grounds for defense or of mitigation of punishment, unless restored before complaint or information is filed.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 8; Dec. Dig. § 5.\*]

Appeal from District Court, Major County; James B. Cullison, Judge.

Peter F. Duerksen was indicted for embezzlement, and on acquittal the State appeals on question reserved. Contention of State sustained.

Smith C. Matson, Asst. Atty. Gen., and Abijah Fairchild, Co. Atty., of Fairview, for the State. John V. Roberts, of Fairview, and Garber & Kruse, of Enid, for defendant in error.

ARMSTRONG, P. J. This is an appeal by the state on a question reserved, growing out of a judgment of acquittal entered in the district court of Major county by direction of the trial court, in a case wherein the state of Oklahoma prosecuted Peter F. Duerksen on a charge of embezzlement.

The charging part of the information, upon which the prosecution was based, is as follows: "That the said Peter F. Duerksen, in said county and state, on or about the 29th day of August, 1910, was the agent of Hiram S. Aumiller for the purpose of renting and receiving the rents therefor on the following tract of land then and there owned and possessed by the said Hiram Aumiller, to wit, the S. ½ of the N. W. ¼ of section 3, in township 30 north, of range 12 west, 1. M.; and being agent as aforesaid, by virtue of his said employment as such agent,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 129 P.—56

there came into the care and control of him (the said Peter F. Duerksen), for and on account of the said Hiram S. Aumiller, as rents from one Philip Wagner, on or about the said 29th day of August, 1910, the sum of \$80.50; and the said Peter F. Duerksen, aforesaid, so received and took into his control and care the said money for and on account of the said Hiram S. Aumiller, and afterwards, to wit, on or about the 3d day of September, 1910, at and in said county and state, the said Peter F. Duerksen did willfully, unlawfully, feloniously, and fraudulently embezzle, convert, and appropriate the same to his own use, and not in the due and lawful execution of the said trust of his (the said Peter F. Duerksen), contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The statute upon which this prosecution was founded is as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 2609, Comp. Laws 1909. "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector, or being otherwise intrusted with or having in his control property for the use of any other person, or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement." Section 2612, Comp. Laws 1909. "The fact that the accused intended to restore the property embezzled is no ground of defense, or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense." Section 2618, Comp. Laws 1909.

The material facts upon which the state relied for conviction, as disclosed by the proof introduced at the trial, are substantially as follows: The prosecuting witness, Hiram S. Aumiller, was a resident of the state of Kansas, and owned the quarter section of land in Major county, Okla., described in the information. He had given the defendant in error, Duerksen, a power of attorney to rent and collect the rents from such land. The place was rented by him to one Philip Wagner for the year 1910. In the fall of that year, the prosecuting witness came down to his place for the purpose of settling with Duerksen and receiving his rents. There were about \$100 due him after commissions were paid. Upon this occasion, the prosecuting witness was informed by his agent, the defendant in error, that he had collected the money, but had used it, and was not able to pay him at that time, but would endeavor to get it. A small amount of money was paid—about \$10. In April following, the prosecuting witness went back to

Major county for the purpose of collecting his rent. This time the defendant in error, Duerksen, could not pay, said he ought to be ashamed to ask for any more time, but that he was in adverse circumstances and could not pay it. Said that he wanted to borrow it, and would be glad to pay interest on it, to which the prosecuting witness would not agree, claiming that he did not have the money to loan, and that he needed it. After repeated efforts to collect the money, prosecuting witness swore out a complaint against the defendant in error on a charge of embezzlement; and, after his arrest, a tender of the full amount claimed was made.

[1] At the close of the state's testimony, which made out a complete case of embezzlement under the statute, the court gave the following instruction to the jury: "Gentlemen of the jury, at this time the court informs you that the state having submitted its testimony in this case and rested, the defendant herein having filed his motion asking the court to direct the jury or advise the jury to retire to your room and return a verdict of not guilty, and the court, having carefully listened to the testimony and heard argument of counsel in their presentation of the law, is of the opinion that there is no evidence in this case warranting you in finding that a crime has been committed, and advise you and direct you that you retire and deliberate upon this case, and I advise you to return a verdict of not guilty. When you have retired to your jury room, it will be your duty to select one of your number as foreman; and, when you have agreed upon a verdict, your bailiff will return you into court. A blank verdict will be furnished you." The state duly excepted to this instruction at the time.

It appears that the trial court assumed the position that, because the accused had never denied that he received the money and converted it to his own use, as alleged in the information as the agent of the prosecuting witness, and repeatedly promised to pay it, and afterwards tendered it to him, the state failed to prove fraud and other elements necessary to constitute embezzlement. In reaching this conclusion, the court was in error.

[2] When one converts the money of another to his own use, without permission from the lawful owner thereof, the law infers a fraudulent intent, and punishes the act as embezzlement. The fact that a person never concealed the taking or converting of the money received, as the money in this case was, and promises to return it, does not make the act lawful or any the less embezzlement under the statute. The trial court clearly misunderstood the law as applied to the facts in this record, and erroneously advised the jury to return a verdict of not guilty. A conviction and punishment should have followed rather than an acquittal from the facts before us. If every person in this

state, who occupies a confidential relationship as agent to other persons, should be permitted to use and convert the money of his principal, that might come into his hands, to his own use, and then escape punishment simply because he admitted using the money and promised to pay it back, the embezzlement statute had just as well be erased from the books, and the courts rallied to the support and condonement of such conduct. There will be some misappropriation of trust funds with a rigid enforcement of the law; and when such is the case, the sooner and swifter the punishment, the better for the public welfare. This court declines to approve a rule which places a premium on crookedness. The indiscreet handling of money by those who, by reason of a confidential relationship, come into possession of funds of another and appropriate the same to their own use is not to be tolerated, and the guilty permitted to escape punishment. A man who appropriates to his own use the funds of another, received in a trust capacity, is no less a thief under the law than one who in the nighttime purloins his money or other personal property and sells the same for his own benefit. Such conduct is to be condemned rather than condoned. The action of the trial court in the case at bar was error prejudicial to the rights of the state. The contention of the county attorney at the trial and of the state on appeal is sustained.

DOYLE and FURMAN, JJ., concur.

# METROPOLITAN BLDG. CO. v. KING COUNTY et al.

(Supreme Court of Washington. Feb. 7, 1913.)

## TAXATION (§ 349\*)—DEDUCTION OF INDEBTEDNESS.

Where a leasehold interest in land is subject to an indebtedness exceeding its value, it cannot be assessed for taxation at its value if there was no indebtedness, but its value is to be measured both by its burdens and its benefits.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 590; Dec. Dig. § 349.\*]

En Banc. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the Metropolitan Building Company against King County and others. From a judgment, the county appeals. Affirmed.

John F. Murphy and Robert H. Evans, both of Seattle, for appellant. Douglas, Lane & Douglas and Kerr & McCord, all of Seattle, for respondent.

GOSE, J. This is an appeal from a judgment of the superior court of King county, modifying an assessment upon a leasehold interest in the old university grounds in the

city of Seattle. The case is not a stranger here. See *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114, Ann. Cas. 1912C, 943; *Id.*, 64 Wash. 615, 117 Pac. 495. The law of the case was settled upon the first appeal. The second appeal presented substantially the same facts as this appeal. On the first appeal the judgment reducing the assessment on the leasehold for the year 1909 from \$480,000 to \$96,000 was affirmed. In the second case the trial court reduced the 1910 assessment from \$810,000 to \$225,000. On appeal this court reduced it to \$90,000. The assessor valued it at \$2,000,000 for the year 1911. This valuation on the adopted basis of 45 per cent. gave it an assessed valuation of \$900,000. Despite the protest of the respondent, the board of equalization confirmed the assessment. The case was taken to the superior court by certiorari, where the valuation was reduced to \$200,000, and the assessed valuation was placed at \$90,000. The county has appealed.

The lease was made for a term commencing February 1, 1907, and ending November 1, 1954. The rent reserved is \$15,000 per annum to November 1, 1912; \$40,000 per annum for the succeeding 10 years; \$80,000 per annum for the next succeeding 10 years; \$100,000 per annum for the next succeeding 10 years; and \$140,000 per annum for the remainder of the term, all payable quarterly in advance. When the lease was made, the property was many feet above grade and unimproved. Up to March 1, 1911, the respondent had issued and sold its mortgage bonds to the amount of \$2,267,000. Of this sum it had expended \$2,080,000 in productive improvements and \$210,000 in nonproductive improvements, consisting of grading the property and the street, paving, sidewalks, water mains, sewer and gas mains, light, heat, power, etc. In giving the figures we have used round numbers. Both the fee and the improvements belong to the state. The gross income from March 1, 1910, to March 1, 1911, was \$329,000. The gross expenses, not including taxes, during the same period, was \$341,000.

The testimony shows that the leasehold measured by its burdens and benefits has no real market value, but that relieved of its burdens and measured only by its benefits it is of large value. Counsel for the appellant framed his hypothetical questions so as to ask the witnesses "to assume that there is no indebtedness against it," meaning the leasehold interest. The assumption belies the facts. As we have stated, the state owns both the fee and the improvements subject only to the right of user in the respondent. The leasehold is burdened by a debt exceeding the value placed upon the lease by most of the witnesses. A purchaser of the lease would necessarily stand in the shoes of the respondent. He would take what it has with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



all its burdens, no more and no less. We had supposed that the former appeals fixed the standard of estimating the value. In the first appeal we said that the value of the leasehold interest is its actual value in money on the date of the assessment, and "the value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity of selling, and to one who is desirous of buying but is under no compulsion to do so." In the second appeal we said: "While it is true that appellant has paid a considerable sum for the lease, has made valuable improvements, has issued bonds in the sum of \$1,844,000, and hopes to realize at some time in the future a profit on its investment, it indisputably appears that at the present time appellant is incurring a heavy loss which is constantly increasing, and that its entire enterprise may and probably will prove a financial failure unless growth of the city, improvement in the immediate locality, and material advancement in rental values cause the lease to appreciate in value. Should such an appreciation occur, an increased assessed valuation may be then legitimately imposed for the purposes of taxation." The last words quoted were prophetic. The situation has not changed. The law of common honesty applies to the taxing power with the same force that it applies to an individual. To approve the equalized value would be virtual spoliation. We say here, as we have said before, that the value of the leasehold interest is to be measured both by its burdens and its benefits. It cannot be otherwise. A purchaser would necessarily take it cum onere.

The judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, PARKER, ELLIS, MORRIS, and MAIN, JJ., concur.

#### In re TWENTY-SECOND AVE. SOUTH-WEST.

#### CITY OF SEATTLE v. MOELLER.

(Supreme Court of Washington. Feb. 13, 1913.)

#### 1. HIGHWAYS (§ 1\*)—PRESCRIPTION—ESSENTIALS.

To establish a highway by prescription, the public use must be general, uninterrupted, and continuous for 10 years under a claim of right.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 2. HIGHWAYS (§ 6\*)—PRESCRIPTION—INTERUPTION OF USE.

Where, before a strip of land had become a highway by prescription, the owner placed fences across it, with gates therein for the public to pass through, and posted notices declaring it to be private property, the immature

prescriptive right was destroyed, since any unambiguous act evidencing the owner's intention to exclude the public from the uninterrupted use of the highway destroys such right.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.\*]

#### 3. ESTOPPEL (§ 68\*)—EXISTENCE OF HIGHWAY—PETITION TO VACATE.

A petition to the county commissioners for the vacation of certain portions of a highway did not estop one of the petitioners to deny that one of such portions was a public highway, or to assert his title thereto.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Proceeding by the City of Seattle against William Moeller for the improvement of Twenty-Second Avenue Southwest, in the City of Seattle. From a judgment setting aside the assessment roll, the city appeals. Affirmed.

Jas. E. Bradford and Wm. B. Allison, both of Seattle, for appellant. Bostwick & Steele, of Seattle, for respondent.

MAIN, J. This is an appeal by the city of Seattle from a judgment of the superior court of King county, setting aside an assessment roll for local improvement district No. 2497, for the improvement of Twenty-Second avenue southwest. The property within the confines of the district is owned by William Moeller, the Coryell Investment Company, a corporation, and the Westerman Iron Works, a corporation. There was exempted and excepted from the assessment roll a strip of land 60 feet wide extending across the entire width of the district. The sole question involved in this appeal is whether this 60-foot strip is private property or a public highway.

Some time during the year 1875, certain persons living in proximity to the property now confined within the limits of the assessment district, and others living more remote therefrom, desired that a county road be laid out and established, starting from a certain fir tree located on what is known as Alki Point, and extending by a somewhat circuitous route in a general southeasterly direction toward the then suburb of the city of Seattle, known as Georgetown. To this end a petition was prepared and presented to the board of county commissioners of the county of King, requesting that road No. 51 be laid out and established over the route indicated. The county commissioners took no steps to acquire title to the property over which the proposed highway should pass, either by a condemnation proceeding or by receiving conveyances therefor. At least as to that portion of road No. 51 involved in this proceeding, nothing further appears to have been done until the fall of the year 1895, when it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was opened for traffic; and from that time until August, 1904, more or less traffic passed over that portion of the route of the proposed highway which is involved in this proceeding. August 12, 1904, the respondent, William Moeller, purchased property which he now owns within the district, and immediately thereafter began the erection of a house thereon, which stood in the path of the highway; and he also erected, or caused to be erected, fences across the proposed highway, permitting the public, however, to pass through by means of gates. During the earlier part of the year 1904, notices had been posted upon the property in question, which declared it to be private property. On March 17, 1905, the respondent, Moeller, together with a number of other persons owning property in the vicinity, and certain persons who were not property owners therein, petitioned the county commissioners for the vacation of certain portions of proposed road No. 51, including that portion involved in this proceeding. The petition was denied.

During the year 1907, the boundaries of the city of Seattle were extended so as to include the property now within assessment district No. 2497. The strip of land exempted from assessment by the assessment roll is that over which proposed road No. 51 passed. This 60-foot strip has continuously been assessed for general taxes; and such taxes have been paid. It has also been assessed by the city of Seattle, a number of times, for certain local improvements.

In the trial court, the parties to this proceeding entered into a stipulation by which the issues submitted to that court were confined to one question, and that is as to whether or not the 60-foot strip within the assessment district, which was exempted from the assessment, is a street or highway, or private property. That portion of the stipulation which is pertinent to the inquiry here is as follows: "It is further stipulated and agreed that, if it be established by the city of Seattle, upon the trial of this cause, that the said 60-foot strip of land omitted from said assessment roll is a public highway and thoroughfare, then the assessment roll shall be confirmed; but if the city of Seattle shall fail to establish the said 60-foot strip of land as a public highway and thoroughfare, then said assessment roll shall be set aside and returned to the proper authorities of the city of Seattle, to be recast in accordance with the direction of the court, to include therein the said 60-foot strip, or such portion thereof as shall not be established as public highway or thoroughfare." The trial court found it to be private property, and directed that the assessment roll be recast. The city appeals.

[1] The appellant's first contention is that the 60-foot strip of land in question became a public highway by general, uninterrupted, and continuous public use. In order to establish a highway by prescription, it is necessary that the public use must be general,

uninterrupted, and continuous for a period of 10 years under a claim of right. This court, in *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204, states the principle in these words: "To establish a highway by prescription, there must be an actual public use, general, uninterrupted, and continuous, for 10 years under claim of right."

[2] The undisputed facts in this case are that the public use of the 60-foot strip in question began during the fall of the year 1896, and was interrupted during the month of August, 1904, provided the placing of the fences across the 60-foot strip, with gates placed therein for the public to pass through, and the posting of notices declaring it to be private property, are sufficient to arrest the running of the prescriptive right. On this question the law appears to be that any unambiguous act by the owner, which evidences his intention to exclude the public from the uninterrupted use of the highway, destroys the immature prescriptive right. *Jones v. Davis*, 35 Wis. 380; *Shellhouse v. State*, 110 Ind. 510, 11 N. E. 484. In *Shellhouse v. State* there is found this paragraph: "A highway, from its very nature, must be open to the public use day and night, and any unambiguous act by the owner, such as erecting gates or bars over the highway, which evidences his intention to exclude the public from the uninterrupted use of the highway, destroys the prescriptive right, unless it had fully matured before it was interrupted." We think that the posting of notices and the erection of the fences and gates by the respondent, Moeller, destroyed the prescriptive right in the 60-foot strip in question, for the reason that such right had not fully matured when the intention to exclude the public from the uninterrupted use of that portion of the highway was manifested.

[3] The appellant also contends that the respondent, Moeller, is estopped from asserting that the 60-foot strip is not a public highway, by reason of the petition which he and others filed with the county commissioners on the 17th day of March, 1905, praying that this strip, together with other portions of the highway, be vacated. We have examined this petition with care, and find nothing in it to justify such a conclusion. The necessary elements of an estoppel are not present. The appellant in its brief cites no authority in support of this contention; and, by an independent investigation, we have discovered none. The appellant in its brief argues at length and cites numerous authorities to the effect that a highway, once established, cannot be vacated, except in the manner provided by statute. The vice in this argument, as applied to the present case, is that it assumes a fact which the undisputed evidence in the record negatives. This argument is based on the assumption that a highway had become fully established by prescriptive right, while the facts are

that the prescriptive right was arrested before it matured.

The judgment is affirmed.

**MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.**

### SCOTT v. GUIBERSON.

(Supreme Court of Washington. Feb. 1, 1913.)

#### 1. HOMESTEAD (§ 187\*)—JUDICIAL SALES—CONFIRMATION—MATTERS DETERMINED.

Under Rem. & Bal. Code, § 591, providing that the only objections to be considered upon the confirmation of a judicial sale are such as go to the regularity of the proceeding, and since the inquiry upon confirmation is in a sense collateral, and may involve the rights of third parties who are not before the court, a homestead cannot be adjudicated, on motion to confirm, in unoccupied land on a mere declaration of intention; the hearing on confirmation not being to try title, but being limited to the objects covered by the statute.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 356; Dec. Dig. § 187.\*]

#### 2. JUDICIAL SALES (§ 31\*)—CONFIRMATION.

An irregularity rendering a judgment void does not require the court to refuse to confirm a judicial sale, which in itself is regular.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.\*]

#### 3. HOMESTEAD (§ 200\*)—APPRAISEMENT—JUDICIAL SALES.

Laws 1895, c. 64, § 9 et seq., relating to appraisement, cover only those cases where an execution is levied upon an existing homestead, and do not require an appraisement where no homestead was asserted or in existence at the time of the levy, and no declaration of intention had then been filed; the object of such statute being to provide for a levy upon the excess value of property claimed to be exempt, and not to try title.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 372-377; Dec. Dig. § 200.\*]

Department 1. Appeal from Superior Court, Thurston County; John B. Yakey, Judge.

Action by John H. Scott against O. H. Guiberson. From an order confirming an execution sale under a judgment for plaintiff, defendant appeals. Appeal dismissed, and judgment affirmed.

Edwin F. Masterson, of Tacoma, and Allen Weir, of Olympia, for appellant. Thomas M. Vance and Harry L. Parr, both of Olympia, for respondent.

CHADWICK, J. Plaintiff, Scott, secured a judgment against the defendant, Guiberson. Thereafter Guiberson came into a devise of some real property situate in Pierce county. Execution was levied upon this property, which was wild, unoccupied, and uninclosed. Thereupon defendant filed a declaration of homestead, saying: " \* \* \* Said land is at the present time in a wild and uncultivated condition, and there are no buildings of any character on said land; that as rapidly as my means will permit I am

placing said land under cultivation, and intend to erect thereon a residence suitable for the occupancy of myself and family; \* \* \* that it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house to be erected thereon, and its appurtenances, as a homestead." The sheriff of Pierce county proceeded to and did sell the property, whereupon defendant objected to the confirmation of the sale.

The issue presented upon confirmation was whether a homestead can be claimed in unoccupied land by a mere declaration of intention. It has been held in *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054, *Harding v. Atl. Trust Co.*, 26 Wash. 536, 67 Pac. 222, *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737, and *Boothe v. Summit Coal Mining Co.*, 59 Wash. 610, 110 Pac. 536, that the confirmation of an execution sale of realty, after it has been claimed as exempt as the homestead of the judgment debtor, is not an adjudication upon the question of the homestead claim, nor does it conclude the right to question the sale upon collateral attack, for the reason that the only question that can be determined under the statute is the regularity of the proceedings leading up to and including the sale. Plaintiff accordingly asks for an order of dismissal and affirmation of the judgment of the lower court. On the other hand, defendant insists that we have held, in *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. Rep. 1022, that the right of homestead may be adjudicated upon confirmation; that an appeal may be taken from the order of confirmation; and that we will go beyond the regularity of the proceedings and inquire into the title to the property. We confess to some confusion in reconciling this case with our earlier decisions and the later case of *Boothe v. Summit Coal Mining Co.* The judgments being valid, it is not made clear why there should be an appeal in one case and not in the others; consequently we shall inquire briefly into the underlying principle governing cases of this kind.

[1] There are very substantial reasons why the cases first referred to should be adhered to. The first and most important is that the Legislature, with seeming design, has said that the only objections to be considered upon the confirmation are such as go to the regularity of the proceeding. Rem. & Bal. Code, § 591. There can be no doubt of the construction put upon the statute in the *Krutz Case*, for the court is directed to confirm the sale, notwithstanding objections that do not go to the regularity of the proceeding; and further that, if the proceeding is irregular, the court is directed to disallow the motion and direct the property to be resold. The statute describes the duty of the court in the particular proceeding. Again, the inquiry upon confirmation is in a sense

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

collateral, and may involve the rights of third parties who are not before the court. This being true, it has been held, with one accord, that the sale of a homestead passes neither title nor the right of possession (21 Cyc. 631); and this is the logic of our own cases, when it is said that the homestead claimant is not concluded of his right by the order of confirmation. Neither has any procedure been devised by the Legislature. A court is at a loss to know whether to proceed to hear the contention upon affidavits, or to frame an issue and take testimony on the law or equity side of the court. The futility of proceeding to the conclusion of either party, or going beyond the statute, is well illustrated by the record in this case. We have here only a claim of homestead in wild, unoccupied land. The claimant says he intends to make it his home. This may be true; but should he be permitted to conclude the right of his adversary upon such a showing? Must there not be some evidence to sustain the declaration; some showing of a movement toward the land claimed as a homestead? The court should not bind the parties upon such a record, since it may be that, by the time the question can be heard in a proper proceeding, the avowed intention may be abandoned; for unquestionably, if we are to sustain defendant's contention that the homestead may be eluded by a declaration of intention, we should also hold that the land must be occupied within a reasonable time thereafter. To hold to the theories advanced by the defendant would be to declare a rule which would allow a stranger to the record to appear and resist confirmation and, upon hearing, to set up an independent title and demand a final adjudication. More might be said; but this is enough to excite an appreciation of the reason for the rule that hearings on confirmation are not for the purpose of trying title, but are limited to the objects covered by the statute.

The Waldron Case seems to have proceeded upon the theory that the right to be heard could not be abridged as to either time or place. This is unsound, for remedies are wholly with the Legislature, and, in so far as the rights of defendant are concerned, they have not been denied. The Waldron Case purports to be based upon *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259, and *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046. In the *Field* Case the question before us was not argued in the briefs; nor does it seem to have been reflected on by the court. However, admitting that the question was decided, and that the case is in point, it cannot stand as an authority in the light of the later cases. The *Whitworth* Case was an independent action. The court held, and properly so, that, notwithstanding confirmation, the sale of a homestead was void. Our question was not involved or discussed. As said in the *Waldron* Case, if the homestead is

sold, it is a void sale; but it does not follow that the courts can resort to the general principles of equity, or try collateral questions of law, under a statute which says that, notwithstanding any objections, the court shall allow the order confirming the sale if the proceedings are regular—that is, in keeping and in line with the procedure in like cases. The confusion in our cases comes from a failure to differentiate between a judgment and sale.

[2] If the judgment is void, the court might, as suggested in *Krutz v. Batts*, refuse a confirmation—that is, an irregularity in the proceeding—but the sale may be regular and subject to confirmation, although eventually held to be void. This is the meaning of the *Boothe* Case, wherein it is said that an order of confirmation can “be successfully resisted where it was made to appear that the order of sale on which it is based was void—this on the principle that a void order or judgment may be questioned at any time—but the cases first cited [being the *Krutz* and other cases] still stand as authority to the effect that a valid or voidable order of sale cannot be questioned on an appeal from the order of confirmation.” This is the final expression of this court; and it unquestionably states the law. Mr. Freeman, in his valuable work on Executions, concludes as we do, saying: “Whether the exemption of the property is a proper subject of consideration upon motion to confirm an execution sale is a question which has been but infrequently considered. If a sale may be refused confirmation on the ground that the property sold was exempt therefrom, the granting of an order of confirmation might involve an adjudication, actual or presumed, that the property sold was not exempt from such sale. We think the better opinion is that the right of exemption, where claimed, should be left for determination in some subsequent action to recover the property sold, or to otherwise determine its title, and hence that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead, and was therefore not subject to execution sale.” *Freeman on Executions* (3d Ed.) § 311.

[3] The point is made that, there being no showing of an appraisal of the homestead, it is such an irregularity as will avoid the sale. The statute covering appraisal (*Laws 1895*, p. 109, § 9 et seq.) covers only those cases where an execution is levied upon an existing homestead, the value of which may be contested by the execution creditor. Here there was no homestead asserted or in existence at the time of the levy, nor had the declaration of intention been filed. The execution was regular, and the land subject to levy. There was no irregularity. The object of the act of 1895 was not to try title, but to provide for a levy upon the excess

value of property claimed as exempt; the exemption being admitted. This question may occur later; but it is not before us now.

For these reasons, the appeal is dismissed, and the judgment of the lower court is affirmed.

MAIN, PARKER, MOUNT, and GOSE, JJ., concur.

#### GAUNTT v. CHEHALIS COUNTY.

(Supreme Court of Washington. Feb. 13, 1913.)

#### CONTRACTS (§ 196\*)—CONSTRUCTION—ARCHITECT'S CONTRACT—"BUILDING."

"The building" in a contract of county commissioners with an architect to draw plans for a courthouse, providing that, if contract for building be not let, the architect shall receive \$1,000 only for plans and specifications, same to be applied as part payment in the event of "the building" going ahead at some future time, refers to the building to be erected according to such architect's plans; so that he is entitled to no compensation further than the \$1,000, the courthouse having been constructed according to plans subsequently made by another.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 856-860; Dec. Dig. § 196.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 889-892; vol. 8, p. 7593.]

Department 2. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge.

Action by Newton C. Gauntt against Chehalis County, by its Board of County Commissioners. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Abel, Arthur I. Moulton, both of Portland, and T. H. McKay, of Aberdeen, for appellant. Wm. E. Campbell, of Hoquiam, and J. E. Stewart, of Aberdeen, for respondent.

MAIN, J. This is an action on a contract to recover money alleged to be owing, due, and unpaid. On November 13, 1906, Gauntt, the appellant, entered into a written contract with the respondent, the board of commissioners of Chehalis county. Under this contract, the appellant was to prepare plans and specifications for a courthouse building, to be erected at Montesano, Wash., and deliver them to the respondent on December 3, 1906. On or prior to this date the plans and specifications were prepared and delivered as required by the contract. At the time of their delivery the respondent paid to the appellant the sum of \$1,000, and by resolution declared its intention of taking no further immediate action relative to the erection of the building. The compensation of the appellant as specified in the contract was to be 2½ per cent. of the cost of the proposed building for the plans and specifications, and 2½ per cent. additional for supervising the erection thereof, the total cost of which was not to exceed the sum of \$100,000.

That portion of the contract the construction of which is involved in this proceeding is as follows: "It is understood and agreed by both parties to this contract that, should contract for building not be let, then the party of second part is to receive the sum of one thousand dollars (\$1,000.00) only for plans and specifications, same to be applied as part payment in the event of the building going ahead at some future time." On April 6, 1909, the respondent advertised for plans and specifications for a modern fireproof courthouse building. In response to such advertisement, and on May 3, 1909, the appellant, one Watson Vernon, and a number of other architects submitted plans and specifications. On July 6, 1909, the plans and specifications submitted by Vernon were accepted, and, pursuant to these plans, a courthouse was subsequently erected, the contract therefor being let on November 5, 1909. Subsequent to the completion of the building according to the Vernon plans and specifications, and prior to the institution of this action, the appellant presented to the respondent a claim for the sum of \$3,400. Of this amount \$1,500 was claimed as the balance due for the plans and specifications, and \$1,900 as the profits which the appellant would have made from the superintendence of the erection of the building. The claim was disallowed. Thereupon this action was begun. During the progress of the trial in the superior court, the appellant offered oral testimony to explain the terms of the contract, and also to show that the respondent at no time subsequent to November 13, 1906, had abandoned its intention of erecting the courthouse. To these offers of proof the respondent objected. The objections were sustained by the trial court. At the conclusion of the appellant's evidence, the respondent challenged the legal sufficiency of the evidence, and his challenge was sustained by the court. The action was dismissed. The cause is brought here on appeal.

The appellant assigns as error the rulings of the trial court in refusing to permit the introduction of oral testimony (1) to explain the terms of the written contract, and (2) that the respondent had at no time since November 13, 1906, abandoned its intention to erect a courthouse building. The ultimate question to be determined upon this appeal is, What is meant by the term "the building" in the paragraph of the contract above quoted? The appellant contends that it means any courthouse building which the respondent might thereafter erect, and that oral evidence was admissible to show that this was the intention of the parties to the contract. With this we do not agree. The contract is plain and free from ambiguity, and its meaning must be determined from the language used. The term "the building," in the paragraph of the contract quoted, refers to the building to be erected under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plans and specifications prepared by the appellant. It does not refer to a building that might be erected according to plans and specifications prepared by any other architect. The contract does not obligate the respondent to erect a building according to the plans and specifications of the appellant. The obligations of the respondent under the contract were fulfilled when the appellant was paid the \$1,000, unless it should subsequently erect a building according to the appellant's plans and specifications. The evidence shows that this it did not do.

The evidence offered to show that the respondent had at no time since the execution of the contract with the appellant abandoned its intention to erect a courthouse building was clearly immaterial. Whether it had or had not abandoned such intention would neither enlarge nor minimize the rights of the appellant under the contract.

The judgment is affirmed.

CROW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

#### WILE v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. Feb. 8, 1918.)

##### 1. CARRIERS (§ 298\*)—INJURIES TO PASSENGER—JERKS AND JARS.

A passenger on a freight train cannot recover for injuries caused by a jolt or jar, without showing that it was something more than the ordinary jerking or jolting necessarily incident to the operation of freight trains, or that it resulted from defects in the equipment or roadbed, or from negligence, or other causes showing that it was an unusual happening.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.\*]

##### 2. CARRIERS (§ 280\*)—INJURIES TO PASSENGER—DEGREE OF CARE REQUIRED.

The degree of care demanded from a carrier toward a passenger, whatever the character of the train on which he rides, is the highest degree of care consistent with good railroading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1093–1106, 1109, 1117; Dec. Dig. § 280.\*]

##### 3. CARRIERS (§ 298\*)—INJURIES TO PASSENGERS—JERKS AND JARS.

A passenger on a mixed train assumes the usual and incidental jerks necessary to its operation, but not the extraordinary jerks and jars resulting from negligence of those operating the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.\*]

##### 4. CARRIERS (§ 316\*)—PASSENGER'S ACTION FOR INJURIES—BURDEN OF PROOF.

In a passenger's action for injuries caused by a jolt or jar of the freight train on which he was riding, it will be assumed that it was one of the ordinary jerks assumed as an incidental risk of the journey, and not one caused by negligence, in the absence of evidence of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283–1294; Dec. Dig. § 316.\*]

##### 5. CARRIERS (§ 316\*) — PASSENGER'S ACTION FOR INJURIES—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not apply wherever a passenger on a railway train is injured, but only where the act causing the injury is of such a character that it would not ordinarily happen with due care; and hence does not apply to an injury from a jerk or jar of a freight train, in the absence of proof of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283–1294; Dec. Dig. § 316.\*]

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by Stewart M. Wile against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

C. H. Winders, of Seattle, for appellant. Neterer & Pemberton, of Bellingham, for respondent.

MORRIS, J. Damages are asked for in this case, based upon the claim of respondent that he was injured by being thrown against the corner of a seat while a passenger upon one of appellant's mixed trains. The allegation of negligence is that "defendant so negligently and carelessly operated the engine detached from the said car by backing and bumping same against the car on which plaintiff was riding while said car was standing still, with great force, and such force as to move the car with such suddenness and force as to throw the plaintiff down." The claim of error is that the evidence is insufficient to sustain this allegation, and that appellant's motion for judgment notwithstanding the verdict should have been granted.

[1] The train upon which respondent took passage was composed of 80 freight cars and a passenger car. Respondent was lame and walked with a limp; one of his legs being shorter than the other. He generally carried a cane or stick to assist him in walking. When the train arrived at Wheeler, and after it had been standing some time, respondent arose from his seat and started to walk to the other end of the car to obtain a drink of water. He did not take his stick with him, but left it in his seat. He had taken only a few steps when, he says, "there came in from in front a bump which took me about three or four feet off my feet, and then I went to catch myself, and I fell over." He says again, in response to a question as to the force of the jolt: "Well, there was force enough to take me about four feet, and then the length of myself." There is no other testimony in the record as to the jerk or jolt to which respondent attributes his fall. He says that the car in which he was riding frequently received the same kind of a jolt or jar, both before and after the one which caused his fall. There was no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

testimony showing other facts incident to the occurrence, such as any unusual disturbance; nor did respondent attempt to show that the jolt or jar was greater than is ordinarily incident to the operation of freight trains with passenger accommodations attached. The law, as established by a long list of authorities in cases of this character, will not support a recovery until there is some evidence to justify a finding by the jury that the thing complained of was something more than the ordinary jerking or jolt necessarily incident to the operation of freight trains, or results from defects in equipment or roadbed, negligence of train operations, or other causes leading to a belief that it was an unusual happening, and one which could not be said to be the ordinary and usual disturbance caused by the handling of freight and the backing and filling incident to the work performed by trains of such a character.

"It is a matter of common knowledge that jolts and jerks are usual incidents in the operation of freight trains; and therefore negligence cannot be inferred from the mere fact that a passenger's injury resulted from a jar caused by the sudden stopping of such a train. In other words, a jar or jerk in a freight train is not, of itself, evidence of negligence." 2 White or Personal Injuries on Railroads, § 670. In the preceding section the same author says: "A railroad company undertaking to carry passengers, for hire, upon freight trains owes them the same duty, as to care, which the law exacts of it as to passengers transported on passenger trains; the only difference being that the passengers on freight trains assume those dangers or perils which are necessarily incident to that mode of conveyance. \* \* \* A passenger on a freight train is charged with knowledge of and assumes the increased hazards incident to that mode of travel, and he accepts passage with notice that the train is not equipped with all the safeguards provided for passenger trains, and the risk of injury due to this fact." Elliott on Railroads states the same rule in volume 4, § 1629, and says: "The duty of the company is, therefore, modified by the necessary difference between freight and passenger trains and the manner in which they must be operated; \* \* \* nor is the company necessarily negligent because in starting, or in taking up or letting out slack there is more or less of a jerk or sudden motion of the cars." Thompson, in volume 3, § 2903, of his Commentaries on the Law of Negligence, announces the same rule. A late case reviewing many of the authorities in cases of this character is *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, where, after stating the rule as derived from the many authorities reviewed, in a case where the injured person, while standing with his hands against the casings of the rear door of the caboose at-

tached to a freight train upon which he had taken passage, was thrown down and injured by the sudden stopping of the train with a jar such as to cause him to leave his feet, it was held there could be no recovery. There was in that case, as in this, nothing to show that the jolt or jerk was anything more than was to be anticipated in a train of this character. It is there pointed out as well established that, before a recovery can be sustained in these cases, there must be some evidence to justify the conclusion that the jolt or jar was of such unusual severity that it was not attributable to the jerking and jolting incident to the operation of freight trains. There are many cases in which recovery has been sustained for injuries resulting from jerks, jars, and jolts on freight or mixed trains; but in all of these cases there was evidence that the cause of the injury was other than a necessary incident to the careful operation of such trains, and the facts and circumstances surrounding the injury were such as to speak negligence.

[2-4] The rule for which we contend does not lessen the degree of care demanded by the law to the passenger on a railway train. It is the same, whatever be the character of the train upon which he rides. The life and safety of the passenger on the freight train is as valuable to him as that of his more fortunate brother, who rides upon the most elaborate train de luxe. The duty in each case is the highest degree of care consistent with good railroading. The law cannot, however, blind itself to the common facts of everyday experience; and it takes knowledge of the fact that with the highest care known to modern railroading the best-built Pullman or drawing room car will lurch and sway, bringing a risk of injury to the passenger, which he assumes, because scientific railroading knows no way to avoid it. *Valentine v. Northern Pacific*, 126 Pac. 99. So, for the same reason, the passenger on the freight must assume the risk of injury from causes that are incident to the operation of such trains; and when he pleads an injury as the result of negligence in the operation of such a train he must prove it by going farther than saying, while he was walking or standing in the car, a sudden jerk or jolt threw him to the floor. Because of his crippled condition, respondent usually carried a stick to aid him in walking. When he arose to walk to the water tank, he left his stick in his seat. It is, we think, evident that, under these circumstances, an ordinary jerk or jolt would cause him to lose his equilibrium. We agree with counsel for respondent that, while it is the law that one who rides upon a mixed train assumes the usual and incidental jerks necessary in the operation of the train, he does not assume the extraordinary jerks and jars resulting from the negligence of those operating the train. There is, however, no evidence in the case that the jerk causing respondent's in-

jury was of the latter kind; and until there is some evidence of that fact the law will assume that, since freight trains will jerk and jar, when one testifies he was injured by a jerk or jar on such a train, without going farther and coupling it with some negligent act, the jerk was the ordinary jerk assumed as an incidental risk to such a journey.

[5] It is also contended by respondent, and the court below in effect so charged the jury, that the rule of *res ipsa loquitur* applies to cases of this character, and that it was incumbent upon appellant to show its freedom from negligence. Such a rule, admitting its force in a proper case, has no application here. It can only be applied under circumstances where the act itself is of such a character that with due care it would not ordinarily happen. *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 433. So far as we know, it has never been applied to a case where the injury resulted from an ordinary incident. As applied to railways, it has been held that, where the injury was the result of a collision, derailment, or some defect in the roadbed, cars, or equipment of the train, the rule under discussion was properly applied; but it is not the law that, where a passenger upon a railway train is injured, with no showing of some facts of the nature of those above referred to, there is a legal presumption of negligence, casting upon the carrier the burden of disproving it. *Allen v. Northern Pac. Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *De Yoe v. Seattle Electric Co.*, 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133. See, also, *St. Louis & S. F. Ry. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, where many cases supporting the rule as here announced are cited.

For these reasons it was error to deny appellant's motion for judgment notwithstanding verdict. The judgment is reversed and the cause remanded, with instructions to dismiss.

MOUNT, MAIN, and ELLIS, JJ., concur.

#### STATE v. COHEN.

(Supreme Court of Washington. Feb. 13, 1913.)

#### CRIMINAL LAW (§ 1171\*)—TRIAL—CONDUCT OF COUNSEL—HARMLESS ERROR.

Where counsel for the prosecution, in looking for a copy of the information, may have exposed a picture of defendant, claimed to have been taken while he was confined in the penitentiary, to the notice of any one observing him, but it did not appear that any of the jurors saw it, or that they would have known what it was had they seen it, or that there was

any purpose to exhibit it to the jury, the circumstance was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

Department 2. Appeal from Superior Court, Pierce County; William O. Chapman, Judge.

Meyer Cohen was convicted of grand larceny by embezzlement, and he appeals. Affirmed.

Louis I. Lefebvre, of Tacoma, for appellant. J. L. McMurray, A. O. Burmeister, and G. C. Nolte, all of Tacoma, for the State.

MORRIS, J. Appeal from a conviction of grand larceny by embezzlement. Many errors are assigned in the brief; but, on the oral argument, counsel for appellant called our attention to but three upon which he relies for a reversal. The first of these is that the court erred in denying a challenge for cause as against a juror on his voir dire examination. The claim is made that the examination of the juror disclosed that he was biased in favor of the state, and not possessed of that impartial and unprejudiced mind required by the law of trial jurors. The examination of this juror takes up 12 pages in the record; and no fair statement of his mental condition upon the point to which appellant takes exception can be given without reciting his entire examination, as every answer is more or less qualified by what precedes or follows it. The main attack upon the juror's mental condition is based upon his statement that he considered the arrest of the appellant as a "suspicious circumstance." It is apparent, from the whole examination, that the juror meant by this expression that he assumed, from the fact that an information had been filed upon which appellant had been arrested and brought to trial, that there were circumstances which, in the opinion of the officers of the law, would justify such a course. He realized, however, that "a man could be arrested and not be guilty"; and before he would convict he would require the state to prove guilt beyond a reasonable doubt. Upon the whole examination, as disclosing the mental attitude of the juror, and the degree and character of proof he would require before he would convict the appellant of the crime charged, we are of the opinion that no error was committed in the denial of the challenge.

The next error urged is that counsel for the state, in addressing the jury, made certain statements, not justified by the record, which were highly prejudicial. We will not review these statements, as it would take too much time and space to set forth that part of counsel's address of which they form a part. We, however, have carefully considered them in connection with appellant's criticism, and do not believe his claim of error as to these matters is well founded.

It is next urged that one of the deputies

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the prosecuting attorney, assisting in the trial, exhibited to the jury, during the progress of the trial, a picture of appellant claimed to have been taken while he was an inmate of an eastern penitentiary. The court's attention was called to this charge, and the court dismissed the jury and made a full investigation into the matter, taking testimony of those who claimed knowledge of the matter. We agree, with the conclusion reached by the court, that nothing more is shown than that the assisting counsel, in going through his files seeking a copy of the information, may have uncovered this picture to the notice of any observing him. This occurred during the examination of one of the witnesses by other counsel for the state. It does not appear that any of the jurors saw the picture, or that they would have had any intimation of what it was, had they seen it. Neither does it appear that there was any design or purpose to exhibit the picture to the jury. We find nothing here to sustain the claim of error, or that there was in the circumstance anything which had, or had a tendency to have, the slightest effect upon the jury in determining the guilt or innocence of the appellant.

Finding no error in the record, the judgment is sustained.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

#### HUTCHINSON et al. v. CITY OF SPOKANE et al.

(Supreme Court of Washington. Feb. 8, 1913.)

#### MUNICIPAL CORPORATIONS (§ 358\*)—PUBLIC IMPROVEMENTS — PERFORMANCE OF CONTRACTS—ACCEPTANCE—EFFECT.

Where a contract for a street improvement vested in the board of public works and city engineer the power to determine all questions relating to its performance, and the contract was substantially complied with, the decision of those officials that the work was properly performed was final and concluded all interested parties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. § 358.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Action by R. A. Hutchinson and others against the City of Spokane and another. From an order of dismissal, plaintiffs appeal. Affirmed.

Peacock & Ludden, of Spokane, for appellants. A. M. Craven, W. E. Richardson, and Graves, Kizer & Graves, all of Spokane, for respondents.

CROW, C. J. This action was commenced by 24 property owners within an assessment district to enjoin the city of Spokane from collecting a special assessment for the grad-

ing and paving of Arthur street and Newark avenue. The Spokane Asphalt Macadam Paving Company, a corporation, the contractor, with leave of court, intervened and joined in defending the action. From an order of dismissal, the plaintiffs have appealed.

The record shows that, with two exceptions, the owners of all property abutting on Arthur street and Newark avenue between Ivory and Third avenues petitioned for the improvement, using a printed form which reads as follows: " \* \* \* The undersigned owners of property fronting upon Newark and Arthur between Ivory and Third Ave. \* \* \* respectfully petition your honorable body to cause said streets to be improved within said limits at the expense of the owners of the property, in accordance with section 61, City Charter, said improvements to consist of grading the same to the established grade, the full width thereof, and by building ——— sidewalks on both sides thereof; said grade to be as per diagram, to be made by the city engineer." At the time the petition was filed, a typewritten slip had been pasted over that portion of the above excerpt following the words "City Charter," causing the petition to read as follows:

" \* \* \* Respectfully petition your honorable body to cause said streets to be improved within said limits at the expense of the owners of the property, in accordance with section 61, City Charter, said improvements to consist of paving same with 'Oileroid' pavement on a macadam foundation, according to the specifications drawn and now on file in the office of the city engineer; cost of same not to exceed \$1.50 per square yard; curb to be made of cement." Appellants alleged and asked the trial court to find that after the petition had been signed it had been changed by attaching the typewritten slip; that the change was made without their knowledge or consent; that it was acted upon by the city; and that an ordinance was passed, authorizing an oileroid, or oil and rock pavement, and not an asphalt, macadam, or other substantial pavement, as originally understood and intended by the petitioners.

Appellants contend that the alleged change in the petition was fraudulent, but do not specify the person by whom it was made. Some of the petitioners testified that the typewritten slip was not on the petition when they attached their signatures, but they were so indistinct and uncertain in their recollection of the contents of the petition which they claim they did sign that we conclude they must have been mistaken. The person who circulated the petition, a disinterested party, testified that no change had been made after any signature was obtained. There is no contention that the petition, when filed with the city, was not in its present condition. If the petition be considered with the slip removed, the only improvement thereby request-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed would be the grading of the street and the building of sidewalks, without indicating any character of sidewalks or calling for any street pavement whatever. It is conceded that the contemplated improvement was to be a street grade and pavement, and not any sidewalk construction. Our finding is that the petition was not changed after the signatures of any of them had been obtained. This finding is supported by the undisputed fact that the ordinance enacted by the council, the specifications prepared by the city engineer, and the contract with the intervenor all called for and contemplated an olleroid pavement, and by the further fact that no question as to the pavement intended was raised until the work was substantially completed, when some of the appellants interposed objections and complained that the street pavement as constructed would be valueless and of no benefit to the abutting property.

Appellants contend that the improvement as constructed does not comply with specifications adopted by the city engineer, although the engineer has found that it does. They further contend that the pavement is worthless, unfit for travel, and a detriment to their property. After hearing the evidence the trial court found that the contractor had exercised the utmost good faith and diligence in carrying out the specifications; that the city, through its proper authorities, exercised like good faith and diligence in seeing that the work was done according to the contract; that the work was performed in all substantial and essential respects according to the contract and specifications; that any immaterial deviations from the specifications that might have occurred were such as ordinarily occur in the doing of any work of like character, and had no detrimental effect upon the results obtained; that such defects as appeared in the completed work are inherent in the nature and plan of the improvement specified by the contract; and that they are such as would inevitably result from constructing the character of street improvement thereby proposed. Without stating the conflicting evidence, which we have carefully examined, we conclude that it sustains the findings made. The situation seems to have been that the appellants petitioned for an olleroid macadam pavement of limited cost, and that they have obtained the pavement for which they petitioned. Evidence of expert engineers, who testified on behalf of appellants and also on behalf of respondents, was to the effect that such a pavement would necessarily be inferior in quality and usefulness to other well-known street pavements, such as asphalt or brick. When the pavement for which appellants petitioned was constructed, it did not meet their expectations, and, being dissatisfied, they now seek to avoid payment of the assessment, although, as shown by the

evidence, the contractor has done the work in substantial compliance with the contract and specifications. The power and authority to determine all questions relating to the performance of the contract was, by its terms, vested in the board of public works and city engineer; and their decision as to whether the work was properly performed should be final and conclusive. It is a well-established rule of law that, in the absence of fraud, the decision of officials having this power concludes all interested parties. 28 Cyc. 1137; 1 Elliott on Roads and Streets (3d Ed.) 654; *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; *Morehouse v. City Clerk of Edmunds*, 126 Pac. 419; *State ex rel. Murphey v. Coleman*, 127 Pac. 568; *Chance v. City of Portland*, 26 Or. 286, 38 Pac. 68.

In the case last cited the Supreme Court of Oregon has stated the rule in language which we regard as especially pertinent to the instant case, and from which we will quote at considerable length. Speaking through Mr. Justice Wolverton, the Oregon court said: "Here, then, is presented the question whether a street assessment can be declared null and void, and its collection perpetually enjoined, when it appears that the conditions and specifications of an ordinance providing for a street improvement for which the assessment was made have been substantially complied with by the contractor in making such improvement; that the officers and agents of the city acted honestly and in good faith in the supervision of the work; and that such improvement was completed to the satisfaction of the common council, and by said common council accepted in good faith. Undoubtedly, under such conditions, where there has been a substantial compliance with the ordinance which prescribes the mode in which the improvement shall be made, and the common council has honestly and in good faith accepted the improvement as satisfactory and completed in accordance with the ordinance, such acceptance is conclusive upon the abutting property owners. *Cooley on Taxation* (2d Ed.) 671; *Elliott on Roads and Streets*, 416; *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *Motz v. City of Detroit*, 18 Mich. 515. Indeed, many authorities hold generally that when work has been accepted by the proper authorities of a city, and there is no allegation of fraud or collusion, such acceptance is conclusive evidence that the work was performed according to the requirements of the contract. See *Cooley on Taxation* (2d Ed.) 671; *City of Henderson v. Lambert*, 14 Bush [Ky.] 30; *Ricketts v. Village of Hyde Park*, 85 Ill. 113; *Emery v. Bradford*, 29 Cal. 83; *Joyes v. Shadburn* [Ky.] 13 S. W. 361. But it is not necessary for us to go thus far in the present case. There was a substantial compliance with the ordinance,

so that it cannot be alleged that fraud is even implied by reason of there being a wide difference between the work required by the ordinance and the work actually done. There is here no violation of the trust relations which exist between the officers of the municipality and the abutting property holders whose property is charged with the assessment. Neither fraud nor collusion is exhibited by the complaint on the part of the officers, and their authority throughout the whole proceedings, as shown by the testimony, appears to have been exercised within the limitation of their powers under the character, and they have acted at all times in the utmost good faith. The acceptance of the improvement by the common council, under these conditions, is conclusive upon the defendants. It could not be promotive of good results to hold otherwise, as it would make the courts revisory bodies for every city government within the state, and open wide the doors for contests of this nature upon collateral proceedings like the present. By so doing the courts would usurp a large portion of the administrative powers of municipal governments. They have no such authority, and cannot interfere with the discretionary powers of such governments. These matters of discretion and authority must remain with the officers intrusted therewith under the law, without molestation or interference by the courts. It follows that the defendants are entitled to a decree dismissing the complaint; and it is so ordered."

Appellants are disappointed in the street improvement, but from the evidence we conclude that they have obtained the identical improvement for which they petitioned; that the contractor has completed it, in accordance with the specifications, to the satisfaction of the city engineer; that no fraud has been shown; and that appellants have no just cause of complaint.

The judgment is affirmed.

PARKER, ELLIS, and GOSE, JJ., concur.

#### SCANDINAVIAN AMERICAN STATE BANK v. DOWNS et ux.

(Supreme Court of Washington. Feb. 8, 1913.)

##### 1. MORTGAGES (§ 38\*)—DEED OR MORTGAGE—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that a warranty deed, absolute in form, was in fact executed as additional security, so as to be a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

##### 2. NEW TRIAL (§ 88\*)—GROUNDS—SURPRISE.

The mere fact that it was evident that the testimony of a certain person might be material to plaintiff, and that such witness was not in fact produced by him, was not ground for a new trial on motion of defendant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 176; Dec. Dig. § 88.\*]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the Scandinavian American State Bank against John M. Downs and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

D. R. Glasgow, of Spokane, for appellants. Charles N. Madeen, of Missoula, Mont., and Samuel R. Stern, of Spokane, for respondent.

PARKER, J. The plaintiff seeks foreclosure of liens claimed by it upon three different parcels of real property in Spokane county, which it alleges are evidenced by three warranty deeds absolute in form, but which are in fact mortgages given by the defendants to the plaintiff to secure an indebtedness of \$7,500. Judgment was rendered in favor of the plaintiff, foreclosing all of the liens so evidenced. The defendants have appealed from so much of the judgment as decrees foreclosure against the real property conveyed by one of the deeds, contending that that deed was not given as security for the indebtedness as the other deeds were, but for the purpose of having respondent hold the property conveyed thereby in trust for appellants. Appellants are residents of Spokane, in this state. Respondent is a banking corporation of Montana with its principal place of business in Missoula in that state. In January, 1911, appellants executed and delivered to respondent their promissory note for \$7,500, to evidence an indebtedness then owing by them to it. About the same time, to secure this indebtedness, they executed and delivered to respondent two deeds of certain real property owned by them in Spokane county. This was done in pursuance of negotiations leading up to the incurring of the indebtedness. Soon thereafter appellants executed and caused to be delivered to the respondent another deed for lot 11, block 30, Heath's Fifth addition to Spokane, being the deed and property involved in this appeal. At the same time appellant John M. Downs signed and caused to be delivered to respondent, with this deed, a writing reading as follows: "For and in consideration of a loan of seventy-five hundred (\$7,500) dollars, which the Scandinavian American State Bank made to the undersigned John M. Downs, on the 13th day of January, 1911, I, the undersigned, John M. Downs, hereby assign, sell, transfer and set over to the said Scandinavian American State Bank at Missoula, Montana, all my right, title and interest in and to Lot Eleven (11), Block Thirty (30), Heath's Fifth Addition, to the city of Spokane Falls, now Spokane, Washington, as per deed handed you herewith today. [Signed] John M. Downs." So far the facts are undisputed.

[1] The controlling question presented is,

Was the deed here involved given by appellants as additional security for the indebtedness, or merely for the purpose of vesting title in respondent, to be held by it in trust for appellants? Aside from the above-quoted writing signed by appellant John M. Downs, showing the evident purpose of the giving of this deed, the testimony is in serious conflict as to the purpose of appellants, especially in so far as respondent may be bound by any such purpose on their part. We think, however, that the learned trial court was warranted in believing the following facts established by the evidence: When the first deed was given as security for the indebtedness, respondent was led to believe that the property conveyed thereby was free from incumbrance. Soon thereafter it discovered that the property was incumbered, and it thereupon demanded additional security. In response to this demand, it received this deed and the signed statement of appellant John M. Downs accompanying it. This deed and statement were not delivered directly by appellants or either of them; but were delivered by a Mr. White, their agent, to whom they had sent the deed and statement to be delivered to respondent. This is, in substance, all of the information respondent or its officers had touching the intent and purpose of appellants in the execution and delivery to it of the deed in question. Appellant John M. Downs testified, in substance, that another of his creditors was pressing him for payment at the time of, and shortly before, the execution of this deed, and that, in order to be able to give a plausible excuse for not subjecting this property to the satisfaction of his debts, he conceived the idea of placing this deed in the hands of respondent, not as additional security, but in trust only, with a view to having it returned upon settlement with the creditor then pressing him, and that White was so instructed as agent of appellants. In view of this stated purpose of Downs to thus hinder, if not actually defraud, his creditor in this manner, the trial court was evidently not impressed with his version of the purpose for which the deed was executed, and concluded that it was in fact executed by appellants and received by respondent as additional security. We are constrained to fully agree with the trial court in so concluding.

[2] One of the grounds of appellants' motion for a new trial was surprise, which they contend consisted of the fact that upon the trial of the case respondent did not produce White as a witness. It is not contended that there was any promise or inducement held out to appellants which would lead them to believe that White would be produced as a witness, other than the mere fact that it was evident that the testimony of White might have a material bearing upon the question of his power as agent in

delivering the deed to respondent. This contention is answered by the general rule that "the fact that the adversary's evidence is different from what it was supposed it would be is not sufficient" to show surprise calling for a new trial. 14 Ency. Pl. & Pr. 734. The decision of this court in *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832, is in harmony with this view.

The judgment is affirmed.

CROW, C. J., and GOSE, MOUNT, and CHADWICK, JJ., concur.

PATTERSON v. CITY OF EDMONDS et al.  
(Supreme Court of Washington. Feb. 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 864\*)—LIMITATION OF INDEBTEDNESS—DEBTS SUBJECT TO LIMITATION.

The provision of Const. art. 8, § 6, that cities shall not become indebted to an amount exceeding  $1\frac{1}{2}$  per centum of their taxable property without the assent of three-fifths of their voters, does not apply to obligations which are mandatory on the municipality by the Constitution and laws of the state, or such as are necessary to maintain its corporate existence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]

2. MUNICIPAL CORPORATIONS (§ 864\*)—LIMITATION OF INDEBTEDNESS—DEBTS SUBJECT TO LIMITATION.

Expenses for the construction of a city dock, for the improvement and repair of streets where the necessity therefor did not arise so suddenly as to require immediate attention, for auditing the city's books, for sewer estimates, installing street lights, for a typewriter, and for killing dogs, relate rather to the welfare of the city than to the maintenance of its corporate existence, and hence the creation of an indebtedness in excess of the constitutional debt limit for such purposes is not justified on the ground of necessity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]

3. MUNICIPAL CORPORATIONS (§ 864\*)—LIMITATION OF INDEBTEDNESS—DEBTS SUBJECT TO LIMITATION.

The creation of an indebtedness by a city in excess of the constitutional debt limit for city printing for supplies to the health officer, for lighting the streets, for court fees, and for fees and salaries of city officers, may be justified up to a certain limit on the ground of necessity, but, to be so justified, the expenditures therefor must be reduced to a bare necessity, without which the city government could not be carried on.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]

4. MUNICIPAL CORPORATIONS (§ 864\*)—LIMITATION OF INDEBTEDNESS—DEBTS SUBJECT TO LIMITATION.

An indebtedness may properly be created by a city in excess of the constitutional debt limit for the expense of holding city elections, for the salaries of necessary municipal officers, and for supplies necessary to carry on the city government.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

# 5. MUNICIPAL CORPORATIONS (§ 1000\*)—TAXPAYERS' ACTION—JUDGMENT.

In a friendly action to restrain a city from issuing and delivering municipal bonds, the court should have confined its judgment to that issue, and had no authority by its judgment to "approve and confirm" the action of the municipal officers in issuing and selling the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by Daniel B. Patterson against the City of Edmonds and others. From the judgment, plaintiff appeals. Reversed and remanded.

W. J. Daly, of Seattle, for appellant. Parker & Brown, of Seattle, for respondents.

FULLERTON, J. The city of Edmonds, in Snohomish county, is a municipal corporation duly organized under the general laws of the state of Washington as a city of the third class. The assessed valuation of its property for the year 1910, as it appeared upon the last assessment roll taken for city purposes, was \$399,763. Between May 5, 1910, and December 29th of the same year the city became indebted for ordinary municipal purposes in the sum of \$5,849.23, or practically in a sum equal to 1½ per centum of its taxable property as shown on its assessment roll; all of such indebtedness being represented by interest-bearing warrants drawn upon the city treasurer. Thereafter, without in any manner reducing the indebtedness thus created, it incurred further indebtedness, and issued interest-bearing warrants therefor, which on March 12, 1912, amounted to the aggregate sum of \$13,145.61, making the total indebtedness of the city on that date the sum of \$18,994.84. On the date last named the city determined to issue funding bonds to take up and cancel the outstanding warrants above mentioned, and to that end passed a resolution so providing, and thereafter published a notice calling for bids for the bonds proposed to be issued for that purpose. At the time appointed a satisfactory bid for the bonds was received and accepted by the city, and thereafter a contract was entered into for the sale of the bonds between the city and the firm making the bid. Before the sale was consummated, however, the present action was begun ostensibly to restrain the issuance and sale of the bonds. The plaintiff says in his brief that it is a "friendly suit" to test the validity of the warrants, while the defendant says that it is a "proceeding to validate" them. The complaint sets forth the facts substantially as we have outlined them, and prays that the city be restrained from issuing and delivering the bonds. The answer of the city sets out the warrants in detail according to their number and date

of issuance, dividing them into some 13 different classes according to the purposes for which they were issued, and recites in a more or less general way the specific purpose for which each of the several warrants was issued. On the hearing the city clerk and city treasurer were called as witnesses, and testified concerning the purposes for which the warrants sought to be funded were issued. The trial judge ruled that the warrants were valid obligations of the city, that the proceedings had by the city council with reference to funding the bonds were regular, and entered a judgment in which it was "ordered, adjudged, and decreed that the said warrants issued by the city of Edmonds and hereinafter described under the" several subdivisions as set forth in the answer "be and are necessary and lawful indebtedness of said city \* \* \* and are a valid and subsisting obligation against said city" for the amounts thereof with interest as provided by law. The judgment also contains the following: "And it further appearing to the court that the said proceedings of the city council of the city of Edmonds relative to the funding of said warrants and the sale of said bonds were and are regular and valid and that the notice for the sale of said bonds was and is good and sufficient, it is therefore ordered, adjudged, and decreed that the said notice for the sale of said bonds be, and is, sufficient and valid, and that the acts and proceedings of the city of Edmonds relative to the sale of said bonds be and the same are hereby approved and confirmed; and, it also appearing to the court that the bid of Carstens and Earles for said bonds was the most advantageous bid received for the same, it is therefore ordered, adjudged, and decreed that the sale of said bonds to Carstens and Earles be and the same is hereby approved and confirmed. It is ordered, adjudged, and decreed that said bonds be and are regular and valid and a subsisting obligation against the city of Edmonds for the amount of said bonds and according to the tenor and effect of said funding bonds, to wit, for the sum of \$18,994.94 and accrued interest on said warrants to the date of payment thereof." From the judgment so entered the plaintiff appeals.

[1] The provision of the Constitution limiting the indebtedness that may be incurred by municipalities of the character of the one here in question is found in section 6 of article 8, and reads as follows: "No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an elec-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality." This clause of the Constitution would seemingly render void any and all indebtedness incurred for any purpose which exceeded the limitations therein prescribed. This court has, however, laid down the rule that the limitation imposed has no application to such obligations as are made mandatory on the municipality by the Constitution and laws of the state, or to such as are necessary to maintain its corporate existence. *Rauch v. Chapman*, 18 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52; *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583; *Hull v. Ames*, 28 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873. It is on the latter principle that the trial court upheld the validity of the indebtedness incurred in excess of the constitutional limit. It held that all of such indebtedness was incurred for matters necessary and essential to the corporate existence of the municipality, and hence valid obligations against it.

[2, 3] With this conclusion of the trial court we have been unable to agree. There are we think many items of expenditure among those listed that clearly cannot properly be said to be necessary to the maintenance of the corporate existence of the city, and many more which owing to the meagerness of the record are at least in the doubtful class. Indeed, it would appear that the city authorities did not regard passing the indebtedness line as a matter of very serious moment. They apparently conducted the affairs of the city thereafter pretty much as they did before; expenditures being made and debts incurred for matters pertaining rather to the general welfare of the city than to the maintaining of its mere corporate existence. For example, a city dock was constructed at a cost of \$6,351.70; an indebtedness incurred for supplies and labor on the streets in the sum of \$537; an indebtedness for city print-

ing in the sum of \$359; for supplies for the health officer in the sum of \$78.50; for court fees in the sum of \$220.55; for lighting the public buildings and public streets in the sum of \$1,179.37; for auditing the books of the city \$71; for sewer estimates \$123; for installing street lights \$136.10; for a typewriter \$102.50; for engineering expenses \$317.24; for killing dogs \$3; and for fees for various city officers sums aggregating \$3,316.51. Manifestly, if the city may lawfully become indebted for much of the foregoing after it has reached its limit of indebtedness, the constitutional prohibition has no meaning. The city dock is doubtless highly useful and convenient to the people of the city, and the cost of its construction a permissible expenditure on the part of the city were it in a position to act for the general welfare of the people, but it is an absurdity to say that its construction was necessary to maintain the corporate existence of the city. So with the expenditures for work and supplies in the improvement and repair of the city streets. It might be that, if some part of a street should become dangerous so suddenly as to require immediate attention, it would justify the incurrence of an indebtedness to repair it as a work of necessity, but certainly the injury caused by all ordinary wear and tear, the necessity to repair which can be foreseen for a period of time preceding the point of danger, can be repaired at the cost of property benefited without resorting to this extraordinary remedy. The items for auditing the books of the city, for sewer estimates, for installing street lights, for a typewriter, and for killing dogs are clearly all expenditures relating to the welfare of the city, rather than to the maintenance of its corporate existence. Moreover, it would seem that the work of auditing the books and of killing dogs could properly have been imposed upon some one or more of the officers of the city who were drawing a salary therefrom, instead of making it a charge upon the general fund. So, also, with regard to the expenditure for city printing, for supplies to the health officer, for lighting the streets, for court fees, for fees and salary of city officers; these might be justified up to a certain limit on the ground of necessity, but clearly all such expenditures as the city chooses to make in this behalf cannot be so regarded. Expenditures of this kind must be reduced to a bare necessity, to those expenditures without the incurrence of which the city government cannot be carried on, before the expenditure is justified. So with other items of indebtedness not herein specially enumerated, they may or may not be legitimate expenditures accordingly as they may have been incurred or for mere public convenience.

[4] These considerations require a reversal of the judgment entered in the court below. The record, however, is not sufficiently full

to enable us to direct such a judgment as the probable justice of the case requires. The indebtedness incurred up to the constitutional limitation is, of course, legitimate, and could be lawfully converted into funding bonds. A considerable part of the indebtedness incurred after that time is also clearly legitimate; such, for example, as that incurred in holding city elections, salaries of necessary municipal officers, and expenditures for supplies necessary to carry on the city government. Other items represent a mixed class which may be legitimate or not depending, as we have said, on the question whether the particular thing for which the indebtedness was incurred represented a necessity or only a convenience. As to these, further evidence concerning the particular service rendered or the particular thing purchased must be taken before the status of the debt can be known. Other items again, and some of them we have pointed out, do not represent a legitimate expenditure tested by any theory. We have concluded, therefore, to reverse the judgment, and remand the cause for such further proceedings as the parties may deem fit to take in consonance with this opinion.

It is but justice to the trial judge to say that it rested its judgment on the authority of *Gladwin v. Ames*, supra, wherein this court sustained as legal certain indebtedness incurred by the town of Cheney, although issued after the town had reached its limit of indebtedness. It must be confessed that the opinion in that case contains language which read apart from the record then before the court would seem to justify as legitimate expenditures on the part of a municipality some of the expenditures which we have here condemned. But, while we said in that case that the particular indebtedness incurred for the purposes specified were legitimate expenditures, it was not intended to be said that all such indebtedness as might be incurred for the purposes mentioned would be legitimate. For example, an indebtedness was there approved which was incurred for the purchasing of materials and the erection of a city jail; but clearly, had the jail been an elaborate structure in excess of the immediate necessities of the city, the debt incurred would not have been legitimate. The case, however, even within its proper limitations, goes beyond any holding theretofore made by the court, and perhaps beyond a legitimate construction of the section of the Constitution in question. We prefer therefore rather to curtail the rule as there announced than to extend it.

[5] We have set forth something of the nature and form of the judgment entered by the court below. We think it could hardly be said to be proper in these respects were it otherwise regular. The action was to restrain the issuance of bonds to refund cer-

tain warrants thought to be illegally issued. The judgment should have been confined to this issue. Clearly the courts have no authority by judgment to "approve and confirm" the action of municipalities.

The judgment is reversed, and the cause remanded.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

#### STATE v. FERRATO et al.

(Supreme Court of Washington. Feb. 18, 1913.)

##### 1. INDICTMENT AND INFORMATION (§ 110\*)—TAKING BY TRICK OR DEVICE—LANGUAGE OF STATUTE.

An information, charging that defendants, "and each of them, \* \* \* by trick, device, and confidence or bunco game, \* \* \* upon receiving of and from A. \* \* \* \$3,000, \* \* \* did then and there steal and carry away the same with intent to deprive and defraud said A. thereof," was sufficient to charge a crime under Rem. & Bal. Code, § 2601, subd. 2, relative to larceny by trick, device, or bunco game, even though it also set forth an agreement to play a game of chance or skill, and did not describe any trick, fraud, or device, since it charged a crime nearly in the language of the statute, and the allegations relied on to show that no crime was charged might be rejected as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

##### 2. LARCENY (§ 14\*)—TAKING—TRICK OR DEVICE—"BUNCO GAME."

Where the prosecuting witness was induced by defendants to play a game of skill with one of them, who was a skilled player, defendants knowing that the prosecuting witness had no chance of winning, and not intending to permit him to win, and, before the end of the game, defendants decamped with the money bet on the game, they were guilty of the crime of larceny under Rem. & Bal. Code, § 2601, subd. 2, providing that every person who, with intent to deprive or defraud the owner thereof, shall obtain the possession or title to any property from him by any trick, device, or bunco game is guilty of larceny, even though the game played was an innocent one in itself, since any game, whether innocent or outlawed, may be a "bunco game"; it being the design and conduct of those using it that gives it its character.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.\*]

For other definitions, see Words and Phrases, vol. 1, p. 904.]

##### 3. LARCENY (§ 14\*)—"BUNCO GAME."

Any trick, artifice, or cunning calculated to win confidence and to deceive, whether it be by conversation, conduct, or suggestion, is a "bunco game" within Rem. & Bal. Code, § 2601, subd. 2, making any person obtaining another's property by means of a bunco game, with intent to deprive or defraud him thereof, guilty of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.\*]

Parker and Gose, JJ., dissenting in part.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Leonardo Ferrato and another were con-

victed of grand larceny, and they appeal. Affirmed.

Wm. R. Bell, of Seattle, for appellants. John F. Murphy, Hugh M. Caldwell, and H. B. Butler, all of Seattle, for the State.

CHADWICK, J. [1] The material parts of the information upon which appellants were tried follow: "That said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, in the county of King, state of Washington, on or about the 26th day of March, 1912, with intent to deprive and defraud the owner thereof, did willfully, unlawfully, and feloniously obtain from one Jos. Alassa \$3,000 in lawful money of the United States, the property of the said Jos. Alassa, by trick, device, and confidence, or bunco game, in this: That said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, upon the pretense that he (the said Jos. Alassa) might win and receive from said Bendetto Arnardo a like sum of \$3,000, and the return of his own \$3,000 upon the result of a certain game of boccie to be then and there played, whereas the said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, did not intend that said Jos. Alassa should receive the sum of \$3,000 of or from the said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, or either of them, nor did they or either of them intend that said Jos. Alassa should or would have returned to him his own \$3,000 so paid to said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, as aforesaid, and the said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, upon receiving of and from said Jos. Alassa the said \$3,000 in lawful money of the United States, did then and there take, steal, and carry away the same with intent to deprive and defraud the said Jos. Alassa thereof, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington." A demurrer to this information was filed by the defendants upon the grounds: (1) That several separate crimes and offenses are included therein; (2) that the facts pleaded are not sufficient to charge the crime of grand larceny; (3) that the facts stated in said information are insufficient to establish the commission of any crime by the defendants, or either of them; (4) that the facts pleaded therein show that the defendants have not been guilty of any offense whatsoever; (5) misjoinder of several distinct offenses.

Appellants assume that the information was designed to charge a crime under section 2471, Rem. & Bal. Code, defining the crime of swindling, and that, inasmuch as the information sets forth an agreement to play a game of chance or skill, and no trick, fraud, or device is described, appellants should not have been put to trial, or, being convicted, are now entitled to an arrest of judgment. We

think this position is not well taken. It is insisted by the state that the information was drawn under subdivision 2, § 2601, Rem. & Bal. Code, which, in so far as it is material to the present charge, reads as follows: "Every person, who with intent to deprive or defraud the owner thereof, shall obtain from the owner or another, the possession or title to any property \* \* \* by any trick, device, bunco game, or fortune telling \* \* \* steals such property and shall be guilty of larceny."

In the absence of a motion to strike or make more definite and certain, the parts of the information, which are relied on to show that no crime is charged, may be rejected as surplusage; and enough will be left under our practice allowing a crime to be charged in the language of the statute to pass the grounds of demurrer, and especially the ground that the information does not state facts sufficient to constitute the crime of grand larceny. The crime of grand larceny being charged, and the part of the information objected to being treated as a matter of inducement, the information is sufficient, for we have a charge as nearly in the language of the statute as it can be made: "The said Leonardo Ferrato, Sisto Roe, and Bendetto Arnardo, and each of them, \* \* \* by trick, device, and confidence or bunco game, \* \* \* upon receiving of and from said Jos. Alassa \* \* \* \$3,000 in lawful money of the United States, did then and there steal and carry away the same with intent to deprive and defraud the said Jos. Alassa thereof, contrary to the statute," etc.

[2] It is next contended that the facts do not warrant the verdict; that the game of boccie is an innocent game, depending upon the skill of the players; that Joseph Alassa, the prosecuting witness, voluntarily entered into the play for high stakes; that he admits that he expected to keep the money of his adversary if he won; and therefore no criminal charge can be sustained. In a sense, this is all true. But, threading the whole narrative of the testimony, there is the track of fraud. It seems certain to us, as it did to the jury, that the prosecuting witness was the victim of a conspiracy to defraud him of his money. It is no defense that the game was as innocent as billiards, baseball, croquet, or wrestling. The game was an instrument in the scheme to bring the victim into play with an adversary, a reputed stranger, who had been in this country but three months, and who, according to his own testimony, had taken several medals in the old country because of his skill as a boccie player. He was, to use the vernacular of the race track, a ringer. The defendants and Sisto Roe, who was not apprehended, did not intend to take any chance. Alassa, the victim, was allowed to win two or three games played for small stakes. His measure was taken. It was then proposed that they play for a larger sum, and



Alassa drew nearly \$3,000 out of the bank. Sisto and Leonardo pretended to contribute with him enough to match the \$3,000 which Arnardo pretended to have. Sisto held the stakes. The game went on. During the game, Alassa temporarily retired, and the three confederates decamped with the money. After dividing Alassa's money equally, they fled to Butte, Mont., where Ferrato and Arnardo were apprehended. Sisto, the other confederate, escaped. It is possible that, in the absence of a statute, one who lures another into a sure thing game by exciting his cupidity might not be criminally liable. But fortunately the statute covers such cases. We think it is clearly proved that appellants never intended that Alassa should win any money. They knew, as one of the appellants, who spoke at the trial of the others, as his partner admits, that Alassa had no chance of winning against the skill of Arnardo, nor did they give him a chance, if any he had. They stole the money before the game was over.

The law does not demand, as a condition or as an element of the crime defined by our statute, that the game employed by confidence men shall be an outlawed game. They sometimes employ them; but more frequently do they employ one that seems legitimate to the intended victim. Wrestling, foot racing, horse racing, pool, tenpins, or any game of endurance, chance, or skill, is apt to be more attractive to the guileless, conceited, or avaricious than a chuck-a-luck, strap, panel house, or badger game, and less calculated to excite suspicion than the old-fashioned gold brick, whatever its wrapping may be. Even outlawed games are innocent in themselves. Games never injure any one. It takes a crooked player to make a crooked game, and the law, as it is written in this state, is aimed against the man, and not against the inanimate dice, cards, billiard, or bocce balls. So any game, whether innocent or outlawed, may be a bunco game, for it is the design and conduct of those who use it that gives it its character under the statute.

[3] Any trick, artifice, or cunning, calculated to win confidence and to deceive, whether it be by conversation, conduct, or suggestion, is a bunco game, within the meaning of the statute. The prosecuting attorney has cited the following cases which sustain his theory and our conclusion: *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *People v. Mason*, 113 Cal. 76, 45 Pac. 182; *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862; *State v. Donaldson*, 35 Utah, 96, 99 Pac. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372; *People v. Miller*, 160 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546.

The testimony of the prosecuting witness is vigorously attacked. Certain differences

between his testimony and that of other witnesses, and the fact that he did not publish the fact of the robbery until the next day, are relied on. The differences in the testimony, if any, appear trivial in the light of the whole record. Alassa's delay in going to the police was explained to the satisfaction of the jury.

Error is predicated upon the giving and refusal to give instructions. We find no error in the instructions given, and the requested instructions were fully covered by those given to the jury by the court.

The judgment of the lower court is affirmed.

CROW, C. J., and MOUNT, J., concur.

PARKER, J. I concur in the result. I think that when appellants decamped with the money, before the close of the game, they committed plain grand larceny, regardless of whether the game was a so-called "bunco game" or a fair game. I am not ready to hold that the crime charged would have been committed had the game been completed and the staked money paid over in pursuance of the result of the game. I fear the majority opinion may be so construed.

GOSE, J. I concur with PARKER, J.

STATE ex rel. McCALLUM et al. v.  
SUPERIOR COURT, COW-  
LITZ COUNTY, et al.

(Supreme Court of Washington. Feb. 14, 1913.)

1. INTOXICATING LIQUORS (§ 14\*)—LOCAL OPTION — ELECTIONS — CONTESTS — CONSTITUTIONAL AND STATUTORY PROVISIONS.

The provision of Rem. & Bal. Code, § 6313, making the decision of the superior court in local option election contests final, is valid, notwithstanding the constitutional provisions authorizing the Supreme Court to issue writs of review necessary to the complete exercise of its appellate and revisory jurisdiction, since the determination of questions concerning elections belongs to the political rather than the judicial branch of state government, and the determination of election contests is a judicial function only to the extent authorized by statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 16; Dec. Dig. § 14.\*]

2. CERTIORARI (§ 28\*)—CONTESTS — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Although Rem. & Bal. Code, § 6313, makes the superior court's decision on the merits in a local option election contest final, the Supreme Court may review its action for the purpose of determining whether it has acted within its jurisdiction or exercised such jurisdiction contrary to law.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.\*]

En Banc. Certiorari by the State on relation of J. H. McCallum and others against the Superior Court for Cowlitz County and others, to review a judgment of the lower

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court in an election contest. On motion to quash the writ and dismiss the proceedings for lack of jurisdiction. Motion granted.

Thacker & Hancock, of Chehalis, and Hayden & Langhorne, of Tacoma, for relators. O'Neill & Spaulding, of Castle Rock, and Percy P. Brush, of Kelso, for respondents.

MORRIS, J. Writ of certiorari to review the judgment of the lower court in an election contest, involving the validity of an election in the city of Castle Rock, to determine whether said city should license the sale of intoxicating liquors. The following facts will be sufficient for a proper understanding of the question submitted for our determination. On November 5, 1912, a local option election was held at Castle Rock, the result of which was in favor of no license. On November 21, 1912, relators commenced a proceeding in the lower court, alleging various irregularities under which they charged the election was illegal, and praying the lower court to restrain the city clerk from entering and publishing the result of the election, and for a decree declaring the election to be null and void. In this proceeding an answer was filed, putting the allegations of the petition in issue, and in due time a hearing was had in the lower court, when, after a full hearing upon the merits of the controversy as presented by the petition and answer, the lower court denied the prayer of the petition and dismissed the action. Thereupon relators came to this court and sued out this writ, under which they seek to have us review the determination of the lower court upon the merits.

[1] Respondents appeared upon the return day and moved to quash the writ and dismiss the proceedings here upon the ground that no jurisdiction is vested in this court to review the judgment of the lower court upon the merits. This motion must be granted. Section 6313, Rem. & Bal. Code, which is section 22 of the local option law of 1909, provides for contesting the validity of local option elections, confers jurisdiction over such election contests in the superior court for the proper county, and further provides that "the said court shall have final jurisdiction to hear and determine the merits of such cases." Answering this contention, relators assert that, inasmuch as under our Constitution this court is vested with the power to issue writs of review to the complete exercise of its appellate and revisory jurisdiction, the right of review is constitutional and not statutory, and a jurisdiction which is constitutional cannot be taken away by statute. In discussing this question, we confine ourselves to the character of cases involved in the local option law, and do not mean to hereby express any opinion as to general suits at law or actions in equity involving common-law

rights. Whatever may be said as to the right of the Legislature to limit the jurisdiction of this court in actions involving property rights or personal liberty, where no appeal is given, no such question is presented under the facts in this case. Nor does it in our opinion fall within that rule, announced by some courts, that writs of error will lie from appellate to inferior courts for the purpose of reviewing their final determination in all cases involving property rights or personal liberty, where no appeal is given, and that this right exists, independently of any statutory or constitutional provisions, by force of the common law, in all cases in which the jurisdiction of such inferior court is exercised according to the course of the common law. The questions here involved, and to which the act in question is devoted, are public rather than private rights, and determine the manner in which the public will shall be finally ascertained, in questions purely of a public nature, and not involving an attempt to determine property rights or restrain personal liberty. The determination of these questions is one of undoubted legislative power, and belongs to the political, rather than the judicial, branch of state government. It has, we think, been universally held that an election contest, such as this proceeding was, as brought in the lower court, is not an ordinary adversary proceeding. *Minor v. Kidder*, 43 Cal. 229. The public is concerned, and it is the public interests that are to be determined, and hence the rule has become established that elections are beyond the control of the judicial power, and that the determination of election contests is a judicial function only to the extent authorized by statute. These rules are so well established no authority will be required to sustain them. Hence we find numerous cases holding that, where the Legislature had committed the final decision of the removal of county seats or questions of a similar nature to public officials or trial courts, the appellate court was thereby deprived of the right to review such decision. *Coon v. Mason County*, 22 Ill. 666; *Moore v. Mayfield*, 47 Ill. 167; *Loomis v. Hodson*, 224 Ill. 147, 79 N. E. 590; *Heffner v. County Commissioners*, 16 Wash. 273, 47 Pac. 430.

[2] This, of course, does not mean that, under constitutional authority such as is conferred upon this court in the issuance of its writs to inferior tribunals, appellate courts may not issue writs of review to determine whether such tribunal is exercising its power according to law, or is acting within or without its jurisdiction. We have repeatedly issued such writs in proceedings under this same law, where the question involved the sufficiency of the petition, or other like matter, affecting the jurisdiction of the lower court, such as in *State ex rel. Quillen v. Superior Court*, 126 Pac. 899; *State ex rel.*

*Griffin v. Superior Court*, 127 Pac. 120; *State ex rel. Czerny v. Superior Court*, 127 Pac. 207; *State ex rel. Forgues v. Superior Court*, 127 Pac. 313. In none of those cases, however, were we called upon to exercise a revisory jurisdiction in the nature of an appeal from the determination of the lower court upon the merits of the controversy. The *Griffin Case* submitted the question whether a city election was the "last general election" within the meaning of the law, as determining the number of required signatures to a petition calling an election. The other cases involved the sufficiency of the petition under which the jurisdiction of the lower court was invoked. It might be added that in none of them was any question raised as to our full and complete jurisdiction.

The cases cited by relators, and under which their counsel strenuously contend for the exercise of our jurisdiction, are, it seems to us, when properly read, authority against the assumption of such jurisdiction. In *Independence Party Nomination*, 208 Pa. 108, 57 Atl. 344, it is said, in a case involving the right of the Independence party to a separate column of nominations on the official ballot: "The case having been brought to this court by certiorari, the first question is our jurisdiction. The proceeding being entirely statutory and without appeal, we cannot review the findings of fact or the merits of the case; but, under the general supervisory powers of the court on certiorari, we are entitled to inspect the whole record, with regard to regularity and propriety of the proceedings, to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion"—citing *Pollard's Petition*, 127 Pa. 507, 17 Atl. 1087, involving the granting of wholesale licenses for the sale of liquors, where such matters were specially committed to the court of quarter sessions, and where it was said: "Upon the writ of certiorari, we may review their proceedings so far as to see whether they have kept within the limits of the powers thus conferred, and have exercised them in conformity with law." These cases are authority for our assumption of jurisdiction in the four cases involving this law, where we have accepted jurisdiction; but they hardly go as far as to say that, because jurisdiction is vested in appellate courts by the Constitution of the state to issue writs in aid of appellate or revisory jurisdiction, in cases involving no private rights, which are purely statutory in their nature, with the denial of the right of appeal, the appellate court may accept jurisdiction under its revisory writ, and make such writ a medium for a review of the merits of a controversy, presenting no constitutional or jurisdictional questions.

Another case relied upon by relators is *Rash v. Allen*, 1 Boyce (Del.) 441, 76 Atl. 370, an election case, involving the rights of the parties to a seat in a city council.

The act construed provided that the decision of the city council in such cases should be "final and conclusive." A writ of certiorari was sued out, under which it was sought to test the constitutionality of the law vesting the city council with sole jurisdiction and the validity of its judgment, because the record disclosed that, in hearing and determining the case, the council did not proceed in the manner prescribed by law. The right to the writ being questioned, it was held that, since the power to issue the writ was conferred by the Constitution, such right could not be taken away by statute; a rule which will be readily subscribed to. But that the court intended thereby to assert that, because of its constitutional authority in the exercise of its writ of certiorari, it assumed full power of reviewing the judgment below on the merits, as though no question had been suggested as to its power to so review upon an appeal, can hardly be claimed from the language of the decision, for it is said, after reviewing *State v. City Council*, 3 Har. (Del.) 294, where mandamus had issued commanding the city council to admit one John Hogany to the office of city treasurer, and it was held that the right to issue writs of mandamus could not be taken away, "but by express exclusive words": "We cannot believe that in the case above mentioned the court meant to declare that the constitutional power to issue a writ of certiorari for the purpose of determining whether the city council had jurisdiction of a contested election case could be taken away by statute, no matter how 'express and exclusive' the words might be. If the court had in mind the constitutional authority vested therein, they must have meant express exclusive words of as high authority as the power given, to wit, of the Constitution. \* \* \* What did the Legislature mean by the statutory provision that the decision of the city council should be final and conclusive? Manifestly it meant that such decision should be final and conclusive so far as the merits of the case are concerned; that is, as to the question the council was to determine—the election that might be contested. It could not have meant or intended that the proceedings of the council could not be reviewed by the appellate tribunal for the purpose or to the extent of ascertaining whether the council had jurisdiction of the cause, had exceeded its jurisdiction, or had not exercised it according to law. To hold otherwise would be to make the city council superior to the Constitution of the state, and to vest it with powers greater than any court of limited jurisdiction or any inferior tribunal in this state has ever possessed. It would enable the council to hear and determine an election case without notice of any kind, without due process of law, without jurisdiction, and, indeed, in absolute disregard of the rights of the contestee, constitutional or otherwise. Such arbitrary and

unlimited power would be not only dangerous, but it is inconceivable and impossible, under our system of government. But the words 'final and conclusive,' in the statute, have some meaning. What is it? It is simply this: That the action and decision of the council shall not be reviewable so far as the merits are concerned. It does not mean that it might not be reviewed to the extent of ascertaining whether the council had jurisdiction, had acted in excess of its jurisdiction, or exercised the same contrary to law: This we hold to be the law, and our conclusion is amply supported by authority, as well as reason. 4 Enc. Pl. & Pr. 12, 73; Commissioners v. Thompson, 15 Ala. 184, and 18 Ala. 694; Peters v. Peters, 8 Cush. (Mass.) 537; Cardiff's Case, 1 Salk. 146; Niblo v. Post, 25 Wend. [N. Y.] 280; 15 Cyc. 395-397."

Thus it will be seen that the rule there announced is in harmony with our prior assumption of jurisdiction in cases under the local option law. We have assumed jurisdiction for the purpose of ascertaining whether the lower court had acted within its jurisdiction or exercised the same contrary to law. We decline, as here, to accept jurisdiction where no question is raised involving the jurisdiction of the court below; and the only thing required of us is to review the merits of the controversy, as determined by the lower court, acting under a conceded jurisdiction. We do not feel called upon to say more. To accept jurisdiction in this case is to read out of the law the provision that the superior court should "have final jurisdiction to hear and determine the merits of such cases"—a provision within the power of the Legislature to include in granting a statutory right of action and naming the tribunal that should exercise jurisdiction over that right of action, in a case involving only a political, and not a private, right.

The motion to quash is granted.

CROW, C. J., and PARKER, MOUNT, MAIN, FULLERTON, and ELLIS, JJ., concur. GOSE, J., concurs in the result.

#### LUDWIGS v. DUMAS.

(Supreme Court of Washington. Feb. 8, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES ON STREET—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Whether one injured by being struck by defendant's automobile while crossing a street on a bicycle should have seen defendant and avoided the automobile *held* a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES ON STREET—JURY QUESTION—NEGLIGENCE.

Whether defendant whose automobile struck plaintiff while he was crossing the street

on a bicycle at a crossing should have seen plaintiff, and avoided striking him, *held* a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 705\*)—ORDINANCES—SPEED LAWS—AUTOMOBILES.

A person riding a bicycle or some other vehicle or standing or moving is entitled to the protection of an ordinance, making it unlawful for an automobile to cross over any crossing or sidewalk at a speed greater than four miles an hour when any person is upon the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

Department 1. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by George Ludwigs against J. L. Dumas. From a judgment for plaintiff, defendant appeals. Affirmed.

Sharpstein & Sharpstein, of Walla Walla, for appellant. T. P. & C. O. Gose, of Walla Walla, for respondent.

MOUNT, J. The plaintiff brought this action to recover damages on account of personal injuries sustained by reason of having been run over by defendant's automobile. The complaint alleged that the defendant was running his automobile upon a street in the city of Walla Walla at a greater rate of speed than 10 miles per hour, and that while he was so running his automobile he so carelessly and negligently operated the same that it struck the plaintiff with great force, knocked him down, and ran over him, etc. The defendant denied these allegations, and pleaded contributory negligence of plaintiff. A jury trial resulted in a verdict and judgment in favor of the plaintiff for \$1,250. The defendant has appealed.

He insists (1) that the court erred in refusing to direct a verdict in favor of the defendant at the close of all of the evidence; and (2) in giving to the jury the following instruction: "I instruct you that it is unlawful for any person to drive or operate an automobile in the city of Walla Walla over any crossing or crosswalk at a rate of speed faster than one mile in fifteen minutes; that is, at a rate of speed faster than four miles per hour when any person is upon the same." The facts in the case show that on the 8th day of July, 1911, the defendant was driving a new automobile south along Second street, in the city of Walla Walla. This street was a paved street running nearly north and south. The evidence is not clear whether he was driving upon the right or left side of the street. Plaintiff's witnesses say that he was upon the left, while the defendant's witnesses say he was upon the right side of the street. He was driving at about 10 miles per hour. He intended to turn into Newell street to his left. This street was an unimproved street; that is, it was not paved, but was commonly used by pedestrians upon the side-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

walk on each side of the street, and by vehicles upon a well-beaten roadway about the center of the street. This street intersected Second avenue at right angles, running east and west. It was about 48 feet wide between the curbs of the pavement on Second street. The pavement upon Second street extended into Newell street to the property lines on each side of Second avenue, so that the pavement upon the entrance to Newell street from Second street was the same width of the parking strip and sidewalk on Second street. When the defendant was driving in his automobile south along Second street toward Newell street, he saw the plaintiff riding a bicycle also south about the middle of Second street. Plaintiff was 100 or 150 feet ahead of the defendant, both going in the same direction, and both going at about the same rate of speed. When the plaintiff came to Newell street, he at first intended to turn to his left along that street and ride his bicycle upon a path or sidewalk and go east upon the south side of that street; but he saw some persons upon the path or walk, and for that reason concluded to go upon the bicycle path along the north side of Newell street. At that time he had passed the north line of Newell street upon Second street, and was about the center of that street; so that in going to the north side his bicycle described a semicircle which brought him out of the line of Second street and upon the pavement between the curbs upon Newell street, going northerly upon the pavement where pedestrians crossed Newell street upon Second street. At this time plaintiff says he glanced up Second street and saw no one approaching. There was no one except plaintiff upon the crossing at that time. The defendant with his automobile in the meantime came down Second street and turned into Newell street. Neither party saw the other until it was too late to stop or avoid a collision. Defendant swerved his machine to the left, but the right front wheel of the automobile struck the plaintiff's bicycle about the front wheel, threw the plaintiff to the ground, and ran over and injured him. Before the defendant turned into Newell street, he shut off the power of his machine and slowed down some. The lot upon the corner where the accident happened was an unimproved lot, and the automobile was making no noise and sounded no alarm. The accident happened in the daytime.

The appellant contends that this case falls within the principle of, and is controlled by, the following cases: *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983; *Flehart v. Seattle Electric Co.*, 65 Wash. 291, 118 Pac. 51; *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458—and therefore that the trial court should have directed a verdict for the defendant. We think this case is not controlled by those cases, because there the party injured went into the course of the approaching vehicle or car when he should

have known that the vehicle was coming, and could not be stopped in time to prevent an injury. In this case the plaintiff testified that he looked up the street in the direction from which he came, and saw no vehicle. At that time the plaintiff's automobile must have been very near, probably to his left on the opposite side of the street. It was making no noise. The plaintiff was upon the crossing ordinarily used by pedestrians, going in an opposite direction from which he had come the moment before. He was in plain view of the defendant, and apparently crossing the course which defendant desired to take at that time.

[1, 2] Whether he should have seen the defendant and avoided the automobile, or whether the defendant should have seen the plaintiff and avoided him, were, we think, questions for the jury. In the case of *Hillebrant v. Manz*, 128 Pac. 892, where we were considering the question of failure of the injured party to look for the automobile which struck him and where the trial court had granted defendant's motion for a nonsuit, we said: "Even granting that the appellant was negligent in failing to look to the south after leaving the curb, that fact cannot be held as a matter of law the proximate or efficient cause of the injury. The respondent had no absolute right of way along the street. His right was certainly no greater than that of the appellant. Their rights and duties were reciprocal. Whether, notwithstanding any previous negligence of the appellant, the respondent could have seen the appellant and avoided the accident had he been running at a reasonable rate of speed, or had he sounded a horn, was a question for the jury." In that case the parties were the reverse of this, but the facts upon this point are very similar, and we held that the case should have gone to the jury. We think the rule in that case controls this, and the court, therefore, did not err in submitting the question of negligence to the jury.

Appellant argues that the court erred in giving the instruction above quoted, because it is not applicable to the facts in this case. The instruction is substantially in the language of the ordinance of the city of Walla Walla. The appellant contends that the accident did not happen on the crossing or crosswalk, and that the phrase, "when any person is upon the same," means when any person is using or crossing as a pedestrian, and does not apply to persons riding a vehicle over or across the same. The ordinance is general. It was intended to prevent automobiles from running in excess of four miles per hour over street crossings while other persons were upon such crossings. We think the evidence showed quite clearly that the plaintiff was upon the crossing. He may have been slightly off the line of the usual travel, but he was crossing the street at the crossing, as he had a right to do.

[3] The fact that he was riding a bicycle,

or was standing, or was in some other vehicle either standing or moving, would make no difference. He was upon or so near the crossing that he must be regarded as upon it, and it was therefore the duty of the driver of the automobile to slow down to the required speed, or at least to prevent his machine from running down some person who was there ahead of him, or who was likely to be endangered by the automobile. We think the instruction is applicable to the facts in the case. It was therefore not erroneous.

The judgment is affirmed.

CROW, C. J., and PARKER and FULLERTON, JJ., concur.

### CHENIER et ux. v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Washington. Feb. 1, 1913.)

#### 1. INSURANCE (§ 128\*)—BREACH OF CONTRACT—INSURER—PROOF OF LOSS—WAIVER.

In an action for damages for breach of a contract to issue an insurance policy on property which was subsequently destroyed by fire, the failure of plaintiff to make proof of loss, which proof would have been required by the policy had it been issued, did not bar recovery; failure of insured to issue the policy constituting a waiver of this condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 188-193; Dec. Dig. § 128.\*]

#### 2. INSURANCE (§ 128\*)—BREACH OF CONTRACT OF INSURED—WAIVER OF CONDITION—COMMENCEMENT OF ACTION WITHIN A YEAR.

Nor was recovery barred by the failure of insured to sue within a year after the fire, as would have been required by the policy, had it been issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 188-193; Dec. Dig. § 128.\*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Joe Chenier and wife against the Insurance Company of North America. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hathaway & Alston, of Everett, for appellant. Alexander & Bundy, of Seattle, for respondents.

PARKER, J. This is an action to recover damages in the sum of \$500, alleged to have resulted to the plaintiffs from a breach of a contract on the part of the defendant, by which it agreed to execute a policy of insurance upon a building owned by them. A trial resulted in verdict and judgment in favor of the plaintiffs for the amount claimed, from which the defendant has appealed.

The contentions of counsel for the respective parties rest upon facts as to which there is no substantial dispute. Respondents had an insurance policy for \$500 executed by appellant upon their building. This policy, by

its terms, expired on January 1, 1909. On September 1, 1908, respondents entered into an oral contract with appellant through its agent, by which it agreed that, upon the expiration of the policy on January 1, 1909, a new policy should be executed; in other words, that the insurance should then be renewed. There was some evidence tending to show that respondents had a sufficient amount of return premium due them in the hands of the agent, from other canceled policies, to pay the premium upon the new policy to be issued January 1, 1909, and that it was understood that such sum should be applied in payment of the premium upon the new policy. It seems probable that the jury concluded that the premium was paid upon the new policy in this manner. But, however that may be, it is plain that the jury was warranted in concluding, and did conclude, from the evidence that the contract for the new policy, to be issued January 1, 1909, was actually made and became a binding contract. Indeed, it is not now seriously disputed but that the verdict of the jury became conclusive upon the existence of this contract, though its existence was denied by appellant's answer, and strenuously contested at all times up to the rendering of the verdict. On January 10, 1909, 10 days after the agreed time for the issuing of the new policy, the building was destroyed by fire. The evidence is somewhat in conflict as to respondents' giving notice to the agent of the destruction of the building by fire, and as to the claim made against appellant by respondents prior to the commencement of this action. It is, however, undisputed that respondents never tendered to appellant any proof of their loss.

This action was commenced on April 15, 1910, which it will be noticed was more than 12 months after the date of the fire. In addition to its denial of the making of the contract, appellant affirmatively alleged in defense that it never issued an insurance policy which did not contain a provision that, "if fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, \* \* \* and, within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interests of the insured and all others in the property, the cash value of each item thereof, and the amount of loss thereon." Also that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire." Also that "the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiffs had knowledge of the fact that all fire insurance policies contain such provisions;" that the plaintiffs never made any proof of loss; and that more than one year elapsed between the date of the fire and the commencement of this action. Respondents demurred to this affirmative defense, which demurrer was sustained by the trial court. Therefore no evidence was introduced by appellant to sustain its affirmative defense. Respondents, however, did introduce in evidence the original policy of insurance, which contained provisions substantially as pleaded in appellant's affirmative defense. It also appears, from the evidence introduced by respondents, that none of the conditions relied upon by appellant in its affirmative defense were complied with. We therefore have before us all of the facts necessary to the maintenance of appellant's affirmative defense, if such facts constitute a defense.

[1] The controlling question here is, Are respondents precluded from recovering because of their failure to comply with conditions precedent to recovery, which would have been contained in the policy had it been issued in compliance with the contract? No doubt, if such policy had been issued, and this were a suit thereon to recover the amount of the insurance evidenced thereby, respondents would be so precluded, unless appellant had in some manner waived the conditions to be performed by respondents as a prerequisite to such recovery. But this is not a suit upon such policy; nor is it a suit upon an oral contract of insurance. It is a suit for damages because of the failure of appellant to execute a contract of insurance, as it agreed to do. It is true, as insisted upon by counsel for appellant, that "it will be presumed that they contemplated such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties." *Eames v. Home Insurance Co.*, 94 U. S. 621, 629 (24 L. Ed. 298). But the general rule seems to be that a failure, on the part of the insurer, to issue a policy in pursuance of such a contract constitutes a waiver of conditions precedent to be performed by the insured, which the policy, if issued, would have contained. It also seems to be the general rule that a denial by the insurer of the existence of such a contract, whether it be for insurance—that is, a contract for a policy to be issued—or a contract of insurance, strictly speaking, constitutes a waiver of conditions precedent to be performed by the insured. These general rules are apparently not adhered to by all of the courts, though we think they are supported by the decided weight of authority.

In *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 485, 88 Pac. 941, 942, we said: "Appellant next contends that respondent cannot recover because no proofs of loss

were made. We may assume that, under an oral contract of insurance, the usual conditions of written contracts of insurance are to be followed, and we may also assume that no formal proof of loss was furnished by the respondent to the appellant. Still the rule is that, when a contract is repudiated, as in this case, on the ground that there is no contract and no liability, before the time expires for furnishing such proofs, such denial of liability is a waiver of the proof of loss"—citing authorities. In the recent case of *Hatcher v. Sovereign Fire Ins. Co.*, 127 Pac. 588, we held that the waiver will be effectual, although the act or conduct of the insurer, relied upon to constitute such waiver, is subsequent to the time fixed by the policy within which proof of loss must be furnished. True, in that case the waiver did not arise from a denial of the existence of the contract on the part of the insurer; but we are unable to see that conduct consisting of a denial of the existence of the contract, made after the prescribed time for furnishing proof, is not as effectual to relieve the insured from making proof of loss as such a denial on the part of the insured, made before such time, would be. In either event, such denial is wholly inconsistent with the necessity of proof. The offer of proof in one case is as vain and useless as in the other; and this apparently is the reason upon which the rule rests. These decisions seem to effectually dispose of appellant's contentions, in so far as they rest upon respondents' failure to furnish proof of loss.

[2] Since appellant also rests its defense upon respondents' failure to commence this action within 12 months after the occurrence of the fire, as the conditions of the policy, if issued, would have required, it becomes necessary to follow learned counsel's contentions further and ascertain whether such limitation, as to the time of commencing an action, is any more binding upon respondents, or less capable of being waived by the insured, than the conditions as to furnishing proof of loss. Now, if the condition to be contained in the prospective policy as to furnishing proof of loss within a certain time is ineffectual, as against respondents, because of appellant's denial of the contract and failure to issue the policy, it would seem that other conditions precedent to recovery, to be contained in the prospective policy, would be equally ineffectual upon denial of the contract and failure to issue the policy.

While it seems clear to us that this is a contract for the issuing of a policy of insurance—that is, a contract for insurance rather than a contract of insurance, strictly speaking—we think it unnecessary to dwell upon the technical distinction differentiating such contracts, which is sometimes noticed by the authorities. The practical importance of this distinction does not seem to have been

recognized by the decisions of the courts to the extent one might expect from the statement of the general rule found in the authorities. This is at least true where there has been under consideration an oral contract, and the question of giving force to conditions precedent to be contained in the prospective policy; that is, the question of waiver or rendering effectual of such conditions, by denial of the contract and failure to issue the policy, has not in all adjudicated cases been rested upon the technical distinction between contracts for insurance and contracts of insurance. Now it would seem that, if such prospective conditions would be binding in any case upon the insured under an oral contract, they would be where the oral contract is one of insurance contemplating the issuance of a policy as further evidence of the contract; yet, even in such cases, a majority of the decisions seem either to ignore the distinction between oral contracts for insurance and oral contracts of insurance, or else to hold the conditions waived by the insurer by its failure to issue the policy. We will now notice some of the decisions applying the law to the facts of particular cases.

In *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840, there was involved an oral contract. The insured had a policy issued by the defendant, which was of questionable validity by reason of defective description of the property. This policy was by agreement canceled, with the understanding that a new policy should be issued as soon as could conveniently be done. It was agreed that, since the new policy could not be immediately issued, as it had to be procured by mail from a distance, the insurance should commence July 20, 1889, the date of the agreement, as though the policy had been then actually issued and delivered, and that the new policy should run from that date. About a month later the property was destroyed by fire, at which time the new policy had not been issued, and thereafter the insurer refused to issue the new policy and refused to pay the loss. Apparently one of the conditions of the prospective policy was that the insured must commence an action to recover for loss within six months from the date of the loss. Disposing of the contention that this condition was binding upon the insured, the court said: "In the ruling of the court sustaining the motion to strike out that portion of the answer alleging that the action was not commenced within six months after loss, and in refusing to give the instruction asked by defendant to the same effect, there was no error. This action is not based upon the terms of any policy, but upon the breach of a contract. Although plaintiff testified that the policy to be issued was to be in terms the same as the former one, except as to length of time and amount of premium, defendant refused to issue or deliver the policy according to

contract, and hence this action. Having failed to issue the policy, it can claim no exemption from liability on account of any provisions the policy might or would have contained had it been issued." It is difficult to escape the conclusion that that contract was one of insurance rather than one for insurance, though the court seems to have ignored such distinction and based its decision upon the ground of waiver upon the part of the insurer by its failure to issue the policy. This is the only decision coming to our notice involving the waiver of, or rendering ineffectual, a condition limiting the time for commencing suit to recover the loss, to be contained in a prospective policy, by a failure to issue such policy in pursuance of an oral contract.

In *Sproul v. Western Assurance Co.*, 33 Or. 98, 54 Pac. 180, there was involved an oral contract contemplating the issuing of a policy in usual form. The policy would have contained conditions rendering it void if the property was, or should become, incumbered by mortgage. The property was so incumbered, and was destroyed by fire before issuance of the policy. Answering the defense, made by the insurer, that the right of the insured to recover was defeated by failure of the insured to comply with conditions which would have been contained in the prospective policy if issued, the court said: "Where the existence of a contract to insure is flatly denied, and the issuance of the policy is refused and withheld, the company should be held to have waived such conditions as are calculated to void it at the very moment of its execution, unless it has given ample notice to the assured that they will not only be contained in the policy, but insisted upon, in case the facts which are supposed to give rise to the stipulations prove to be falsely represented. So it is, as it respects those conditions which the assured is required to observe in order to perfect his remedy against the company."

In *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423, there was involved an oral contract, which the court regarded as a contract of insurance, and not simply a contract to issue a policy of insurance. Disposing of the defense that the proof of loss had not been made as would have been required by the conditions of the prospective policy, the court said: "Soon after the fire the company denied that any contract of insurance existed by refusing to issue a policy. When the company refused, upon request, after the loss, to issue a policy based upon the oral agreement, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit." The following decisions are also in harmony with these views: *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Gold v. Sun Ins. Co.*, 73 Cal. 216,



14 Pac. 786; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Baile v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo. 371.

It may be suggested that the decisions rest to some extent upon want of knowledge in the insured of the conditions which would be contained in the prospective policy. For instance, such fact is noticed in the *Missouri* case above cited. However, that such fact is not controlling seems to be plain, in view of the fact that the *Oregon*, *Indiana*, and *California* cases above cited deal with contracts for renewal of policies. Of course, in such cases the insured knew what the conditions of the prospective policies would be; and yet the insured were held not bound thereby, because the contracts were denied and the policies never issued.

We will now notice the decisions upon which counsel for appellant place their principal reliance. In *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, there was involved an oral contract which a majority of the court regarded as a contract of present insurance. The parties to that contract, no doubt, contemplated the issuance of a policy; but, whether or not they did in fact so contemplate, the statutes of New York then in force prescribed a standard form of insurance policy, the terms of which, by operation of law, became a part of the contract. A majority of the court held that the conditions specified in the statutory policy must be complied with by the insured as a prerequisite to his right of recovery. Three of the judges of that court dissented from the majority opinion upon the ground of waiver of those conditions by the failure of the company to issue the policy in compliance with the contract. It is also worthy of note that that decision reversed a decision of the appellate division of the Supreme Court, which decision was concurred in by all of the five judges of that court. 13 App. Div. 444, 43 N. Y. Supp. 623. In *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, there was involved a binding slip, as it was called, being a memorandum evidencing what the court regarded as a contract of present insurance. The court held that the insured was bound by all of the conditions of the prospective policy as if it had been issued. But, while these decisions do not seem to be in harmony with all of those above noticed, they nevertheless are not necessarily in conflict with our holding in this case in favor of the respondents, because there is here involved a contract which is not a contract of present insurance, but a contract for the issuance of an insurance policy at a future time. The only decision called to our attention, which is seemingly in direct

conflict with this view, is that of *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. 373.

We feel constrained to follow what we regard as the decided weight of authority, and hold that the failure of appellant to issue an insurance policy in pursuance of the contract, which the jury found to exist in this case, rendered wholly ineffectual, as against respondents, the conditions which would have been contained in the prospective policy, had it been issued, requiring the respondents to furnish proof of loss within a certain time, and requiring the commencement of an action to recover upon the policy within one year from the date of the fire.

The judgment is affirmed.

CROW, C. J., and GOSE and MOUNT, JJ., concur.

#### BORELL et al. v. CARSON.

(Supreme Court of Washington. Feb. 13, 1913.)

##### 1. APPEAL AND ERROR (§§ 70, 78\*)—JUDGMENT APPEALABLE—ORDER OF DEFAULT.

An order of default for failure to answer the complaint within the time fixed by a prior order is not appealable, not being a "final order" or one specifically mentioned in Rem. & Bal. Code, § 1716, defining appealable orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-385, 426, 464-483; Dec. Dig. §§ 70, 78.\*]

##### 2. APPEAL AND ERROR (§§ 70, 78\*)—ORDERS APPEALABLE—INTERLOCUTORY ORDERS.

An interlocutory order directing that defendant specifically perform the contract sued on, and pay to plaintiff the balance due under her contract, and, in the event that defendant does not obey such order, that the property be sold to discharge a lien against the property for money paid by plaintiff, was not appealable, not being a final order or one defined as appealable by Rem. & Bal. Code, § 1716.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-385, 426, 434, 464-477, 480, 481; Dec. Dig. §§ 70, 78.\*]

Department 1. Appeal from Superior Court, Stevens County; F. K. P. Baske, Judge.

Action by Blanche R. Reddish Borell and husband against Maida T. Carson. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

A. C. Shaw, of Spokane, for appellant. Guy B. Groff, of Spokane, for respondents.

PARKER, J. This is an action to enforce specific performance of a contract for exchange of real property between the plaintiffs and the defendant, and to recover upon two promissory notes given by the defendant to the plaintiffs in connection with the exchange contract. The plaintiffs seek recovery upon three causes of action pleaded in their complaint—one for recovery upon each of the promissory notes, and one for specific performance of the exchange contract and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

enforcement of a lien against certain of the property on account of money paid out by them. On January 15, 1912, the court entered an order, adjudging the defendant to be in default because of her failure to answer the complaint within the time fixed by a previous order of the court striking her second amended answer to the complaint. On January 29, 1912, after making findings of fact and conclusions of law, the court entered an interlocutory order, adjudging "that the defendant Maida T. Carson is hereby directed to specifically perform the contract set out and made part of the plaintiffs' third cause of action, \* \* \* that the defendant pay to the plaintiffs herein within 30 days from this date, to wit, on or before March 1, 1912, the sum of \$1,852.10, \* \* \* being the balance due under her contract specifically set out in plaintiffs' third cause of action, and, in the event that said defendant shall not obey said order within the time specified, that the property in Stevens county hereinbefore described shall be decreed to be sold to discharge the said lien." Thereafter, on January 30, 1912, notice of appeal was served upon plaintiffs' attorney, stating that the defendant appealed from the order of default of January 15, 1912, and from the order of January 29, 1912, the latter order being the last act of the court in the cause. Thereafter, on March 7, 1912, the defendant having failed to comply with the interlocutory order of January 29th, requiring her to pay the amount of the lien found against the property, a final decree was entered foreclosing that lien and directing sale of the property in satisfaction thereof.

[1, 2] Counsel for respondents move to dismiss the appeal, on the ground that the orders attempted to be appealed from are not final orders nor orders specifically mentioned in section 1716, Rem. & Bal. Code, from which appeal may be taken to this court. We are constrained to hold that this motion must be sustained. We are of the opinion that the orders attempted to be appealed from are neither of them a final judgment in the case, nor any of those specifically mentioned in the statute, from which appeal may be taken to this court. Section 1716, Rem. & Bal. Code, and our former decisions thereunder, are decisive in favor of respondents' motion to dismiss the appeal. *Yatsuyanagi v. Shimamura*, 57 Wash. 42, 106 Pac. 503; *Zellar v. Siemens*, 58 Wash. 116, 107 Pac. 1054; *Gilliland v. German-American State Bank*, 59 Wash. 292, 109 Pac. 1020. It is not pretended that any appeal has ever been taken from the final decree entered in this cause, which decree was entered more than a month after the appeal which is here sought to be prosecuted was taken.

The appeal is dismissed.

CROW, C. J., and CHADWICK, MOUNT, and GOSE, JJ., concur.

# JOHNSON v. HEIRGOOD et al.

(Supreme Court of Washington. Feb. 13, 1913.)

## 1. MECHANICS' LIENS (§ 281\*)—FORECLOSURE—SUFFICIENCY OF EVIDENCE.

Evidence in an action to foreclose a materialman's lien held to sustain a finding that the material was sold to the contractor as an independent contractor, and not as agent of the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 665-672; Dec. Dig. § 281.\*]

## 2. MECHANICS' LIENS (§ 99\*) — NOTICE TO OWNER BY MATERIALMAN—SUFFICIENCY.

The leaving of duplicate statements of the contents of each load of material furnished with the contractor and other persons on the premises was not a compliance with Rem. & Bal. Code, § 1133, requiring that a materialman, to secure a lien, shall mail or deliver to the owner a duplicate statement of all materials furnished to the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.\*]

## 3. MECHANICS' LIENS (§ 99\*) — NOTICE TO OWNER BY MATERIALMAN—WAIVER.

That the owner was present when the first load of material was delivered, and refused to accept a statement for the material, and pointed out another person, saying, "He is the man to attend to that, and not me," did not constitute a waiver of the owner's right to insist that duplicate statements of the materials furnished be mailed to him as a prerequisite to the right of lien as required by Rem. & Bal. Code, § 1133, where none of the parties regarded these statements which were sent out with the loads as notices under the statute.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.\*]

## 4. MECHANICS' LIENS (§ 99\*) — NOTICE TO OWNER BY MATERIALMAN—SUFFICIENCY—ACTUAL NOTICE.

That the owner had actual notice of the delivery of materials did not dispense with the necessity of sending him the statement provided for by Rem. & Bal. Code, § 1133, as a prerequisite to a materialman's lien; a substantial compliance with the statute being necessary to obtain its benefits.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.\*]

Department 2. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Action by C. E. Johnson against M. Heirgood and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John M. Gleeson, of Spokane, for appellant. Danson, Williams & Danson, of Spokane (Geo. D. Lantz, of Spokane, of counsel), for respondents.

FULLERTON, J. On September 5, 1910, the respondents Heirgood entered into a contract with the respondent Charles Kolb, whereby the latter, for a stated consideration, undertook to furnish all necessary labor and material, and erect for the former a dwelling house on certain lands owned by them situated in Spokane county. Kolb procured the principal part of the material that entered into the construction of the house

from the appellant Johnson, and, on his failing to pay for the same, Johnson filed a lien on the dwelling house for the amount of the contract price of the materials furnished. Subsequently Johnson began the present action to foreclose the lien. Issue was joined on the allegations of his complaint, and a trial had resulting in findings, and a judgment denying his right to foreclose the lien. He appeals.

The record presents chiefly questions of fact. It is not important that these be discussed in detail or at length.

[1] The first is: To whom was the lumber actually sold? It is the appellant's contention that it was sold to the respondents Heirgood, or, more accurately perhaps, to Kolb and the Heirgoods jointly. He testified that Mr. Heirgood appeared at his place of business some time in the summer of 1910, looked over his materials, inquired concerning prices, and where good carpenters could be found, saying that he contemplated building a house, and desired to get some idea as to its probable cost; that he later appeared with Mr. Kolb, and again looked over the materials, stating that Mr. Kolb was going to build the house, and would later furnish him with a statement of the materials required and give him a chance to bid on them; that later the statement was furnished, that he did submit prices, and was given an order by Mr. Kolb for the materials; that he was not informed of the fact that Kolb was building the dwelling under contract, but understood that Kolb had charge of the construction of the building as the agent of the Heirgoods, and that in dealing with Kolb he was dealing with the Heirgoods. His testimony is directly opposed in all of its material particulars by that of Heirgood, and to the greater extent by that of Kolb. Their testimony is to the effect that Johnson was informed as to the exact relation between Kolb and Heirgood, and dealt with Kolb with full knowledge of such relation. In this they are supported by the written evidence put into the record by Johnson himself. The written statements of the materials delivered sent out with each separate wagon load are all marked as sold to Kolb, with the name of Heirgood thereon as the owner of the building at which the materials were delivered. Without, therefore, further pursuing the inquiry, we think the trial court was justified in finding that the materials were sold and delivered to Kolb as an independent contractor, and not as the agent of Heirgood; at least, there is no such preponderance of the evidence in favor of the opposite view as to warrant us in reversing the finding.

[2, 3] The statute (Rem. & Bal. Code, § 1133) provides that a person furnishing materials to a contractor to be used in the construction of a building shall at the time the materials are delivered to the contractor, as

a condition precedent to the right of lien, mail or deliver to the owner of the building a duplicate statement of all such materials. This requirement of the statute was not complied with in this instance, but the appellant seeks to escape the penalty usually following such an omission by contending that there was a waiver of the statutory requirements by the respondents, and that they had actual notice of the delivery of the materials. It appears that as each separate wagon load of material left the appellant's place of business the driver of the wagon was furnished with duplicate statements of the contents of the load, and was instructed to leave one of such statements with the person to whom the materials were delivered, and to have the other signed by such person and returned to the appellant as evidence of such delivery. Among the first of the materials delivered was a load of cement intended for the foundation of the building. The driver after unloading the load tendered the statements to Heirgood, who was present at the place where the material was unloaded. Heirgood refused to accept the statement or receipt for the materials, and pointed out to the driver another person saying, "He is the man to attend to that, and not me." This act is thought to constitute a waiver on the part of Heirgood of the right to insist that duplicate statements of the materials furnished should have been mailed to him as a prerequisite to the right of lien. But plainly it is not so. If the act of Heirgood could be said to be the constituting of the particular individual his agent to act for him, the agency could relate only to the particular load, as no other of the very considerable quantity of material that went into the building was receipted for by this particular person. But the conclusive answer is that neither the appellant, the respondents, nor the drivers of the wagons hauling the material regarded these duplicates as notices under the statute. The scheme was the convenient means adopted by the appellant for keeping account of materials sold, and the signature desired was the signature of the person, or the representative of the person, to whom the materials were sold. This is further evidenced by the fact that the appellant received and retained without question numerous receipts signed by Kolb himself, who is concededly not the owner of the property, nor the person pointed out by Heirgood as the proper person to whom to deliver the statements.

[4] But it is said that the respondents had actual notice of the delivery of the materials, and hence further notice to them by way of duplicate statements was not necessary. The record does indeed show that the respondents resided close to the property on which the house was being built during the entire time the house was in process of construction, and that Mr. Heirgood frequently

inspected the materials and at times caused the superintending architect to reject some that he thought were not of the quality called for in the specifications for the building. But the right of lien is statutory and a substantial compliance with its terms is necessary to obtain its benefits; and since the statute makes this one form of notice essential, and places the burden of giving it upon the person asserting the lien, the courts should be slow in saying that some other form of notice will answer the purpose. It should not be so held in the present instance.

There is no error in the record, and the judgment will stand affirmed.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

### STATE v. RICE.

(Supreme Court of Washington. Feb. 13, 1913.)

#### CRIMINAL LAW (§ 1090\*)—APPEAL AND ERROR—RECORD.

In the absence of a statement of facts or bill of exceptions, an alleged error, in that the trial court of its own motion recalled the jury and gave additional instructions, could not be reviewed, though the facts surrounding the recalling of the jury were set out by affidavit, a copy of which appeared in the certified transcript.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Tom Rice was convicted of robbery, and he appeals. Affirmed.

Wm. R. Bell, of Seattle, for appellant. John F. Murphy, Crawford E. White, and Reah M. Whitehead, all of Seattle, for the State.

MAIN, J. The defendant in this case was charged in the superior court by information with the crime of robbery. In due time he was tried, and a verdict of guilty returned. Motion for a new trial was seasonably made and overruled, and the defendant sentenced to the state penitentiary at Walla Walla. From this judgment and sentence the defendant appeals.

No statement of facts or bill of exceptions has been brought to this court. The appellant in his brief assigns error, in that the trial court, while the jury were deliberating upon their verdict, of its own motion recalled the jury into open court, and gave them additional instructions. The facts surrounding the recalling of the jury are set out by affidavit, a copy of which appears in the transcript, which was certified by the clerk. The respondent objects to the consideration of this affidavit, for the reason that it is not properly before this court. This contention

must be sustained. Under the repeated decisions of this court, affidavits used upon a hearing before the trial court cannot be made a part of the record on appeal by simply incorporating them in the clerk's transcript. *Spoar et al. v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190; *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984. In the *Hayworth Case*, the court in deciding a similar question said: "The appellants failed to propose or have certified into this court any statement of facts, and the case is here on a transcript of so much of the record as the appellants have seen fit to direct the clerk to transmit to this court. In the record so certified are copies of two affidavits filed for use on the motion to vacate the judgment. The respondent objects to the consideration of these affidavits on this appeal on the grounds that they are not properly a part of the record, the same being in the nature of evidence which can only be brought to this court by a statement of facts. This objection is well taken. We have in a long line of cases held that affidavits filed as proof of particular facts cannot be made a part of the record in this court by the mere certification of the clerk. *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190, and cases cited."

There being no assignment of error in the record which we can consider, the judgment will therefore be affirmed.

CROW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

### LEWER v. CORNELIUS.

(Supreme Court of Washington. Feb. 13, 1913.)

#### 1. INTOXICATING LIQUORS (§ 327\*)—ILLEGAL CONTRACT—AIDING IN EVADING LAW.

Though Laws 1909, c. 84, declaring it unlawful for a wholesaler or manufacturer of liquor "to pay, advance or loan or become surety for the payment for any other person of the license fee" for engaging in the retail liquor business, does not prevent a bank loaning money to a retailer to pay his license, or making a loan to a brewing company, knowing the money was to be used to pay such a license, yet for it to loan its money to the retailer for such purpose on the security of the brewing company, or to loan in its name to the retailer, for such purpose, the money of the brewing company, would be such a participation in the illegal acts as to render void any contract or obligation made in connection therewith.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467-473; Dec. Dig. § 327.\*]

#### 2. CONTRACTS (§ 138\*)—EFFECT OF ILLEGALITY—ENFORCEMENT—MANNER OF RAISING OBJECTION.

A court will not knowingly aid in the furtherance of an illegal transaction, and in harmony with such principle does not concern itself as to the manner in which the illegality

of a matter before it is brought to its attention; so that, notwithstanding any rule estopping the maker of a note to deny that the payee is the real party in interest, he having, by his answer, made such denial and disclosed a subterfuge to evade the law, the court will look into the matter to the end of refusing enforcement of the note, if the transaction be found illegal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 687-700; Dec. Dig. § 188.\*]

### 3. STATUTES (§ 114\*)—TITLE AND SUBJECT—INTOXICATING LIQUORS.

The words in the title of the act (Laws 1909, c. 84) "to prohibit any manufacturer or wholesaler dealer in \* \* \* liquors from \* \* \* having any interest in any \* \* \* retail liquor store, or in any retail liquor license," are broad enough to include the clause of the act prohibiting any such manufacturer or wholesaler from advancing money to pay, or becoming surety for the payment of, a retail dealer's liquor license.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.\*]

### 4. CONSTITUTIONAL LAW (§ 296\*)—DUE PROCESS—REGULATION OF LIQUOR TRAFFIC.

The provision of Laws 1909, c. 84, making it illegal for a manufacturer or wholesaler of liquor to advance money to pay a retail dealer's liquor license, or to become surety for payment thereof, does not deprive the manufacturer or wholesaler of his property without due process; the act being but a regulation of traffic in intoxicating liquors, which is in the powers of state governments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-830, 835-846; Dec. Dig. § 296.\*]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by M. W. Lewer against E. M. Cornelius. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

R. G. Hutchinson, of Spokane, for appellant. Happy, Cullen, Lee & Hindman, of Spokane (Sydney A. Cryor, of Spokane, of counsel), for respondent.

FULLERTON, J. This is an action, brought by the respondent against the appellant, to recover upon two promissory notes alleged to have been made and delivered by the appellant to the Exchange National Bank of Spokane, and by the bank indorsed to the respondent after maturity. The appellant, for answer to the complaint, set up facts thought to show that the notes were founded on an illegal consideration. To the answer a general demurrer was interposed, which the trial judge sustained. The appellant thereupon refused to plead further, and judgment was entered against him according to the prayer of the complaint. The ultimate question therefore is, Do the facts set forth in the answer show an illegal consideration for the notes?

The material part of the answer is as follows:

"(1) That the promissory notes referred to in paragraph 1 of plaintiff's first and second causes of action were given for an illegal

consideration, and in furtherance of an illegal transaction arising as follows: The Inland Brewing & Malting Company is, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the state of Washington, and authorized to do business in said state and in the city of Spokane, is, and was at all of said times, a corporation engaged in the manufacturing and bottling of fermented malt liquors, and was at all of said times engaged in buying, selling, and disposing of the same in quantities of five gallons or more in said city of Spokane; that at all of said times one Charles Theis was, and now is, president of said Inland Brewing & Malting Company, and one William Huntley was at all of said times, and now is, secretary of said brewing company.

"(2) That the Exchange National Bank of Spokane, mentioned as payee in the notes referred to in plaintiff's first and second causes of action herein, is, and was at all of said times, a national bank organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business at Spokane, Washington; that said William Huntley, heretofore mentioned as secretary of said Inland Brewing & Malting Company, is, and was at all of said times, the vice president of said Exchange National Bank, and had full knowledge of all of the transactions herein-after mentioned between said bank, said brewing company, and this defendant.

"(3) That on or about the 12th day of May, 1911, this defendant was, and ever since has been, engaged in the business of operating a retail liquor store or saloon at No. 8 Howard street, in said city of Spokane, for the retailing of spirituous, fermented, malt and other intoxicating liquors; that the cost of the license for retailing such liquors, under the requirements of Ordinance No. — of the ordinances of said city of Spokane, was at all times herein mentioned \$1,000; that shortly before his license became due defendant told said Inland Brewing & Malting Company that he did not have the ready money with which to pay said license; that said brewing company thereupon solicited from said Exchange National Bank a loan of \$1,000, a portion of which is represented by the promissory notes set out in paragraph 1 of plaintiff's first and second causes of action herein, with which to pay said license; that said loan was made by said bank upon the solicitation of said brewing company; that defendant at no time, nor at all, requested or solicited a loan of said bank of \$1,000, or of any other sum whatsoever, or at all; that said bank made said loan at the request and solicitation of said brewing company, and knew the purpose for which said loan was made, and made the same after being fully advised by said Theis and said Huntley of the use to which the money so

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

loaned would be put; that said bank allowed its name to be used as payee in said promissory notes, with the view to and for the purpose of aiding and assisting said brewing company, and did so aid and assist said brewing company in evading and circumventing the law; that in truth and in fact said brewing company paid said license for defendant, contrary to law; that said promissory notes were taken by said bank as a cloak under which to hide the fact that said brewing company had, contrary to law, paid the license of defendant, a retail liquor dealer; that said promissory notes, when signed by defendant, were not delivered to said bank, but were, by defendant, delivered to said brewing company; that the \$1,000, for a portion of which said two promissory notes were, by defendant, signed, was delivered by said bank to said brewing company, and not to defendant; that by reason of having so paid said license said brewing company sought to and did acquire, contrary to law, a financial interest in defendant's retail liquor store."

Prior to the hearing on the demurrer, the parties stipulated that the notes were first signed by the appellant and then delivered to the Brewing & Malting Company named in the answer, and by that company in turn delivered to the Exchange National Bank, and by the bank indorsed after maturity to the respondent.

The statute on which the answer is based is found in the Laws of 1909, at page 182, and reads as follows: "That from and after the 31st day of December, 1909, it shall be unlawful for any person, persons, firm or corporation engaged in the manufacture, rectifying or bottling of spirituous, fermented malt or other intoxicating liquors or engaged in buying, selling or disposing of the same in quantities of five gallons or more to own all or any part of or to have any interest in the liquor, stock, fixtures or equipment of any kind whatsoever of any retail liquor store or to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law or city charter or ordinance, or to hire, engage or employ, directly or indirectly, any person, persons, firm or corporation to manage, conduct, control or operate a place where intoxicating liquors are sold at retail, to wit, in less than five gallons at a time or to sign or become surety on any bond required by law of a retail liquor dealer."

[1] In this court the respondent makes two principal contentions against the sufficiency of the answer, namely: (1) That the facts pleaded therein do not show a violation of the statute; and (2) that the statute is unconstitutional, in so far as it has relation to the facts shown in the answer. Noticing the first of these contentions, it is at once apparent that the payee named in the notes is not within the class of persons who are denied the right "to pay, advance or loan or

become surety for the payment for any other person of the license fee" required as a condition precedent to engaging in the barter and sale of intoxicating or malt liquors. But, while the payee itself could do any or all of these things without violating any of the prohibitions of the statute, it could not with impunity lend its name as a cloak to cover similar transactions on the part of the prohibited persons. It could not make a loan for the purpose of paying a license fee on the security of a person or corporation engaged in the manufacture of spirituous or malt liquors, nor could it loan in its own name, for this purpose, the money of the person or corporation so engaged, as to do these things would be such a participation in the illegal acts as to render void any contract or obligation made in connection therewith; and this although it be true, as counsel contend, that the bank could knowingly loan money to the brewing company, to be used for paying such a license fee, without rendering the contract of loan illegal or unenforceable.

[2] And here it may be well to notice another contention of the respondent. It is claimed that the maker of a note is estopped to deny that the payee thereof is the real party in interest. But conceding this to be a general rule, it has no application to the question suggested here. The court listens to this defense not because of any desire to aid the maker of the note—indeed, he is usually as culpable as the payee—but listens to it because of the public policy involved; because the parties in entering into the contract have violated the statute. A court will not knowingly aid in the furtherance of an illegal transaction. And in harmony with this principle it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. If such illegality appears in the pleadings of either party, it will not inquire into the technical accuracy of such pleading; if it appears in the statement of witnesses at the trial, it will not inquire into the technical admissibility of such statement as evidence, but will in either case start an inquiry of its own, and if it be found that the differences which it is called upon to adjudicate arise out of an illegal transaction it will leave the parties where it found them, to work out their differences as best they may. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960, and cases there cited; *Baird v. Sheehan*, 38 App. Div. 7, 56 N. Y. Supp. 228; *Howe's Ex'r v. Griffin's Adm'r*, 126 Ky. 373, 103 S. W. 714, 128 Am. St. Rep. 296.

Tested by these rules, it is manifest that the court was in error when it refused to inquire into the legality of the transaction giving rise to the notes in suit. In the answer it is alleged that the brewing company named is a corporation engaged in manufacturing and bottling of fermented malt liquor, and is selling the same in quantities of five gallons and more; that the appellant is engaged in

conducting a retail liquor store; that the brewing company solicited of the payee named in the note a loan of \$1,000 to pay the license fee required of the appellant by the city of Spokane; that the payee knew the purpose for which the loan was desired; that it allowed its name to be used as payee of the notes "with the view to and for the purpose of aiding and assisting said brewing company, and did so aid and assist said brewing company, in evading and circumventing the law; that said promissory notes were taken by said bank as a cloak under which to hide the fact that said brewing company had, contrary to law, paid the license fee of defendant;" and that the notes, when signed, were not delivered to the bank by the appellant, but were delivered to the brewing company, who delivered them to the bank. It may be that the answer is inartificially drawn, and it may be that conclusions are stated therein when a detail of facts would be more appropriate; but clearly it states enough to show a reasonable probability that the notes were signed by the maker and taken by the payee in the furtherance of an illegal transaction. The court therefore, before entering judgment, should have entered upon an inquiry as to the facts concerning the making and delivery of the notes, and if it found the transaction illegal, and that the payee participated therein, should have refused to aid in enforcing the collection of the notes.

[3] The title of the act is as follows: "An act to prohibit any manufacturer of or wholesale dealer in intoxicating liquor from owning, operating or having any financial interest in any saloon or other retail liquor store, or in any retail liquor license, in the state of Washington or to become surety on any liquor dealer's bond and providing penalties for violation thereof."

The act, it will be remembered, makes it an offense for a person or corporation engaged in the manufacture, rectifying, or the bottling of spirituous, fermented malt, or other intoxicating liquors "to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law or city charter or ordinance" for the sale of intoxicating or malt liquors in less than five gallons at a time. It is the contention of the respondent that the answer, if it sets forth a violation of the statute at all, sets forth a violation of that portion of the statute which we have quoted, and that such portion is not within the title of the act. It is argued that a person reading the title of the act would not be apprised of the fact that the act prohibits a brewery from loaning money to a retail liquor dealer for the purpose of paying his license fee, or from becoming his surety to another who makes a loan for that purpose, and, inasmuch as the title is thus deficient, this particular part of the statute is not en-

forceable, because not within the title. But we have many times held that it is not required that everything in the body of the act be pointed out in the title, as this would require the title to be an index to the body of the act, or the body of the act to be a mere repetition of the title; but that it is sufficient if the matters contained in the body of the act are fairly embraced therein. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Lancey v. King Co.*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; *State v. Jones*, 66 Wash. 229, 119 Pac. 384.

Under the rules as announced in these cases, we think the title sufficient. We think the words in the title, namely, "to prohibit any manufacturer or wholesale dealer in intoxicating liquors from \* \* \* having any interest in any saloon or other retail liquor store, or in any retail liquor license," are broad enough to include a clause in the body of the act prohibiting any manufacturer of or wholesale dealer in intoxicating liquors from advancing money to pay, or becoming surety for the payment of, a retail dealer's liquor license.

[4] A second ground on which the act is said to be unconstitutional is that it deprives manufacturers of and wholesale dealers in intoxicating liquors of their property without due process of law, and hence is in violation of the federal as well as the state Constitution. But it has seemed to us that this question is scarcely any longer debatable. The act is but another form of regulation of the traffic in intoxicating liquors, and to regulate the sale and use of intoxicating liquors is now among the universally recognized powers of the state governments.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

#### ARNOLD v. HALL

(Supreme Court of Washington. Feb. 8, 1913.)

#### 1. TRUSTS (§ 30½\*) — EXPRESS TRUSTS — AGREEMENT TO RECONVEY.

Where plaintiff, owning land, on the belief of his mother, who was infirm in body and mind, that his recent marriage had deprived him of his right thereto as his separate estate, and that the change might result in future injury to him which might be avoided by his conveyance of the property to her and her reconveyance to him, by conveyance in which his wife joined, conveyed it, without other consideration, to his mother, on the agreement and understanding that she would reconvey it

as a gift or legacy, there was an express trust to reconvey.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.\*]

## 2. TRUSTS (§ 1\*)—CREATION AND VALIDITY—“EXPRESS TRUSTS.”

“Express trusts” are presumably created by the free and deliberate act of the parties, are in accordance with equity, and, by the terms of their creation, are permanent in their operation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2611-2613.]

## 3. TRUSTS (§ 91\*)—CREATION AND VALIDITY—“IMPLIED TRUSTS.”

“Implied trusts” have not the element of permanency and rightfulness, so far as relates to the intention of the responsible party, and freedom of action may be altogether lacking; the essential idea of an implied trust involving a certain antagonism between the cestui que trust and the trustee, even where the trust does not arise out of fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 139; Dec. Dig. § 91.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3436, 3437.]

## 4. TRUSTS (§ 43\*)—EXPRESS TRUST—PAROL EVIDENCE.

Under Rem. & Bal. Code, § 8745, providing that all conveyances of real estate and all contracts creating or evidencing any incumbrance upon real estate shall be by deed, an express trust in lands cannot be established by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

## 5. TRUSTS (§ 109\*)—IMPLIED TRUST—EVIDENCE TO ESTABLISH PAROL EVIDENCE.

An implied trust in real property may be established by parol testimony.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.\*]

## 6. TRUSTS (§ 109\*)—ESTABLISHMENT—PROOF BY PAROL EVIDENCE—FRAUD.

The rule that it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol refers to such fraud as inheres in the original transaction.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.\*]

## 7. TRUSTS (§ 96\*)—ESTABLISHMENT—CONSTRUCTIVE TRUSTS—BREACH OF EXPRESS CONTRACT TO RECONVEY REAL PROPERTY.

Equity will not raise a constructive trust upon breach of an express contract to reconvey real property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.\*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by Nathan A. Arnold against Minnie M. Hall. Decree for plaintiff, and defendant appeals. Reversed, with direction to enter a judgment for defendant.

Jas. J. Anderson, of Tacoma, for appellant. Thos. M. Vance, of Olympia, for respondent.

GOSE, J. On the 24th day of May, 1911, the plaintiff conveyed to his mother, Sarah

E. Arnold, by a deed absolute in form with covenants of warranty, a tract of land containing 20 acres, situate in Thurston county in this state. On the 5th day of June following Mrs. Arnold conveyed the property to the defendant, her daughter, by a deed of general warranty. Mrs. Arnold died on the 29th day of June following. On the day succeeding this action was commenced; the plaintiff contending that he conveyed the property to his mother in trust, upon her promise to reconvey it to him. There was a decree for the plaintiff. The defendant has appealed.

[1] There was nothing in the deed to show a trust, and there was no written declaration of a trust. It will be observed that the appellant and the respondent are sister and brother. The basis of the respondent's claim, as alleged in the complaint, is that he was the owner of the land when he made the conveyance to his mother, and had then owned it for about 12 years; that she was then “infirm in mind and body,” and believed that his recent marriage had transformed the property from separate to community property; that by reason of her “said infirmity” she believed that he would be deprived of his right thereto as his separate estate, and that the transformation “might in the future work injury and damage” to him; that she believed that such result might be avoided by a conveyance of the property to her and the reconveyance by her to him, and “that yielding to the solicitations of his mother, and to relieve her anxiety and uneasiness, plaintiff conveyed the said property, as described, to her, and had his wife to join in said conveyance; that these were the sole considerations passing for the said conveyance; and that at the time of its making it was agreed and understood that his mother, Sarah E. Arnold, would promptly reconvey the said property to plaintiff.” It is further alleged that the appellant had knowledge of these facts at the time of their occurrence. A general demurrer to the complaint was overruled. The testimony submitted by the respondent is to the effect that the mother promised to reconvey the property by “a gift or legacy.” When the plaintiff rested, a demurrer to the evidence was likewise overruled.

[2, 3] The demurrer to the evidence should have been sustained. The trust alleged and proven was an express trust. “Direct or express trusts are created by the direct or express words of a grantor or settlor.” 1 Perry on Trusts (6th Ed.) § 73. The distinction between express and implied trusts is pointed out by Beach on Trusts and Trustees (volume 1, p. 172) as follows: “A fundamental distinction between express and implied trusts is that the former, presumably, are created by the voluntary or free and deliberate act of the parties, that they are in accordance with equity, and that by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



terms of their creation they are permanent in their operation; while in the latter, from the nature of the case, the element of permanency is absent, and that of rightfulness, so far as relates to the intention of the responsible party, and of freedom of action as well, may be altogether lacking. The essential idea of an implied trust involves a certain antagonism between the cestui que trust and the trustee, even where the trust has not arisen out of fraud, nor out of any transaction of a fraudulent or immoral character."

[4, 5] The case is controlled by *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306; *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 385; *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340; *Holmes v. Holmes*, 65 Wash. 572, 118 Pac. 733, 38 L. R. A. (N. S.) 645; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074. Our statute (Rem. & Bal. Code, § 8745) provides: "All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed." The cases cited settle the law in this state in this: That a resulting trust can, and that an express trust cannot, be proven by parol testimony; the latter being within the prohibition of the statute quoted. In *Spaulding v. Collins* one of the grantors continued to reside upon the premises without paying rent, for more than 20 years after they had conveyed the property by a deed absolute in form; there being no written declaration of trust, either in the deed or otherwise. More than 20 years after conveying the property, the grantors brought an action, contending that the grantee was a trustee ex maleficio, or, if not, that a resulting trust had been created. The facts relied upon to establish the trust, and the view of the court as to the nature of the trust created may be best stated in the language of the opinion. It says: "We are satisfied from the evidence of Mr. J. M. Colman, who was the only witness who testified as to what the trust agreement really was, that the trust, if any, was an express trust, and not a trust ex maleficio, or resulting trust. This witness testified that Mrs. Spaulding wanted his son to take the deed, but that witness objected. 'So she spoke of Mr. Collins. I told her I would see him, and I saw Mr. Collins about it. \* \* \* There was no talk about his buying the property. She did not talk about his buying the property. What she wanted was to have it deeded over to him until she could pay his debts. \* \* \* She was afraid, she said, that her husband was running bills, and they would be after her for the money, and it might come against her property; that was the reason she wanted to get rid of it. She wanted it turned over to somebody that would protect her.' We think this evidence clearly shows an express trust, which cannot be established by parol. *Holly Street Land Co. v. Beyer*, 48 Wash.

422, 93 Pac. 1065. \* \* \* The rule is well settled, under statutes like ours (Bal. Code, § 4517; P. C. § 4435), providing that contracts creating incumbrances upon real estate shall be by deed, that it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol."

In the course of the opinion the court quoted with approval from *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509, as follows: "The essential inquiry that arises upon this record is whether the trust sought to be proved and enforced is an express trust or an implied resulting trust. If express, there can be no resulting trust; and parol evidence is not admissible to prove that an absolute conveyance was made upon an express trust not declared in the writing itself. *Green v. Cates*, 73 Mo. 115; *Kingsbury v. Burnside*, 53 Ill. 310 [11 Am. Rep. 67]; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379. The character of the alleged trust in this case must be ascertained from the petition and the evidence offered in support thereof. \* \* \* The father conveyed said real estate by deed absolute to his son, without qualification or limitation of any kind in the deed, and contemporaneously imposed upon the son the express parol trust to sell the lot as trustee for his father, pay off the liens, and refund the balance. If these averments and this testimony do not charge an attempt to establish an express trust of lands, then it would be difficult, indeed, to define an express trust within the meaning of the statute." In conclusion the court said: "The trust, if any exists, is an express trust, which cannot be proved by parol; and equity will not therefore interfere to change the contract from what it appears upon its face to be."

In *Kinney v. McCall* it is said: "The conveyance to Lide Gonder was absolute in form; and if there was a trust in favor of the grantors, or in favor of Mrs. Kinney, or in favor of Mrs. Kinney and the children, it was an express trust, and could not be proved by parol. *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306. The wisdom of the rule excluding parol testimony in such cases was never better illustrated than in the case at bar."

In volume 2 of *Pomeroy's Equity Jurisprudence* (section 1053) the following pertinent language occurs: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, *taking advantage of one's weakness or necessities*, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor

of the one who is truly and equitably entitled to the same; \* \* \* and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoers, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust."

[6] In saying that "it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol," this court had reference to such fraud as inhered in the original transaction. Otherwise all trusts, whether express or implied, could be proven by parol; for in the larger sense the failure or refusal of the trustee of an express trust to execute the trust would be constructive fraud, and the statute would be rendered nugatory. In the instant case there is no claim of fraud, other than the failure of the trustee to perform her express contract.

The respondent relies upon *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270, and *Bluett v. Wilce*, 43 Wash. 492, 86 Pac. 853. In *Rozell v. Vansyckle* a mentally weak, ignorant old man conveyed 80 acres of land, without consideration, to Vansyckle, upon whose counsel he unreservedly relied. Vansyckle assured him that he would hold the land in trust for him and reconvey it upon his request. The court said that the promise of the grantee was made in bad faith and with intent to deceive, and hence amounted to "an actual fraud." The court held, in effect, that the transaction created a trust *ex maleficio*. In *Bluett v. Wilce* the plaintiff sought to establish a trust *ex maleficio* in real property. The complaint alleged facts which, if true, would have established that the plaintiff had been induced to convey the property to the defendant by means of his fraudulent representations. The court said that the complaint disclosed a trust *ex maleficio*; but the evidence was not of that clear and convincing character required in such cases, and the plaintiff was denied relief.

[7] The respondent argues that the transaction raised either a trust *ex maleficio* or a constructive trust. He pleaded an express contract to reconvey the property, and the evidence submitted is in harmony with the complaint. This would create an express trust. It is true that equity will raise a constructive trust to prevent a fraud; but where there is an express trust there can be, in the very nature of things, no implied or constructive trust. We need not consider the cases cited by the respondent from other jurisdictions, of which *Bowler v. Curler*, 21 Nev. 158, 26 Pac. 226, 37 Am. St. Rep. 501, is a type. It holds that equity will raise a constructive trust when an express contract to reconvey the property has been breached. Such view is not only a virtual repeal of the statute of frauds, but is in clearest conflict

with the decisions of this court to which reference has been made.

The judgment is reversed, with directions to enter a judgment for the appellant.

MAIN, MOUNT, CHADWICK, and PARKER, JJ., concur.

#### WHITE v. STOUT et ux.

(Supreme Court of Washington. Feb. 8, 1913.)

#### 1. APPEAL AND ERROR (§ 91\*)—APPEALABLE ORDERS—REFUSAL TO RETAX COSTS.

An order refusing to retax costs is not appealable, and an appeal taken therefrom must be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 612-671; Dec. Dig. § 91.\*]

#### 2. EMINENT DOMAIN (§ 29\*) — IRRIGATION RIGHTS — CONDEMNATION BY PRIVATE OWNER.

A private owner may condemn a right of way for an irrigation ditch over lands of another private owner.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 76; Dec. Dig. § 29.\*]

#### 3. EMINENT DOMAIN (§ 279\*)—INJUNCTION—AFFIRMATIVE DEFENSE SEEKING CONDEMNATION OF LAND.

In an action to restrain defendant from trespassing upon lands of the plaintiff, defendants' affirmative demand for condemnation amounts to a defense to the plaintiff's action, and defeats the plaintiff's right to injunctive relief.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 775, 776, 781; Dec. Dig. § 279.\*]

#### 4. JURY (§ 14\*)—RIGHT TO TRIAL BY JURY—INJUNCTION.

In an action to enjoin defendants' use of plaintiff's land for irrigation ditch purposes, equitable rules apply; and, whether plaintiff demands a jury trial or not, it is within the discretion of the trial court to grant it.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. § 14.\*]

#### 5. JURY (§ 14\*)—RIGHT TO TRIAL BY JURY—EJECTMENT.

In a law action in ejectment, the plaintiff has a right to a jury trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. § 14.\*]

#### 6. EMINENT DOMAIN (§ 74\*)—CONDEMNATION—COMPENSATION AND COSTS.

Upon defendants' affirmative demand to condemn a right of way for an irrigation ditch over plaintiff's land, compensation, including the costs in the superior court, must be made and paid into court before a decree of appropriation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 188-197; Dec. Dig. § 74.\*]

#### 7. JUDGMENT (§ 228\*)—INJUNCTION—DECREE FOR CONDEMNATION—CERTAINTY.

In an action to enjoin defendants' use of plaintiff's land for an irrigation ditch, a decree finding the value of the land necessary to be taken for such right of way and the damage to the remainder by such taking, and providing that, on payment of the money into court, the plaintiff should be perpetually enjoined from interfering with defendants' use, and that, upon plaintiff's acceptance of such damages, a supplemental decree should be rendered adjudging defendants to be the owners of the ditch lands

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taken thereunder, and enjoining plaintiff from interfering with defendants' use thereof, was definite and not objectionable for uncertainty, in that it provided for relief in the alternative. [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 407; Dec. Dig. § 228.\*]

Department 1. Appeal from Superior Court, Okanogan County; O. H. Neal, Judge.

Action by Joseph S. White against Don A. Stout and wife, who answered, asking affirmative relief. From a decree on the merits plaintiff appeals, and from an order refusing to retax costs defendants appeal. Defendants' appeal dismissed, and decree affirmed.

Smith & Gresham, of Conconully, for appellant. William C. Brown, of Okanogan City, for respondents.

MOUNT, J. The plaintiff brought this action to quiet title and to restrain the defendants from trespassing upon certain lands owned by the plaintiff, and for damages because of alleged trespass. The defendants in answer to the complaint admitted ownership of the lands by the plaintiff, but denied all the other allegations relating to trespass and damage. Then, by way of affirmative defense, alleged ownership of certain lands adjoining the plaintiff's; that these lands were irrigable lands situated on and riparian to Chilliwist creek which flows across the same; that plaintiff's lands were above the defendants' lands, and that, in order to secure water from said creek, it was necessary to carry the same across defendants' lands; that, while the title to the lands now owned by both plaintiff and defendants was in the United States, the plaintiff, in the year 1900, permitted the defendants to construct a ditch across his land and carry water therein to the defendants' lands; that plaintiff stood by and permitted defendants to spend a large amount of money constructing said ditch; that defendants have ever since used this ditch upon plaintiff's lands (this ditch is known in the record as "ditch line B"); that in the year 1905, in consideration of certain improvements made by defendants upon plaintiff's lands, plaintiff permitted the defendants to construct another ditch across plaintiff's lands. This ditch is known as "ditch line A." For a second affirmative defense and by way of cross-complaint, the defendants alleged necessity for the ditches for irrigation and for rights of way across plaintiff's lands, and asked the court to determine what damages the plaintiff should recover therefor. The third affirmative defense was a claim of adverse user of said lands. The prayer of the answer was as follows: "(1) That the plaintiff take nothing by this action. (2) That in case the court determines that the defendants have not a perfected right of way and easement for said ditches, or either of them, that the court then ascertain the amount of plain-

tiff's damages as and for a right of way for said ditches or either of them and decree upon the payment of said damages that defendants be and are the owners of said ditches and rights of way therefor, as the same are now laid out, or in case the court determines that the defendants are the owners of said ditches and rights of way therefor, but that the plaintiff is entitled to pay for the land used and occupied by the same, that the court proceed to ascertain the amount of such damages and give judgment for the same. (3) That the plaintiff be temporarily enjoined from interfering with said ditches and with defendants' use and enjoyment thereof until the final determination of this action. (4) That, upon the final determination of this action, the plaintiff be perpetually enjoined from interfering with said ditches and defendants' use and enjoyment thereof."

The reply was, in substance, a general denial of the affirmative defenses. Upon the trial of the case without a jury, the court concluded that the prior use of plaintiff's land by defendants was a permissive use or license which could be revoked at any time, and which license had been revoked; but found the value of the land necessary to be taken for each ditch, and the damage to the remainder by reason of the taking. The decree provided for different amounts depending upon the defendants constructing an open ditch or an underground pipe line. The decree recited: " \* \* \* And it is further ordered and adjudged that unless defendants choose to so elect within 30 days after the date of the rendition of this decree, and pay into this court for the plaintiff the sum or sums of money hereby awarded plaintiff as damages, that the defendants be enjoined from the use of said ditch lines, but upon an election being made under the terms of this decree by the defendants, and the money awarded as damages being paid into court for the plaintiff, then the plaintiff shall be perpetually enjoined from interfering with the defendants in maintaining, using, and operating said ditches or either of them, and upon the acceptance of such damages by plaintiff for either or both of said ditch lines, then a supplemental decree shall be rendered and entered decreeing and adjudging the defendants to be the owners of such ditch line or ditch lines, and that the plaintiff be perpetually enjoined from interfering with defendants in using, maintaining, and operating a ditch or canal along and across the course of either or both of said lines in accordance with the election made by the defendants, and upon the said damages being paid and an acceptance thereof consummated by plaintiff." Within the 30 days the defendants filed a declaration abandoning ditch line A, but accepting ditch line B, and paid into court \$239.75, being the value of the land taken as found by the court, and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damages to the remainder of the land for ditch line B as an open ditch. Thereafter the plaintiff filed a cost bill amounting to \$694.25, which defendants moved to retax. The trial court struck out one item of \$10.60, but refused to further retax costs. The plaintiff has appealed from the decree upon the merits, while the defendants have appealed from the refusal to retax costs.

[1-3] The defendants' appeal must be dismissed under the rule of *Smith v. Palmer*, 38 Wash. 276, 80 Pac. 460. The plaintiff contends that, because the trial court determined that the prior use of plaintiff's land for the two irrigation ditches was merely a permissive use, and because defendants had no other right to maintain ditches upon the plaintiff's land, therefore the court should have granted an injunction as prayed for in the complaint, but might have suspended this injunction order for a reasonable time to give the defendants an opportunity to condemn a right of way if they desire to do so across the plaintiff's land. In support of this position, the plaintiff relies upon the rule as stated in *Atkinson v. Washington Irrigation Co.*, 44 Wash. 75, 86 Pac. 1123, 120 Am. St. Rep. 978, and *Lund v. Idaho & Wash. No. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. Rep. 916. In those cases the injunctive order was made and stayed as requested by the plaintiff in this case, but in those cases there were no demands for condemnation in the answer as there was in this case. If the defendants in this case were wrongfully using the plaintiff's land and had no defense to injunctive relief, such relief would no doubt be granted; but where it appears by the answer, as it does in this case, that the defendants desired to acquire the right to remain in possession, or where it appears during the trial that the defendants may acquire that right, injunctive relief will not be given, provided the defendant seeks his remedy in condemnation. In the cases above cited and relied upon the injunctive remedy was suspended in order to give the defendants an opportunity to exercise the right of eminent domain, which they were entitled to do. The bringing of an action to condemn within the fixed time suspended the injunctive order indefinitely, so that the remedy became of no effect when the judgment in condemnation was entered. In short, the condemnation of the plaintiff's land was a defense to the plaintiff's action to quiet title and to restrain the defendants from using the land. There can be no doubt of the defendants' right to condemn a right of way for irrigation over the plaintiff's lands. *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 898. It was proper, therefore, in this case to allege the right to condemn, and have the damages fixed as a defense to the plaintiff's demand for injunction.

[4] The plaintiff argues that he was there-

by deprived of the right to a jury trial. No jury was demanded in this case, and, if one had been demanded, it was within the discretion of the trial court to grant such demand. The plaintiff selected his remedy by bringing his action in equity demanding equitable relief. Equitable rules therefore applied to the future procedure.

[5] The plaintiff might have brought a law action in ejectment and demanded a jury trial, but, not having done so, he cannot be heard to complain that the action was tried according to rules of his own selection.

[6] Plaintiff argues that the court erroneously authorized the defendants to take the land by paying the value thereof, together with the damages caused to the remainder of the land, without paying the costs of the action to condemn. The decree in this case cannot be construed as permitting the taking without the payment of costs, in view of the rule that compensation shall first be made and paid into court, and that such compensation includes the costs in the superior court, as held in *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150, and cases there cited. The defendants concede that the costs must be paid prior to the decree of appropriation.

[7] It is also argued that the decree is uncertain, because it provides for relief in the alternative, and because the ditch line is not definitely located. There is no merit in either of these points. The decree is clear and definite. The line of the ditch in question is definitely fixed. It is already constructed, so that there can be no question as to its exact location. We find no error.

The judgment is therefore affirmed, without costs to either party in this court.

CROW, C. J., and GOSE, CHADWICK, and PARKER, JJ., concur.

#### BEYMER v. MONARCH et al.

(Supreme Court of Idaho. Jan. 23, 1913.)

##### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 1195\*)—DECISION ON PRIOR APPEAL—EFFECT.

*Held*, where questions have been decided by this court in a former opinion, and the case is retried upon the same pleadings and the same evidence, with some new evidence which does not change the weight of evidence, this court will not review the facts in the opinion upon the second appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

#### 2. FINDINGS—EVIDENCE—JUDGMENT.

The evidence examined, and *held* sufficient to support the findings and judgment.

#### 3. UNITED STATES (§ 67\*)—CONTRACTOR'S BONDS—OBLIGATIONS OF PRINCIPAL—AGREEMENT TO PAY.

Where the contract sued upon was made at Washington between Monarch & Porter and the government of the United States and the Title Guaranty & Surety Company, and by such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contract the Title Guaranty & Surety Company agreed to pay the indebtedness in dispute, and such company, in consideration of Monarch & Porter's turning over to the company its property and turning over the contract to the company, assumed the responsibilities of Monarch & Porter under said contract, and the completion of the contract having been fully proven, *held*, that the plaintiff should recover the damages proven and alleged in the complaint.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Suit by A. F. Beymer against John W. Monarch and another, copartners, and the Title Guaranty & Surety Company, a corporation. Judgment for plaintiff, and defendant the Title Guaranty & Surety Company appeals. Affirmed.

Hawley, Puckett & Hawley and B. F. Neal, all of Boise, for appellant. Cavanah, Blake & MacLane, of Boise, for respondent. Karl Paine and John Porter, both of Boise, for defendants.

STEWART, J. This action was brought to recover the sum of \$4,433.22 alleged to be due for labor and merchandise furnished to Monarch & Porter by the respondent and his assignors while Monarch & Porter were engaged in the construction of an irrigation system near Rupert, Idaho, under a contract with the government of the United States. The case was tried in the district court of Ada county, and judgment rendered in favor of the respondent in this case and against Monarch & Porter, and in favor of the defendant Title Guaranty & Surety Company. An appeal was taken in that case, and the judgment was reversed. 19 Idaho, 304, 113 Pac. 739. Upon a retrial the cause was tried upon the same pleadings as the former trial, and the evidence offered and received in the former trial was by agreement admitted as evidence at the retrial, and additional evidence was also offered by the introduction of oral testimony, and depositions were also introduced. Upon the evidence thus taken, the cause was submitted to the trial court and findings of fact were made by the trial court.

The trial court upon the second trial found for the respondent upon all the issues of fact, and as conclusions of law found as follows:

"(1) That this court has jurisdiction and power to hear and determine all of the causes of action set forth in plaintiff's complaint.

"(2) That the agreements in these findings found to have been made by the defendants are not within the statutes of fraud of Idaho.

"(3) That the defendants John W. Monarch, William S. Porter, a copartnership, and the Title Guaranty & Surety Company, a corporation, are justly indebted to the plaintiff in the amounts claimed in the causes of action set forth in plaintiff's complaint [ag-

gregating \$5,118.04], together with interest on said several amounts at the rate of 7 per cent. per annum from this date.

"(4) That the plaintiff is entitled to recover of and from the said defendants attorney's fees in the sum of \$50 on his said first cause of action, and attorney's fees of \$50 on his fourth cause of action, together with interest thereon at the rate of 7 per cent. per annum from this date.

"(5) That the plaintiff is entitled to judgment against the said defendants for the aforesaid sums referred to, \* \* \* together with interest thereon at the rate of 7 per cent. per annum from this date, and for his costs and disbursements incurred therein; and it is ordered that judgment be entered accordingly. Carl A. Davis, District Judge. Jan. 24, 1912."

In accordance with the findings of fact and conclusions of law the court rendered judgment that the plaintiff, A. F. Beymer, respondent herein, recover of and from the defendants John W. Monarch and Wm. S. Porter, a copartnership, and the Title Guaranty & Surety Company the sum of \$5,118.04, together with the sum of \$100, attorney's fees, found to be due plaintiff from defendants, with interest on the sums at the rate of 7 per cent. per annum from the date thereof until paid, together with plaintiff's costs and disbursements. A motion for a new trial was made and overruled, and this appeal is from the judgment and the order overruling the motion for a new trial.

There are many errors assigned as occurring during the trial, all of which are necessarily included in the principal questions summarized by counsel for appellant in his brief as follows:

"(1) Did appellant take possession of the property of Monarch & Porter in use on said construction contract, about March, 1906, \* \* \* as found by the court, or at all?

"(2) Did appellant take over said contract in March, 1906, and thereafter complete said contract?

"(3) Was either T. P. Murphy, B. F. Neal, or Neal & Kinyon authorized to bind appellant, upon any special promise, to pay any of the claims involved in this suit?

"(4) Was a promise made by L. A. Wares to John Porter, or at all, that appellant would apply any part of the proceeds of the government warrant of \$18,482.67 paid to Monarch & Porter in March, 1907, to the payment of the claims involved in this action, or any part of them?

"(5) If T. P. Murphy, B. F. Neal, and Neal & Kinyon, or any of them, made promises to appellant or to any of his assignors that appellant would pay, was such promises upon a consideration, moving to appellant?"

[1] Most of the questions here assigned were considered and decided by this court in the former opinion, and the real point that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant seems to be urging in his brief is: Did the defendant company which executed a surety bond for Monarch & Porter under a contract with the government promise to pay the claims involved in this suit? This question was considered and decided in the former opinion, and a re-examination of the evidence upon this appeal clearly shows that the Title Guaranty & Surety Company, appellant, took possession of the property and assets of Monarch & Porter, and assumed the responsibilities of Monarch & Porter in the completion of said contract and the payment of the debts of Monarch & Porter contracted in the constructive work done under said contract, up to the time Monarch & Porter turned over their property, and the further construction of the works by the Title Guaranty & Surety Company.

[2, 3] We think the weight of the evidence supports the findings of the trial court, that the cause of action is based upon the contract alleged in the complaint, and that such contract was made at Washington, and that the Title Guaranty & Surety Company agreed to pay the indebtedness in dispute in this action, and that such company, in consideration of Monarch & Porter's turning over to the company its property, and turning over the contract to the company, assumed the responsibility of Monarch & Porter under said contract, and that the completion of the contract is fully proven, and the court has so found. We deem it unnecessary, by reason of the former opinion, to enter into any further discussion of the facts or the specific errors assigned upon the appeal.

The judgment is affirmed. Costs awarded to the respondent.

SULLIVAN, J., concurs.

#### KELLEY v. CLARK.

(Supreme Court of Idaho. Aug. 27, 1912. On Rehearing, Feb. 10, 1913.)

(Syllabus by the Court.)

#### 1. MORTGAGES (§ 605\*)—FORECLOSURE—REDEMPTION—TENDER.

The evidence *held* sufficient to support the finding of fact that a legal tender was made for the purpose of redeeming the mortgaged property from foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. § 605.\*]

#### 2. MORTGAGES (§ 605\*)—FORECLOSURE—REDEMPTION—TENDER.

Under the provisions of section 4494, Rev. Codes, if the purchaser at a foreclosure sale refuses to accept a lawful tender of the redemption money, he does so at his own risk, and his refusal will not prevent the legal effect of the tender to defeat the sale and to extinguish the purchaser's interest in the mortgage lien. In such a case, the tender *ipso facto* discharges the mortgage lien and is equivalent to payment of the mortgage debt so far as the mortgage lien is concerned; and the debtor is not required to keep the tender good, but the purchaser

at such a sale is remitted to his action at law for the recovery of the money which still remains due on the mortgage debt provided the debtor refuses to pay it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. § 605.\*]

#### 3. MORTGAGES (§ 605\*)—FORECLOSURE—REDEMPTION—TENDER.

To hold that the tender must be kept good would completely nullify said provision of said section 4494, Rev. Codes, and inject therein a provision not contemplated by the Legislature.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. § 605.\*]

#### 4. QUIETING TITLE (§ 7\*)—MORTGAGE FORECLOSURE—REDEMPTION.

*Held*, under the facts of this case, that the equities are with the plaintiff, and that the court did not err in quieting title in him.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.\*]

#### On Rehearing.

#### 5. QUIETING TITLE (§ 14\*)—MORTGAGE FORECLOSURE—REDEMPTION—TENDER—REFUSAL—OFFER TO ACCEPT.

*Held*, under the facts of this case, that the refusal to accept the redemption money tendered was withdrawn, and the offer to accept the same was made so soon after the refusal that in equity it should have been accepted.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.\*]

#### 6. QUIETING TITLE (§ 14\*)—MAXIMS.

He who seeks equity should do equity.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.\*]

(Additional Syllabus by Editorial Staff.)

#### 7. TENDER (§ 1\*)—WHAT CONSTITUTES.

"Tender" is an unconditional offer of a debtor to the creditor of the amount of his debt. It is the real amount of the debt as fixed by the law, the purpose being to enable the debtor to relieve himself of interest and costs, and to relieve his property of incumbrance by offering his creditors all that he has any right to claim. It does not mean that the debtor must offer an amount beyond reasonable dispute, but the amount actually due.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6910, 6911.]

#### 8. MORTGAGES (§ 605\*)—REDEMPTION—TENDER—"EQUIVALENT TO PAYMENT"—"EQUIVALENT."

Within Rev. Codes, § 4494, relating to redemptions, and providing that a tender is "equivalent to payment," the phrase "equivalent to payment" means equal in power and effect to payment, since "equivalent" is defined as equal in value, force, power, and effect.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. § 605.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 2449, 2450.]

Ailshie, J., dissenting.

Appeal from District Court, Ada County; John F. MacLane, Judge.

Action by L. M. Kelley against C. K. Clark. Judgment for plaintiff, and defendant appeals. Remanded, with instructions.

Martin & Martin, B. F. Neal, and Dean Driscoll, all of Boise, for appellant. A. A. Fraser and R. R. Wedekind, both of Boise, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SULLIVAN, J. On August 10, 1909, the district court in and for Ada county entered a judgment and decree in favor of C. K. Clark for the sum of \$3,181.84, and adjudged and decreed the foreclosure of a certain mortgage on real estate situated in Boise City, and for the sale of the property in payment of the judgment. In pursuance of this judgment and decree, the property was sold on the 2d day of October, 1909, and was bid in by C. K. Clark, the plaintiff in that action, who is defendant and appellant in this action. The time for redemption of the premises expired on October 2, 1910. The whole controversy involved in this appeal centers in the transactions which took place between the parties on September 30, 1910, which was two days before the expiration of the period of redemption. On October 4, 1910, the sheriff of Ada county executed and delivered to Clark, the purchaser at the foreclosure sale, a sheriff's deed to the property, and thereafter, and on October 7th, Kelley commenced his action in the district court to quiet his title to the premises, and secure a cancellation of the sheriff's deed. Judgment was entered in favor of the plaintiff, and the defendant Clark appeals.

The property had originally belonged to, and the mortgage had been executed by, John I. Wells and wife. The foreclosure had been against Wells and wife. On September 30, 1910, Wells and wife executed and delivered a deed to the property in favor of L. M. Kelley. Kelley succeeded to all the rights of Wells, and all subsequent proceedings were taken in Kelley's name. On September 30, 1910, and prior to the execution of the deed from Wells to Kelley, Wells and his attorney met Clark on one of the streets in Boise City, and gave Clark a written offer to redeem the property from the foreclosure sale. At Clark's request, Wells and his attorney went with Clark to the office of his attorney. Here negotiations and conversations took place looking to a redemption of the property. There is a sharp conflict between the witnesses as to whether or not the money was actually in sight and tendered in payment of the mortgage. The court has found, however, that a tender was made, and the evidence is sufficient to sustain that finding. At the time this tender was made, Clark, acting under the advice of his attorney, declined to accept the payment, unless Wells should also pay the amount due on a second mortgage which had been executed by Wells and wife in favor of C. P. McCarthy and B. S. Crow for the sum of \$500, and which mortgage had been sold and assigned to Clark. No question was raised as to the existence of this \$500 mortgage and the indebtedness thereby secured. It is admitted here that the mortgage did exist, and that the debt existed. They refused, however, to pay this as a condition of redemption. The demand was made for the payment of this \$500

mortgage under advice of Clark's counsel, who claimed that under the provisions of section 4492 of the Revised Codes, which provides, among other things, that "if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest" must also be paid. The interview terminated, and thereupon Clark's attorney notified the sheriff of Ada county in writing not to accept the redemption money, unless the redemptioner paid said \$500 mortgage and interest thereon. It appears that Clark's attorney made further investigation in regard to the matter, and finally concluded that Clark was not entitled to demand the payment of the \$500 mortgage as a condition precedent to or attendant on the redemption from the foreclosure sale. On the 30th day of September, 1910, and after said tender had been made, Wells and wife sold and conveyed said mortgaged real estate to the respondent Kelley. Thereafter, on the same day, Clark's attorney called Kelley's attorney by phone, and advised him that he would accept the tender and release the property, but Kelley's attorney declined, and refused to renew the tender. Clark's attorney on the following day served written notice on Kelley's attorney that he was willing to accept the tender, and release and reconvey the property. Kelley's counsel, however, refused to renew the tender, and thereafter and subsequent to the expiration of the period of redemption Clark procured a sheriff's deed to said property, and a few days thereafter Kelley commenced this action to quiet his title. No tender of payment was made when this action was commenced, and no tender has ever been made since that time. Kelley had taken the position, and was sustained therein by the trial court, that the refusal of Clark to accept the money when tendered ipso facto discharged said lien, and that the cloud thereon might be removed by a court of equity without any payment or tender of payment of the debt secured. This contention is based upon the provisions of section 4494, Rev. Codes. That section reads as follows: "The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment." This case was first tried before Hon. Fremont Wood, judge of the Third judicial district, and Judge Wood found that a tender was made by Wells through his attorney and was refused by Clark. He made the further finding, however, "that a controversy existed between said Clark and said Wells, and said tender was refused by the

said Clark because of a claim put forward by him, and was not refused wantonly, nor said claim put forward by him as a cover to a wrong purpose, and said Clark acted in said matters in all respects in good faith," and entered judgment in favor of the defendant, refusing to quiet the title to said premises in the plaintiff.

A motion for a new trial was made, and in the meantime Judge Wood's term of office expired, and the motion for a new trial was heard by Judge MacLane. A new trial was granted, and the case was heard on the evidence previously taken and some minor evidence which was produced on the trial, and Judge MacLane found that a tender had been made and refused, and the refusal to accept said tender was subsequently withdrawn. The refusal to accept the tender was based on the ground that the appellant had purchased said \$500 mortgage on August 29, 1910, and that he would not accept said tender, unless the debt represented by said \$500 mortgage was paid. On the trial of the case before Judge MacLane, certain facts were stipulated, and it was stipulated that the question to be submitted to that court for decision was whether under all of the facts of the case a valid tender of money was made, within the meaning and intent of section 4494, Rev. Codes, and other sections of the Idaho statutes, such as will discharge the lien of the defendant's judgment, and make void the sheriff's deed issued to the defendant. The court in its findings of fact found that the time for redemption of said property from the sheriff's sale expired on October 2, 1910, and that the amount required to redeem the property was \$3,798.35, and that on September 30, 1910, the attorney for the mortgagor Wells tendered that sum to the defendant Clark in the presence of his attorney; that said Clark and his attorney refused to accept and claimed at that time that they should receive in addition to said sum the sum of \$500 and interest thereon, being the amount of the mortgage executed by Wells and his wife to McCarthy and Crow, which mortgage had not at that time been foreclosed; that the plaintiff Kelley on September 30, 1910, purchased whatever interest Wells and his wife had in said property, and received a warranty deed therefor, and succeeded to whatever right Wells acquired by virtue of the tender of redemption money, and as conclusions of law found that the plaintiff made a valid tender of the amount of money required to redeem said lots from said foreclosure sale, and that such tender was refused and that the lien of the mortgage and the sale and the foreclosure thereof was discharged thereby; that the plaintiff is the owner of the premises, free of the lien of said mortgage and the sale thereunder; that the deed from the sheriff to said defendant Clark dated on the 4th of October, covering the premises described in

the complaint, is void and of no force and effect, and entered judgment and decree quieting the title to said lots or land in the plaintiff. The appeal is from an order denying a new trial.

Appellant's assignments of error may be considered under two heads: First, the insufficiency of the evidence to support the finding of facts to the effect that John I. Wells, through his attorney, made a tender to the appellant of the sum of \$3,798.35 for the purpose of redeeming said property from sheriff's sale; second, that the court erred in making its first conclusion of law from the facts, to the effect that a valid tender of the amount required to redeem lot 4 in block 84 of the original town site of Boise, Idaho, from the sheriff's sale of October 2, 1909, was made, and that such tender was refused by the defendant, and that the lien of the mortgage and of the sale on the foreclosure thereof was discharged thereby, and that the plaintiff is the owner of the premises, free from the lien of said mortgage and the sale thereunder.

[1] The evidence clearly supports said finding of facts that said tender was made in proper time, and for the sole purpose of redemption. The appellant, Clark, made no claim whatever at the time the tender was made that said tender was not sufficient to discharge the mortgage debt and costs of foreclosure; neither did he ask for any time to ascertain whether such sum was sufficient, but he did then and there demand the payment of said \$500 debt secured by another mortgage on said premises, which mortgage and the debt secured thereby was purchased by the appellant on the 29th of August, 1910, more than 30 days prior to the time said tender was made, and he now contends that he was entitled to a reasonable time and opportunity to ascertain whether he was entitled to the payment of the last-mentioned debt before a redemption could be made from said sheriff's sale. He thus had had about 30 days in which to determine his rights under said second mortgage. We think the evidence is amply sufficient to sustain the finding of the court to the effect that a legal tender was made and refused.

[2] It is next contended that the court erred in concluding as a matter of law that on the refusal of said tender the lien of the said first mortgage and the sale on the foreclosure thereof was fully discharged. The trial court no doubt based said conclusion of law upon the provisions of said section 4494, above quoted, which provides, among other things, that a tender of money by one entitled to redeem is equivalent to payment. Said section was adopted from the statutes of California. It was enacted by the Legislature of that state in 1872 (see section 704, 3 Kerr's Cyc. Codes of Cal. and notes thereto), and was thereafter adopted by Idaho Territory in 1874 (see 8th Terr. Sess. Laws, p. 140, § 254),



and our attention has not been called to a statute of any other state similar to said section. In *Hershey v. Dennis*, 53 Cal. 77, the court had under consideration said section of the California statutes, and there held that the tender of the redemption money extinguishes the purchaser's lien, and is equivalent to payment. In *Halle v. Smith*, 113 Cal. 656, 45 Pac. 872, the court held that: "While the unaccepted tender did not release the defendant from his obligation to pay the money, it had the effect to release the land from any further claim thereto by the plaintiff, and to remit the plaintiff to his personal claim for the money." In the well-considered case of *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653, the court held that, if the purchaser refuses a lawful tender of the redemption money, he does so at his own risk, and his refusal cannot prevent the legal effect of the tender to defeat the sale and to extinguish the purchaser's interest in the mortgage lien; and the purchaser is remitted to his action at law for the recovery of the money which still remains due. In that case the court reviewed many cases, and there laid down the correct rule applicable to the facts of this case. Of course, it goes without saying that the purchaser at a foreclosure sale must have sufficient time to ascertain whether the amount of money tendered is sufficient to satisfy the debt, but he cannot evade the provisions of said section 4494 by refusing to accept the tender until he ascertains whether some other claim that he holds against the redemptioner must be paid at the time the tender is made. In *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247, the court said: "If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished, and he runs no risk in accepting it. If, upon the other hand, it is sufficient in amount, his debt is paid, and that is all he has any right to demand. It is his own folly if he attempts to exact more. But, in view of the serious consequences which might possibly result from a refusal to accept such a tender, the proof should be clear that it was fairly made, deliberately, and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered." See, also, *Bunting v. Haskell*, 152 Cal. 426, 93 Pac. 110. Those cases rest on the proposition that a tender ipso facto discharges the lien, and that proposition finds much support among the decisions of the courts of last resort. *Ball v. Stanley*, 5 Yerg (Tenn.) 199, 26 Am. Dec. 263; *Mitchell v. Roberts* (C. C.) 17 Fed. 779; *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Or. 321; *Cass v. Higgenbotam*, 100 N. Y. 248, 3 N. E. 189; *Kortright v. Cady*,

21 N. Y. 343, 78 Am. Dec. 145. It is stated in 1 Jones on Mortgages, § 893, as follows: "The rule in several states, however, is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law made upon the day named in the condition for payment has this effect. The lien of the mortgage is thereby ipso facto discharged, and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt."

Referring to the principle under discussion, the court in *Merritt v. Lambert*, 7 Paige (N. Y.) 348, said: "So that, if the mortgagee is so unwise as to refuse his money when it is tendered at the time and place and in the manner prescribed in the instrument itself, he necessarily must lose his security upon the land which was merely collateral to the debt, although the mortgagor may be still liable for the money, where there is an existing indebtedness." In *Jackson v. Crafts*, 18 Johns. (N. Y.) 115, the court quotes the rule laid down by Lord Coke to the effect that, "if the mortgagor tender the money to the mortgagee and he refuseth, the land is freed forever from the condition, but yet the debt remaineth." Section 4492, Rev. Codes, provides what the judgment debtor or redemptioner must do to redeem the property from the purchaser at foreclosure or execution sale. Said Wells was the judgment debtor in the case at bar, and when he tendered the full amount due, as provided by said section 4492, that was a good and sufficient tender, and under the provisions of said section 4494 said tender was equivalent to payment, and ipso facto discharged the mortgage lien. The right of redemption is purely statutory, and the statute provides that in a redemption case the tender of the money is equivalent to payment.

[7] Tender is the unconditional offer of a debtor to the creditor of the amount of his debt. This means the real amount of the debt as fixed by the law, and the purpose of the law of tender is to enable the debtor to relieve himself of interest and costs and to relieve his property of incumbrance by offering his creditor all that he has any right to claim. This does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due—actually due. Some of the decisions hold that tender must be kept good at least for a reasonable length of time such as would enable the creditor in good faith to ascertain and determine his rights both in fact and in law. Such a holding places the debtor at a great disadvantage as the creditor might involve him in prolonged litigation in order to determine some imaginary right, as, for instance, in the case at bar that holding would have required the debtor to have kept the tender good during an action to determine

whether the creditor had the right to compel him to pay the debt secured by said \$500 mortgage in order to redeem, thus compelling the debtor to employ counsel and go to the expense of a defense in an action which might be delayed for months and even years. Said section 4494 was adopted to protect the debtor from that kind of proceedings on the part of the creditor, and thus shield him from the rapacity of the creditor. The case of *Mitchell v. Roberts* (C. C.) 17 Fed. 779, is an instructive case upon the question here involved, although it involves the extinguishment of a lien on personal property pledged to secure payment. The court said: "Upon this question there is no conflict in the authorities. The rule is settled that a tender of the debt, for which the property is pledged as security extinguishes the lien, and the pledgor may recover the pledge, or its value, in any proper form of action, without keeping the tender good or bringing the money into court, because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien it is gone forever. This rule accords with justice and fair dealing. It would be an exceeding great hardship on the debtor if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed, and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem. And on a bill to redeem a debtor would have to pay interest and costs down to the decree, unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt when lawfully tendered cannot complain at the loss of his security for that debt, 'because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him.'"

[3] The equities and fair dealing in this case, it seems to us, are all on the side of the debtor. The creditor did not question the amount of the tender, but had purchased a subsequent mortgage and debt secured thereby thirty days before the tender, and paid therefor \$50, with the understanding that, if he collected the whole amount due thereon, he would pay to the mortgagee one-half of what he collected. He made this purchase with the evident purpose of making the debtor pay it, or at least harassing him with it by declining to accept said tender. This transaction seems unfair to us, and we believe it is just such transactions that induced the Legislature to adopt said section 4494.

It is unreasonable for the appellant to contend that he ought to have a reasonable time to determine whether he was entitled to collect said note and mortgage at the time of redemption, as he had already owned said note and mortgage more than 30 days prior to the tender. There is no equity shown on his behalf, and the provisions of said section 4494 ought to be given some force and effect in favor of the debtor for whose protection the section was enacted.

[8] The statute has declared that tender is "equivalent to payment," and, under many well-considered cases, it is held that upon tender the lien of the mortgage is thereby ipso facto discharged, and the holder of the mortgage can then only look to the personal responsibility of the person liable on the mortgage debt. It would completely nullify the provisions of said section 4494 to inject therein that, in order to make tender "equivalent to payment," it must be kept good. Section 4492 provides that the debtor may redeem by payment, and section 4494 provides that tender is "equivalent to payment," and payment or its equivalent certainly discharges the lien. "Equivalent" is defined by lexicographers as "equal in value, force, measure, power and effect." Then "equivalent to payment" under that definition would be "equal in power and effect" to payment. The case of *Salinas v. Ellis*, 20 S. C. 337, 2 S. E. 121, is in accord with the views expressed in this opinion, but the Supreme Court of South Carolina in the case of *Reynolds v. Price*, 88 S. C. 525, 71 S. E. 51, by a divided court has overruled that case to a certain extent, and in our view of the matter the case of *Salinas v. Ellis* and the dissenting opinion in the *Reynolds-Price* Case contain the better reasoning and are in accord with the great weight of authority upon the question here involved. However, the statute of South Carolina is not the same as said section 4494, Rev. Codes, which section provides that tender of the money is equivalent to payment, but nowhere provides that, in order to be equivalent to payment, the tender must be kept good. A legal tender kept good was equivalent to a payment before the adoption of said section, and now to hold under the provisions of said section that a tender must be kept good would be to declare that the enactment of said section accomplished no purpose whatever, and was a work of pure supererogation by the Legislature. The Legislature in enacting said section had no intention of requiring the tender to be kept good, for to require it to be kept good would be of no benefit to the debtor whatever, but a disadvantage, in that he might be under the necessity of borrowing the money tendered and giving as security the identical land included in the foreclosure proceedings, and, unless the lien of the former mortgage was discharged by the tender, the debtor would not be able to borrow money to keep the

tender good, as the person loaning the money might not be willing to loan it, at least for any considerable length of time, unless he was given as security a first mortgage on such land. In order to make the provision of said section of any benefit whatever to the debtor, it must be construed in conformity with its plain provisions, to wit, that a tender is equivalent to payment, and, being so, ipso facto discharges the mortgage lien. To require a debtor to keep the tender good under the provisions of said section is contrary to its express provisions.

There is no question presented in this case in regard to the creditor's having reasonable time to compute the amount of the indebtedness due for redemption, and, as before stated, he had purchased said \$500 note secured by mortgage more than a month before said tender was made, no doubt with the express purpose of compelling the debtor to pay it before he would permit him to redeem, and he ought not to be assisted in that purpose by this court by reading something into said section that is not there and was never intended by the Legislature to be there. It appears that the debtor had borrowed the money with which to make the redemption, and upon the refusal to accept the tender may have been placed in a position where he would have had to return the money in case the tender was refused, and might not have been able thereafter to borrow money for redemption. The creditor refused payment of his debt, which was lawfully tendered, and he cannot justly complain at the loss of his security for that debt "because it shall be accounted to his own folly that he refused the money when a lawful tender was made unto him."

[4] It is next contended that one who asks equity must do equity, and that under that rule respondent must pay the amount due on the Wells mortgage foreclosure decree before a court of equity will quiet the title in the respondent. There is nothing in the record to show that respondent owes that debt. If respondent does not owe the debt, why should he pay it? Would it be equitable to require him to do so? The record shows that Wells owes the debt, and since the statute has made a legal tender by a mortgagor redemptioner, equivalent to payment and thereby discharged the lien, why should a court of equity compel a subsequent purchaser of said real estate to pay the debt of his grantor when the mortgage lien had been already discharged by the tender made before respondent purchased the property? The sheriff's deed was issued subsequent to the purchase made by the respondent Kelley, and the sheriff without any authority of law whatever executed the deed that now casts a cloud upon said title. The wrongful act of the sheriff created the cloud as the lien was discharged ipso facto by the tender. Unless the plaintiff in this action owes said debt, a court of equity has no au-

thority to require him to pay it before it will clear the title from the cloud cast upon it by the unauthorized conveyance executed by the sheriff. The unauthorized act of the sheriff was brought about by the appellant himself because of his refusal to accept said tender, and therefore the equities are with the respondent, and not with the appellant. A different question would be presented if the mortgagor, Wells, had brought this action to quiet title in himself. Said contention of counsel is without merit.

The court, therefore, did not err in concluding as a conclusion of law from said findings that on the refusal of the appellant to accept said tender the lien of the mortgage and the lien created by the judgment on the foreclosure thereof were fully discharged. The judgment of the trial court must be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART, C. J., concurs.

AILSHIE, J. (dissenting). The conclusion reached by my associates in this case goes so wide of what seems to me to be justice and equity that I feel constrained to express my views in the matter.

Stripped of all disguise, the case involves the question, pure and simple, of the respondent availing the payment of a debt aggregating \$3,798.35. Under the decision reached by the majority of this court, respondent will be successful in this attempt, and by solemn decree of court will be enabled to defeat the collection of this sum of money. I shall not attempt to make any additional statement of facts in the case except as in the course of the discussion I may deem it necessary to a clear understanding of my position to restate some of the facts or state some additional fact not embodied in the majority opinion.

In the very outset let it be understood that the law question here involved is not whether a tender made under section 4494, Rev. Codes, shall be kept good from that time on, but the important question here is rather the facts and circumstances under which a tender is made and the good faith and square dealing involved therein. Section 4493 of the Rev. Codes prescribes the order of redemption and the manner in which it takes place. It also provides that "upon a redemption by the debtor the person to whom the payment is made must execute and deliver to him a certificate of redemption," etc. Section 4491 prescribes who may redeem, first, the judgment debtor or his successor in interest; and, second, a creditor having a lien on the property subsequent to that on which the property was sold. These provisions of the statute have reference to the payment of a debt or the tender of payment after a foreclosure and sale, and these sections have no reference to the payment of

the debt before judgment or before sale. We are not here dealing with the common-law right of redemption at maturity or on the "law day." We are dealing with statutory provisions governing redemption after sale. When respondent and his attorney went to the appellant, and proposed to redeem the property from the foreclosure sale which had been made, the appellant consulted his attorney, Mr. Neal, and advised his attorney that he also held a second mortgage on this property for the sum of \$500. Mr. Neal, acting as attorney for appellant, advised him that, under the provisions of section 4492 of the Rev. Codes, the respondent was seeking to redeem as a redemption-er, and that, before appellant would be required to make a certificate of redemption as provided by section 4493, respondent must also pay the amount of the \$500 second mortgage lien. Appellant accordingly demanded the payment of this sum before releasing the security held by him. Respondent and his attorney declined to pay this additional claim and went away, and appellant's attorney apparently investigated the matter further, and, after examining the statute and authorities, concluded that he was in error in the advice he had given his client, and informed him that he could not demand payment of the \$500 mortgage as a prerequisite to releasing the property from the foreclosure sale, and on the afternoon of the same day notified respondent's attorney that they would accept the tender, and was met by the reply that he was too late, and that "there was nothing doing." On the following morning counsel for appellant executed the proper certificate of redemption, and acknowledged the same, and went to the office of respondent's attorney and handed it to him, and offered to accept the payment. Respondent's attorney says: "I looked it over, and handed it back, and said there was nothing doing."

There is even a direct conflict in the evidence as to whether any payment was tendered or any money was in sight, and appellant's counsel testifies that payment was not refused, but that, as he understood it, the matter was left open until he could have time to further investigate the question as to whether his client was entitled to have the second mortgage paid as a condition of redemption under sections 4492 and 4493 of the Rev. Codes. Now, in the face of all these facts, my associates suggest that the appellant was acting unfairly, and was endeavoring to oppress and harass the respondent. They even seem to think there was something wrong, inequitable, or unjust about the appellant urging that respondent pay an honest debt, the justice of which he did not question. Since when, I ask, has it become unfair, oppressive, or wrongful for a creditor in Idaho to urge that his debtor pay on honest debt overdue? Why should he be

mulcted out of his security for a debt approximating \$4,000 because he has urged his debtor to pay an additional debt he owes? And, I may further ask, since when has it become inequitable or unjust for a creditor to purchase an additional claim against his debtor? By reverting to the legal phase of this case, we discover that Judge Wood upon the original trial found "that a controversy existed between said Clark and said Wells, and said tender was refused by said Clark because of a claim put forward by him, and was not refused wantonly, nor said claim put forward by him as a cover to a wrong purpose, and said Clark acted in said matters in all respects in good faith." Judge MacLane on the second trial did not reverse or disturb this finding, nor has he made any finding in conflict therewith. On the contrary, it is admitted that the foregoing finding by Judge Wood is in fact true and correct. The witnesses for respondent testified to facts which show this to be unmistakably true. Now, in the face of these facts, can it be said either as a matter of law or in good conscience that this so-called tender was a straightforward good-faith tender where the creditor within less than 10 hours thereafter, on discovering his mistake and being so advised by his attorney, notified the debtor that he would accept the tender and execute the release and certificate of redemption. As above stated, there is no occasion in this case for considering or discussing the question as to whether a tender under our statute must be kept good until a suit to remove cloud and quiet title can be prosecuted, and I shall not attempt to discuss that question at this juncture. The only question here involved is the rule applicable to a tender and the good faith of the transaction. I shall first briefly address myself to some of the cases cited in the majority opinion.

In the first place, I may say—and a reading of the decisions will amply justify me in it—that not a single case cited in support of the majority opinion deals with the question here directly involved or is parallel with the facts of this case. *Hershey v. Denais*, 53 Cal. 77, the first California case relied on by my associates, was an ejectment case, and does not touch the question here involved, nor does it cite or consider the California statute corresponding with our section 4494. The syllabus to the case was not written by the court, but rather by the reporter, and does not correspond with the opinion itself. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872, was another suit in ejectment, and involved the construction of a contract to sell real estate and a specific performance thereof, and a tender of payment provided for in the contract. It in no sense or particular deals with or cites the statute here under consideration, nor was any such question presented to the court in that case. *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653, was also an action in eject-

ment, and the question there involved and considered was the necessity for keeping a tender good under the provisions of section 704 of the Code of Civil Procedure of California. No question whatever arose as to the good faith of the tender or the grounds of the refusal of the tender or the good faith on the part of the creditor in refusing to accept the tender. No discussion whatever was had in that case of the important question of good faith, either in making the tender or in refusal to accept, that is here involved. *Mitchell v. Roberts* (O. C.) 17 Fed. 779, discusses the same question considered in *Leet v. Armbruster*, and in no way touches upon the good faith of the tender or the good faith of the refusal. That case, however, was dealing with a pledge of personal property instead of a mortgage on real estate, and the judge who wrote the opinion premised his discussion by pointing out the difference between the two, and showing that in a pledge of personal property the pledgee holds the possession, and that in such case an action might be maintained for the possession of the property as soon as a valid and legal tender has been made.

I shall not pursue an analysis of the cases cited further than to say that an examination of the remaining citations will disclose that they were each dealing with pledges of personal property or with common law tenders, and that none of them was dealing with the statutory redemption from foreclosure, nor were they dealing with a question of good faith and bona fides on the part of either the debtor or creditor. So I dismiss the authorities cited in support of the majority opinion with the assertion that not a single one of them deals with or supports the doctrine enunciated by my associates. I am not, however, without authority on the direct question involved in this case, and that, too, from modern, eminent, and respectable jurists. As late as May, 1911, the Supreme Court of South Carolina in *Reynolds v. Price*, 88 S. C. 325, 71 S. E. 51, had before it a case involving a state of facts parallel with the case at bar. In that case a tender was made and the creditor demanded the sum of \$2 which he called a renewal fee, for extending the time of the payment of the loan, and the sum of \$10 as attorney's fees for preparing summons and complaint in foreclosure which had not yet been filed or served. Some days thereafter the creditor concluded that he would waive the demand for the \$2 renewal fee and the \$10 attorney's fee, and accordingly went to the debtor and so notified him, and offered to accept the sum tendered. The debtor refused to make the payment or make good the tender, and claimed that the security had been discharged. The creditor commenced his action to foreclose the mortgage. The trial court, upon the authority of *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121, held that the lien of the mortgage was discharged by the tender, and entered judgment accordingly. The

creditor appealed, and the Supreme Court of South Carolina considered this question at length, and with a keen sense of justice and equity reached the conclusion that the refusal to accept the tender had been made in good faith and without any purpose to wrong, oppress, or injure the debtor, and that the security was not discharged. The court there said: "If a mortgagee refuses a tender, not arbitrarily or for a wrongful purpose, but in good faith, under the honest belief, based upon reasonable grounds, that more is due him than has been tendered, refusal of the tender will not operate to discharge his lien." The court thereupon quotes from the note to *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, as follows: "In all the states the tender must be absolute and unconditional, and the mortgagee must be given a reasonable time to compute the amount due in order to discharge the lien, and if he refuses the tender in good faith, even though the tender is sufficient, the lien will not be discharged." The court also quotes from *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.* (C. C.) 37 Fed. 286, 3 L. R. A. 90, the following: "But to produce such serious and heavy consequence the refusal must have been unqualified, and unaccompanied by any bona fide claim of right, which was supposed by the party to justify his refusal. The claim of right may have been one that could not be supported as matter of law; still if it was believed in, and was not wantonly put forward as a cover to a wrong purpose, it is sufficient to prevent the forfeiture of the security." The court then proceeds to state the real question before it in that case as follows: "The question, therefore, is not whether the plaintiff's claim to the renewal and attorney's fee can be sustained in law, but, rather, whether it was made in good faith. The testimony shows that it was." Upon this finding of fact, the court reaches the conclusion which it says is unavoidable in equity, that the lien was not discharged by a tender made under such circumstances. A dissenting opinion was filed in that case to which Justice Sullivan refers as being the sounder and better rule. It is perhaps to be regretted that a dissenting opinion must sometimes state the safer and more modern rule of law, and I am fully persuaded that will be true in this case, but unfortunately the dissenting judge in the *Reynolds Case* insisted on standing on the ancient rule of "an eye for an eye," instead of the modern and more humane rules of equity and good conscience. The dissenting opinion there insisted on cutting the creditor off, and sweeping away his security, irrespective of the question of good faith and fair dealing. The majority have quoted at length from the opinion of the federal district judge reported in (C. C.) 17 Fed. 779, dealing with the straight question of the effect of a tender. I find the question, however, involved in the present case considered in (O. C.) 37 Fed. 286, 3 L. R. A. 90, in the case of

Union Mutual Life Ins. Co. v. Union Mills Plaster Co., wherein another federal district judge holds that a refusal to accept the tender under a bona fide claim of right does not extinguish the lien. The court said: "But to produce such serious and heavy consequence the refusal must have been unqualified, and unaccompanied by any bona fide claim of right, which was supposed by the party to justify his refusal. The claim of right may have been one that could not be supported as matter of law, still, if it was believed in, and was not wantonly put forward as a cover to a wrong purpose, it is sufficient to prevent the forfeiture of the security. So here, while it is clear enough that the complainant had no right to make it a condition of receiving payment, that the defendant should enter into stipulations about making repairs on the mortgaged property, still it may have been that it thought it had such right, and I do not find such evidence of its bad faith in this regard as to justify a declaration of forfeiture."

The majority opinion in this case holds that it would be inequitable and unjust to require the debtor to keep the tender good "for a reasonable length of time such as would enable the creditor in good faith to ascertain and determine his rights both in fact and in law." That contention on the part of my associates strikes me as both remarkable and alarming. I confess that no authority whatever has been called to my attention which goes to any such length or intimates such a doctrine. Mr. Jones in his work on Mortgages, § 893 (6th Ed.), says: "If a mortgagee acting in good faith refuses a tender through a mistake as to his legal rights, the lien of the mortgage is not discharged." And again in the same section the author says: "One designing to make a tender with the purpose of insisting, in case of refusal, that the mortgage lien is discharged, is bound to act in a straightforward way and distinctly and fairly make known his true purpose without mystery or ambiguity, and allow reasonable opportunity for intelligent action by the holder of the mortgage." The same doctrine is clearly and tersely stated by the Supreme Court of Michigan in *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458. Judge Black in his text on Mortgages, at 27 Cyc. 1406, says: "A tender of payment or performance of a mortgage, to be effective, must be open, fair, and reasonable, so clear and explicit as to leave no doubt of the intention to satisfy and discharge the mortgage. \* \* \*" See, also, 20 A. & E. Ency. 1062. In the case at bar, at the time the alleged tender was made, no intimation was given that the debtor intended to rely on the tender so made as discharging the security, nor was it intimated that the respondent meant to rely on the tender thus made as a discharge *ipso facto* of the security. The authorities are

all agreed, so far as I have been able to find, that the proof should be clear and unmistakable that the tender was made, and that, where there is any doubt about it, the security will not be discharged. In the present case it is proposed by this court to wipe away the security on a conflict of evidence, and where the very best that can be said for the tender is that it was open to doubt, and the debtor refused to keep it good for a period of 10 hours. It is held by the majority of the court that a tender *ipso facto* releases and discharges the security, and a number of authorities use that language. This language, however, is used only in cases where no dispute or controversy arises as to the fact of the tender actually being made and its good faith and the absolute and unqualified refusal of the creditor to accept the tender. No such language is used by the courts in cases where the good faith of either party is involved. Now it is clear, and needs no legal argument or discussion to fully disclose, that the facts which constitute a valid bona fide tender must necessarily cover some perceptible period of time, and that will necessarily vary in different cases. So, also, will the matter of acceptance or refusal necessarily involve a perceptible period of time, and the intelligent exercise of the right to reject or accept must necessarily occupy a space of time differing in different cases. In one case the party may have to go to the county seat and consult the judgment itself in order to ascertain the amount of principal, interest, and penalties, or he may have to do more than that. He may have to secure some one to make the necessary computations for him. In another case, he may have to ascertain his legal rights in the premises as to the amount he is entitled to demand, or whether he holds other incumbrances or claims against the property which are prior to the claim of the redemptioner. This may, and often will, necessitate consulting a lawyer and obtaining legal advice as to his rights, and this will take time. Surely no one would be so obtuse and deaf to the claims of equity and fair dealing as to deny the creditor the right to a sufficient length of time to inform himself either as to the facts or the law involved in the transaction, and on which his demands must rest. In this case there was no controversy between the parties as to the facts. There was no difference between them as to the amount of money due on the foreclosure sale, but there was a bona fide controversy between them as to whether or not the respondent fell within the provisions of section 4492, and was obliged to pay to the appellant the amount of the other mortgage that he held against the same property as a condition precedent to redemption under the provisions of section 4493. Appellant was not a lawyer, and did not know what his legal

rights were in the matter. He did the best thing he knew—consulted his attorney, a man holding a license from this court to practice law, and advise a citizen as to his legal rights in matters arising under the laws of this state. In the face of this state of facts, this court solemnly says that the appellant did not act in good faith, that he was endeavoring to oppress and harass his debtor, and that a court of equity will not protect him in acting upon the advice of his attorney, but will with one fell swoop wipe out the security he holds for a \$3,700 debt. This, to my mind, demonstrates the truth of the current maxim that "everybody is expected to know the law except lawyers and judges." The appellant, although presumed in law to know the law, did not know it and consulted his attorney, and apparently his attorney did not know the law, and wrongly advised him, but, as soon as he did ascertain his mistake, he advised the appellant of the mistake, and also advised the respondent that they would accept the tender which they claim had been made only a few hours before. Although he had owned the second mortgage for some 30 days, he had no notice that a tender would be made until the alleged tender was made, and so he had no previous occasion to investigate his legal rights in the matter. It is everywhere held that either debtor or creditor may be relieved and the time be extended by a court of equity on account of mistake, fraud, or other circumstances appealing to the discretion of a court of equity. *Bunting v. Haskell*, 152 Cal. 426, 93 Pac. 110.

My associates tell appellant that although his security is wiped away, and in the meanwhile the property held as security has been sold to a third party, nevertheless the naked debt still exists. This may afford a balm to his lacerated sense of justice, but it will prove a very poor boon to his ravished purse when he discovers that under the provisions of the statutes of this state (section 4520) there can be "but one action for the recovery of any debt or the enforcement of any rights secured by mortgage upon real estate," which action must be in accordance with the provisions of the statute for the foreclosure of mortgages. Another thing, he will discover that his judgment has been satisfied, that the property has been sold for the amount of the judgment, and that the sheriff has made his returns, and the judgment is satisfied of record. His security is gone, and under the statute he has no cause of action left. My associates have construed section 4494 in the light of an old common-law rule which prevailed before these statutes were enacted, but that rule had no reference to redemption after sale on foreclosure. It had reference solely to the payment of the debt on the day of maturity which was known at common law as the "law day" for the debt. *Murray v. O'Brien*,

56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. Our statute says, however, that "a tender of the money is equivalent to payment," not merely equivalent to a discharge of the security, but equivalent to "payment" of the debt. I call attention to this simply as an illustration of the futility of a court sweeping away the creditor's security merely because he has been ill advised, or has made a mistake in believing himself entitled to demand as a condition of redemption the payment of a second lien against the property, and then trying to console him by telling him that the debtor, though a bankrupt he may be, is still indebted to him.

There is another aspect to this case which should not be passed over lightly, and in which this case differs from the cases cited in support of the majority opinion. Here the respondent came into a court of equity, and sought to have his title quieted and the cloud upon his property caused by the foreclosure sale removed, at the same time admitting his indebtedness, and refusing to pay the same, and making no offer or tender whatever into court. So far as I am aware, the authorities are well nigh, if not entirely, unanimous in holding that, although a lien for some legal cause or other cannot be enforced, still a court of equity will not interpose to remove the cloud cast by such lien, unless the debtor does equity, and pays, or offers to pay, the debt. Those who seek the aid of a court of equity must themselves do equity, whether the cold letter of the law lays any obligation upon them or not. The fact that one's adversary has done him a wrong or an injury even, or some act which has resulted in a hardship, does not justify a court of equity in sanctioning another or like wrong and injustice being done to the offending party. In *Tarr v. Western Loan & Savings Bank*, 15 Idaho, 741, 99 Pac. 1049, 21 L. R. A. (N. S.) 707, this court in a suit in equity declined to cancel a mortgage and remove the cloud cast by the same from the property where the debt had not been paid, although the court at the same time declined to give the lender a judgment and decree of foreclosure because it had failed to comply with the foreign corporation laws of this state. This was done upon the principle that one who is seeking an inequitable and unconscionable advantage over his adversary will be left in statu quo, or granted no relief by a court of equity until such time as he himself offers to do equity. For a holding to same effect, see *N. Y. & C. B. & L. Ass'n v. Cannon*, 99 Tenn. 345, 41 S. W. 1054. Jones in his work on Mortgages, at section 893, in considering the effect of a tender upon the mortgage security, says: "But, even if a sufficient tender be made out, the mortgagor cannot come into a court of equity to have the mortgage decreed to be surrendered or extinguished without paying the amount equitably due under it." The author then proceeds with the proposition that the rule with reference to

a sufficient tender extinguishing the mortgage lien is limited in its operation to defenses to the enforcement of the mortgage. "It does not," says the author, "avail a mortgagor who seeks a discharge of his mortgage; for, when he seeks relief in a court of equity, he must do equity, and must pay the mortgage debt. The tender then avails merely to stop the interest, and not to discharge the debt." In support of the foregoing text the author cites *Tuthill v. Morris*, 81 N. Y. 94, in which the court says: "A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt by way of penalty for having declined to receive payment when offered." It has likewise been repeatedly held that, even though the statute of limitations has run against a debt secured by mortgage, a court of equity will not grant a decree cancelling the mortgage and removing the cloud from the debtor's title, unless he pays the debt or tenders payment into court. In *Hall v. Hooper*, 47 Neb. 111, 66 N. W. 33, the Nebraska Supreme Court said: "A mortgagor, in order to remove the cloud cast upon his title by a sheriff's deed, executed in pursuance of a void foreclosure, must offer to pay what is equitably due under the mortgage"—and this though the statute of limitations has barred the right to foreclose on the mortgage. To the same effect, see *Michigan Trust Co. v. Frymark*, 76 Neb. 634, 107 N. W. 760; *Henry v. Henry*, 73 Neb. 746, 107 N. W. 789; *New York, etc., Ass'n v. Cannon*, 99 Tenn. 344, 41 S. W. 1054; 28 Am. & Eng. Ency. of Law, 39; *Werner v. Tuch*, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443 (holding tender not good for affirmative relief in equity); *Ruppel v. Missouri Guarantee Ass'n*, 158 Mo. 613, 59 S. W. 1000; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998 (holding that a tender will not entitle the debtor to have the cloud cast by the mortgage removed without an offer to pay into court). I opine it would be difficult to find an authority sustaining the position that a debtor can have relief by way of removing the cloud cast upon his property by a mortgage or other lien, where he admits the bona fide existence of the debt and refuses to make the payment.

From the foregoing considerations, I cannot escape the following conclusions:

First. That the tender made by the respondent in this case was not a bona fide, straightforward tender of payment within the contemplation of the statute, for the reason that it was not kept good for a sufficient length of time to enable the appellant to in good faith determine his rights and accept or refuse the tender.

Second. That the appellant acted honest-

ly, fairly, and in good faith when he procured the advice of his counsel, and, acting upon that advice, declined to accept the tender unless the second mortgage held by him was also paid.

Third. That the tender meant and intended by the provisions of section 4494 is a fair and straightforward offer to pay the amount then due with a present ability to make the payment in cash or in the specified kind of money or currency in which the judgment is made payable, and that this tender must be kept good for such a reasonable length of time as will enable the creditor in good faith to ascertain and determine his rights both in fact and in law.

Fourth. That a tender of payment under section 4494, Rev. Codes, cannot afford a foreclosure debtor an affirmative cause of action in a court of equity to remove the cloud from the property cast by the sale unless he pays or offers to pay the debt secured thereby.

Fifth. That those who seek the aid of a court of equity must themselves do equity, and that it would be inequitable and unjust and a recognition of dishonesty for a court of equity to cancel and remove the cloud from the debtor's property on the grounds that he had tendered payment where he refuses to make the tender good or to pay the debt which he admits is justly and honestly owing.

The foregoing are some of the salient reasons why I dissent from the majority opinion, and believe that the judgment of the trial court should be reversed.

#### On Rehearing.

SULLIVAN, J. The original opinion in this case was handed down August 27, 1912. Thereafter a rehearing was granted, and the cause has been reargued and resubmitted for decision.

[5] The writer of this opinion prepared the former opinion, and he does not intend by anything said in this opinion to change the views expressed in the former opinion in regard to the construction placed upon section 4494, Rev. Codes, but we have concluded that since this is an equitable suit to quiet title, and as it appears from the record that the refusal to accept said tender was withdrawn within a very few hours after the tender was made, and that the redemption money was available at the time of the withdrawal of said refusal to accept the tender, it is only equitable and right to require the judgment debtor or his assignee to pay to the proper party the amount of money so tendered.

[6] One of the best established rules of equity is that he who seeks equity must do equity, and we think it only equitable, upon a review of all the evidence in this case, that the plaintiff or his grantor be required to pay to the defendant, or his assignee, the amount of money tendered for the redemption of the



property before a redemption can be made. If said money be not paid to the defendant or his assignee within thirty days from the date of this opinion, whatever title was procured at said foreclosure sale shall be quieted in the defendant.

The cause is remanded, with instructions to make findings, and enter decree in accordance with the views expressed in this opinion, each party to pay his own costs on this appeal.

STEWART, J., concurs.

AILSHIE, C. J. I concur in the judgment and order entered and still adhere to the views expressed by me in my dissenting opinion filed upon the original hearing.

### STEWART MINING CO. v. ONTARIO MINING CO. et al.

(Supreme Court of Idaho. Jan. 20, 1913.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 954\*)—REVIEW—REFUSAL OF INJUNCTION PENDENTE LITE.

Where the Stewart Mining Company owns the Senator Stewart Fraction mining claim, and it is claimed that a vein which apexes in said mining claim extends on its dip outside of the exterior boundaries of said claim and underneath the surface boundaries of the Ontario mining claim, and the Ontario Mining Company is working said Ontario mining claim and extracting large amounts of ore therefrom, which is claimed by the Stewart Mining Company as a part of the Stewart Fraction vein on its dip, and an action is brought to determine the rights of the parties, and application is made for an injunction pendente lite, the action of the court in refusing to grant such injunction will not be disturbed, unless it clearly appears that there has been an abuse of the discretion of the court in said matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.\*]

#### 2. MINES AND MINERALS (§ 38\*)—INJUNCTION PENDENTE LITE.

In this class of cases an injunction pendente lite, upon proper application, should be granted, unless it appears that there is no reasonable ground for the assertion of title in the plaintiff.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

#### 3. MINES AND MINERALS (§ 38\*)—EXTRALAT-ERAL RIGHTS—INDEMNIFYING BOND.

In this class of cases it is within the discretion of the court to substitute an indemnifying bond in lieu of the injunction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by the Stewart Mining Company against the Ontario Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Featherstone & Fox, of Wallace, and W. E. Cullen, of Spokane, Wash., for appellant. Jas. B. Gyde, of Wallace, John P. Gray, of Cœur d'Alene, and M. A. Folsom, of Spokane, Wash., for respondents.

SULLIVAN, J. This appeal is from an order denying the application of the appellant for an injunction pendente lite. The complaint alleges the ownership by the appellant of the Stewart Fraction quartz lode mining claim, and that within said claim is a vein or lode, the top or apex of which crosses the easterly end line of said claim at approximately the center thereof between corners 1 and 2 and extends within the boundaries of said claim in a westerly direction, following the general course of said vein for a distance of 705 feet, more or less; that said vein has a downward course and descends into the earth southerly and beyond the south boundary and side line of said claim into and beneath the surface of the Ontario lode mining claim; that defendants have been and are now extracting ore and mineral from that part of said vein beneath the surface of the Ontario claim between a vertical plane drawn downward through the east end line of said Stewart Fraction claim extended southerly in its own direction and a vertical plane drawn downward through a line parallel to and 705 feet westerly from said east end line extended.

The prayer is for an accounting, for judgment for the value of the ore and mineral removed by the defendants, and for a temporary injunction pendente lite and a permanent injunction when the action is finally determined.

The complaint is supported by several affidavits. At the time of the commencement of the action a restraining order and an order to show cause why an injunction pendente lite should not be granted were issued. The application was made and decided upon the complaint, affidavits filed by the respective parties, oral testimony adduced by the cross-examination of certain of the witnesses for the plaintiff, and the oral testimony of Easton, one of the defendants. The court refused to grant the injunction pendente lite, and it is from that order that this appeal is taken. The only error specified is that the court erred in denying said application for an injunction.

There appears to be no question in regard to the fact that the Stewart Mining Company, a corporation, owns the Senator Stewart Fraction mining claim, which claim is patented. There are three ore bodies beneath the Ontario mining claim, which are in controversy. The most southerly one is designated as the "Frank" ore body, the most northerly the "Gray" ore body, and the middle one the "May" ore body.

It is contended by the appellant company that the apex of said ore bodies is within

the surface boundaries of the Senator Stewart Fraction mining claim, and that the ore in said ore bodies is the property of the Stewart Mining Company. It is claimed that said apex is a subsurface apex. It is admitted by both the appellant and the respondents that the said vein or lode ends along the line of the said apex where it encounters a fault of large magnitude, known as the "Osborn" fault. What is claimed by the appellant to be the apex of said vein is claimed by the respondents to be the side edge or bottom edge of the vein. There is but little controversy regarding the facts to be considered in determining the question of apex. The position of the respondents with reference to said alleged apex is stated in the affidavit of Mr. Hershey, one of the expert witnesses for the respondents, as follows:

"The apex alleged as crossing the easterly end line of the Senator Stewart Fraction mining claim and extending thence substantially parallel to the said line of the said claim is the line along which the northeast ore body is cut off by a great fault. This fault was observed on October 7th, this year, in the Fir tunnel and in the stopes near the 300-foot level. \* \* \* It is one of the great faults of the district, and has a very strong gouge and fault breccia. This displacement on the fault is not definitely known, but it is certainly some thousands of feet. It is younger than and cuts off all the veins of the system to which the Stewart ore bodies belong. In the Fir tunnel and near the 300-foot level, it strikes approximately east and dips approximately south. Projecting it to the surface at any dip known to be persistent for some distance on any section of the fault will bring its apex well north of the northeast or No. 1 corner of the Senator Stewart Fraction claim; hence outside of the claim. As the northeast ore body in the Stewart mine approaches this great fault, it is broken and bent somewhat toward the right by the drag of the fault. It is further broken and dragged in the fault breccia, but is cut off rather abruptly on the Fir tunnel level. In the stopes immediately above the 300-foot level, there is an angle of more than 30 degrees between the fault and the adjacent portion of the vein. From a geological standpoint, the above-defined line along which the vein is cut off by the great fault is not a top or an apex, but rather the bottom edge of the ore body. From the known structural relations of the district, it may be premised that this fault will continue to cut off the vein in depth, so that by going down on the dip of the vein on any line one will come eventually to this fault. For practical purposes it is the downward termination of the vein. In the same way the Frank ore body is terminated downward by the fault traced upward from the Ontario workings. The only essential difference between the two faults is that the displacement on one apparently is much greater than on the

other. The real apex of each of these ore bodies must be looked for upward. From a knowledge of the position of the Frank vein in the so-called Stewart upper tunnel, I believe the real apex of the vein to lie within the west 400 feet of the Senator Stewart Fraction claim, substantially as indicated in a plat accompanying the affidavit of F. W. Callaway. It has a course approximately parallel to the general course of the vein. \* \* \* The position of the true or subsurface apex of the northeast [or Gray] ore body or vein, in the Senator Stewart Fraction claim, is not known to me; but from the known position of the vein in the workings I believe it must lie more than 600 feet westerly from the easterly end line of the claim, and know that it does not pass through this easterly end line."

Witness Bailey testified: "I visited the place where the vein and ore body within the Stewart works terminates underneath the east end line of the Senator Stewart Fraction claim. Said ore body and vein are cut off underneath said east end line by fault dipping southwest and having a strike, the course of which is substantially parallel to the side lines of the Senator Stewart Fraction claim. The line of the vein where it is cut off by the said fault beneath the east end line of the Senator Stewart Fraction claim is merely the edge of the vein on the line of its dip. The apex of said Stewart vein is much farther to the west end, judging from the dip of the vein. The apex has a course almost at right angles to the course of the alleged apex described in the complaint herein."

Witness Boehmer testified: "I find a vein penetrating both properties, having a course north 30 degrees east, nearly parallel to the end line of the Senator Stewart Fraction claim, and its apex crossing the southerly side line of the latter about 700 feet to the west of its easterly end line. At about the middle of this claim the vein is abruptly terminated by an extensive fault, which has a course north 75 degrees west. The dip of the vein is in a direction south 60 degrees east, nearly parallel to the side lines of the Senator Stewart Fraction claim. The apex of the vein would cut both side lines of this claim, if not cut off by the fault. The fault cuts off the vein on its course to the north, and this edge of the vein against the fault is nearly parallel to the dip of the vein, and is in no sense the apex of the vein. The apex of this vein does not and cannot cross the easterly end line of the Senator Stewart Fraction claim."

Witness Bradley testified: "The vein now being worked in the Senator Stewart Fraction is one of the northerly and southerly veins of the Wardner district, which is cut off on its northeasterly strike by one of the many important faults that traverse the Wardner district; i. e., the northeasterly limit of the stopes on the vein now being work-

ed in the Senator Stewart Fraction is the edge of the vein on its dip as cut off by the above-mentioned easterly and westerly fault—the angle between the strike of this fault and the strike of the Senator Stewart Fraction vein being at least 30 degrees. The apex of this easterly and westerly fault at the surface would be to the north of the Senator Stewart Fraction claim, because its dip is to the southwest. The apex of the ore itself would have a northeasterly strike across the western portion of the Senator Stewart Fraction claim, crossing beneath the side lines of the Senator Stewart Fraction claim, were it not cut off to the north by another fault before it reaches the northerly side line of the Senator Stewart Fraction claim. \* \* \* From my knowledge of the underground workings of the different veins being worked in the Senator Stewart Fraction and Ontario mines, it is absolutely a physical impossibility for the Ontario ore bodies to have their apex in position as alleged by the Stewart Mining Company in the complaint herein; nor does the apex of any present known vein cross the easterly end line of the Senator Stewart Fraction claim."

Witness Sinks testified: "The alleged apex described in the complaint herein as crossing the east end line of the Senator Stewart Fraction occupies a position at right angles to the course of the ore bodies which I have been working for the Ontario Mining Company."

There are affidavits of other witnesses for the respondents substantially to the same effect as given above.

Witness Greene for the appellant, in his affidavit, among other things, states as follows: "This vein has a course which resembles an arc of a circle in which the strike is continually changing, with a consequent change in the direction of the dip. As it approaches the northeast, its course changes until it lies approximately east and west, making only a very small angle with the strike of the fault mentioned elsewhere. That this fault does not constitute a side edge termination of this vein is conclusively shown by the fact that the vein departs from the fault at an angle less than 45 degrees on its strike, and has a course downwards from the point of termination of 45 to 50 degrees below the horizontal in a direction parallel to the east end line of the Senator Stewart Fraction claim. Nor can this termination possibly constitute a bottom edge of this vein, for the even greater reason that the included angle between the course of the vein and the course of the fault is very considerably less than 90 degrees. This fault has a known displacement of several thousand feet, which renders it impossible to correlate the vein with any vein on the north side of this fault. The facts as exposed in the ground show conclusively that the true top or apex of this vein crosses the east end line of the Senator Stewart Fraction

claim and continues in a general westerly and southwesterly direction to and across the south side line of this same claim at a point approximately 705 feet west of the southeast corner No. 2 of the Senator Stewart Fraction claim."

Witness Clancy, in his affidavit, states as follows: "I have prepared a map which correctly represents and shows the true course of apex of said vein in the Senator Stewart Fraction mining claim, which map is made a part of this affidavit. The apex of said vein, as depicted on said map, is not the side edge or bottom edge of the vein, but is the true top or apex. From the said top or apex the vein has a downward course for a distance of over 60 feet at an angle of from 45 to 50 degrees from the horizontal and continues in a downward course at a lesser angle to and into the Ontario mining claim. \* \* \* I have maps of cross-sections of the vein from the top or apex of the Stewart Fraction to the workings in the Ontario claim, which said maps are hereto attached and made a part of this affidavit. The apex of said vein, as shown by the map hereinbefore referred to, and the downward course of the vein as shown by such cross-sections, were placed on such maps by me from actual surveys made by me in the ground, in connection with mining operations conducted therein."

Witness Wilson testified: "I have read the affidavit of Fred T. Greene with reference to the apex or top of the vein in the Senator Stewart Fraction claim being the side edge of the vein. I agree with Mr. Greene that the conditions as they exist conclusively show that the fault is not along the side edge of the vein, but is along the apex. This vein, extending easterly and westerly, has a downward course southerly at an angle of 45 or 50 degrees from the horizontal for a distance of 50 feet or more, after which the angle of the downward course decreases. It can be followed along its course easterly and westerly for a distance of several hundred feet. The downward course of this vein from the top or apex is such as to preclude any possibility of what I state to be the apex being the side edge of the vein."

Witness Beaudry testified: "The apex of this vein, as it was found to exist by actual mining operations conducted, is correctly depicted on the map made and a part of the affidavit of Mr. Clancy; that the stopes and workings following the vein for a considerable distance along this vein in the Stewart Fraction claim are closed by filling and pressure of the ground, so that it is impossible at this time, and has been impossible for some time, to enter the same. I know, however, that the vein was continuous, and the ore in the vein was continuous, as stated above. This vein, as disclosed by such workings, had a pitch downward from the apex at an angle of 45 to 50 degrees from the horizontal for a distance of 60 feet.

This downward course of the vein can now be seen in the stopes, which are open. The ore body and vein in the Stewart Fraction claim, which extends easterly and westerly along the claim, is of my own knowledge, gained from actual mining operations in the property, a part of and connected with the ore body in the Stewart mining claim designated by Mr. Hershey as the Frank ore body, and which is in fact the Stewart ore body. The apex of the vein in the extending through the east end line of the Stewart Fraction claim is not the side edge of a vein or the bottom edge of a vein, but is the top and true apex of the vein. From this apex the vein has a downward course to and into the workings of the Ontario claim. I am familiar with the fault disclosed in the 300 and the 200 levels of the Stewart mine, and referred to by Mr. Hershey as the second fault in the Ontario. This fault has caused a displacement of the vein in the 200-level of about 30 feet. Stopping is now being done above this level, and at the top of the stopes the ore from both sections of the vein is continuous through the plane of the fault. I therefore know and state that what is designated in the affidavit of Mr. Calloway as the southern ore body in the Ontario is a part of the same vein as the other ore bodies shown on the map and made a part of his affidavit. There is a working, known as the 300 of the Stewart, extending from the east and west apex in the Stewart Fraction claim to a point in the Ontario claim near the northwest boundary thereof. From this working a drift has been run southerly on ore in the vein to a point within a very short distance of the stopes extended by the Ontario Mining Company above the Gray drift. The works so extending from the east and west apex in the Stewart Fraction has followed the vein, and has been in ore all the way. There is no doubt but that the ore body of the Ontario, designated as the Gray ore body, is a part of the same vein and ore body disclosed in the working and drift mentioned."

Witness Frank testified: "That what he [Clancy] designates as the top or apex of the vein is not the side edge or the bottom edge of the vein, and cannot be, for the reasons stated in the affidavit of Mr. Fred T. Greene, to which reference is hereby made. That this apex at all points constitutes the topmost portion of the ore body and vein which has been mined below, and from this apex the vein has a downward course at an angle from the horizontal in excess of 45 degrees, which is wholly inconsistent with the claim of the defendant that this apex is the side edge or bottom edge of the vein."

Witness Miller testified: "That the portion of the apex of the Stewart vein westerly from the point where it crosses the east end line of the Stewart Fraction mining claim, to the point where it begins to curve to the

southwest, is not the end of the vein cut off by the major fault running easterly and westerly through the country, the foot wall of which is northerly of the Stewart vein, is evidenced by the fact that the portion of the vein in the easterly workings of the Stewart Mining Company has a course or trend more nearly with the course or trend of the fault than at right angles to, and the vein dips away from the fault to the south at an angle of less than 45 degrees. In other words, the angle of approach is much under 45 degrees; whereas the angle would have to exceed 45 degrees before the question could be mathematically raised as to whether it could possibly be the end of the vein or no."

Witness Merriam testified: " \* \* \* That the top or apex is along a fault plane; that from the said top or apex the vein has a downward course at an angle from the horizontal of 45 to 50 degrees; that the said apex is not the side edge or bottom edge of the vein, but is the true top or apex of the vein; that affiant followed said vein from its top or apex in its downward course to the stopes in the Ontario claim."

Clancy testified orally that the elevation of the top of the stope at or near the east end line of the Senator Stewart Fraction claim is approximately 2,865 feet, and that the elevation of the top of the stope at a point marked "N" on the map introduced as Exhibit E is approximately 2,990 feet, and that there is a difference in elevation of 325 feet; that the distance between the points mentioned is 600 feet; that the angle of declination is approximately 26 degrees, which is less than the slope of the mountains in the Cœur d'Alene district—the usual slope being about 30 degrees. The witness further testified that the cross sections shown on said map show that the vein has a downward course of 45 degrees from the top or apex for a distance of 80 or 90 feet, and that the cross-section B shows the vein to have a downward course, as it leaves the apex, of 45 degrees.

[1] There is a clear conflict in the opinion testimony of the witnesses as to whether the apex of said three ore bodies is within the exterior boundaries of the Stewart Fraction mining claim. The main question in the case is whether the end or edge of the vein in the Senator Stewart Fraction, along the Osborn fault, as above described in the testimony, is an apex. The witnesses for the defendant state that the end or edge of the vein along said Osborn fault is the side or bottom edge, and the witnesses for the plaintiff testify that said end or edge of the vein is not the side or bottom edge, but is the top edge of the vein or apex. The testimony is uncontradicted that from the edge of the vein along said fault the vein has a downward course for a distance of from 80 to 100 feet, or from 45 to 65 degrees, and then flattens, but still has a pronounced downward course

to the said ore bodies in the Ontario mine.

[2, 3] As this case will shortly be determined upon its merits, we are not inclined to comment very extensively upon the evidence. While we think from all of the evidence the court would not have abused its discretion in granting an injunction pendente lite, or in requiring the respondents to give a sufficient bond to secure the appellant for the ore taken out, in case the action was finally determined against the respondents, we are not inclined to hold that the court abused its discretion in refusing to do so. However, in cases of this character, it is proper for the court to grant an injunction, or require security to be given, pending the determination of the issue as to the ownership of the ore, if there is any doubt in the mind of the court as to the title. The mere existence of a doubt as to the title does not, of itself, constitute a sufficient ground for refusing an injunction. However, in questions of injunction against the working of mines, the doubt should be resolved in favor of granting the writ. This comports more with substantial justice to the parties, we think, than to leave the plaintiff to pursue his remedy at law, provided he is successful in sustaining his title to the ore. *Lindley on Mines and Mining*, § 82, p. 1608. It was held by this court, in *Safford v. Flemming*, 13 Idaho, 271, 89 Pac. 827, that it has been the practice of courts in mining cases to be liberal in granting injunctive relief in mining litigation, in order that one party might not be placed in a worse position during the litigation than he otherwise might be. In *Snyder on Mines* (section 1628) it is said: "It is easy to see why this remedy should be granted more readily in a case where the person against whom it is asked is mining and removing the minerals than in almost any other case."

We are unable to say, in this case, that the judge or trial court abused its discretion in refusing to grant said injunction pendente lite. Therefore its action therein will be affirmed; and it is so ordered. Costs awarded to respondents.

STEWART, J., concurs.

#### PENDRY v. EDGAR et al.

(Supreme Court of Kansas. Dec. 7, 1912. On Petition for Rehearing, Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. MANDAMUS (§ 79\*) — SCHOOL DISTRICT BOARD—TEXT-BOOKS.

The uniform text-book law authorizes the state text-book commission to adopt a series of text-books in various specified branches, including a primary reading chart. Standards of quality are prescribed, maximum prices are fixed, and provisions are made for letting contracts upon competitive bids for supplying the

text-books named in the list, but a maximum price is not fixed for a primary reading chart. The statute also declares that "it shall be unlawful for any school district board \* \* \* to purchase or contract for any chart, map, globe, or other school apparatus, \* \* \* unless the same shall have been \* \* \* approved, and a maximum price therefor fixed by said state text-book commission." Gen. St. 1909, § 7836. It is held (1) that the Arnett primary reading chart, described in the petition, is intended and adapted for class instruction, and not for individual use by pupils as an ordinary text-book; and (2) that a school district board will not be compelled by mandamus to buy or install a primary reading chart for class instruction in a district school and pay to the manufacturer the maximum price fixed therefor by the text-book commission, although the commission has adopted the chart for use in the public schools.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 84\*)—APPARATUS—READING CHART—CONTRACT TO PURCHASE—USE.

A contract entered into between the school text-book commission and the author of a primary reading chart to supply the needs of the state for such chart does not compel a school district board to purchase one of the charts for use in the district school.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 200, 201; Dec. Dig. § 84.\*]

Appeal from District Court, Shawnee County.

Action by H. E. Pendry against J. N. Edgar and others, members of the School Board, District No. 35, Shawnee County. Judgment for defendants, and plaintiff appeals. Affirmed.

Stone & McDermott and Hugh T. Fisher, all of Topeka, and Maurice O. Lock, of Emporia, for appellant. E. D. McKeever, of Topeka, for appellees.

BENSON, J. This is an action in mandamus to compel the defendant school board to install a primary reading chart in the district school, and to pay the plaintiff \$12 therefor.

It is alleged that the state text-book commission, in pursuance of the uniform text-book law, has adopted the Arnett primary reading chart for use in the public schools, and also "adopted the price therefor of \$12 per chart." It is further alleged "that said chart is filed and prescribed \* \* \* for use by a class, and not for individual pupils, for class instruction, and not for individual study; \* \* \* that \* \* \* plaintiff \* \* \* purchased from Anna W. Arnett, the holder, this contract with the state to supply Arnett primary reading charts to the public schools of Kansas." There is, however, no allegation of the execution of a contract, unless the adoption of the chart and the price should be construed as a contract. It is also alleged that the plaintiff is the manufacturer of the article in question which is described in plaintiff's brief as a large chart supported on an iron stand with large

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

characters that can be read across a room. The petition contains averments that the district has pupils for instruction in the primary course of reading, writing, and orthography, and until a short time before this suit had used a similar chart. A demand by the plaintiff and refusal by the board to purchase one of the charts is also alleged.

[1] On this appeal from an order quashing the alternative writ, the only question is whether the school board should be compelled by mandamus to install one of these charts, and pay the plaintiff \$12 therefor. The statute authorizes the text-book commission to adopt a uniform series of school text-books in the following branches: "A primer, a primary reading chart, and a graded series of drawing books or drawing portfolios, geometry, \* \* \* Latin grammar, Latin exercises, Cæsar, Cicero, Virgil, general history, history of Kansas, English history, rhetoric, English literature, botany, zoölogy, chemistry, word analysis, geology, German exercises, German grammar and descriptive astronomy." Gen. Stat. 1909, § 7833. This provision is followed by others prescribing standards of quality and maximum prices for the books named, but primary reading charts are omitted from the regulations concerning maximum prices. Other sections relate to bids and contracts for such books to be furnished to the patrons of the schools at prices fixed by contracts awarded upon competitive bids. Another section of the statute following those just referred to provides: "It shall be unlawful for any school-district board or board of education of any city of the first or second class to purchase or contract for any chart, map, globe, or other school apparatus, except scientific apparatus for high schools, unless the same shall have been submitted to the school text-book commission at a regular or special session, and by them approved, and a maximum price therefor fixed by said school text-book commission." Gen. Stat. 1909, § 7836.

While a reading chart is included among text-books in the section first quoted, it is manifest from the nature of the article that it is not intended for individual purchase and use as an ordinary text-book. This distinction is not only apparent from its adaptation to class instruction rather than individual use by pupils, but is recognized in its omission from the regulations prescribing standards of quality and maximum prices which apply to books to be purchased by patrons of the schools under contracts awarded by the commission. It will also be observed that charts are classified with maps, globes, and other school apparatus, and can only be purchased when approved by the commission and a maximum price is fixed therefor. It seems from all these provisions that books which are to be purchased by patrons for individual use are the subject of competitive bidding and contract, and that adopted charts may be purchased by school boards when a maximum price has been fixed

therefor. No statutory provision is found compelling the purchase of charts, maps, globes, or other apparatus from any particular dealer, or manufacturer, nor the payment of the maximum prices. The use of the term "maximum" implies a right to purchase for less if that can be done. In obtaining supplies of ordinary text-books the maximum price is a statutory limitation. The price, not exceeding this maximum, is fixed by the contract. Gen. Stat. § 7834. We do not understand that the text-book commission has entered into any contract to supply charts under the provisions of the statute regulating the purchase of ordinary text-books for individual use, but has merely adopted this chart and fixed the maximum price as authorized by statute. If this chart is to be treated as an ordinary text-book, it should be the subject of contract by the text-book commission and sale to patrons as a reader or speller is treated. Considered in the classification with maps, globes, and other apparatus, such a contract is not authorized. In either case the court has no authority to compel a school board to buy or install this chart in the public school and to pay the manufacturer the maximum price therefor.

The judgment is affirmed. All the Justices concurring.

#### On Petition for Rehearing.

In a petition for rehearing it is stated that the school text-book commission entered into a contract with the author of the chart in question as provided in case of adopted text-books. Gen. Stat. 1909, §§ 7814, 7815, 7824, 7836. From a copy of the contract, set out in the petition for rehearing, it appears that the commission adopted the charts at the price of \$12, and the author agreed to place such charts "in the hands of the state depository in sufficient quantities to supply the then needs of the state," and to fulfill the terms of her offer submitted to the commission. The existence of the contract being conceded, it appears that the former opinion was based in part upon a misapprehension of facts, for it was said in the opinion: "We do not understand that the text-book commission has entered into any contract to supply charts." The question, therefore, remains whether the contract imposes the duty upon the district to purchase the chart of the appellant at the price adopted by the commission.

[2] While the article in question is scheduled with text-books to be adopted, no provision is found for adopting a price, unless it be the price specified in an accepted bid. In the case of the text-books specified in the schedule, such price cannot exceed the maximum price named in the statute. But no maximum price is prescribed for a primary reading chart. Whether the text-book commission has authority to adopt a price and make a contract to supply such charts may

be the subject of divergent opinions; but it is not found necessary to decide that question. A contract in the case of ordinary text-books certainly does not impose any duty upon a district board to purchase them, unless it be in a case of district ownership, provided for in the statute (Gen. Stat. 1909, § 7822), but not adopted by this district. Treated as text-books, with which it is classified in the statute, except as to maximum prices, purchases would be made by patrons of the school, and not by the district. Appellant disclaims any right to compel such purchase under the section of the statute relating to charts, maps, globes, and other school apparatus. Gen. Stat. § 7836. With or without the contract, no provision of law is found requiring district boards to buy the chart of the manufacturer and pay the price demanded therefor.

In the former opinion reference was made to the omission of a reading chart from the regulations prescribing standards of quality and maximum prices in the statute authorizing the adoption of text-books. A standard is provided, viz., Wooster's primary reading chart (Gen. Stat. 1909, § 7833); but a maximum price is omitted. A necessary correction is made accordingly in the opinion, but the conclusion is adhered to. All the Justices concurring.

**DIXON v. WINDSCHEFFEL et al.**  
(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

**LIMITATION OF ACTIONS (§ 197\*)—ABSENCE FROM STATE—EVIDENCE.**

The allegation of a pleading that the running of the statute of limitations has been prevented by the absence of a person from the state for a specified time is not necessarily established by proof of his nonresidence therein.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722-726; Dec. Dig. § 197.\*]

Appeal from District Court, Sherman County.

Action by M. E. Dixon against H. W. Windscheffel and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lee Monroe and C. M. Monroe, both of Topeka, for appellant. Mahin & Mahin & Mahin, of Smith Center, for appellees.

MASON, J. In 1887 Andrew J. Campbell and his wife executed a note and real estate mortgage, due December 1, 1892, which were afterwards sold to M. E. Dixon. On December 14, 1901, Dixon brought action on the note. The summons was served only on Campbell, although his wife was named as a party in the petition. He pleaded the statute of limitations, and a trial resulted, in May, 1903, in a judgment in his favor on that issue, declaring the note to be barred. A record of the judgment contains recitals of the appear-

ance of the "defendants" by counsel, but in fact no one was authorized to appear for Mrs. Campbell. In this state of the record, H. W. Windscheffel in 1905 became the owner of the land by title derived from the Campbells through mesne conveyances. On February 12, 1910, Dixon began an action for the foreclosure of the mortgage, alleging that Mrs. Campbell had been absent from the state ever since the maturity of the note. Windscheffel denied this. The deposition of Mrs. Campbell was introduced, to the effect that she had been a nonresident of Kansas during all but 2 years of that time. The court found for the defendant, and rendered judgment accordingly. The plaintiff appeals.

The plaintiff, in order to show that the note was still alive as to Mrs. Campbell (and that therefore the mortgage was enforceable against Windscheffel), was required to prove that between December 1, 1892, and February 12, 1910, the time spent by her in Kansas did not amount to 5 years; in other words, that she had been absent from the state between these dates for 17 years, 2 months, and 11 days. Her evidence was that she left Kansas, and moved to Nebraska, in 1888, 1889, or 1890; that about 2 or 3 years later she moved to Illinois, where she remained 9 or 10 years; that she next lived in Kansas for about 2 years; that she then resided in Nebraska 2 or 3 years; that she then went to Illinois, and remained there until 1910, when she moved to Montana; that she last left Kansas about 1903. While the language varies somewhat, we think it clear that in all her answers the witness had reference to the place of her domicile, and not to her personal presence in or absence from this state. Her testimony amounts to this—that she resided in Kansas only 2 years after the note matured. But, for anything shown in her testimony, she may have been in the state for more than 3 years additional. As the running of the statute of limitations is suspended only by absence from the state, and not by nonresidence, the judgment was not contrary to the evidence. *Miller v. Baier*, 67 Kan. 292, 72 Pac. 772, and cases there cited. The plaintiff argues that, while there is a difference between residence in a state and personal presence therein, there is a presumption, in the absence of a showing to the contrary, that a person spends his time in the state of his residence. This is true in a sense, just as "a person's domicile is sometimes presumed to be in a certain place from the fact that he is present there." 4 Enc. of Evidence, 848. If it is necessary to indulge in presumption on the subject, it would doubtless be presumed that at a particular time a man was at his permanent home, rather than elsewhere. But it can hardly be said that there is any substantial presumption that he never leaves the state of his residence. "A party may reside in Illinois,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and yet spend more than half of his time in Kansas. An allegation that a party has only been a *resident* of Kansas 3 years last past throws no light upon the question of his presence in or absence from the state during the years prior thereto." *Hoggett v. Emerson*, 8 Kan. 232, 265. In *Coale v. Campbell*, 58 Kan. 490, 484, 49 Pac. 604, 605, it was said: "The agreed facts show: 'The defendant, W. T. Coale, is now, and always has been, a non-resident of the state of Kansas.' The exception, contained in section 21, preventing the statute from running, is where the defendant is personally absent from the state; and there is nothing in the case showing whether he was so or not. The mere fact of non-residence is insufficient to bring the case within the exception and prevent the statute from running."

The present case was not decided upon a demurrer to the evidence but upon a final submission upon the merits. The court was not bound to give effect to all favorable inferences that might be drawn from the facts proved. There was no occasion for indulging in doubtful presumptions, or in a strained construction of an equivocal phrase. The issue was plain and simple—the presence in or absence from the state of Mrs. Campbell. There was no direct evidence on that point. The circumstances suggest that the omission to elicit more specific information from the witness may have been intentional. The 5-year statute of limitations had run against the husband in 1901. Where he resided is not shown, nor whether his wife was with him any part of the time. For nearly 7 years the record of the judgment was permitted to stand, showing a determination that the note was barred as to both makers. As the trial judge intimated, the situation justified holding the plaintiff to strict proof. The decision was placed distinctly upon the ground that the evidence introduced by the plaintiff related to residence out of the state, and not to personal absence from it. If upon its announcement the plaintiff had represented that the phrasing of the deposition was inadvertent, and had asked time to produce further evidence, a different question would be presented. But he rested upon the showing made, and upon that we think the ruling of the court was correct.

The judgment is affirmed. All the Justices concurring.

#### PARKER et al. v. McLAIN.

(Supreme Court of Kansas. Feb. 8, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1056\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where real estate standing in the name of one person is attached as the property of another, upon a trial of the question of the true ownership, the attaching creditor should be al-

lowed considerable latitude in the examination of his debtor; but where the case is tried without a jury, a judgment will not be reversed because of limitations placed by the court upon the inquiry, where there is no probability that the admission of the rejected evidence would have resulted in a different decision.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.\*]

Appeal from District Court, Wyandotte County.

Action by May L. Parker and Effie E. Parker against Julia A. McLain, executrix. Judgment for plaintiffs, and defendant appeals. Affirmed.

Keplinger & Trickett, of Kansas City, Kan., and Thurmond & Farrar, of Kansas City, Mo., for appellant. I. O. Pickering, of Olathe, for appellees.

MASON, J. Carey McLain obtained a judgment in Missouri against M. V. B. Parker. He sued upon it in Johnson county, Kan., attaching real estate there and elsewhere, including a tract in Wyandotte county. The plaintiff died, and the action was revived in the name of his executrix. May L. Parker and Effie E. Parker moved to discharge the Wyandotte county land from the attachment, on the ground that it belonged to them. The motion was overruled. Later they brought an action in Wyandotte county against the executrix, asking to quiet title to the land. They recovered judgment, and the defendant appeals.

There is nothing to show that in the Johnson county court any trial was had of the ownership of the Wyandotte county land, other than the summary hearing usual where a motion is made by a stranger to discharge attached property. In such case the motion is denied, unless the ownership of the claimant is demonstrated beyond substantial question, and the ruling is not regarded as an adjudication of title. *Grocer Co. v. Alleman*, 81 Kan. 543, 900, 106 Pac. 460, 997, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398. The judgment here appealed from was rendered upon oral evidence, as well as depositions. A fair question of fact was presented, and the decision of the trial court is final.

Complaint is made that the scope of inquiry was unduly limited. The plaintiffs introduced in evidence a deed to them from M. V. B. Parker and wife, covering the property in controversy, executed February 3, 1892, and recorded the 4th of the following April. One of the plaintiffs (Effie E. Parker) testified to their ownership, and was cross-examined at considerable length. The defendant then offered the record of the evidence given at the hearing on the motion in Johnson county. This was rejected, except as to the deposition of May L. Parker. This ruling is complained of, but cannot be re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



viewed, for nothing is shown as to the contents of the rejected record, except that it included a deposition of the wife of M. V. B. Parker taken by the plaintiff. It is not shown that May L. Parker or Effie E. Parker were notified of, or were represented at, the taking of this deposition. It would have been admissible against them in the hearing on the motion as an affidavit, so that its admission there does not throw light upon the matter. It was offered only as a part of the entire evidence given in the Johnson county hearing, evidently on the theory that its use in one proceeding rendered it competent in the other. It had little direct relation to the particular matter in controversy. Its rejection cannot be regarded as material error.

The defendant's attorney next called M. V. B. Parker to the stand, and began his examination by asking what property he had, and if he had any real estate in his own name. The court regarded this as an attempt to use the proceeding as one in aid of execution, and for that reason sustained objections to the questions. A list previously made by the witness of property owned by himself and his wife at various times was introduced in evidence. Several schedules, including those for 1883 and for 1903, showed the land in controversy. On motion of the plaintiffs, the court struck out all entries prior to May, 1893, the date of the first transactions between Carey McLain and M. V. B. Parker, out of which the original litigation grew. The examination of the witness was also confined to matters subsequent to that date. These rulings are complained of. It cannot be thought that the decision of the court could have been changed by the retention of the evidence, which had been stricken out after having been once considered. The matter of Parker's method of handling property and of doing business was quite fully gone into. Enough evidence was admitted to exhibit in considerable detail the basis of the claims made by the defendant. The court had some discretion in controlling the examination, and we cannot say that this discretion was abused, or that, if all the rejected evidence had been admitted, there is any probability whatever that a different conclusion would have been reached.

The judgment is affirmed. All the Justices concurring.

#### STATE v. PRICE et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1084\*) — APPEAL — BONDS.

By the provisions of the statute, a defendant, who has been convicted of a felony and appeals to the Supreme Court from such conviction, may be granted a stay of the sentence pending the preparation and hearing of the case on appeal upon a sufficient undertaking, given

by others and not himself, upon the approval thereof by the proper officer of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2728, 2729, 2731, 2733-2735; Dec. Dig. § 1084.\*]

#### 2. CRIMINAL LAW (§ 1084\*)—APPEAL—BOND.

When such an undertaking is presented to the proper officer for approval, he may, if he finds the same sufficient, approve the same and grant the stay, although the body of the bond may indicate that it was prepared to be signed, not only by those who did in fact sign it, but by others also.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2728, 2729, 2731, 2733-2735; Dec. Dig. § 1084.\*]

#### 3. CRIMINAL LAW (§ 1084\*)—APPEAL—BOND.

In such case, the makers of the bond are not to be excused from liability thereon, although they may have understood and agreed, at the time of signing the same, that the undertaking should not become valid until signed by such others. It devolves upon such signers to see that such undertaking or agreement is completed before delivery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2728, 2729, 2731, 2733-2735; Dec. Dig. § 1084.\*]

(Additional Syllabus by Editorial Staff.)

#### 4. RECOGNIZANCES (§ 1\*)—"BOND"—DISTINCTION.

There is no distinction in Kansas between a "recognizance" and a "bond," but the words are used interchangeably; a "recognizance" being an acknowledgment of record of a pre-existing debt owing by the cognizors to the state as principal.

[Ed. Note.—For other cases, see Recognizances, Cent. Dig. §§ 1-19; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6001-6005; vol. 8, p. 7781; vol. 1, pp. 830-834; vol. 8, p. 7592.]

Appeal from District Court, Franklin County.

Action by the State against H. J. Price and others. Judgment for defendants, and the State appeals. Reversed and remanded.

John S. Dawson, Atty. Gen., and S. N. Hawkes, Asst. Atty. Gen., for the State. F. M. Harris, of Ottawa, for appellees.

SMITH, J. W. M. Stuckey, one of the appellees, was tried and convicted of a felony in the district court of Franklin county, and appealed to the Supreme Court. The form of a bond was prepared, in the body of which were the following recitals: "Now, therefore, we, the said W. M. Stuckey, as principal, and John Bollman, H. J. Price, A. Reid, C. B. Caldwell, J. C. Nelson, of Franklin county, Kansas, as sureties, acknowledge ourselves indebted to the state of Kansas in the sum of \$2,000, for the payment of which, well and truly to be made, we bind ourselves, our heirs and legal representatives, by these presents. The condition of this obligation is such that, if the said W. M. Stuckey shall, on the order or judgment of said Supreme Court, surrender himself to the sheriff of Franklin county, and shall in all respects abide and perform the judgment and decision of said court in this action,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then this obligation shall be null and void; otherwise to remain in full force and effect."

The bond was signed by the persons named as sureties, except John Bollman, who did not sign it; neither did Stuckey. In this condition it was presented to the Chief Justice of the Supreme Court and was approved, and the stay of judgment against Stuckey was granted. Thereafter it was ordered by the Supreme Court that the appeal be dismissed and the appeal bond be forfeited unless the appellant, W. M. Stuckey, should surrender himself to the sheriff of Franklin county and bring himself within the jurisdiction of this court within 10 days. Thereafter, upon motion and evidence of the failure of Stuckey to comply with such order, the Supreme Court declared of record the bond forfeited, and adjudged that the sureties who signed the bond should pay the county treasurer of Franklin county the amount of the recognizance, \$2,000. Thereupon this action was commenced in the district court of Franklin county to recover on the bond. The petition in the action recited the facts in full, of which this is an abbreviated statement, and there were attached thereto, as exhibits, copies of the proceedings in the district court and in the Supreme Court, and of the bond and of the record of the forfeiture thereof. Judgment was prayed for against Stuckey, Price, Reid, Caldwell, and Nelson. To this petition the defendants Price, Reid, Caldwell, and Nelson filed a general demurrer, which was overruled; and thereupon they filed an answer in which they alleged that the bond, as prepared, recited that it was understood that it was to be signed not only by themselves, but by W. M. Stuckey and John Bollman; also that there was an agreement between themselves and the defendant Stuckey and John Bollman that they were not to become liable upon such bond unless Stuckey, as principal, and all the sureties named in the bond, including Bollman, should sign the same, and that the bond should not be delivered to any officer of the state until so signed; that the bond was delivered in violation of such agreement; that the recital of the names of the persons, by whom the bond was to be made, was notice to the justice of the Supreme Court, who approved the bond, and to the state of Kansas, of such agreement and understanding between the parties thereto that the bond should not become valid until signed by the principal and all the sureties named therein. To this answer a general demurrer was filed on behalf of the state. Upon the hearing of such demurrer in the district court, it was sustained, on the principle that it searched the record and carried it back to the petition; and, the attorney for the state electing to stand thereon, judgment was rendered against the state for costs. To reverse these rulings, the case

is brought here upon the appeal of the state.

[1] The provisions and requirements in regard to giving bonds in felony cases like this are found in section 6861 of the General Statutes of 1909 (Code Cr. Proc. § 287). By the provisions of the statute, the party appealing is not required to sign the bond.

[4] An attempt is made to distinguish between a recognizance and a bond. There is no distinction, and the words are used interchangeably in this state. *Ingram v. State*, 10 Kan. 630; *Jennings v. State*, 13 Kan. 80. Several other decisions have been rendered following these cases. By the provisions of section 6730 of the General Statutes of 1909 (Code Cr. Proc. § 154), no irregularity in giving the bond, or in any proceeding relating thereto, shall defeat an action upon the recognizance, if it be made to appear that the defendant was legally in custody charged with a public offense; that he was discharged by reason of the giving of the recognizance; and it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense. The strict rule of the common law in reference to recognizances is changed by this statute. *McLaughlin v. State*, 10 Kan. 581. In *Gay v. State*, 7 Kan. 394, it is said: "The recognizance is not a contract between individuals. It is an acknowledgment of record of a pre-existing debt owing by the cognizors to the state, not as sureties, but as principals." See, also, *Barkley v. State*, 15 Kan. 99.

Regarded as a contract, the recognizance pleaded would at common law be a joint contract; but, by the provisions of section 1638 of the General Statutes of 1909, it must be construed as a joint and several contract. It follows, therefore, that under such a recognizance, executed by several persons, an action would lie against any one, or any number less than all, or against all of the signers thereto. The petition in this case stated sufficient facts to constitute a cause of action upon the bond against each one severally, or against all jointly of the signers thereto. The order of the court, therefore, in sustaining the demurrer to the petition was erroneous. It remains to inquire whether the court erred in declining to sustain the demurrer filed to the answer of the appellee.

[2, 3] It is urged that, since the body of the bond indicated that it was proposed to be the obligation of Stuckey and Bollman jointly with the appellees, this was notice to the justice of the Supreme Court, who accepted and approved the bond, that the instrument was incomplete; also that there was an agreement between the proposed makers thereof that the undertaking was not to bind any one of them until all of the makers, including Stuckey and Bollman,

should sign the undertaking. This contention is negated by the fact that the undertaking was several, as well as joint, and, as we have seen, the instrument is an individual acknowledgment of each signer that, upon breach of the condition of the bond, he would become individually indebted to the state; that he stands as a principal and not as a surety. It devolves upon each signer to such a bond, if he so desires, to see that the bond is not delivered to a public officer for approval, until it is signed by all persons who are to be obligated thereby. Moreover, the provisions of section 8730 of the General Statutes of 1909 fairly preclude the defenses pleaded to the action in this case. The signers of the bond are presumed to know the law; and when they individually signed the bond and delivered it to another to be delivered to the officer for acceptance, even if they had expected or had even agreed that the bond should not be valid until signed by others, if such bond came to the possession of an officer, authorized to approve and accept it, and a defendant legally in custody, charged with a public offense, was discharged from custody by reason of the giving of the recognizance by which they undertook that the defendant should appear before a court or magistrate for examination or trial for such offense, they cannot be heard to dispute their obligation. The demurrer to the answer should have been sustained.

The judgment is reversed, and the case is remanded, with instructions to set aside the order sustaining the demurrer to the petition, and to sustain the demurrer to the answer, and, unless further pleading is allowed, to enter judgment against the appellees as prayed for. All the Justices concurring.

#### BOARD OF COM'RS OF KEARNY COUNTY v. DAVIS, Auditor, et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. TAXATION (§ 915\*)—COMPROMISE SALES—LIABILITIES OF COUNTY—STATE TAXES.

Under chapter 122 of the Laws of 1901 and chapter 328 of the laws of 1911, counties are not relieved, upon making the certificate provided for, from liability to the state for the unrealized portions of taxes due upon compromised tax sales, and are not entitled to be given such a credit by the auditor of state as will relieve them from such liability.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1752; Dec. Dig. § 915.\*]

#### 2. STATE TAXES—LIABILITY OF COUNTIES.

The decision in the case of Harper County v. Cole, 62 Kan. 121, 61 Pac. 403, approved and followed.

Action by the Board of County Commissioners of Kearny County for writ of mandamus to William E. Davis, Auditor, and Mark Tulley, Treasurer. Writ denied.

Clad Hamilton and Clay Hamilton, both of Topeka, for plaintiff. Jno. S. Dawson, Atty. Gen., and Nation & Grant, of Erie, Kan., for defendants.

**BURCH, J.** The action is one of mandamus against the state auditor to compel him to credit Kearny county with the sum of \$5,008.07, the amount of state taxes charged against it for the years 1888-1905, inclusive, and uncollected on sales of land for delinquent taxes. The object is to relieve the county from liability for such taxes, on the certificate of the county commissioners and the county clerk that the sum stated is the proper proportion of state taxes remaining uncollected upon compromised tax sales. Laws 1911, c. 328.

The liability of a county to the state for such taxes was considered in the case of Railway Co. v. Clark, 60 Kan. 831, 58 Pac. 561, decided in 1889, and in the case of Harper County v. Cole, 62 Kan. 121, 61 Pac. 403, the precise question under consideration was determined adversely to the plaintiff upon the statutes as they stood in the year 1900. In the Harper County Case it was pointed out that counties are not relieved from liability to the state for uncollected state taxes upon real estate, and that the deficiency is to be made up by a special levy in the succeeding year. Chapter 199 of the Laws of 1885 provided that unrealized taxes should be distributed to the several funds entitled thereto, and that the county commissioners should certify to the auditor of state the proportion of state taxes uncollected for which the county was entitled to credit, and that the auditor should credit the county with the amount. A penalty was imposed upon the county board for willfully making a false certificate. It was held that this credit was a provisional credit only in the matter of the accounting between the state and the county as to uncollected state taxes, and that the Legislature did not intend to discharge the liability of the county to the state for such taxes.

[1, 2] At the session of 1901, immediately following the decision in the Harper County Case, an act was passed using almost the identical language of the act of 1885. The only innovations were that the certificate was to be made by the board of county commissioners and the county clerk, instead of by the board alone, six months' time from the taking effect of the act was given to claim credit on previous compromises, the uncollected portions of taxes upon subsequent compromises were to be certified to the auditor within 60 days, and the penalty for a false certificate was extended to "any officer," to include the county clerk. Laws 1901, c. 122. If it were the purpose of the Legislature to nullify the interpretation which the court had placed upon the provisions of the law of 1885, relating to credit in the auditor's office

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for unrealized taxes, it failed to avail itself of any of the resources of the English language to express such a purpose. Instead of that, it adopted in the act of 1901 the substantive provision of the law of 1885, which the court had interpreted, without material change; and under all the rules for discovering legislative intent it adopted the interpretation with the language to which it applied. In 1911 the act of 1901 was amended by again allowing 60 days' time in which to certify unrealized taxes on previous compromises, but in all other respects the act of 1901 was continued in force. Laws 1911, c. 328. The action is based on the law of 1901 as amended in 1911. The court is entirely satisfied with the decision in the Harper County Case; but if it were not the Legislature has accepted the decision as sound, and has framed its subsequent acts accordingly.

The writ is denied. All the Justices concurring.

**LONG et al. v. BOYER.†**

(Supreme Court of Kansas. Feb. 8, 1913.)

Appeal from District Court, Gove County.

Action by Jacob H. Long and others against Alverda E. Boyer, individually and as executrix. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. D. Gilkeson, of Hays, Lee Monroe, of Topeka, and W. E. Saum, of Kansas City, Mo., for appellant. John E. Hessin, of Manhattan, for appellees.

**PER CURIAM.** This was an action to set aside the will signed by Samuel Long, and the grounds of attack were that he lacked testamentary capacity to execute the will, and that it was signed through undue influence exercised by his daughter, a beneficiary under the will. Much testimony was taken as to the capacity of Long, and upon it the court found that on April 11, 1906, when the will was executed, he was of unsound mind, did not know the extent of his property, nor understand the disposition he was making of it. It was found that he was suffering from senile dementia or melancholia, and was not conscious either of the ties of relationship or of his obligations to kindred. It was found, too, that, while the evidence did not disclose that fraud or undue influence was exercised at the signing of the will, Mrs. Boyer had secluded him most of the time since he had resided with her, which was about six months before the will was made, that she denied relatives and others access to or communication with him, that this surveillance increased after the signing of the will, until it reached practical imprisonment "in a lonely hut on an uninhabited prairie," and because of his condition and surroundings Mrs. Boyer had exercised undue influence over him.

It appears that at least a year before the will was made the mind and memory of Long began to fail, and although, on a hearing in the probate court several months before the will was made, he was found to be insane, an appeal was taken from that decision to the district court, and on a trial there a finding of sanity was returned. Between the time of the adjudication in the probate court and the reversal of that decision on appeal in the district court the will was signed by Long. There is a sharp conflict in the testimony in regard

to his mental capacity. Many of his neighbors and those near to him testified that his mind was sound enough to transact ordinary business and that he was competent to make a will when the paper was signed. However, there is abundant testimony tending to show mental incapacity, and which sufficiently supports the findings of the trial court. Most of the testimony upon which the findings rest was oral; but, even if it had all been in the form of depositions and documents, we would be inclined to the opinion reached by the district court.

Complaint is made of testimony given by some of the Long heirs, who were parties, which included transactions and communications had personally with Long. The witnesses were not incompetent to testify, but some of the testimony did trench on the rule excluding that kind of evidence. The court, however, expressly stated in one of the conclusions that such testimony was incompetent, and, holding that view, it must be presumed that the court gave it no weight, and hence no prejudice could have resulted. Broadie v. Carson, 81 Kan. 467, 106 Pac. 294.

The judgment of the district court will be affirmed.

**GRIMM v. KUBACH et al.**

(Supreme Court of Kansas. Feb. 8, 1913.)

Appeal from District Court, Dickinson County.

Action by Albert D. Grimm against Charles Kubach and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. S. Crawford, of Abilene, for appellants. E. C. Little, of Kansas City, for appellee.

**PER CURIAM.** This action was brought by the appellee to recover from the appellants a sum alleged to have been paid by him to the holders of the appellee's promissory notes, which notes are alleged to have been given to appellants, and the consideration for which was in whole or in part a patent right, or an interest in a patent right; that the notes did not contain the words, "Given for a patent right," as required by section 5516 of the General Statutes of 1909, and that the holders thereof to whom the payments were made were innocent holders. There was evidence to sustain the finding of the court in favor of the appellee.

The legal questions involved are decided in *Nyhart v. Kubach*, 76 Kan. 154, 90 Pac. 793, and in *Tredick v. Walters*, 81 Kan. 828, 106 Pac. 1067; the latter case being quite similar to this one. In that case the evidence in regard to the consideration was: "Q. Mr. Walters, I will ask you what, if anything, Mr. Bets said with reference to his patent? A. He said he had a patent—he said he had a patent on the use of the cable wire that was used to reinforce the posts." The portion of the opinion relative thereto is: "These were the only representations in regard to a patent. It goes without saying that one who has an article designed for a particular use, who has the right to use the article for the purpose for which it is designed, and who sells the article to another, by necessary implication sells also the right to use the article for such purpose. The molds described in the contract were designed expressly for the manufacture of the posts claimed to have been patented, and the sale of such molds, by the terms of the contract, necessarily carried with it the exclusive right to manufacture, sell, and use the posts claimed to be patented, within the designated territory for the time specified. The right to manufacture, sell, and use a patented article is the very essence of the intangible thing

† Rehearing denied March 15, 1913.

called a patent, and brings the case squarely within the reasoning of *Hankey v. Downey*, 116 Ind. 118 [18 N. E. 271, 1 L. R. A. 447]."

In this case the appellee's evidence is: "Q. Tell what they said and did. A. They made a proposition to me, and told me what they did with agents, and if I would take an agency for my township they would sell me 12 machines and 12 sets of molds, price \$6 and some cents apiece. Q. What was said about patents? A. They stated they had patents. Q. Did they say they had patents on both molds and fence? A. Yes, sir."

The following cases are also instructive as to the question involved: *State v. Morey*, 81 Kan. 149, 105 Pac. 501; *Bolte v. Sparks*, 85 Kan. 13, 116 Pac. 224.

The judgment is affirmed.

#### MENNONITE MUT. FIRE INS. CO. v. MISSOURI PAC. RY. CO. et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

Appeal from District Court, Woodson County.

Action by the Mennonite Mutual Fire Insurance Company against the Missouri Pacific Railway Company and others. Judgment for defendant Railway Company, and the other defendants appeal. Affirmed.

S. C. Holmes, of Yates Center, and C. E. Benton and W. P. Dillard, both of Ft. Scott, for appellants. J. C. Culver and Lamb & Hogueland, all of Yates Center, for appellee.

**PER CURIAM.** Insured property was destroyed by fire. The insurance company paid \$1,700 upon its policy, and brought action for that amount against a railroad company, claiming the fire to have been caused by its negligence. Two owners of separate portions of the property were made defendants. Each filed an answer and cross-petition, asking a judgment against the railroad company—the one, for \$500; the other, for \$1,400. A verdict was returned in favor of the railroad company, upon which it was given judgment for all its costs against all the claimants. The two owners of the destroyed property filed a motion to retax the costs, asking in effect that they be released from liability for any costs, except such as they had themselves made, and that the judgment for the defendant's costs should run only against the plaintiff. The court then made an order that each claimant (the plaintiff and the two cross-petitioners) should pay the costs each respectively had made, and also one-third of the costs made by the defendant. The two cross-petitioners appeal from this order.

The appellants assert that they did not themselves desire to bring an action, but wished to settle with the railroad company without suit, and would have done so, except for the plaintiff's course; that a settlement was prevented, and litigation was made necessary, by the action of the plaintiff. They argue that for this reason they should be relieved from the payment of any costs, excepting such as were occasioned by their own conduct, and would not have been made if they had disclaimed. They also contend that the statute does not authorize a division of the judgment for costs.

By whatever motives the appellants may have been actuated, we think that, when they joined

with the plaintiff in the prosecution of the claim against the railroad company, they incurred an equal liability for that company's costs, if it should prevail. So far as the railroad company was concerned, it was doubtless entitled to a joint and several judgment against these claimants for reimbursement of all the expenses it had incurred that were taxable as costs. But as between the claimants it was reasonable that an apportionment should be made. It was not necessary that the division should be in proportion to the amounts claimed, for there was no relation between these amounts and the costs incurred by the railroad company. The order that each claimant should pay one-third of the costs for which all were liable is not one of which the appellants can justly complain.

The judgment is affirmed.

#### GUDMUND v. GUDMUND.†

(Supreme Court of Kansas. Feb. 8, 1913.)

Appeal from District Court, Republic County.

Action by Andrew Gudmund against Emma M. Gudmund. Judgment for plaintiff, and defendant appeals. Affirmed.

R. S. Hanley, of Belleville, and J. M. Livingston, of Belleville, for appellant. N. J. Ward, of Belleville, and Mrs. L. O. Case, of Topeka, for appellee.

**PER CURIAM.** The parties to this action were married September 3, 1910, and the decree of divorce from which the wife appeals was granted October 28, 1911. At the time of the marriage the husband was 74 and the wife 32 years of age. Both were born in Sweden. For several months previous to the marriage she had been his housekeeper. The husband owns three pieces of real estate, estimated to be worth \$6,000; the wife has no property. Shortly after the marriage the husband conveyed to the wife a five-acre tract and two town lots. Differences soon afterwards arose between the parties, and the husband brought suit for divorce, alleging gross neglect and extreme cruelty. The answer denied the charges, and alleged a promise on the husband's part, made before marriage, to convey the property described in the deeds to her. The court set aside the conveyances, and gave to the wife her wearing apparel and an allowance of \$150, which the husband was directed to pay her. The residue of the property was given to the husband.

The court might well have refused a decree of divorce. In our opinion, the clear weight of the evidence disproved the charge of neglect of duty, and of extreme cruelty, also. Because of the disparity in the ages of the parties and the probability that they will never live together, we shall not disturb the divorce. The so-called division of the property, however, seems so manifestly inequitable that the judgment will be modified, and the court directed to award the wife \$1,250, which, under all the circumstances of the case, and in view of the evidence, is no more than a just and fair allowance. The decree of divorce will be made subject to the payment to the wife of the allowance. The costs in the court below and of the appeal will be taxed against the plaintiff. Affirmed.

† Rehearing denied March 15, 1913.

## GEORGE J. BIRKEL CO. v. NAST.

(Civ. 1,186.)

(District Court of Appeal, Second District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

## 1. SALES (§ 477\*)—CONDITIONAL SALES—WAIVER OF CONDITION.

Where a contract for sale on installments provided that the title should not pass until full payment, the condition was for the sole benefit of the seller, who might waive it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. § 477.\*]

## 2. ELECTION OF REMEDIES (§ 3\*)—ELECTION—ACTS CONSTITUTING.

Where a contract for the sale of a piano upon installments provided that, until full payment, title should remain in the seller, who might, upon failure to pay any of the installments, retake the instrument without legal process and terminate the contract, or enforce payment of all sums then unpaid, the bringing of an action for the unpaid purchase money was an election to enforce payment, and a waiver of the seller's right to retake possession upon default; such waiver vesting complete title in the buyer, so that the piano might be taken upon attachment in such action.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.\*]

Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by the George J. Birkel Company against Mrs. H. H. Nast. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Judgment and order reversed.

E. S. Williams, of Los Angeles, for appellant. Geo. M. Harker, of Los Angeles, for respondent.

SHAW, J. Action to recover upon a contract for the conditional sale of a piano made by plaintiff to defendant. Judgment went for defendant. Plaintiff moved for a new trial, which was denied, and it appeals from the order denying its motion, as well as from the judgment.

At the time of the delivery of the piano to defendant, she executed a contract whereby she agreed to pay therefor to plaintiff the sum of \$600, as follows: Ten dollars upon the signing of the contract, and at least \$10 on the 8th day of each month thereafter, together with interest, until the whole sum was paid, and that, until said sum and interest should be fully paid, the piano should remain the property of plaintiff, but, upon full payment, title thereto should vest in defendant; in addition to which, the contract contained the following clause: "I also hereby agree that if I fail to pay any of said monthly installments when due, or to fulfill and keep any other of the aforesaid conditions, thereupon George J. Birkel Company may enforce payment of all of said sum of \$600 then unpaid and interest thereon; or, at its option, George J. Birkel Company may retake possession of said piano without legal process, and for that purpose may enter any premises

where the same may be, and thereupon without further notice terminate this contract." Defendant made default in the monthly payments which, by the terms of the contract, she was required to pay, whereupon plaintiff brought this action for the unpaid balance of principal and interest, and caused to be issued, in said suit, a writ of attachment, under and by virtue of which the sheriff levied upon and took into his possession the piano, which he stored in a warehouse owned and controlled by plaintiff.

[1] Upon these facts, the court found that title to the piano did not vest in the defendant by reason of the action brought by plaintiff, in the exercise of its option, to recover the purchase money which defendant had agreed to pay; that the taking of the piano by the sheriff under the writ of attachment and storing it in plaintiff's warehouse was a recaption thereof by plaintiff; that, under the terms of the contract, title could not vest in defendant without her consent, and that she never assented thereto. These findings, consisting of a jumble of both law and fact, cannot be sustained. The provision of the contract, to the effect that the title to the piano should remain in plaintiff until payment of the full purchase price thereof, was inserted for the purpose of securing such payment, and therefore was for the benefit alone of the vendor. Being for its sole benefit, it had the right to waive the same. *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709.

[2] Plaintiff could not retake the piano and also sue for the price thereof. *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945. Therefore, when it brought this action for the purchase money, it waived its right to retake possession, and elected to enforce payment. Having exercised its option to sue, it was debarred from all right to recover the property under a claim that title had not passed to defendant. *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Parke, etc., Co. v. Lumber Co. et al.*, 101 Cal. 37, 35 Pac. 442. The legal effect of such election was, immediately upon the filing of the complaint, to transfer to and vest in defendant title to the piano as completely as though defendant had made full payment therefor. *Elsom v. Moore*, 11 Cal. App. 377, 105 Pac. 271; *Shepard v. Mills*, supra. The title having passed to and become vested in defendant by reason of plaintiff's election to exercise its option to enforce payment, it was not only subject to an execution which might be issued upon a judgment obtained in the action, but likewise, and for the same reason, subject to levy under a writ of attachment issued in the suit. The act of the sheriff in taking possession of the piano was in no sense a recaption by plaintiff under the terms of the contract, which authorized the taking without legal process. Until a sale thereof under execution, issued upon a judgment obtained in the action, the property be-

longed to defendant, subject to the levy of the writ, possession of which she might obtain, either upon payment or the giving of a bond for the release thereof. The act of the sheriff in storing it in plaintiff's warehouse was immaterial, so far as it affected plaintiff's rights in the matter.

Defendant, in her answer, set up certain facts as a separate defense. No findings, however, were made by the court upon the issues so tendered.

The judgment and order are reversed.

We concur: ALLEN, P. J.; JAMES, J.

**JACKSON v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY.** (Civ. 1,244.)

(District Court of Appeal, Second District, California. Dec. 14, 1912.)

**APPEAL AND ERROR (§ 415\*)—NOTICE OF APPEAL—PARTIES TO BE SERVED—CODEFENDANTS.**

Where petitioner brought action in the justices' court against two defendants to recover for labor of an agreed value, and had judgment against one of them only, who appealed, it was not necessary that the appellant should serve his notice of appeal upon the codefendant, since a judgment on appeal changing the liability of appellant would not in any way affect the other defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139; Dec. Dig. § 415.\*]

Original proceeding in certiorari by J. H. Jackson against the Superior Court of the State of California in and for the County of Los Angeles (Hon. Curtis D. Wilbur, Judge) to review an order of the court refusing to dismiss an appeal taken from a justices' court. Order affirmed.

George E. Cryer, of Los Angeles, for petitioner. B. M. Marble, of Los Angeles, for respondent.

JAMES, J. Petitioner here was the plaintiff in an action commenced in the justices' court against Lewis Rees and the Kline Invalid Bed Company, which action was for labor done at the alleged request of defendants of the alleged agreed value of \$67.50. The defendants therein answered separately, and after trial had the justice rendered judgment in favor of plaintiff against the defendant Rees only. Rees gave notice of appeal and filed an undertaking on appeal. His notice of appeal he served upon the plaintiff only, and, because such notice was not also served upon Rees' codefendant, petitioner here moved in the superior court to dismiss Rees' appeal on the ground that he had not served all of the adverse parties. This the superior court declined to do. If, after judgment had been rendered in its favor, the codefendant with Rees continued to be an adverse party, then, of course,

in order to make his appeal effectual, Rees should have served his notice of appeal upon his codefendant. It is said in *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225, that "an 'adverse party,' within the meaning of section 940 of the Code of Civil Procedure, is one 'whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken.' Senter v. De Bernal, 38 Cal. 637. If a judgment may be modified in any manner favorable to appellant without injuriously affecting the interest of the party not served, the appeal will not be dismissed." It is correct to say in a general way that in all of those cases where it has been held that a codefendant must be served by the party appealing the subject-matter of the action was such that any change worked by the appeal would affect the interest of such codefendant, such as in actions of partition, foreclosure of mortgages, etc. In the matter here considered the justices' court determined by its judgment that there was no liability against the Kline Invalid Bed Company for any part of the amount of money claimed by plaintiff, this petitioner, but that defendant Rees was there liable for the full amount. Upon a retrial of the action in the superior court, if a judgment was there rendered as affecting Rees different from that made by the justice, the liability or interest of the Kline Invalid Bed Company would be in no wise affected. On the other hand, if the plaintiff in the justice court action was dissatisfied because he had not secured judgment against Rees' codefendant, he possessed the same right to appeal as did Rees. Clearly the Kline Invalid Bed Company was not an adverse party such as to require that notice of appeal be served upon it.

For the reasons stated, it is made to appear that the superior court has not exceeded its jurisdiction in refusing to make the order dismissing the appeal as asked for, and its order denying the motion is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

**DE MITCHELL v. OROAKE.** (Civ. 1,168.)  
(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**1. APPEAL AND ERROR (§ 430\*)—RIGHT OF REVIEW—NECESSITY OF APPEAL.**

Where defendant gives no notice of appeal, either from an order striking his unsettled statement from the files or dismissing his motion for a new trial, such orders cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174, 3126; Dec. Dig. § 430.\*]

**2. APPEAL AND ERROR (§ 302\*)—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.**

A proposed unsettled statement of the case, incorporated in a bill of exceptions to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

used on an appeal never taken from an order striking it from the files, does not entitle it to consideration as a statement in support of the motion for a new trial, and hence, for want of a sufficient statement, the motion must be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.\*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by A. B. De Mitchell against P. W. Croake. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Dillon and A. S. Goldfiam, both of Los Angeles, for appellant. Lucius M. Fall and Webster Davis, both of Los Angeles, for respondent.

SHAW, J. Action to quiet title. Judgment, entered August 23, 1910, went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

Pursuant to his notice of intention to move for a new trial, defendant prepared, served, and filed his proposed unsettled statement of the case to be used in support of his motion. Thereafter, on October 17, 1910, plaintiff moved to strike from the files and records defendant's proposed statement upon the ground that the same had not been served within the time prescribed by law, and also moved to dismiss the motion for a new trial. The court granted both motions, and made its orders striking from the files and records in the case the defendant's proposed statement of the case, and dismissed defendant's motion for a new trial. Thereupon defendant prepared and, on January 5, 1911, caused to be settled a bill of exceptions, wherein was set out and exhibited the alleged erroneous rulings of the court in the making of said orders.

[1] Defendant, however, gave no notice of appeal, either from the order striking the statement from the files or dismissing the motion; hence, conceding the orders to have been the subject of appeal, in the absence of any appeal therefrom, the action of the court in making them cannot be reviewed.

[2] After the making of these orders, from which no appeal was taken, defendant gave a second notice that he would, on November 7, 1910, move the court for a new trial, which motion, it was stated in the notice, would be made upon a "statement upon appeal, which is herewith served upon you, attached to the bill of exceptions in said case." This motion was made at the time specified in the notice, and by the court denied. Defendant appeals from this order. Not only was there a failure to give notice of the motion within the time prescribed by law, but no statement in support of the motion was ever settled. In the absence of a statement on motion for a new trial, the motion

is properly denied, and the order denying the motion must be affirmed. *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770. For the purpose of showing error in the making of the order of November 7, 1910, denying his motion for a new trial, appellant has printed in his transcript the statement by order of court stricken from the files, and which is embodied in the bill of exceptions allowed January 5, 1911, upon the making of said last-mentioned order. Since this proposed statement was never settled, it could not be used upon the hearing of the motion. Incorporating it in a bill of exceptions to be used on an appeal never taken from an order striking it from the files does not entitle it to consideration as a statement in support of the motion for a new trial. Moreover, the bill of exceptions was not settled and filed until long after the court had denied the motion for a new trial. *Mills v. Dearborn*, 82 Cal. 52, 22 Pac. 1114.

The only ground urged in support of a reversal of the judgment is that the court erred in admitting certain evidence. There is no record before us upon which these alleged errors may be reviewed.

Judgment and order affirmed.

We concur: ALLEN, P. J.; JAMES, J.

#### CHANNEL COMMERCIAL CO. v. HOURIHAN. (Civ. 1,201.)

(District Court of Appeal, Second District, California. Dec. 16, 1912. Rehearing Denied by Supreme Court Feb. 14, 1913.)

#### 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

If there is any evidence in the record to sustain findings, they cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 2. SALES (§ 417\*)—CONDITIONAL SALES—EVIDENCE.

In an action for damages for breach of contract for the sale of beans, evidence held to show that the sale was conditional on the seller being able to procure beans at the agreed price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.\*]

#### 3. EVIDENCE (§ 408\*)—VARYING CONTRACT—SALE.

A memorandum of an agreement to sell beans in the following form: "Sep. 30, '10, Rec'd. C. C. Co., \$180.45 to apply on 1 M. sk lot pink beans as per sample at 4¼c"—signed by the seller, was not a sufficient memorandum of a contract of sale, but a mere receipt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

#### 4. EVIDENCE (§ 384\*)—PAROL EVIDENCE—VARYING CONTRACTS.

Where a writing purports upon its face to completely express the whole agreement, it is presumed that the parties embodied every material term therein.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 384.\*]



**5. EVIDENCE (§ 408\*)—PAROL EVIDENCE—VARYING RECEIPT.**

The terms of a written receipt may be varied by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

**6. APPEAL AND ERROR (§ 995\*)—FINDINGS—CONCLUSIVENESS.**

The appellate court cannot determine where the preponderance of the evidence lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.\*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Channel Commercial Company against M. P. Hourihan. From an order denying a motion for a new trial after judgment for defendant, plaintiff appeals. Affirmed.

B. F. Thomas, of Santa Barbara, for appellant. H. C. Booth, of San Francisco, for respondent.

**JAMES, J.** This is an action for damages alleged to have been suffered by plaintiff through breach of contract committed by defendant. Plaintiff alleged in its complaint that on the 30th day of September, 1910, in the county of Santa Barbara, it purchased of defendant 1,000 sacks of beans at the rate of  $4\frac{1}{2}$  cents per pound, to be delivered at once, and that defendant failed and refused to deliver the same. As evidencing the alleged contract of sale, plaintiff set out in its complaint that a memorandum of the agreement had been made in the following form: "Sep. 30, '10, Rec'd. C. C. Co., \$160.45 to apply on 1 M. sk lot pink beans as per sample at  $4\frac{1}{2}$ c. M. P. Hourihan." Plaintiff alleged that it had been damaged in the sum of \$720, plus the sum of \$160.45, which amount was alleged to have been paid to defendant at the time of the making of the agreement. The complaint was unverified. The defendant, by answer, made general denial thereto, and alleged further that plaintiff had executed to him a voluntary acquittance of an indebtedness in the sum of \$160.45, which sum of \$160.45 defendant alleged that he had tendered to plaintiff before answering, together with interest at 7 per cent. per annum, which tender had been refused. The trial judge made his findings of fact wherein he determined that there had been no contract for the sale of the beans entered into between plaintiff and defendant, and that the memorandum was not intended by either plaintiff or defendant to evidence a contract of sale, but that the amount of \$160.45 was to be held by defendant to bind the bargain on 1,000 sacks or less of beans, if the defendant could purchase the same for the account of plaintiff at  $4\frac{1}{2}$  cents per pound. There is a further finding that, at the time the alleged agreement was made, plaintiff's agent promised to notify defendant within two days, whether plaintiff would desire defendant to endeavor to purchase beans for it, and that

plaintiff did not so notify defendant, but that several days later made the claim that the memorandum amounted to a contract, and demanded the delivery of the beans therein described, and that the defendant then tendered to plaintiff the sum of \$160.45. Upon these findings, judgment was entered in favor of defendant. A motion for a new trial having been subsequently made on the part of plaintiff and denied, this appeal followed.

[1] So far as the findings of fact made by the trial court are to be considered, if there is any evidence in the record to sustain them they must, upon this review, be held to be fully supported. In the testimony of the defendant are to be found direct statements sufficient to warrant all of the findings of fact, as made. Defendant testified that he was a storekeeper in the Santa Ynez Valley; that he had had various dealings with the plaintiff; that the representative of plaintiff, according to his usual custom, called upon him on the day when the alleged agreement respecting the sale of beans was made; that he proceeded to adjust his accounts with this representative; that as he was about to draw a check in settlement of the amount of \$160.45, which he then owed to plaintiff, the representative of plaintiff told him to keep that and use it as a deposit on the beans. According to defendant's testimony, there had been some conversation, respecting the purchase of the beans, before the settlement of accounts was made; that plaintiff's agent had asked him if he could get beans, and he told him that he would see, and that he might be able to buy them at  $4\frac{1}{2}$  cents; that plaintiff's agent took a sample of the beans and said, "I will let you know to-morrow evening if the sample is satisfactory, and you buy the beans;" that he told the agent that it was all right, but to be sure and let him know, and he would try and get them, and that there the matter rested. Regarding the signing of the receipt, he said that, after the accounts had been adjusted, the agent told him that he wished some paper to show his employers how the account had been adjusted, and said, "I will just make a note that there is so much to your credit;" and that he (defendant) had said, "All right," and had signed the receipt in that way. Taking this evidence as true, it would appear that defendant was to act rather in the capacity of agent for plaintiff than otherwise, in the matter of the purchase of the beans, though it seems to have been shown, by all of the testimony, that defendant was to reap no profit in the transaction, but was to purchase the beans from the growers at the price which the plaintiff agreed to pay.

[2] Assuming that a different legal relation arose between the parties, and that they dealt with each other as distinct principals in the transaction, then the evidence estab-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lishes the fact that the sale was conditional upon defendant being able to procure the beans at the price agreed upon. Other evidence in the record shows that he was unable to procure them at that price, and that he promptly notified plaintiff of the fact.

[3] The vital question in the case, however, depends upon what construction shall be given to the receipt as signed by defendant and as set out in plaintiff's complaint. If that instrument contains sufficient terms to evidence a complete contract of sale and purchase, then all of the testimony introduced, which tended to vary or limit the effect of that agreement, would be irrelevant and incompetent. Code Civ. Proc. § 1856. By the section last referred to, it is provided that, where an agreement is reduced to writing, it must be considered as containing all of the terms agreed upon, except that evidence may be introduced of the circumstances under which the agreement was made, or to explain an extrinsic ambiguity, or to establish illegality or fraud. We do not think that the receipt, so called, of itself evidenced a contract of sale. Plaintiff only treated it as a mere memorandum, which required explanation by oral testimony, and there seems not to have been any special objection made on the part of plaintiff to the introduction of any of the testimony of defendant, where in he gave his version of the transaction.

[4] The rule is that, where a writing imports upon its face to be a complete expression of the whole agreement, it is then presumed that the parties have introduced into it every material item and term. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. In the case of *Gardner v. McDonogh*, 147 Cal. 313, 81 Pac. 964, relied upon by appellant, the memorandum stated, in express terms, that the parties had that day "bought" a certain quantity of beans, stating the name of the beans, but not otherwise designating them as beans. Here no words are contained in the written receipt appropriate to convey the meaning of sale or purchase and undoubtedly oral testimony was admissible to explain just what the obligations of the parties were in the entire transaction.

[5] The instrument was in the nature of a receipt only, in the consideration of which it has been often held that the terms of such documents are not conclusive, but that they may be explained or varied by parol proof. *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429. As we have before noted, it appears from the record that both parties at the trial considered that the true transaction was to be established in the main by oral proof, for both sides offered such proof, and that offered on the part of defendant to this point was not objected to.

[6] We can, on this review, have no concern as to whether the preponderance of evi-

dence tended to sustain the plaintiff's contentions, or those of the defendant. That was a matter solely for the determination of the trial court, and its conclusions thereon must be treated as final.

The order denying a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

TEALE et ux. v. SOUTHERN PAC. CO.  
(Civ. 1,007.)

(District Court of Appeal, Third District, California. Dec. 12, 1912. Rehearing Denied by Supreme Court Feb. 10, 1913.)

1. CARRIERS (§ 318\*)—INJURY TO PASSENGER  
—SUFFICIENT LIGHT—EVIDENCE.

In an action by a passenger for personal injuries received by a fall while descending from defendant's coach, evidence held to warrant a finding that the accident was due to defendant's negligent failure to maintain sufficient lights at its depot.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

2. CARRIERS (§ 286\*)—INJURY TO PASSENGER  
—DUTY TO FURNISH STATION LIGHTS.

Common carriers must furnish sufficient light at night at their stations to enable passengers boarding or leaving their trains to do so with safety, a failure to do so being culpable negligence, and it makes no difference if the light was shut off from the alighting place by a row of box cars.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

3. CARRIERS (§ 286\*)—INJURY TO PASSENGER  
—PROXIMATE CAUSE.

Where a plaintiff while alighting from defendant's train in the dark fell to the ground, and was seriously hurt, it will be held an accident which may be "reasonably anticipated" will occur from a railroad's omission to sufficiently light its station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

4. CARRIERS (§ 333\*)—INJURY TO PASSENGER  
—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM TRAIN.

A woman well along in years, but who was robust, and did all her household duties, was not guilty of contributory negligence in getting off of defendant's train without assistance at her destination, carrying a small valise and a suit case, in the dark, there being nobody to help her off; it being her duty to alight when she reached her destination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

5. CARRIERS (§ 333\*)—INJURY TO PASSENGER  
—CONTRIBUTORY NEGLIGENCE.

Where a woman of advanced years, but in robust health, was injured by falling from the steps of a passenger car while attempting to alight without assistance at her station, the place being very dark and there being no one to assist her, the mere fact that she realized the risk of doing so did not make her act the voluntary assumption of the risk; she not being responsible for the situation in which she was placed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

**6. TRIAL (§ 243\*)—CONTRADICTORY INSTRUCTIONS—CARRIERS—LIGHTS.**

Where the court instructed that defendant carrier must furnish such a light at its depot as an ordinarily careful person would have furnished under the circumstances, the fact that other parts of the charge required that plaintiff must furnish "sufficient light" and "proper light" did not give the jury a double standard of defendant's duty in lighting its station, since the jury will be assumed to have understood such terms to mean such light as an ordinarily careful person would have furnished.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

**7. TRIAL (§ 260\*)—HARMLESS ERROR—INSTRUCTIONS—SUFFICIENCY.**

Where the principle declared in a rejected instruction was in substance given in the court's charge, its refusal was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Superior Court, Napa County; Henry O. Gesford, Judge.

Action by Charles L. Teale and wife against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. E. & L. E. Johnston, of Napa, for appellant. E. S. Bell, of Napa, for respondents.

**HART, J.** This is an action to recover damages for personal injuries which the complaint alleges that the plaintiff, Annie E. Teale, suffered through the negligence of the defendant. The jury by whom the issues of fact were tried found in favor of the plaintiff, awarding her damages in the sum of \$2,500, for which amount judgment was entered in her favor. The defendant has brought the case to this court by appeals from the judgment and order denying it a new trial.

The complaint, which is in four counts, alleges (in the third count) that the plaintiff on the evening of January 21, 1908, at the hour of 7 p. m., having been on that day a passenger on one of the defendant's railway trains running between the city of Oakland and the town of Calistoga, in Napa county, in attempting to alight from said train at the depot in the last-mentioned place fell to the ground, and thereby sustained serious injuries to one of her lower limbs; that the accident thus happening was due to the culpable fault of the defendant because of its failure to maintain on said evening at said depot sufficient light to enable the plaintiff to see her way down the steps from the platform of the passenger coach in which she was a passenger to the ground. The defendant, by its answer, besides specifically denying the material facts of the complaint, makes the charge that the accident whereby the plaintiff was injured was the direct consequence of her own inexcusable fault, and, furthermore, that the circumstances disclose that she assumed the risk incident to the act resulting in the accident and its consequences. At the close of the plaintiff's case, the fourth

cause of action was, by stipulation, stricken from the complaint, and thereupon the defendant moved for a nonsuit as to the remaining causes of action on a number of specific grounds, the general effect of all which was that the evidence presented by the plaintiff in support of her complaint showed that the injuries sustained by her were not proximately caused either by the negligence of the defendant's servants and employes or by that of the defendant itself, but that, to the contrary, it thus appeared that the injuries so received were the direct result of the plaintiff's own negligence. The court granted the motion as to the first and second causes of action, but denied it as to the third cause of action, which counts on the negligence of the defendant as the proximate cause of the alleged damage.

The principal point relied upon here by the defendant is that the evidence does not support the verdict, or, as the motion for the nonsuit necessarily implies, that plaintiff's own proofs disclose that the accident and consequent injuries to her would not have occurred but for her own inexcusable negligence or palpable want of ordinary care in attempting to leave the passenger coach. It is further objected that the court committed error, seriously affecting the rights of the defendant, in certain portions of its charge to the jury, and also in rejecting certain instructions which the latter requested it to read to the jury.

The evidence discloses these facts: That the plaintiff, who is a woman of advanced years and who had resided in Calistoga and vicinity for 40 years, left Oakland, as the complaint alleges, on the afternoon of the 21st day of January, 1908, on one of the defendant's railway trains, for the purpose of returning to her home at Calistoga. From Vallejo Junction, to which point she was transported by said train, she was taken by one of the defendant's ferryboats across the straits of Carquinez to the city of Vallejo, where she boarded one of the defendant's trains of cars directly plying between the said city of Vallejo and the town of Calistoga. This train consisted of four cars—a mail car, a baggage car, a smoking car, and a passenger coach, the latter being the rear car of the train. The train reached Calistoga at 7:10 o'clock p. m., the schedule time. The day was stormy, a wind, and rain prevailing at the time of the arrival of the train at Calistoga. The train stopped at the usual point on its arrival at the depot. Between the depot building and the track on which the passenger train went into Calistoga there were, at the time, some box cars standing on a track; that is, on the track nearest the depot. When the passenger train came to a standstill, Mrs. Teale arose from her seat, and, taking in her left hand a small valise or satchel and by the other carrying a suit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case of the ordinary size, started toward the front end of the passenger coach. Although there were some lights in the car and some in and about the depot building, when she opened the door of the coach to make her exit, she found it to be, as she described it, "pitch dark"—so dark, in fact, that, as she testified: "I couldn't see my hand before my face. It couldn't have been darker. I couldn't see the platform or the steps of the car." She stepped out on the platform, however, and, taking hold of one of the guard rails maintained on either side of the steps, thus started to descend from the platform, and, in doing so, fell to the ground, whether from missing the lower step or miscalculating the distance of the latter to the ground she was unable to say. The injury consisted of a sprain of the right knee, and from the effects thereof she testified she was still suffering at the time of the trial—nearly three years after the injury was received.

We shall not give a synopsis of all the evidence in this opinion. It is thought to be sufficient to say that from the evidence the jury were perfectly justified in finding that it was exceedingly dark at the point at which Mrs. Teale alighted or fell from the passenger coach. There can be no doubt that the night was naturally intensely dark, it being very cloudy and a drizzling rain falling; but there is some little doubt as to whether there were any electric lights operating at the time on the outside of and connected with the depot building. One of the employees of the defendant testified that early that evening he lighted a coal-oil lamp which was maintained at and on the outside of the building. It is quite clear from the testimony, however, that it was so dark at the point where Mrs. Teale attempted to alight from the passenger coach that a person standing a distance of 20 or 25 feet from said point could not recognize an acquaintance at the steps of the car. This was shown by the testimony of Hawley Smith, a runner for a local hotel, who always met the incoming trains for the purpose of soliciting patrons. He stated that he was standing at about the distance above indicated from the steps by means of which Mrs. Teale attempted to reach the ground. He said there was no light at that point. He saw an object fall to the ground, but while, perhaps, he realized it was some person, he did not know who it was until he assisted Mrs. Teale to her feet. This witness could not say that there were any lights at the time on the outside of and connected with the depot building. He, in effect, stated, however, that, had there been such lights, reflection therefrom to the point where the accident occurred would have been obstructed by the box cars referred to. From this testimony, as well as from other testimony in the case, the jury could have found that the condition as to darkness of the place where Mrs. Teale received her injuries might have been due either to one or both of two causes,

viz.: (1) That there were no lights in operation on the occasion of the accident on the outside of and connected with the depot building; (2) that, if the usual lights were maintained by the defendant on the outside of said building on that evening, reflection therefrom to the point where passengers would naturally alight by means of the steps leading from the exit of the passenger coach in question was entirely obstructed by the box cars standing on the track nearest the depot building or between the latter and the track on which the passenger train went into the depot that evening.

[1] At all events, the jury were justified in finding, and their verdict implies that they did so find, that the accident occurred by reason of the negligent failure of the defendant to maintain, at said time, sufficient light in and about its depot at Calistoga to enable passengers carried by it in its trains to said point to alight therefrom, in the nighttime, with safety. As to the evidence upon this point, therefore, this court is concluded by the verdict.

[2] And it will not be disputed that the defendant, in omitting, without just or legal excuse, to provide sufficient light to aid the passengers transported by it on its trains to alight therefrom at night with safety, was guilty of a violation of a plain legal duty it owes to passengers thus carried by it. "The law imposes on a railroad company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platform, approaches thereto, and station grounds, as far as passengers would naturally resort to them, properly lighted at night, for a reasonable time next prior to and immediately following the departure of trains, which its time cards specify will stop at night to take on or put off passengers." *Abbott v. Oregon R. R. & Nav. Co.*, 46 Or. 549, 80 Pac. 1012, 114 Am. St. Rep. 885, 1 L. R. A. (N. S.) 851; 7 Ann. Cas. 961, 969; 3 Thompson on Negligence, § 2691; *Louisville & C. Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; 4 Ellis on Railways, § 1641; *Hutchinson on Carriers* (2d Ed.) § 516.

The rule, as thus stated, is expressly indorsed by counsel for the defendant, as setting forth abstractly a correct statement of the duty in the respect indicated which a railway company owes to passengers going on or leaving its trains; but it is contended that this rule is to be applied according to the conditions or circumstances of the particular case in hand, and that the station at Calistoga, on the occasion of the accident, when consideration is given to the conditions with respect to the character and extent of the business or traffic generally transacted and handled at said station, was sufficiently lighted to satisfy the law or to operate as a full compliance by the defendant with its duty, as prescribed by said rule, to the traveling public engaging its means of transport-

tation. *St. Louis, etc., Railroad Co. v. Marshall*, 71 Kan. 886, 81 Pac. 169; *Falls v. San Francisco, etc., R. R. Co.*, 97 Cal. 120, 31 Pac. 901. Those cases hold, as is obviously true, that whether the railroad company, in the discharge of such duty as is involved here, has exercised that care with respect thereto, a reasonable degree of care, which the law imposes upon it, "depends upon the circumstances of the case—the nature of the road, and the character of the traffic and place where the accident occurred." *Falls v. S. F., etc., R. R. Co.*, supra. Or, as the Kansas case, above cited, puts the proposition: "It is true, as the court said, that the proper character of the lights furnished at any particular station will depend upon the character and extent of business transacted at the station. If many passengers are to be taken on the trains, and many others are to be discharged, if much baggage, mail, and express is to be handled by many employes, if the station grounds must be used at the time of the arrival of the trains by many persons having business there with the company, or with incoming or outgoing passengers, confusion and accident at night can be prevented only by the aid of a lighting system much more extensive than would be required under other circumstances." In other words and in brief it is, of course, true that light which might be insufficient at one station might be adequate at a station surrounded by different conditions. But in the cases cited, and some others similarly expounding the rule under consideration, it will be found that the injuries complained of were mostly received in going to or leaving the station, and not in going on or leaving the passenger coaches. No one, however, can dispute the soundness or justness of the rule as thus declared by the cases here referred to as well as other cases not cited, where, as is manifestly so in those cases, the rule is properly applied; but, although it is true, as counsel for the defendant say, that the evidence here shows that the business, particularly the passenger traffic, transacted at the Calistoga station was generally very light (there was but one other passenger in the coach with Mrs. Teale when the train reached Calistoga the evening of the accident), still we see nothing in the rule as it is stated by the cases cited which in any way conflicts with the rule as first above stated in general terms, or, in other words, with the proposition, of the soundness of which there can be no doubt, that it is a duty legally incumbent upon common carriers to furnish sufficient light at night at their stations, whatever may be the extent and character of the traffic or business generally transacted by them thereat, to enable the passengers going on or leaving their passenger trains in the nighttime to do so with safety, and that, where they fail in that duty through causes over which they can exercise control, they are guilty of culpable negli-

gence. In the case at bar, as we understand the description given by the plaintiff, Mrs. Teale, of the condition of the immediate surroundings of the point where she attempted to alight, there was at that time total darkness. Of course, she was entitled to sufficient light to enable her, by the exercise of proper care, to descend the steps from the platform of the coach to the ground. Such light she was clearly not furnished with. The defendant was negligent in not providing her with the requisite light, and it can make no difference, so far as is concerned the matter of tracing to its negligence in that regard responsibility for the accident and liability for the consequent damage, whether the condition as to light or darkness was due to its failure to maintain the requisite lights on the outside of the depot building at all, or, thus maintaining sufficient light under ordinary circumstances at that station, the reflection thereof was so obstructed by the line of box cars standing on the track nearest to the depot as that the light therefrom was prevented from reaching the point where the plaintiff attempted to descend from the car to the ground, and that, by reason thereof, it was too dark at said point to enable her to see the steps.

[3] Nor do we think, as counsel for the defendant contend, that the rule applied in *Holt v. Southeast Mo. E. R. Co.*, 84 Mo. App. 443, and approved in *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 605, 108 Pac. 682, 684 (27 L. R. A. [N. S.] 764, 21 Ann. Cas. 1329), is applicable to this case. The rule referred to is thus stated in the Missouri case mentioned: "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before and which may not reasonably be anticipated. \* \* \* That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when, in the course of years, it does happen, furnish good ground for charge of negligence in not foreseeing its happening and guarding against that remote contingency." In both the Missouri and California cases adverted to and which apply the rule as thus declared the torts complained of were committed under most unusual circumstances. In each case the accident happened on a crowded street car. In the Missouri case, as the plaintiff was in the act of stepping upon the front platform, where an unusually large number of persons had crowded themselves, the brake on the car became unfastened, and, revolving rapidly around, struck her in the face, producing painful and serious injury. The motorman was at his post, and no one knew how the brake became loosened, whether by the act of the plaintiff herself in taking hold of the brake when she was stepping upon the platform, as was one of the claims of the defendant, or by some one of the other pas-

sengers striking with his foot the mechanical appliance by which the motorman, with his foot, manipulated or operated the brake. In the California case, while the plaintiff was in the act of alighting from the car, another passenger, without the knowledge of the conductor, gave a signal to the motorman to start the car. The motorman, in obedience to such signal, started the car, with the result that the plaintiff was thrown violently to the ground and sustained serious injuries. Thus it is readily to be understood that the accident producing the injuries in those cases were of so unusual a character that of them it cannot be said that they could reasonably be anticipated. In other words, accidents from such causes might not happen more than once in the allotted lifetime of man. They are causes against the occurrence of which the highest prudence or care could not uniformly operate as a guard, and it would indeed be an unjust rule which, in such a case, would authorize the presumption of negligence on the part of a common carrier from acts of that character. Whether such acts are traceable to the negligence of the defendant would depend upon whether the proof affirmatively disclosed that they were brought about directly through the carelessness or negligence of the defendant's employés, servants, or agents, and in the cases referred to no such showing was made.

But no such situation as is found in those cases is present in the case at bar. In the first place, it may well be noted and borne in mind that the rule under consideration, as it is stated in the Missouri case, obviously does not mean that it is true under all circumstances that, because a particular accident has not been known to happen before, such accident is not of the character of those casualties which may "reasonably be anticipated" in the sense that it is a duty to exercise reasonable care in guarding against their occurrence. Particular accidents, under whatever circumstances they may occur, cannot, of course, be foreseen; but the character of a business may be such (and that of transportation companies is peculiarly so) that it may reasonably be expected that, in its prosecution under certain conditions or circumstances, accidents may happen at any time and personal injuries follow, and it is in such cases that the law imposes upon those carrying on such business the duty of furnishing, as far as it can reasonably be done, safeguards against accidents. As applied to railroad companies as common carriers, in the conduct of whose business, in the very nature of the case, accidents by which personal injuries are received are likely to happen even where such business, generally speaking, is carefully carried on, the rule simply means that they must use such reasonable means or adopt such reasonable precautionary measures as will properly safeguard those who do business with them at

their stations and upon their trains. In brief, the rule may be stated to be that where, in the conduct of a certain business, it must be known that unusual or uncommon danger must necessarily coexist with certain conditions, which are capable of being controlled to a large extent by the use of reasonable and available means, the law will hold casualties resulting from an omission to so control such conditions as among those which could "reasonably be anticipated" and against the happening of which therefore it was the duty of the person conducting such business to adopt and enforce precautionary measures.

Of course, everybody knows the increased danger to life and limb at railroad stations when such places are enveloped in darkness or not equipped with sufficient artificial light after the light of day has disappeared to enable persons having business there to guide their footsteps over the ways provided there for that purpose. And everybody knows that the safety of passengers in going to and from such stations in the nighttime or in entering and getting off trains stopping there at night can be preserved largely by means of sufficient light to enable them to find the proper means of ingress and egress therein and therefrom. The accident whereby Mrs. Teale received the injuries complained of here was one of that class which must reasonably be anticipated will occur as the result of omission on the part of a railroad company to provide the requisite or sufficient light at its station to permit passengers leaving its trains at night to do so with safety, and the failure of the defendant in this case to do so reasonable and at the same time so manifestly a necessary act as furnishing the plaintiff with light sufficient to enable her, by the exercise of due care, to guide her feet down the steps from the coach to the ground constituted negligence.

[4] The next, and, so far as it concerned the claim that the evidence does not support the verdict, the last, question to be determined is whether the plaintiff in alighting from the train was herself guilty of negligence which constituted the proximate cause of her injuries, and, furthermore, whether she assumed the risk incident to her attempt to reach the ground from the platform of the coach under the circumstances as described by her. The evidence, as before shown, does not disclose the exact or particular cause of the plaintiff's fall to the ground, and therefore, unless it can be said, as the argument of the appellant goes, that from the fact that the plaintiff attempted to leave the coach in the intense darkness of that night while she was engaged in carrying a small valise in one hand and a suit case of ordinary size in the other, and, under those circumstances, undertook to guide herself down the steps from the coach to the ground by taking hold of the guard rail with her left instead of her

right hand, she was guilty of contributory negligence, then it is very clear that that question was one for the decision of the jury, and that the verdict forecloses the review thereof by this court.

But it cannot be held that the circumstances referred to show contributory negligence. The plaintiff had reached her destination, and obviously she had the right to leave the train with her valise and suit case by the usual means of egress in such case, and she adopted those means for making her exit. Although she was a woman well advanced in years, she was nevertheless in robust health, active, capable of performing and did perform, prior to the accident, the household duties for her family, and possessed excellent eyesight; and from these facts it is reasonable to infer that, under ordinary circumstances, she was capable of handling the small baggage she carried with her without any great inconvenience or trouble. She was thoroughly familiar with the ground about the depot and particularly in the immediate vicinity of the point where the coach in which she rode to Calistoga stopped on the occasion of the accident. She testified, as seen, that, before starting down the steps, she took hold of the guard rail, thus "carefully feeling her way down." But it is suggested that she could have remained in the car until some one came to her assistance. There is no merit in that suggestion. She not only had a right to leave the coach at the time that she did leave it, but it was her duty to do so, since her contract with the defendant ended when the train on which she was riding arrived at Calistoga, her point of destination. Besides, there was, when she left the coach, no other person in said coach. Calistoga was the terminus of the road and the train crew had left the train—the conductor by means of the steps located between the front end of the smoking car and the rear end of the baggage car. It is however, further suggested that, having found it very dark on the front platform of the car in which she was riding, she should have passed on and through the smoking car to the front platform thereof, and there made her descent to the ground. But there is nothing in this record indicating that the front platform of the smoking car was any better circumstanced as to light than the platform from which she descended. Everything about the track on which the train stopped, she said, was in total darkness, and, as stated, there is absolutely no evidence in the record that there was any light at the front end or platform of the smoking car or that she could have gotten off the train there more conveniently or with more safety than at the point where she did alight with the disastrous result as described. What more the plaintiff could have done to reach the ground carefully and with safety under the circumstances by which she was surrounded we are unable to apprehend or to suggest, and that she did not suc-

ceed in reaching the ground with safety or without sustaining injury to her body was manifestly not occasioned by the want of due or proper care on her part, but entirely to the untoward circumstances of the defendant's own negligent creation, under which she endeavored to reach the ground—an act which she was not only entitled to do but which it was necessary for her to do.

[5] Much of what has been said in the foregoing applies to the claim that the plaintiff, knowing and realizing the increased peril of attempting to descend the steps by reason of the intense darkness thereabouts, in doing so under such circumstances herself assumed the risk. It cannot, of course, be doubted that the plaintiff, upon reaching the platform of the coach in which she was riding, fully realized and knew that, to attempt to go down the steps under the conditions which then surrounded her, would involve unusual peril. This is clearly evidenced by the care with which she undertook to do so. But this is by no means to say that she assumed the risk, and must, therefore, bear the consequences of her act. It is true as a general rule that where a person injured, although the relation of master and servant does not at the time subsist between him and the party through whose negligence the injury is claimed to have been inflicted, knows and appreciates the danger of doing the act in which he received his injury, and, with such knowledge and appreciation of such danger, voluntarily puts himself in the way of it, must be deemed to have assumed the risk. 1 *Thomp. on Negligence*, § 184. But in this case it cannot justly be said that the plaintiff voluntarily put herself in the way of the danger. The situation of danger in which she was put was caused by the negligence of the defendant; and the circumstances of her surroundings were then such as that she was compelled either to leave the coach or remain therein until, perchance, assistance might come to her. The case here is not, in principle, unlike that of an inmate of a burning building who has sustained injuries while in the act of escaping therefrom. In such a case, in an action for personal injuries, although the plaintiff full well knew the great peril that would attend his effort to so escape, the defendant, charged with negligently or purposely firing the building, would not for a moment be heard on a plea of assumption of risk.

As before stated, it was not only the duty of plaintiff, but her right, to leave the coach upon the arrival of the train to which it was attached at her point of destination, and it was equally her right and duty to do so by the usual means provided for that purpose. Of course, it is always the duty of a passenger, when alighting from a train, to exercise that care which an ordinarily careful and prudent person, having due regard to his safety, would exercise. The plaintiff in this

case was required to exercise that degree of care which the unusual circumstances under which she was compelled to leave the train required, and this the evidence showed that she did. As has been shown, the evidence does not disclose that there was any other safer or more convenient way by which she could have left the train. There was no one at hand to assist her and she simply was forced to do the best thing that the circumstances would permit her to do. In short, our conclusion is that the whole case, as it is presented by the record, upon the question of the alleged negligence of the defendant and that of contributory negligence and the assumption of risk imputed to the plaintiff, was one entirely for the jury.

A careful examination has been given the authorities cited by counsel for the defendant. It is not regarded as necessary, further than has already been done, to analyze or otherwise consider them in this opinion. They will be found, upon examination, to represent conclusions from facts very materially different from those here, and that they are, therefore, not in conflict with anything said or the result reached by this court in this opinion. The complaint regarding the instructions given and refused is untenable. The charge of the court was brief, but it involved a statement in clear language of all the rules essential to a proper and just consideration of the evidence by the jury.

[6] It is said, however, that the instructions with regard to the duty of the defendant to furnish at its station such light as might be necessary for the protection of persons having business with the company there against accidents are contradictory. This criticism has its foundation in the fact that in one part of its charge the court in effect declared it to be the duty of the company to maintain sufficient light at its stations, while in another part thereof it said that the company was required to keep its stations properly lighted. It is the contention that the court thus gave to the jury two different standards of the duty which the company was required to observe in that particular. But we think the criticism is devoid of merit. The court, among other things, instructed the jury that it was the duty of the defendant to "furnish such a light at its depot as an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would have furnished," and, again, that it was its duty, on the occasion of the accident, to have furnished such lights at its depot at Calistoga as to have enabled plaintiff to safely alight from its train. The jury, as men of intelligence, and keeping in mind and considering the charge of the court in its entirety, must be assumed to have understood the terms, "properly lighted," "sufficiently lighted," and "insufficient light," as used in the court's charge, to mean such light or a want thereof "as an ordinarily careful and

prudent person in the same relation and under the same conditions and circumstances would have furnished." Although the words "properly" and "sufficient" cannot be said to be strictly synonymous, or so to a degree that they may be uniformly used interchangeably, it is plainly manifest that in the connection in which they were used in the instructions of the court, the terms "properly lighted" and "sufficient light" meant precisely the same thing and could not as thus used be reasonably interpreted to mean anything more or less than what the court had elsewhere in its charge in effect said, that the company was required to furnish such light as it was necessary to keep under the conditions generally existing at and about its station at Calistoga for the due protection of its patrons having business at night at said station. In other words and briefly, a "proper light" or a "sufficient light," within the evident meaning of those terms as they were used in the court's charge, was that degree of light which the court had correctly told the jury it was the duty of the defendant to furnish, in view of and considering all the conditions surrounding the station at Calistoga, in point of the character and extent of its traffic there.

The instruction, numbered 8 in the record, which the defendant requested, but the court rejected, was properly disallowed. It would have told the jury, if read to them, that if they should find "that the plaintiff knew that it was dangerous for her to attempt to get off the train in the extreme darkness, and would not have attempted to do so but for the fact that she was perfectly familiar with the station, its platform and surroundings, and believed, on account of such knowledge, that she could alight in safety" then they should find that she assumed the risk of so attempting to alight, and "your verdict should be for the defendant even though you should find that the defendant was negligent in providing lights at its station." What we have heretofore said concerning the application of the doctrine of the assumption of risk to the facts of this case constitutes a reply to the claim that the court erred by its refusal to give the foregoing instruction. Under our conception of the situation here as presented by the evidence, the instruction would have been misleading, and, indeed, erroneous.

[7] The principle declared in the rejected instruction, numbered 9, was in substance given in the court's charge, and the refusal to allow said instruction was, therefore, not prejudicial.

We have now examined the principal assignments of alleged error presented on these appeals, and have therein found no occasion for remanding the cause.

The judgment and order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.



**LIPPITT & LIPPITT v. SMALLMAN et al.**  
(Civ. 1,108.)

(District Court of Appeal, First District,  
California. Dec. 12, 1912. Rehear-  
ing Denied Jan. 10, 1913.)

**INJUNCTION (§ 235\*)—BOND—LIABILITY.**

Where plaintiff applied to the judge for a temporary injunction, and the judge issued an order which, by its terms, became operative as a temporary injunction on plaintiff giving bond in a specified sum, and on the same day, and to secure the benefit of the injunction, a bond in the specified sum, and referring to the temporary injunction, was approved and filed, and the temporary injunction was served on defendant and remained in force until a future date, when, on a hearing, it was dissolved, on order to show cause whether it should be continued or not, the bond was the instrument required by the order of the court, and the sureties thereon were liable to defendant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 529-537; Dec. Dig. § 235.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Lippitt & Lippitt against Amelia H. Smallman and others. From a judgment for plaintiff, certain of the defendants appeal. Affirmed.

Frank V. Bell, of San Francisco, for appellants. Reuben G. Hunt, of San Francisco, for respondent.

**KERRIGAN, J.** This is an appeal in an action brought to recover upon an undertaking given for the issuance of an injunction in a case entitled, "Amelia H. Smallman et al. v. Lippitt & Lippitt," in which action the undertaking in question was given by the plaintiffs therein, with appellants Frank V. Bell and Michael Kraker as sureties. The prayer in that action was for a judgment enjoining and restraining Lippitt & Lippitt from procuring, in a prior action, a writ of assistance pending the determination and judgment of the court in the action. The judge before whom the suit was pending, in response to an application by the plaintiff therein for a temporary injunction, issued on the 19th day of July, 1909 (the day the suit was filed), an order entitled, "Order to show cause and restraining order," which cited the defendant to appear at a time and place specified, and show cause why it should not be "enjoined and restrained, pending the determination of the above-entitled action," from committing certain acts. The order further provided: "It is further ordered that, pending the determination and judgment of the court in this action, said defendant Lippitt & Lippitt be enjoined and restrained" from doing certain acts "upon the plaintiff giving a bond in the sum of \$500." In the present action judgment went for plaintiff in the sum of \$300 and costs against defendants Bell and Kraker, who have appealed from the judgment, and also from an

order denying their motion for a new trial.

It is claimed by appellants that the prayer of the complaint in the action above referred to, and in which they filed the undertaking here sued upon, simply asks for a judgment for an injunction and for an order to show cause why a temporary injunction should not issue, but does not ask for a temporary restraining order pending the hearing of the order to show cause; and in view of the fact that no injunction was ever issued in that action, as asked for in the complaint, and that no such injunction or restraining order, as was mentioned and referred to in the undertaking upon which this action is brought, was ever issued, the plaintiff is entitled to no relief. In other words, they invoke the old doctrine of *strictissimi juris*, claiming that sureties on statutory bonds, having no personal interest in the litigation, can stand upon the express terms of their undertaking, and cannot have their liability extended beyond those terms. We think the facts of this case do not bring appellants within the rule by them invoked. For a clear understanding of the case, a further recital of facts, as alleged in the complaint and found by the court, is necessary.

As before stated, on July 19th the plaintiffs in the action heretofore referred to applied to the judge for a temporary injunction, whereupon the judge issued an order which, by its terms, became operative as a temporary injunction upon the plaintiffs giving a bond in the sum of \$500. On the same day, and for the purpose of securing to the plaintiffs the benefit of this temporary injunction, the sureties executed the bond in question. On the next day, in order to have this order become operative as a temporary injunction, the plaintiffs filed the order and bond. The bond was intended to, and did refer to, this particular temporary injunction, and was for the amount named in the order, and was approved by the judge. The temporary injunction was served upon Lippitt & Lippitt, and remained in force until the 31st day of August, 1909, when upon a hearing it was dissolved.

The claim of appellants that the order made by the court was a "restraining order," and not the one contemplated by the bond, cannot be maintained. No restraining order was ever granted. It is the substance of the order and not its title that determines its legal effect and significance. Whatever distinction may exist between a restraining order and a temporary injunction is not material to the issues in this case, for here there was no "restraining order." The order provided, not for a restraining order that should be, upon the giving the bond, in force only until the hearing upon the order to show cause why a temporary injunction should not issue, but that a temporary injunction should issue upon the giving of the bond. If

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the order had been that defendant be enjoined and restrained until the hearing of the order to show cause, there might be, under the authorities cited, some merit to the contention of appellants.

Under these conditions, the only question to be considered upon the order to show cause was whether the temporary injunction then in force should be continued or not, and not whether such an injunction should issue, for such injunction had already issued and was in full force and effect by reason of the giving of the bond. The defendant in the action wherein the injunction was issued was in no wise enjoined or restrained, and there was nothing in force until the bond was given, and no other injunction or restraining order had ever been issued in the case. The order provided for a temporary injunction in the first instance, and the bond that was given complied exactly with the terms of the order, was executed on the same day as the order, and was the very instrument required by the court to give its order vitality. Without it, by the terms of the order, it was to have no force or effect. There can therefore, under these circumstances, be no doubt that the parties had in mind, when they executed the bond, the particular injunction granted by the court. Had there been two orders restraining defendants, and some confusion as to which order the bond referred to, the cases cited by appellants would have some force.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

Ex parte MacDONALD. (Cr. 273.)

(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**1. JURY (§ 33\*)—CRIMINAL PROSECUTION—RIGHT TO JURY—"VICINAGE."**

Pen. Code, § 785, providing that where bigamy or incest is committed in one county, and accused is apprehended in another, the jurisdiction is in either county, is a legislative declaration of the place of trial in such cases, and is not invalid as in derogation of the right to trial by jury, which, by the Constitution, remains inviolate; the word "vicinage" in the rule requiring a jury of the "vicinage" or county applying to a jury of the county wherein trial is had.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7316, 7317.]

**2. JURY (§ 33\*)—CRIMINAL PROSECUTION—RIGHT TO JURY.**

A statute, guaranteeing to accused the right to trial by jury in the place by law designated as the place for trial, confers on him the right contemplated by the Constitution under which the right to trial by jury shall remain inviolate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.\*]

**3. CRIMINAL LAW (§ 106\*)—VENUE.**

The rule that the trial of an offense must be in the county where committed does not apply where, under the Constitution, the place of trial is subject to legislative determination.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 106.\*]

Application for a writ of habeas corpus by John A. MacDonald for his discharge from custody under sentence for bigamy. Denied.

G. M. Spicer, of Long Beach, for petitioner. J. W. Joos, of Los Angeles, and W. T. Helms, for respondent.

PER CURIAM. Petitioner alleges that he was apprehended and informed against in the county of Los Angeles, being charged with the crime of bigamy, alleged to have been committed in the county of San Diego; that, upon the calling of the cause for trial, he entered a plea of guilty, and was sentenced to state prison for a term of four years. It is his contention that his imprisonment is unlawful because of a want of jurisdiction in the superior court of Los Angeles county, and that the respondent sheriff has no warrant for depriving him of his liberty, because of the void character of the judgment.

[1] Section 785 of our Penal Code provides: "When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county." This section is a legislative declaration that the venue in cases of this character may be in the county where the defendant is apprehended. We find no constitutional restriction upon the legislative power to determine the "venue," which is synonymous with "place of trial." The place of trial in offenses of this character has been determined to be either in the county where the offense was committed or where the defendant is apprehended. It is claimed by petitioner that the section above referred to is unconstitutional as in derogation of the right to trial by jury, which by the Constitution remains inviolate; that this right of trial by jury guarantees a common-law jury, which is by a jury of his peers of the vicinage or county where the crime is alleged to have been committed. The position taken by petitioner as to his right to a trial by a jury of his peers in the county or vicinage is unassailable. The word "vicinage" is subject to various definitions, mainly depending upon the sense in which it is used. The Standard Dictionary defines it as the neighborhood, or, as applied to juries, "in modern use, a jury of the county wherein trial is had."

[2] We are of opinion, therefore, that, if the statute guarantees to the accused the right of trial by jury in the place by law designated as the place for trial, it confers upon him the right contemplated by the Constitution.

[3] The authorities cited, to the effect that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

the trial must be in the county where the offense was committed, have no application in this state, where, under the Constitution, the place of trial is subject to legislative determination.

Writ denied.

**BICKEL v. MUNGER et al.** (Civ. 1,178.)  
(District Court of Appeal, Second District,  
California. Dec. 13, 1912.)

**1. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—MATTERS OF OPINION.**

Representations as to what a ranch will produce in the future are not representations of existing facts, but are merely speculative surmises, and are not ground for rescission of an exchange of lands.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

**2. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—QUALITY OF SOIL.**

Representations by an owner of a fruit ranch as to the quality of the soil and like matters while exhibiting the property to a prospective purchaser, made with knowledge that the prospective purchaser is ignorant and inexperienced in such matters, and with knowledge that he will rely thereon are, if false, ground for rescission of a contract of exchange.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

**3. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—AGE AND PRODUCTIVENESS OF ORANGE TREES.**

Representations by an owner of a fruit ranch that orange trees were young, while, as a matter of fact, they are old, made after concealing the age of the trees by piling earth about their trunks, and false representations that the trees had produced a specified number of boxes of oranges in a season, are material representations of existing facts on which a prospective purchaser may rely, and are ground for rescission of a contract of exchange.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

Appeal from Superior Court, Los Angeles County; by Benjamin F. Bledsoe, Judge.

Action by Elizabeth Bickel against Bertha Munger and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, of Los Angeles, for appellants. Robert A. Todd, Williams, Goudge & Chandler, and Harry L. Dearing, all of Los Angeles, for respondent.

**JAMES, J.** Appeal from a judgment entered in favor of plaintiff, and from an order denying the motion of defendants for a new trial.

This action was brought to enforce rescission of an agreement for the exchange of real properties. Defendants Munger were the owners of a ranch, which was located near Baldwin Park, in the county of Los

Angeles, and plaintiff was the owner of a lot located in the city of Los Angeles, upon which was erected a building containing several flats. Plaintiff's attention was attracted by an advertisement inserted by a real estate broker, which represented defendants' property to consist of 15 acres, highly improved, with buildings, tankhouse, windmill, grove of 5 acres full-bearing oranges of the finest varieties together with lemons, peaches, apricots, and other fruits, which would net, with proper care, \$4,000 per year. Negotiations were entered into through the agent, which resulted in the exchange of the properties being made. Prior to the conclusion of the deal, plaintiff visited the ranch of defendants with her two sons, a daughter, and son-in-law, and was shown over it by defendant E. M. Munger. In her complaint it was alleged, and the court found the facts to be, that defendants, for the purpose of influencing and inducing plaintiff to make the exchange of properties, represented to plaintiff that the 15-acre ranch was highly improved; that 5 acres thereof was in young orange trees of the finest varieties in full bearing; that 10 acres thereof was in assorted table grapes, six or seven years old; that the vineyard would yield from 15 to 20 tons of grapes to the acre, and that the grapes would bring about \$20 per ton; that a packing house in the neighborhood would pick and haul the grapes, and plaintiff would have nothing to do in marketing the grapes, except to count the boxes as they were hauled away; that the orange trees had produced 450 boxes of oranges during the year 1908; that the soil was nice sandy loam, all similar to that shown to plaintiff; that the ranch was worth more than \$1,000 an acre, and was a bargain at \$15,000; that it was a very profitable place, and would net \$4,000 a year on the investment; that there was a good pumping plant on the ranch, for which the defendants Munger had paid \$2,500. These representations the court found to be untrue, and particularly that the Munger property was not at the time of the exchange, nor at any other time, worth more than \$7,500; that the orange trees were not young trees, nor of the finest varieties; that a large part of the orange trees mentioned were seedlings, and the balance were trees budded to the old stumps of a lemon orchard, which had been cut down nearly level with the ground and earth heaped around the base of each tree so as to hide the stumps from view, and that the trees were budded in the year 1900 or 1901, and many of them subsequently rebudded; that the vineyard had never produced crops in a quantity which would anywhere near equal the quantity that Munger represented the vineyard would produce, and that the vineyard could not, on account of the nature of the soil, produce the quantity of grapes rep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

resented; that there was no grape-packing house in the neighborhood of the ranch, or anywhere in that vicinity; that the orange trees were not in full bearing, and that in the year 1908 they produced less than 200 boxes of oranges; that the soil of the larger part of the ranch was inferior to that shown to plaintiff; that a wash, or old river bed, ran diagonally through the rear part of the ranch and constituted a large portion of the ranch; that such portion contained very little soil and consisted almost wholly of sand and rock; that a large portion of the remainder of the ranch was rocky and of poor quality; that it would be impossible to realize a net sum of \$4,000 a year out of said ranch, or a net amount anywhere near that sum; that defendants Munger did not pay \$2,500 for the pumping plant on said ranch, but only about the sum of \$1,200. The court further found that the plaintiff, at the time of making the exchange of properties, was 52 years of age, and had been a widow only a short time; that she had never followed any occupation or business other than that of housewife; that her two boys, of the age of 23 and 19 years, respectively, and the daughter and son-in-law had never owned or lived upon a fruit ranch, and had no experience or knowledge concerning fruit farming or fruit raising; that plaintiff was of a credulous disposition, and did not have ordinary business experience, and was lacking in ordinary business intelligence; further, that at the time plaintiff inspected the ranch of defendants she only went over a portion of it, and made only a superficial examination of the orchard and vineyard and soil; that she did not make a more particular examination because of the representations made to her by Munger as to the superior character of the orange trees and vines, and their large producing qualities and the uniform quality of the soil. There was ample evidence to sustain all of these findings. And it was shown by the testimony that plaintiff gave notice of rescission as soon as she had discovered, by actual experience and observation upon the property, that the representations made to her by Munger as to the condition, value, and productive qualities of the ranch were untrue.

[1] The contention is made on behalf of appellants that, conceding, as it must be conceded, because there was evidence to sustain the findings of the court, that the representations as found were made, and that they were untrue, they were not such representations as plaintiff was authorized to rely upon. It is insisted that the false statements all belong to a class to be denominated as simplex commendatio, or those commonly and customarily used by a person in praise of his own property. In so far as the representations expressed a prophecy as to what the ranch would produce in the future, no doubt those matters were matters of opin-

ion, which a person must accept as speculative surmises merely, and not as a representation of existing facts. *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58. In the case of *Rendell v. Scott* it is asserted that representations that a ranch was very rich and productive and would produce 50 bushels of wheat to the acre, and that a portion was good alfalfa land and another portion rich in mineral deposits, were to be considered as matters of opinion, rather than as false representation of facts, where there was no averment excluding the idea that personal inspection had been had by the purchaser.

[2] We do not doubt, however, but that a cause of action might be predicated upon representations made as to condition and quality of soil and like matters, even though the same was exhibited to the party complaining, where such party was ignorant and inexperienced in such matters, and the party making the representations knew this, and knew that the person with whom he was dealing relied upon him to express the truth as to such things. The court here found that plaintiff and her sons, son-in-law, and daughter were inexperienced in the business of ranching, and that plaintiff relied upon the representations made to her by Munger, and that the representations were made for the purpose of inducing plaintiff to make the exchange, and with the intention on the part of Munger that she should act in reliance upon such representations.

[3] Excluding from consideration the finding as to the representations regarding the future bearing capabilities of the trees and ranch, there remain several statements as to material acts, respecting which false representations are found to have been made by Munger, which must be considered actionable. The five acres of young orange trees represented by Munger to be of the finest varieties in full bearing were not, in fact, young orange trees, but trees which were the result of budding upon old lemon roots. Moreover, deceit had been practiced by Munger in order to make it appear that the orange orchard was as represented; for earth had been piled about the trunks of the trees so as to conceal the old stumps, which were discovered by plaintiff after the exchange had been made. The representation that the orange trees had produced 450 boxes of oranges in the year 1908 was a material representation, and a representation as to an existing fact, upon which plaintiff was entitled to rely. In determining the then bearing quality of the trees, the amount of fruit produced in the past would be a material fact to be taken into consideration. The representation that the pumping plant had cost \$2,500, when it had only cost one-half that amount, was also a representation of a material fact. And if the plaintiff had

only relied upon these representations which we have last referred to, excluding all of those which expressed the opinion of defendant Munger, sufficient facts are made to appear to support the judgment of the court. We think that under the findings of the court the judgment as entered was not erroneous, and that the evidence sustains such findings.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

**CENTER v. KELTON, Sheriff.** (Civ. 1,025.)  
(District Court of Appeal, Third District, California. Dec. 12, 1912.)

**1. FRAUDULENT CONVEYANCES (§ 146\*)—PERSONAL PROPERTY—TRANSFER OF POSSESSION.**

A judgment debtor, F., having married plaintiff's daughter, rented from plaintiff a small farm and house, where they all lived together. He fed certain domestic animals while using them, but sold to plaintiff certain cows which had been kept on the place for about a week before that date, and soon after took them to pasture. Plaintiff never saw the animals after they left her place, and said nothing about their being her property until they were attached as the property of F. He also purchased certain grain, and had it hauled to the farm and kept there for sale. This he sold to plaintiff and a few days prior to its attachment, plaintiff had it moved out of the barn into the yard, where it was when it was levied on. None of the grain was marked, and all of it was found by the sheriff on the place where F. was living when he attached it. *Held*, that the alleged sale of the property to plaintiff was invalid as against the levy under Civ. Code, § 3440, providing that a sale of personal property, unaccompanied by immediate delivery and actual and continued change of possession, shall be void as to creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. § 146.\*]

**2. TRIAL (§ 367\*)—TRIAL BY COURT—ARGUMENT OF COUNSEL—RIGHT TO ARGUE.**

Code Civ. Proc. § 631 et seq., providing for trials by the court, does not expressly provide that a party may argue a case, as a matter of right, though, if there is any room for argument, it is the better practice to permit it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 879, 886; Dec. Dig. § 367.\*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Mary Center against E. A. Kelton, as sheriff of Napa County. Judgment for plaintiff, and defendant appeals. Reversed.

Clarence N. Riggins, of Napa, for appellant.  
Edw. S. Bell, of Napa, for respondent.

**BURNETT, J.** The action was in replevin for one mare, one stallion, two cows, two yearlings, three calves, fifty sacks of wheat, eight sacks of barley, five sacks of oats, and eight sacks of bran. Defendant denied the ownership of plaintiff, and justified the taking, under a writ of attachment, against the

property of one Richard Fealy, and he alleged in his answer that plaintiff had replevined the property from him in this action, and he therefore demanded its return or its value in money. The value of the property is shown by the pleadings to be the sum of \$500. Plaintiff claimed to have acquired it from Fealy in several lots at intervals covering about 17 months, and there is nothing to indicate the separate value of the several portions. The dates of the alleged sales are as follows: January 20, 1910, two calves; May 28, 1910, mare and stallion; September 26, 1910, wheat and barley; January 23, 1911, two calves; June 5, 1911, two cows. It does not appear clearly just when the oats and bran were purchased but it is a fair inference that it was about the same time as the wheat and barley.

The defense is based on section 3440 of the Civil Code, and it is insisted by appellant that there was no "immediate delivery" or "actual and continued change of possession," which the law exacts to protect the property from the reach of the creditors of the vendor.

[1] Richard Fealy married the plaintiff's daughter June 12, 1910. Mrs. Center had a small farm and house in St. Helena, where she and her daughter had been living since April, 1909, and after his marriage Fealy came to the place, took charge of the work, and has lived there ever since. He leased the property from plaintiff, and she has continued to occupy the dwelling house with him and his wife and Mrs. Fealy's two boys and plaintiff's brother, a helpless old man. The plaintiff has had nothing to do with the farming or with the management of the place. Fealy fed the animals that he used, and paid for their feed, if he was using them. Plaintiff does not know what cows he milked; but those that could not be milked were put in pasture. The two cows plaintiff claims to have purchased on June 5th had been bought by Fealy and kept on this place for about a week before this date. They were soon after taken by him to pasture. Fealy drove the stock to pasture and made all the arrangements. Mrs. Center never saw the animals after they left her place. The two cows were driven to the Moses Stice place, and Fealy said nothing about them being the property of Mrs. Center, and they remained there until attached. There is no evidence of public notice that plaintiff claimed any interest in the cows until after the attachment. As is apparent from the foregoing recital of facts, they were cared for and treated by Fealy as his own property, and there was no "open, visible change, manifested by such outward signs as render it evident that the possession of the vendor had wholly ceased." *Cahoon v. Marshall*, 25 Cal. 201. Fealy bought the wheat and barley, had it hauled to the farm, and kept it there for sale. Plaintiff purchased it from him, moved it from the lower to the upper floor in the barn,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and fed some to her poultry. A few days before the attachment, the man who was moving the barn took the grain out and piled it in the yard, where it was when levied upon. The evidence is meager as to the bran and oats; but the manner in which plaintiff testified concerning them, in connection with the wheat, gives rise to the inference that she purchased said bran and oats from Fealy. None of the grain or feed was marked or designated in any way, and all of it was found by the sheriff on the place where Fealy was living, and which he held under lease.

Applying the doctrine of the decisions to the foregoing facts, there would seem to be no escape from the conclusion that we have a case for the application of said section 3440 of the Civil Code. The question involved has been many times the subject of careful consideration from the appellate courts. It is sufficient to refer to the following decisions: *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *Woods v. Bugbey*, 29 Cal. 473; *Callender v. McLeod*, 74 Cal. 376, 16 Pac. 194; *Ruddle v. Givens*, 76 Cal. 457, 18 Pac. 421; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; *Sequeira v. Collins*, 153 Cal. 426, 95 Pac. 876; and *Guthrie v. Carney*, 124 Pac. 1045.

There is no dissent from the principles stated in one of the opinions that: "The vendor cannot be allowed to remain in the apparent sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transfer the idea of fraud. Care should be taken, in such cases, to keep in view the object of the statute, and to exact nothing less than a substantial observance of its salutary provisions." Of course, the object of the statute is to require notice to the world of the transfer of personal property in order that creditors may be justly protected. It is easy enough, as it is, for designing debtors to place their property beyond the reach of honest debts, and the rule prescribed by the statute should not be relaxed by judicial interpretation. It may be said, also, that the statute does not impose any great hardship upon the parties in case of a transfer made in good faith. Ordinarily there should be little difficulty in effecting an "immediate delivery" and an "actual and continuous change of possession." But, however honest the sale may be, and whatever hardship may be inflicted upon the vendee, this furnishes no sufficient reason for disregarding the plain provisions of the statute or setting at naught a wholesome and salutary rule for the promotion of personal honesty and commercial security. *Brown v. O'Neal*, 95 Cal. 267, 30 Pac. 538, 29 Am. St. Rep. 111.

As suggested by appellant, the circumstances attending the sale of the cows can be apt-

ly compared with the facts revealed in *Ruddle v. Givens*, *Murphy v. Mulgrew*, and *George v. Pierce*, supra, while the facts in *Callender v. McLeod*, supra, are somewhat analogous to those here in reference to the grain. It may be said, indeed, that, in several of the cases wherein the court held that the attempted transfer was void, the evidence in favor of the vendee was stronger and more persuasive than in the case at bar as to the particulars aforesaid. The other alleged purchases stand upon a somewhat different footing; and, while they present a debatable question, we are not prepared to say that the evidence compels the conclusion that they were fraudulent.

[2] Appellant complains because he was not permitted to argue the case at the conclusion of the testimony. The record shows the following indorsement made by the learned trial judge: "At the close of the case, counsel for defendant asked leave to argue the case; but the court, believing plaintiff had made out a complete case against defendant, denied the request." It is admitted by appellant that the extent to which a trial court may go in declining to hear arguments is undefined; but it is insisted that: "Where a conflict in evidence presents itself on which his decision will be final, it would seem to be his duty, not only to the litigants, but to that high sense of his responsibility, as the exponent and representative of justice, which should animate the breast of every judge, to hear and consider with unbiassed mind whatever may be fairly presented by each of the parties, and to obey the spirit of that admonition to trial juries in like position, neither to express nor form an opinion in the case, until it is finally submitted." There is manifestly a distinction between a case where an issue is submitted to a jury and where it is to be determined by the trial judge. In the former, if the question is debatable, argument is a matter of right. Section 607, Code Civ. Proc.; *Douglass v. Hill*, 29 Kan. 527. In the *Douglass* Case, Mr. Justice Brewer, speaking for the court said: "This is no matter of discretion on the part of the court, but an absolute right of the party. Courts doubtless may prevent their time from being unnecessarily occupied by prolix arguments, and so may limit the time which counsel shall occupy. And if the restriction is a reasonable one, in view of the questions involved and the testimony presented, there will be no error. But limiting the time of an argument and refusing to permit any argument at all are entirely different matters. The one is the exercise of a discretion; the other is a denial of a right." The statute does not expressly provide for argument in the case of a trial by the court (section 631 et seq., Code Civ. Proc.), and there would seem to be reason for leaving it to the wise discretion of the judge; but, where there is room for argument, it would certainly be the better practice to permit it. If the trial judge, at the

close of the evidence, is entirely satisfied as to his decision, argument would generally be of no avail; but even then counsel might be able to make suggestions that would influence the judicial mind.

However, this point need not be considered further, as we think, upon the other ground, the judgment must be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

**LIST v. MOORE et al. (Civ. 1,027.)**

(District Court of Appeal, Third District, California. Dec. 12, 1912.)

**1. VENDOR AND PURCHASER (§ 334\*)—CONTRACT OF SALE—FORFEITURE—RESCISSION.**

Where a contract for the sale of real estate provided that time was of the essence thereof, and that the expiration of the time specified for payment of the balance of the price as limited by the contract, with the fact that no deed was of record from the vendor to the vendee, should conclusively establish default without suit to extinguish the contract or declare a forfeiture, the vendee being in default, a letter written to him notifying him that he was in default, and had forfeited any right or claim to proceed to purchase the property constituted a notice of forfeiture and not a rescission, and hence the vendor was under no obligation to return any part of the purchase price paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

**2. VENDOR AND PURCHASER (§ 335\*)—FORFEITURE—RETENTION OF PRICE PAID.**

The right of a vendor to retain the part of the purchase price paid, after the vendee's default, is independent of any clause in the contract for forfeiture or right to retain part of the purchase money as liquidated damages, and hence the validity of such clause is immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

**3. VENDOR AND PURCHASER (§ 335\*)—VENDOR'S DEFAULT—RESCISSION—VENDOR'S LIABILITY—RETURN PAYMENTS.**

It is only where the vendor after the vendee's default agrees to a mutual rescission that the vendee is entitled to a return of the purchase money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by R. D. List against A. A. Moore, Jr., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. W. Slack, of San Francisco, and D. P. Hatch, of Los Angeles, for appellant. Goodfellow & Eells, of San Francisco, for respondents.

**BURNETT, J.** The action is to recover from the vendor moneys paid by the vendee under contracts of sale of real estate, in which the vendee only was in default, not being willing or able to make the other

payments within the time limited or at all. There were two contracts. The first is dated June 30, 1902, executed by the defendant Florence B. Moore and others, and conditioned for the sale of the property to one J. W. McCauley. This contract provided for a purchase price of \$125,000, of which \$5,000 should be paid when the instrument was executed, \$55,000 on or before October 28, 1902, and the remaining \$65,000 on or before the 1st day of March, 1903, all deferred payments to bear interest at the rate of 5 per cent. per annum. It was further provided that "time is of the essence of this contract, and, in the event of a failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligation in law or equity to convey said property, and the party of the second part shall forfeit all right thereto." The initial payment of \$5,000 was made, but not the second payment of \$55,000. As to the latter, however, an extension of time was granted to March 30, 1903, with a proviso that the original document held by McCauley should be deposited with H. W. O'Melveny, of Los Angeles, "with instructions to him to return said contract to Florence B. Moore, on March 30, 1903, if the terms of said contract were not lawfully carried out by McCauley on or before that time, and, in that event, the said H. W. O'Melveny shall thereupon surrender said contract as above specified to said Florence B. Moore. Thereupon, the same shall be of no further effect or force, but shall be considered canceled and terminated, and the moneys heretofore paid, and the moneys hereinabove specified, shall be considered as liquidated damages accruing to said Florence B. Moore et al. Upon the surrender of said contract to said Florence B. Moore et al., as above stated, the same is to be null and void, and of no further effect, and the said McCauley is to have no claim, directly or indirectly, to any part of the moneys heretofore paid, or hereinabove specified." On the 30th of March, 1903, McCauley was again in default and unable or unwilling to make any payments, and thereupon the original document was surrendered to Mrs. Moore. On the 7th day of April, 1903, McCauley's contract having expired, Mrs. Moore, through her attorneys, entered into a new contract with Nathan Cole by which she agreed to sell to him the property for the sum of \$115,000, payable on or before October 1, 1903, and she acknowledged the receipt of two drafts aggregating \$5,000. Time was of the essence of this contract, also, and it was provided that "the expiration of the time herein limited, with the fact that no deed is of record from the said Florence B. Moore to the said Nathan Cole, Jr., shall conclusively establish default, and no suit, at law or in equity, shall be necessary to be maintained to avoid or extinguish this contract, or de-

clare any forfeiture." Some extensions were made, and according to the last one the time would expire on December 1, 1903, but, on account of Mr. Cole's illness, the parties treated his right to purchase as continuing until January 1, 1904. Plaintiff brought the action as assignee of McCauley and Cole.

The court found that the contract with McCauley became canceled and terminated for the reason that he "was at all times unable or unwilling to carry out or perform the same on his part, although the defendants were at all times ready and willing to perform the same on their part; that the said J. W. McCauley did not pay or offer to pay prior to the 30th day of March, 1903, or at all, the moneys, or any portion thereof, required to be paid by him by the terms of the said contract, and by reason thereof the same became of no force or effect on and after the 31st day of March, 1903." There are similar findings as to the contract with Cole. Indeed, it is not contested that there was default on the part of McCauley and Cole as found by the court, but the defense is that the contract in each instance was rescinded and abandoned, and therefore the claim is made that the vendee was entitled to a return of the part of the purchase price paid. The court found that there was no rescission and no abandonment, and this finding presents the controverted question.

The asserted rescission was attempted to be shown by Mr. Cole. In the transcript we have the following record of his testimony and the proceedings in connection therewith: "My recollection is that about the 1st of January, 1904, my contract with Mr. Moore was annulled or rescinded by Mr. Moore in a letter to me. It was rescinded. Mr. Goodfellow: Q. You don't mean to say that he said it was rescinded, do you? A. Well, I don't know what the language was, but that was the purpose of the letter. Mr. Slack: The letter which was introduced in evidence, Mr. Goodfellow, was this: It was received about the 4th of January, 1904, and informed Mr. Cole that his contract was rescinded, and had been— Mr. Goodfellow: Do you mean to say that the word 'rescinded' was used? Mr. Slack: No; but that the contract was at an end—I think that was it—and had been for some weeks or some time. The witness: I remember that the purport of the letter was that, that the contract was ended. That is the idea that I had, that it was terminated. Mr. Slack: We will accept Mr. Moore's recollection of that as a fact that a letter written to Mr. Cole about this time, January 3, 1904, stated that his contract was at an end, and had been for some time. Mr. Moore: For the reason that he had been unable to make the remaining payments. Mr. Slack: And we will ask also that that be considered as being a statement of the letter. The witness: That is correct." In explanation of the reference to the contents of the letter, it may be stated that

this case was partly tried before April 18, 1906, and the letter and the record of what it contained were destroyed in the great catastrophe of that date. The witness further testified that he "was not able to raise the money by the end of December, 1903, or the 1st of January, 1904. Mr. Moore, so far as I know, and Mrs. Moore, were perfectly willing at all times to sell me that property if I could pay the money according to the contract up to the termination of the arrangements which were terminated by letter." Then the following questions and answers appear in the transcript: "Q. Then your contract ran out because you were unable to pay the money within the time specified in the contract? A. That is right. Q. And afterwards Mr. Moore wrote to you and told you that the contract had run out, and had been run out for some time? A. Yes, sir. Q. And that is the end of the transaction? A. Yes, sir; that is the end of the transaction."

[1] From the foregoing it is clear that the asserted rescission consisted in the notification of the vendee by the vendor that his contract was at an end, and this, after the vendee was in default according to the terms of his contract, and had forfeited any right or claim to proceed to the purchase of the property and had expressly agreed that "the expiration of the time herein limited, with the fact that no deed is of record from the said Florence B. Moore to the said Nathan Cole, Jr., shall conclusively establish default, and no suit, at law or in equity, shall be necessary to be maintained to avoid or extinguish this contract, or declare any forfeiture." It would be rather singular if under the circumstances the mere notice given to the contemplated purchaser by the owner of the land of a fact that was expressly provided in the agreement and of which each had knowledge would operate to change the legal effect of said fact to the detriment of the said owner. The contract was at an end either with or without any formal notice. The purpose of the letter was undoubtedly to inform Mr. Cole that no further extension of time would be granted, but, to say that it established rescission grows out of a misconception, it is submitted, of the significance of that term, and can find support only in the inept application of certain decisions of the courts. Rescission implies, of course, the restoration of the parties to the same situation, and the same terms as existed when the contract was made. It requires the surrender of any consideration or advantage secured by either party. But the only fair interpretation of the notice here, considered in connection with the terms of the contract, is that no further affirmative action should be taken by either party to execute said contract, and that the status of each should remain as provided without further change. It is true that rescission as well as an abandonment of a



contract may be shown by circumstantial or direct evidence or both, but the facts, fairly considered, do not compel the conclusion, in opposition to the finding of the court, that the owner of the land was so gratuitously generous as to voluntarily surrender the valuable right secured to her by the terms of the contract. And it may be said that there is nothing illegal or unconscionable disclosed in her conduct. Adopting the language of respondents: "As the contract had a limit and as time was of the essence of the contract, she was not obliged to keep her property off the market forever, or, in the alternative, to pay them back what they had paid for an extension of time to enable them to speculate with the property and avail themselves of it if the market went up, otherwise turn it back to Mrs. Moore."

It must be admitted that some obscurity is found in certain decisions as to the correlative rights of the parties to contracts analogous to the one before us and appellant's position is not without apparent support in some of the cases. Two of these, upon which he relies, we proceed to notice. In *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, it is held that "where a contract for the sale of land provided for a forfeiture of all right to a conveyance, and that the purchase money paid should be as liquidated damages, in case of nonfulfillment of the terms of future payments by the purchaser, and it appears that full payment of the residue of the purchase money was tendered and a deed demanded ten months after maturity, and that the vendors refused to accept the tender, or to return the purchase money paid, and elected to rescind the agreement, the purchaser may maintain an action to recover from the vendors the installment of purchase money paid." Of course, if the vendors elected "to rescind the agreement," they should restore the money. The decision was really grounded, though, upon the proposition that the stipulation as to liquidated damages was void under the provisions of sections 1870 and 1871 of the Civil Code, and it followed the general rule stated in *Field on Damages*, § 508, holding that the vendor is entitled to recover "the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." But this case, with others, is reviewed in *Glock v. Howard & Wilson*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and it is declared that "the misleading feature in *Drew v. Pedlar*, supra, comes from the lengthy statement of facts, from which it appears that all the plaintiff vendee did was to make tender long after his default, which tender the vendor refused to accept. But the vendee likewise pleaded a mutual abandonment and rescission, and it appears from the opinion the pleading as to these matters was not denied." It is furthermore said, in reference to the *Drew* de-

cision, that "what is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee, for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated liquidated damages or not." The case of *Pierce v. Staub*, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785, 112 Am. St. Rep. 163, rather favors the view taken by appellant, that a rescission was effected by said notice, but it is to be observed that the court in that case attached much importance to the fact that there was no express or implied contract that the money paid by the vendee should be forfeited. The case was one also involving peculiar features and the decision brought to the vendor a just retribution for his inordinate greed in claiming as a forfeit the large sum of \$80,000 without any showing made that he had lost a dollar by reason of his promise or of the default by the vendee.

But there could seem to be no controversy as to what are the controlling principles of law here in view of the decision in the *Glock* Case, supra. Therein it is clearly held that: "Under a contract for the sale of real estate in which time is made of the essence of the contract and performance by the purchaser is made a condition precedent to a conveyance, and upon his breach of the contract he is declared to forfeit all rights thereunder, and all moneys paid thereon, the purchaser cannot, after his default without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract." Furthermore, that, "where time is expressly made of the essence of the contract for the purchase of land, equity will not ignore such provision, but follows the law, and will neither make a contract for the parties, nor violate that which they have entered into; nor will it relieve a purchaser who has made unexcused default under such a provision, and has not fulfilled conditions precedent to the vesting of his right of action."

[2] It is declared, also, that the right of the vendor to retain the part of the purchase price paid after the default of the vendee is independent of any express clause in the contract for forfeiture of rights or for retention of the purchase money as liquidated damages, that such clauses are merely declarations in express terms of the legal rights of the parties under such a contract without them, and that the validity of such express clauses is immaterial.

[3] It is furthermore held that in such case it is only where the vendor, after default of the vendee, agrees to a mutual abandonment and rescission that the vendee is entitled to receive the purchase money paid.

This case is followed and approved in *Our*

slar v. Thacher, 152 Cal. 739, 93 Pac. 1007, and Pohelm v. Meyers, 9 Cal. App. 31, 98 Pac. 65. Furthermore, it is held in the Our-sler Case that "upon the default of the vendee, without excuse, to perform the conditions of the bond, the mere service of a notice on him by the vendor, calling his attention to the particulars in which the default consisted and declaring the bond to be forfeited and all the interest of the vendee in the property to be terminated and demanding possession of the property, and the subsequent peaceable taking possession of the property by the vendor and his bringing an action to quiet the title thereto, did not constitute a rescission of the contract by the mutual consent of the parties so as to give the vendee a right of action against the vendor for the recovery of the portion of the purchase price paid under the contract or for disbursements made in the performance of other conditions thereof." The foregoing, we think, is sufficient to demonstrate the legal soundness of the trial court's conclusion.

As to the McCauley contract, with more reason it may be said that the court was justified in holding that the vendor was entitled to retain what had been paid. In reference to that it will be remembered the parties expressly agreed for the surrender of the contract by Mr. O'Melveny, and that in such event Mr. McCauley should have no right to repayment of the money.

The order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

#### McCANN v. McCANN et al. (Civ. 1,181.)

(District Court of Appeal, Second District, California. Dec. 11, 1912.)

#### 1. NEW TRIAL (§ 79\*)—GROUNDS.

Where the trial judge, after weighing the evidence and making his determination of facts, concludes that he has decided erroneously, he should, on proper presentation of the matter, grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.\*]

#### 2. APPEAL AND ERROR (§ 1015\*) — ORDER GRANTING A NEW TRIAL—CONFLICTING EVIDENCE.

An order granting a new trial, because the trial judge concludes that he has reached an erroneous determination from the evidence, will not be disturbed on appeal, where the evidence is conflicting, and there is no error of law rendering the order improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

#### 3. NEW TRIAL (§ 123\*)—NOTICE OF INTENTION—DATE OF FILING.

A notice of intention to move for a new trial should be regarded as filed on the date tendered and received by the clerk and marked "Filed," though the clerk erases his filing mark for nonpayment of the filing fee and subse-

quently places upon the notice a filing mark of the date when the fee is paid.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William F. McCann against Mary McCann and another. From an order granting plaintiff's motion for a new trial, defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel and J. L. Fleming, both of Los Angeles, for respondent.

JAMES, J. This is an appeal from an order of the superior court granting the motion of plaintiff for a new trial. The action was originally brought in the justice's court, the cause of action in form being that for the unlawful detainer of real property; it being alleged in the complaint that the rental value thereof was less than the sum of \$25 per month, which allegation was sufficient to give jurisdiction to the justice's court, unless upon the trial the evidence disclosed the fact to be that the rental value of such premises was in excess of \$25 per month. The justice of the peace determined the action upon the merits in favor of plaintiff, and an appeal followed, which was taken by the defendants to the superior court on questions of both law and fact. The superior court thereupon proceeded to try the action anew, and rendered judgment in favor of defendants. Thereafter, motion for a new trial being presented by plaintiff, an order was made granting the same. One of the grounds assigned in the notice of intention to move for a new trial was the insufficiency of the evidence to justify the decision of the court.

[1, 2] The trial judge, at the conclusion of all the testimony, weighs the evidence and makes his determination of the facts, and if he afterwards concludes that he has made an erroneous decision it is his duty, where proper proceedings are had calling the matter to his attention, to grant a motion for a new trial; and where there has been heard conflicting testimony an appellate court cannot, in reviewing the ruling made upon such motion, disturb the order. It is only where the evidence heard establishes an uncontradicted state of facts in favor of one or the other of the parties to an action that a question of law is presented which an appellate court may consider. The record of the testimony heard at the trial of this action does not disclose that the material facts were uncontradicted or undisputed, and that being true the appellants must rest content with the order made granting a new trial, unless they can present some question of law upon which we would be impelled for other reasons to conclude that the order was irregularly or improperly made.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] They do advance the contention that the superior court was without jurisdiction to rule on the motion for a new trial, for the reason that the notice of intention given as to such motion was filed after the time limited by law had expired. It is shown by the statement that plaintiff served his notice of motion for a new trial in due time, and that he presented it to the clerk for filing clearly within the time allowed by law. At the time he so presented it, he presented a like notice affecting another cause, and paid to the clerk, upon demand of the latter, the sum of \$2, and the clerk thereafter, on the same day, placed his file mark upon the notices, but later notified plaintiff that an additional \$2 was required to be paid as a fee for the filing of the notice given in this cause, which was promptly paid by respondent. Meanwhile the clerk had erased his file mark as first made upon the notice, and when the second fee of \$2 was paid stamped upon the document a new date of filing; that being as of the date of the latter payment. If this notice should be considered as having been filed only as of the day when the second \$2 fee was paid, then it would have been, as appellants contend, filed too late, and after the time fixed by law for the filing thereof had expired. Under the facts shown we think that the trial court was right in concluding, as it evidently did, that the notice was filed when first tendered to the clerk, and when the first file mark was placed thereon. If the clerk saw fit to receive the notice and file it without requiring the payment of the fee, then, no doubt, the omission to require such payment would be a matter which would result in the clerk being held accountable to the county for the payment of that money. We do not think that, under the circumstances shown, the clerk possessed the right to erase the first file mark placed on the notice of intention to move for a new trial, and that the document should be considered as having been regularly filed on the day it was tendered and received by the clerk of the superior court. If the court had jurisdiction to rule upon the motion for a new trial, then, for the reasons we have hereinbefore expressed, no question is left to be reviewed on an appeal from the order granting to plaintiff a new trial in the cause. The order as made by the trial judge was a general one, and not limited to any special or particular ground assigned in the notice of intention; therefore, if the order can be sustained upon any ground assigned in such notice, the ruling may not here be disturbed, and, as the court might well have made the order because of the insufficiency of the evidence to sustain the judgment, our inquiry on this appeal is ended. *Tibbetts v. Bower*, 121 Cal. 8, 53 Pac. 359.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

**McCANN v. McCANN et al.** (Civ. 1,180.)  
(District Court of Appeal, Second District, California. Dec. 11, 1912.)

**1. STIPULATIONS (§ 14\*)—USE OF EVIDENCE IN OTHER ACTION.**

Where the parties to an action to quiet title stipulated that the evidence adduced in an unlawful detainer case between them should, so far as the court deemed it pertinent and applicable, constitute the evidence in the action to quiet title, the defendant could not object, on the ground that it was irrelevant and immaterial, to such evidence being incorporated in the statement filed by plaintiff in support of his motion for new trial.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

**2. APPEAL AND ERROR (§ 933\*)—STATEMENT ON MOTION FOR NEW TRIAL—PRESUMPTION.**

Where defendant offered no amendments to the proposed statement in support of plaintiff's motion for a new trial, it will be presumed, on appeal from an order granting a new trial, that such statement correctly stated the evidence considered by the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

**3. STIPULATIONS (§ 14\*)—USE OF EVIDENCE IN OTHER CASE—STATEMENT ON MOTION FOR NEW TRIAL.**

Where, in two actions tried separately between the same parties, one for unlawful detainer, the other to quiet title, the parties stipulated that the evidence taken in the unlawful detainer case should constitute the evidence in the other case, so far as the court deemed it applicable, a statement in support of a motion for a new trial in the quiet title case was not objectionable because it also constituted the statement on a like motion in the other case.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

**4. NEW TRIAL (§ 131\*)—STATEMENT—"FILING."**

The placing of a statement in support of a motion for new trial in the official custody of the clerk, accompanied by a payment of the fee therefor, constitutes a sufficient "filing," within Code Civ. Proc. § 659, providing that when a statement is settled it shall be filed with the clerk.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 263-269; Dec. Dig. § 131.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2764-2770.]

**5. NEW TRIAL (§ 131\*)—STATEMENT—FILING.**

The file mark indorsed by the clerk on the statement filed in support of the motion for a new trial is mere prima facie proof thereof, and not the filing; and hence failure of the clerk to indorse thereon the word "Filed," with the day and date of such indorsement, will not deprive a party of his right to use such statement.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 263-269; Dec. Dig. § 131.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Wm. F. McCann against Mary McCann and others. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel and J. L. Fleming, both of Los Angeles, for respondent.

**SHAW, J.** Action to quiet title. Judgment went for defendants. Thereafter the court made an order granting plaintiff a new trial. Defendant appeals from this order.

The grounds upon which a reversal is urged relate to alleged erroneous rulings in the proceedings for the allowance and settlement of the statement used in support of the motion.

It appears that two actions were pending in the trial court, one of which, numbered 72,113, entitled William F. McCann v. Mary McCann, 129 Pac. 965 (an opinion in which an appeal to this court was this day filed, Civil No. 1,181), was for unlawful detainer; the other, numbered 70,875, being likewise entitled, was an action to quiet title. While the cases were tried separately, it was by the parties stipulated that the evidence taken in the unlawful detainer case should, in so far as the court deemed it applicable, be considered as evidence in the suit to quiet title, which is the case at bar now under consideration. Judgment was rendered in both cases for defendants. Thereafter plaintiff gave notices in both cases of his intention to move for a new trial upon a statement of the case. In due time he presented to the court for settlement as a statement in both cases a document wherein it was stated: "This bill of exceptions and the statement of facts herein is made a part of the foregoing statements on motion for a new trial in both cases, having the same title and numbered, respectively, Nos. 72,113 and 70,875." Defendant objected to the settlement of the proposed statement for use in support of plaintiff's motion for a new trial in the case to quiet title, No. 70,875, upon the ground that it also purported to be a statement on motion for a new trial in the action numbered 72,113 for unlawful detainer; and further, that the testimony and proceedings had in the unlawful detainer case, No. 72,113, as disclosed by the statement, were not relevant or material to the action, brought to quiet title. These objections were by the court overruled, and the document allowed and settled as a statement on motion for a new trial, to be used in support of the motions made in both cases, to all of which defendant excepted.

[1-3] We think the stipulation is a sufficient answer to the objection urged against the settlement. Since defendant agreed that the evidence adduced in the trial of the un-

lawful detainer case should, in so far as the court deemed it pertinent and applicable, constitute the evidence in the case to quiet title, she is in no position now to object to the evidence being incorporated in the statement, upon the ground that it is irrelevant and immaterial. Defendant offered no amendments to the proposed statement in support of the motion; hence, upon being settled and allowed by the trial judge, we must assume that it constitutes a correct statement of the evidence upon which the court, in the first instance, rendered its decision, and upon which it subsequently made the order granting a new trial herein. The fact that it also constituted a statement on motion for a new trial in the other case did not affect its validity or use as a statement in the case at bar.

[4, 5] The statement is indorsed: "Filed September 14, 1910, C. G. Keyes, Clerk." Appellant now, for the first time, makes the point that the statement, notwithstanding the indorsement thereon, was not filed with the clerk. This contention is based upon the fact that the successor in office of C. G. Keyes certifies that no statement on motion for a new trial was ever filed herein. Section 659, Code of Civil Procedure, provides that when a statement is settled it shall be filed with the clerk. To file a paper on the part of a party is to place it in the official custody of the clerk, to be by him permanently kept among the papers of the cause, subject to the inspection of parties entitled to inspect the same. Such act, accompanied by payment of any fee due therefor, constitutes a sufficient filing of papers. The file mark indorsed thereon by the clerk, while prima facie proof of the filing, is not the filing, but evidence thereof. There can be no doubt that the statement settled for use in both cases was, within the time prescribed therefor, deposited in the custody of the clerk for use at the hearing in support of plaintiff's motion for a new trial, and that it was so used upon the hearing of said motion. Having so deposited it with the clerk, plaintiff cannot be deprived of the use thereof in support of his motion on account of the failure of the clerk to indorse thereon the word "Filed," with the day and date of such indorsement.

The order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

**ROBINSON v. FOUR METALS SMELTING & MINING CO.** (Civ. 1,192.)

(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**APPEAL AND ERROR (§ 1061\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Any error in an action against a corporation for the price of property sold in admitting written admissions of the amount due, afterwards executed by defendant's manager, was immaterial, where the nonpayment of the amount due was clearly established by other competent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1061.\*]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Charles W. Robinson against the Four Metals Smelting & Mining Company. From an order denying a motion for a new trial, defendant appeals. Affirmed.

P. W. Forbes, of Bishop, for appellant. Wm. J. Clark, of Independence, for respondent.

ALLEN, P. J. Plaintiff declared upon two causes of action: First, for the services and use of 11 certain pack mules for a period of 77 days at an agreed price of \$1 per day for the service of each, the complaint averring an obvious aggregate amount of \$847, and alleging an unpaid balance thereon of \$697. The second cause of action was on account of the sale and delivery by one Gunn to defendant of certain ore at an agreed price of \$861.03, and the assignment of the cause of action on account thereof to plaintiff. The answer denied the hiring of the pack mules and the agreement to pay therefor any indebtedness on account thereof. As to the second cause of action, the only denial related to the assignment and the amount remaining unpaid. The court found the allegations of the complaint to be true, that the denials of the answer were untrue, and rendered judgment for plaintiff. Motion for new trial was denied, and from the order denying such motion defendant appeals.

The only matters involved upon this appeal relate to the sufficiency of the evidence to support the findings and certain exceptions to the admission of evidence. The record discloses ample evidence in support of the findings with reference to the first cause of action. The objections to the introduction of evidence the subject of exception were highly technical and involved no prejudicial error; neither was there any variance between the allegations of the complaint and the proof. The fair and reasonable construction which the court placed upon the evidence offered to support the first cause of action established an agreement as set forth in the complaint, between the agent of plaintiff and defendant for the services of the

mules at an agreed price. Whether the written admissions of the amount due afterwards executed by a manager or superintendent of defendant were binding upon defendant is of little consequence, in face of the fact that the liability and nonpayment of the amount due was clearly established by other competent evidence. We are of opinion, however, that this written statement involving such admissions of indebtedness was properly received in evidence.

As to the second cause of action, the only issue was as to the assignment and nonpayment. Such assignment and nonpayment were established, and all findings of the court have support from the evidence and admissions.

We see no prejudicial error in the record, and the order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

**PEOPLE v. ANTHONY.** (Cr. 410.)

(District Court of Appeal, First District, California. Dec. 12, 1912.)

**1. INDICTMENT AND INFORMATION (§ 159\*)—AMENDMENTS—STATUTORY PROVISIONS.**

Pen. Code, § 1008, as amended by St. 1911, p. 436, providing that an indictment may be amended by the district attorney without leave of court at any time before defendant pleads, but an indictment cannot be amended so as to change the offense charged, empowers the district attorney to amend an indictment only in matters of form not affecting matters of substance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159.\*]

**2. INDICTMENT AND INFORMATION (§ 156\*)—OFFENSES PROSECUTED BY INDICTMENT—CONSTITUTIONAL PROVISIONS.**

Const. art. 1, § 8, providing for the prosecution of offenses by indictment with or without examination and commitment contemplates that an indictment shall be found and presented by a grand jury, and the district attorney may not amend an indictment in matters of substance, but a statute which permits an indictment to be amended as to mere matters of form is not violative of the rights of accused to be prosecuted by indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 503; Dec. Dig. § 156.\*]

**3. INDICTMENT AND INFORMATION (§ 159\*)—AMENDMENTS—DATE OF OFFENSE.**

An indictment charging lewdness punishable by Pen. Code, § 288, may be amended by the district attorney without leave of court by changing the date of the offense, for such an amendment relates to a mere matter of form within section 1008, as amended by St. 1911, p. 436, authorizing amendments not changing the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159.\*]

**4. INDICTMENT AND INFORMATION (§ 87\*)—LEWDNESS—TIME OF COMMISSION.**

The precise date on which the offense of lewdness punishable by Pen. Code, § 288, was committed, is not a material element of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

offense, and an indictment charging generally that the crime was committed within the period of limitations and prior to the finding of the indictment is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.\*]

**5. LEWDNESS (§ 5\*) — INDICTMENT — SUFFICIENCY.**

An indictment charging that accused committed a certain lewd and lascivious act with and on the body and private parts of a female child under the age of 14 years by accused placing the hand of the female on his private parts with felonious intent to arouse the sexual desires of the child sufficiently charges the offense denounced by Pen. Code, § 288, punishing any person committing any lewd act on the body of a child under the age of 14 years.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 7-12; Dec. Dig. § 5.\*]

**6. CRIMINAL LAW (§ 606\*)—EVIDENCE—MOTION TO STRIKE—TIME TO MAKE—PREVIOUS OBJECTION.**

A motion to strike out the testimony of a witness not preceded by an objection to the question eliciting the testimony is properly denied on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 606.\*]

**7. CRIMINAL LAW (§ 1153\*)—WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF TRIAL COURT.**

The allowance of leading questions rests largely in the discretion of the trial court, and, unless the discretion has been abused, the court on appeal will not interfere therewith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\* Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.\*]

**8. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—REQUESTS—NECESSITY.**

Where the court fully and fairly charged on the law applicable to the facts, a failure to instruct on any particular matter deemed essential by accused was not error, in the absence of a requested instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

**9. CRIMINAL LAW (§ 864\*) — INSTRUCTIONS AFTER SUBMISSION—SUFFICIENCY.**

Where the jury, after deliberating on the verdict, returned to the courtroom for information, and for the removal of a doubt as to what a witness had testified to, and the court gave them the information sought and the doubt was removed by agreement of counsel made in the presence of the jury, the action of the court sufficiently protected the rights of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2068; Dec. Dig. § 864.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

David Anthony was convicted of crime, and he appeals. Affirmed.

T. J. Crowley, of San Francisco, for appellant. Attorney General Webb, for the People.

LENNON, P. J. In this case the defendant was indicted by the grand jury of the city and county of San Francisco for the commission of the felony defined in section 288 of the Penal Code, which provides that;

"Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part II of this Code, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year." Upon his trial defendant was convicted, and he appeals from the judgment and from an order denying him a new trial.

In the lower court the defendant interposed a demurrer to the indictment as it was originally returned by the grand jury; but, before the demurrer could be heard and disposed of, the district attorney, of his own motion, amended the indictment in minor matters of dates. This was done under the authority of a recent amendment to section 1008 of the Penal Code (St. 1911, p. 436), which in part reads as follows: "An indictment or an information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

[1] It is the defendant's contention that the Code section just quoted is unconstitutional, in this: that it does not limit the character or extent of the amendment which the district attorney is permitted to make to an indictment or an information. In support of this contention, counsel for defendant cites to us only that portion of the Code section which reads that "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads." The Code section, however, must be read and construed in its entirety; and, when so read and construed, it is manifest that the district attorney is not empowered thereby to amend an indictment or an information in matters of substance. If the Code section under discussion purported to permit an amendment to anything but the mere formal allegations of an indictment, we would have no hesitation in holding such a procedure unconstitutional.

[2] The Constitution contemplates that an indictment shall be found and presented by a grand jury (Const. art 1, § 8); and to permit the district attorney to amend an indictment in matters of substance would in effect render the indictment no longer the finding of the grand jury. It is evident,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

however, that the Code section in question contemplates and permits an amendment to an indictment or information by a district attorney only in so far as such amendment relates merely to matters affecting the formal parts of an indictment or information. That this is so is manifest from the language of the section itself, which plainly provides that an indictment cannot be amended by the district attorney "so as to change the offense charged." It will thus be seen that the district attorney is not empowered to amend an indictment in any matter or thing which would affect the substantial rights of the defendant. Plainly the purpose of the Code section is to expedite the administration of justice by rendering of no avail purely technical objections to inadvertent informalities; and it is well settled that a statute which permits an indictment to be amended as to mere matters of form is not violative of the constitutional rights of a defendant. 1 Bishop's New Crim. Proc. § 97; *State v. Startup*, 39 N. J. Law, 423; *State v. Hanks*, 39 La. Ann. 234, 1 South. 458; *MackGuire v. State*, 91 Miss. 151, 44 South. 802; *State v. Gibson*, 120 La. 343, 45 South. 271; *Baker v. State*, 88 Wis. 140, 59 N. W. 570; *People v. Johnson*, 104 N. Y. 213, 10 N. E. 690; *Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571; *State v. Minford*, 64 N. J. Law, 518, 45 Atl. 817; *Sharp v. State*, 6 Tex. App. 650.

[3] The only amendment which the district attorney made to the indictment in the present case consisted in changing the date upon which the offense was charged to have been committed from the 30th to the 11th day of April, 1912. Such amendment did not change the character of the crime charged against the defendant, and in no aspect of the case could it have operated to the prejudice of the defendant.

[4] The precise date upon which the offense was committed was not in this instance a material ingredient of the offense charged; and it would have been sufficient if the indictment had charged generally that the crime was committed at a time within the period of the statute of limitations, which was prior to the finding of the indictment. *People v. Littlefield*, 5 Cal. 355; *People v. Lafuente*, 6 Cal. 202; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Rice*, 73 Cal. 220, 14 Pac. 851; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

We do not wish to be understood as saying that the allegations of an indictment or information as to the date upon which a crime is charged to have been committed may be in every case omitted or amended without injury to the substantial rights of the defendant. Cases may be supposed where the date of an alleged offense might be a material ingredient of the crime charged; and, of course, in such cases to change the date of its alleged commission would be to change, in part at least, the character of the offense.

Where, however, as here, the date designated in the indictment was not material to the offense charged, its amendment cannot be said to affect the substantial rights of the defendant.

[5] To the indictment as amended the defendant demurred upon the grounds (1) that the facts stated did not constitute a public offense; (2) that the indictment did not substantially conform to the requirements of sections 950, 951 and 952 of the Penal Code. The information charges that the defendant, David Anthony, did "willfully, unlawfully, feloniously, and lewdly commit a certain lewd and lascivious act with and upon the body, limbs, and private parts of one Agnes Richardson, a female minor child then and there under the age of fourteen years, \* \* \* by said David Anthony then and there placing the hand of her, the said Agnes Richardson, upon said David Anthony's private parts, \* \* \* with the felonious intent then and there and thereby of arousing, appealing to and gratifying the lust, passions and sexual desires \* \* \* of her, said Agnes Richardson." In support of the demurrer counsel for defendant contends that the indictment does not state facts sufficient to constitute the offense contemplated by section 288 of the Penal Code, in this: that it affirmatively appears from the indictment that the act charged was a mere licentious act which was not committed upon the body of the child. It is further insisted that the charging part of the indictment is so contradictory and uncertain that it is impossible for a person of common understanding to know what particular act constitutes the offense charged against the defendant. It may be conceded, as counsel for the defendant contends, that the indictment would have been faulty to the extent of being uncertain, as against a demurrer, if the charging part thereof had concluded solely with the allegation that the defendant did commit "a certain lewd and lascivious act with and upon the body, limbs, and private parts of one Agnes Richardson," without specifying the particular act. The charging part of the indictment, however, did not stop there. It proceeded to and did with sufficient certainty and clearness limit the meaning and application of the preceding general and indefinite allegations by specifically alleging and relying upon a particular act of the defendant to constitute the offense charged against him.

Section 288 of the Penal Code not only makes it a crime to commit any lewd or lascivious act "upon or with the body \* \* \* of a child under the age of fourteen years \* \* \*," but that section also makes it a crime to "commit any lewd or lascivious act \* \* \* upon or with the body, or any part or member thereof, of a child under the age of fourteen years." In short, it is clear that said section makes it a crime to commit any lascivious act

with any part of a child's body with the intent therein stated. Obviously the hand of a child is a "part" and a "member" of its body; and when the defendant committed the particular act of placing the child's hand upon his private parts, with the intent of arousing her passions, he violated the terms, and we think the spirit, of the law.

We confess that the language of the indictment might with advantage have been directed more specifically to the act charged against defendant, but we are satisfied that the indictment is not so ambiguous but that the defendant and his counsel might upon slight reflection apprehend with reasonable certainty that the only lascivious act charged against the defendant and upon which the people would rely for a conviction was the placing of "the hand of the said Agnes Richardson upon the said David Anthony's private parts," with the intent alleged in the indictment.

Several rulings of the trial court in admitting evidence, and in denying defendant's motion to strike out certain evidence, are assigned as prejudicial error. Upon an examination of the record we are satisfied that none of the points made in this behalf are well taken.

[6] The motion to strike out the testimony of the witness Meehan was not preceded by an objection to the question which elicited the testimony, and for this reason, if for no other, the motion to strike out was properly denied. Moreover, the testimony of this witness was not only competent, but it was a relevant and material part of the *res gestæ* of the offense, and could not therefore have been successfully objected to.

For the reasons just stated, the defendant's motion to strike out parts of the testimony of the witness Agnes Richardson was also properly denied.

[7] Complaint is made that the trial court permitted a leading question to be put to the witness McDermott over the objection of the defendant. Leading questions are largely in the discretion of the trial court; and, before error can be claimed or allowed for the asking of such questions, it must be shown that the trial court abused its discretion. No such showing is made here; and, furthermore, it does not appear from the record before us that the particular question complained of was answered by the witness.

The remaining rulings of the court complained of concern objections to questions which plainly called for evidence relating to the *res gestæ*, and, this being so, the objection in each instance was properly overruled.

After the jury had retired to deliberate upon their verdict they returned to the courtroom, and through their foreman stated that they desired "further instructions, \* \* \* a little information as to whether a verdict of guilty may be brought in only on the

grounds that it was proven that he (defendant) directed the girl's hand onto his private parts, and therefore they would like the indictment read. \* \* \* Thereupon the indictment was read to the jury; and immediately thereafter the court of its own motion charged them the "the plea of not guilty \* \* \* puts in issue the facts set up in the indictment which has just been read to you. In determining whether or not those acts thus described in the indictment have been established, it is proper to take into account all the evidence which has been introduced into the case. \* \* \* Finally, the jury must determine whether the facts alleged in the indictment have been proved to a moral certainty and beyond a reasonable doubt. What other question is there?" The foreman of the jury then stated that the jury were divided upon the question "as to whether it was the Atheas girl or the Richardson girl that testified in regard to her having her hand on his (defendant's) private parts." Thereupon counsel for the people and counsel for the defendant agreed and admitted without reading the record to the jury that it was the Richardson girl who had so testified; whereupon the foreman of the jury said: "I think that is all I care to know. Is there any question that some of you gentlemen would like to ask, if that don't clear it up?" At this point in the proceedings counsel for the defendant requested the court "to instruct the jury on one point upon which they asked instructions." The court in reply stated that it had "already instructed the jury on every point on which they had asked light," and then ordered the jury to retire for further deliberation. It is now contended that the trial court erred to the prejudice of the defendant in failing to instruct the jury "that unless it was established beyond all reasonable doubt that the defendant guided the hand of the child as in the indictment alleged, then it was their duty to acquit." This contention is based upon the assumption that the jury requested to be instructed upon this particular point in the case. It is further contended that, aside from any request of the jury, and notwithstanding the fact that no instructions were requested upon behalf of the defendant, the trial court should have included such an instruction in its charge.

[8] With reference to the latter contention, it will suffice to say that the trial court fully and fairly charged the jury upon the law appertaining to the facts of the case, and therefore the failure of the court to instruct upon any particular matter deemed essential by the defendant was not error in the absence of a request for such an instruction. *People v. Fice*, 97 Cal. 460, 32 Pac. 531; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Arnold*, 116 Cal. 682, 48 Pac. 803.



[8] Upon a first and hasty reading of what occurred when the jury returned to the courtroom for further instructions the impression is gained that the jury were desirous of being instructed specifically upon the particular point now under discussion; but upon a second and more careful reading of all that was said and done upon the return of the jury it is evident that they were merely seeking information as to what constituted the gist of the offense charged, and at the same time were desirous of clearing up a disputed point in the evidence. The information which they sought as to the gist of the offense was conveyed to them precisely as they requested by a reading of the indictment; and their doubt as to what certain witnesses had testified to was dissipated by the agreement of counsel. This was all that the jury asked for; and therefore it was all that the court was required to give them.

Finally, it is contended on behalf of the defendant that the evidence does not support the verdict. We have carefully read the record; and we have no hesitation in saying that the evidence fully supports the verdict, and that the defendant was justly convicted.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

#### FOX v. MICK et al. (Civ. 1,165.)

(District Court of Appeal, Second District, California. Dec. 12, 1912.)

#### 1. JUDGMENT (§ 818\*)—FOREIGN JUDGMENTS—COLLATERAL ATTACK.

The judgment of another state presented in the courts of this state can be controverted on the question of jurisdiction by extraneous evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458-1481; Dec. Dig. § 818.\*]

#### 2. JUDGMENT (§ 944\*)—ACTION ON FOREIGN JUDGMENT—FRAUD—EVIDENCE.

In an action to enforce a deficiency judgment of another state, evidence held to warrant a finding that the signatures to the acceptance of service of the summons in the action in which the judgment was rendered, by the defendants who were then residing in another state, were obtained by fraud, and that the foreign court had no jurisdiction over the defendants to render a personal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. § 944.\*]

#### 3. APPEAL AND ERROR (§ 931\*)—PRESUMPTIONS—EVIDENCE—LAWS OF ANOTHER STATE.

Although the validity of a judgment rendered in another state is governed by the laws of that state, and a law of another state if invoked must be proven, or the law of this state be deemed to be the law, where a judge stated that he would "take judicial notice of the laws of such state, it is so stipulated," to which neither party dissented, and no evidence other than the judgment of that state was introduced, and the judge found that such judgment was void,

it must be presumed that he found some law of that state justifying his conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William A. Fox against Mary El. McDowell Mick and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Vincent Hannon, of Los Angeles, and Hannon & Gibbs, for appellant. Lucius M. Fall and Edwin A. Meserve, both of Los Angeles, for respondents.

SHAW, J. Action to recover upon an instrument purporting to be a deficiency judgment rendered by the district court of Arapahoe county, Colo., in favor of plaintiff and against defendants herein. Judgment went for defendants. Plaintiff's motion for a new trial was denied, and he appeals from the order of court denying same.

The suit wherein the judgment was rendered by the district court of Colorado was one instituted to foreclose a mortgage executed to defendant Brooks by defendant Mick for the purpose of securing the payment of a certain promissory note made and delivered by her to Brooks. Defendant Mick deeded the mortgaged property to one White, who assumed and agreed to pay the amount of the mortgage. Brooks assigned the note and mortgage to plaintiff herein. At the time of the commencement of the suit all of the defendants therein, including White, were residents of California. Plaintiff secured the signatures of both Mick and Brooks to an indorsement upon the original summons, the effect of which was to enter their voluntary appearance in the action, waive answer and consent to a trial without notice to them, and likewise secured an entry of appearance by White, agreeing that no personal judgment should be entered against him. In their answer defendants alleged that the signatures to the indorsement claimed by plaintiff to constitute their general appearance in the action was procured by the misrepresentation, fraud, and trickery of plaintiff, whereby they were led to believe that the effect of such appearance was merely in lieu of and equivalent to service by publication, and the court in effect so found. Appellant attacks this finding upon two grounds: First, that, as the judgment was rendered by a court of general jurisdiction, it must, in the absence of a direct attack thereon, be deemed to have had jurisdiction, and hence it cannot be impeached or attacked collaterally; and, second, that the evidence is insufficient to support the finding. Neither position is tenable.

[1] "When a judgment recovered in one state is pleaded or presented in the courts of another state, whether as a cause of action or a defense or as evidence, the party sought to be bound or affected by it may

always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter of the action." 23 Cyc. p. 1578. Whatever may have been the law as announced by the earlier decisions, it is now well settled that the record in such case is not conclusive upon the question of jurisdiction, but may be controverted by extraneous evidence. *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Greenzweig v. Strelinger*, 103 Cal. 278, 37 Pac. 398; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539; *Durringer v. Moschino*, 93 Ind. 495; *Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Wood v. Wood*, 78 Ky. 624.

[2] As to the second point, that the evidence is insufficient to support the finding, it appears that upon the bringing of the action in Colorado plaintiff's attorney wrote to plaintiff, who was then in Los Angeles county, where defendants resided, inclosing with the letter the original summons issued in the case and suggesting to plaintiff that he have the defendants sign the indorsement upon the back of the summons, stating: "They should accept service willingly, as we can secure the same result by publication and waiting longer." The evidence of both defendants tends to show that it was understood between plaintiff and themselves that the sole and only purpose of signing the indorsement was to give the court such jurisdiction only as would follow due publication of summons and enable plaintiff to foreclose his mortgage without the delay and expense of such publication, and that plaintiff told defendants that such acceptance of service and appearance was in effect substituted service, and that no personal judgment would be taken thereon. This theory is borne out, not only by the letter of instruction, but by the evidence of plaintiff himself, who testified as follows: "I have not the recollection of telling her anything, and I don't believe I told her anything more than that was a copy of the summons and complaint, and I would gain the same end by publication if she did not sign it, and she seemed perfectly willing to sign it." The end gained by publication of summons would not confer jurisdiction to render a personal judgment. It is thus apparent that the purpose and intention of the parties was not to obtain personal service upon defendants, but to obtain such service only as might be had by a publication of the summons.

[3] There is another point, however, which, upon any view of the case, is fatal to appellant's claim for a reversal of the order. The court found that no proof whatever was offered to sustain the allegations of the complaint other than the purported exemplified copy of the record of the proceedings, together with the certificate thereto attached,

all of which documents constituting the alleged record are set out in *hæc verba* in the finding. The court's conclusion of law based upon this (and other findings not now under consideration) was that plaintiff was entitled to nothing, and that defendants should have judgment for costs. Whether or not this finding justifies the conclusion of the court depends upon the law applicable to the evidence so found by the court to have been given and so embodied in the finding. The validity and effect of a judgment, however, is governed by the laws of the state where it is rendered. 23 Cyc. p. 1547; *Peet v. Hatcher*, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45. If it be made to appear that the judgment sued upon in another state is void, or for any reason nonenforceable, by statute or otherwise, in the courts of the state wherein rendered, it must be held likewise nonenforceable in an action brought thereon in a sister state. Where the law of another state is invoked as affecting a right asserted in the courts of this state, proof thereof must be made by evidence showing the existence of such law. Otherwise, the law of such state applicable to the case will be deemed to be the same as that of this state. *Cavallaro v. Texas Ry. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323. In the trial of the case at bar no proof was made as to any laws of Colorado. Nevertheless, the presumption that they are the same as those of California is overcome by the fact that during the progress of the trial the learned trial judge presiding therein, in open court stated: "I take judicial notice of the laws of Colorado. All the laws of Colorado, whatever they are in the published books—it is so stipulated." Neither party present in court expressed any dissent therefrom, and under the circumstances their silence must be deemed equivalent to an assent. Having so stipulated, we must presume that the trial judge in considering the record of the Colorado court introduced in evidence took judicial notice of the laws of Colorado, and found some provision of law which, upon applying it to the evidence embodied in his findings, justified his conclusion that the judgment rendered by the Colorado court was void, or, at least, by reason of irregularity, nonenforceable. To justify a reversal, it must appear that error has been committed by the trial court. In the absence of any proof of the law of Colorado, which under the stipulation it is presumed the court applied to the facts, we cannot say that it erred in making the order denying plaintiff's motion for a new trial.

Other assignments of error, conceding appellant's contention therein, are, in view of our conclusion, rendered harmless; hence, it is unnecessary to discuss them.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

**STATE COMMISSION IN LUNACY v. WELCH**, County Treasurer.  
(Civ. 1,066.)

(District Court of Appeal, First District, California. Dec. 13, 1912. Rehearing Denied by Supreme Court Feb. 11, 1913.)

**1. STATES (§ 126\*) — GENERAL FUNDS — IMBECILE FUND.**

The money required to be paid to the state treasurer by each county treasurer by Pol. Code, §§ 2192, 2193, providing for the commitment of imbecile persons to the state home for the feeble-minded, and requiring each county auditor to include in his state settlement report the amount due the state for commitments to the home, and providing that the county treasurer, at the time of the settlement with the state, shall pay to the state treasurer, on the order of the controller, the amounts due the state, goes into the general fund of the state, and not into any fund for the home, and the State Commission in Lunacy has no control over the same, except such as is expressly given by statute.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125; Dec. Dig. § 126.\*]

**2. INSANE PERSONS (§ 58\*)—SUPPORT OF IMBECILES—ACTIONS—STATUTES.**

Pol. Code, § 2197, authorizing the State Commission in Lunacy to sue in its own name any county, person, guardian, or relative liable for the maintenance of imbecile persons in the state home for the feeble-minded, does not authorize an action against a county treasurer, for the county treasurer is not the county, and a suit against the county is under the control of the county board of supervisors, while the county treasurer controls the defense in an action against him, and he is liable for the costs.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 90; Dec. Dig. § 58.\*]

**3. MANDAMUS (§ 154\*)—COMPELLING PAYMENT OF PUBLIC FUNDS—PETITION—REQUISITES.**

A petition for a writ of mandate to compel a county treasurer to pay money from the public funds must allege that there is money in the county treasury, or in the custody of the treasurer, with which to pay the demand sued for.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.\*]

**4. INSANE PERSONS (§ 55\*)—CARE OF IMBECILE PERSONS—FUNDS—PAYMENTS TO STATE.**

The duty of a county treasurer to pay money to the state treasurer as provided by Pol. Code, §§ 2192, 2193, providing for the commitment of imbecile persons to the state home for the feeble-minded, and requiring each county auditor to include in his state settlement report the amount due the state for commitments to the home, and the county treasurer to pay on the order of the controller the amounts due to the state by reason thereof, is dependent on his having money in his custody as county treasurer applicable to the payment of the demand.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 87; Dec. Dig. § 55.\*]

**5. CONSTITUTIONAL LAW (§ 186\*)—RETROACTIVE LAWS—VALIDITY.**

The Legislature may pass retroactive laws not impairing the obligation of contracts or vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 526-529; Dec. Dig. § 186.\*]

**6. STATUTES (§ 267\*)—RETROACTIVE EFFECT.**

A statute will not be construed to have a retroactive effect, so as to affect pending litigation,

unless such intent is expressly declared or necessarily implied in the language thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

**7. MANDAMUS (§ 2\*)—RETROACTIVE EFFECT.**

Pol. Code, § 2193, as amended in 1911 (St. 1911, p. 86), providing that, on the failure of the county auditor or county treasurer to perform any of the things required by the statute, the State Commission in Lunacy may require the county treasurer by mandate to pay to the state treasurer all amounts due to the state for commitments of imbecile persons to the state home for the feeble-minded, contains nothing which justifies the court in giving it retroactive effect, so as to affect pending litigation, under the rule that, when a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit, unless required by express legislative mandate or unavoidable implication.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 4; Dec. Dig. § 2.\*]

Appeal from Superior Court, San Benito County; M. T. Darling, Judge.

Petition by the State Commission in Lunacy for a writ of mandate against John Welch, as Treasurer of the County of San Benito, to compel the payment of a specified sum to the state treasurer. From a judgment denying relief, petitioner appeals. Affirmed.

Robert L. Beardslee, of Stockton, John W. Stetson, of Oakland, and C. P. Cutten, of San Francisco, for appellant. Briggs & Hudner and H. W. Scott, all of Hollister, for respondent.

HALL, J. This is an appeal from a judgment rendered against plaintiff, after order sustaining defendant's demurrer to plaintiff's petition for a writ of mandate. The record affirmatively shows that no application for leave to amend was made.

Plaintiff filed its petition against defendant, as treasurer of the county of San Benito, asking for a writ of mandate to compel defendant, as such treasurer, to pay the state treasurer the sum of \$1,460, claimed to be due the state on account of the commitment to, and maintenance in, the Sonoma State Home, of certain children from said county. The second amended petition was filed August 5, 1910. A demurrer thereto was filed October 21, 1910, which raised the point of insufficiency of the facts stated to entitle plaintiff to any relief, and also the capacity of plaintiff to bring the action. Subsequently an act was passed, amending certain sections of the Political Code relating to the subject-matter of the action, which took effect in April, 1911. The demurrer was sustained May 10, 1911.

Appellant contends that the complaint was not demurrable under the law as it stood when the action was commenced, and also that the sufficiency of the complaint and the capacity of plaintiff to sue must be tested by the law as it stood after the taking effect of the amendment in April, 1911. We shall first examine the complaint in the light of the

law as it stood when the action was commenced and the demurrer filed.

[1] Section 2192 of the Political Code, after providing for the commitment of feeble-minded or imbecile persons to the home by a superior judge, and providing that the parent or guardian of such person shall pay to the State Home for his support, provides as follows: "For each child or other person committed to such home there shall be paid by the county from which he is committed to the state treasury the sum of ten dollars monthly for and during each month, or part of month, such person so committed remains an inmate of the hospital, in case the payments herein provided to be made by the parent, guardian or other person charged with the support of any such person shall not be made."

Section 2193 of the same Code, before the amendment thereof in 1911, was as follows: "Each county auditor must include in his state settlement report rendered to the controller in the months of May and December the amount due the state under this act by reason of commitments to the home for feeble-minded; and the county treasurer, at the time of the settlement with the state in such months, must pay to the state treasurer, upon the order of the controller, the amounts found to be due to the state by reason of the commitments herein referred to."

Section 2197 of the same Code provides that: "The Commission may in its own name bring an action to enforce payment for the cost of determining the insanity of any person and securing his admission into a state hospital, when his estate or any person is liable for the same, or to recover for the use and benefit of any state hospital or for the state the amount due for the care, support, maintenance and expenses of any patient or inmate therein, against any county, person, guardian or relative liable for such care, support, maintenance and expenses."

When the action was commenced, as well as when the second amended complaint and the demurrer thereto were filed, this was the only authority given the plaintiff to sue to recover any money for the use or benefit of the state. The money that is required to be paid to the state treasurer by the county treasurer (sections 2192 and 2193) is not paid into any fund for the State Home or hospital. The hospital is supported by a general appropriation made therefor, and such sums as may be paid into the contingent fund thereof by persons liable for the support of inmates. The money required to be paid by the county and its treasurer under sections 2192 and 2193 goes into the general fund of the state treasury, and there can, therefore, be no pretense that plaintiff has any control or power thereover other than such as is expressly given by the statute.

[2] The section (2197) under which the plaintiff claimed the right to bring this suit

against the county treasurer gives only the right to sue "any county, person, guardian or relative liable for such care, support, maintenance and expenses." Appellant claims that the right to sue the county treasurer is embraced within the right to sue the county. But the county treasurer is not the county, and a suit against the county is a very different affair from a suit against the county treasurer. In a suit against the county the board of supervisors controls the defense, and the county is liable for such costs as may be awarded to the plaintiff. The county treasurer controls the defense in an action against him and is liable for the costs. We cannot hold that the statute as it existed when this action was commenced authorized plaintiff to institute this suit without reading into the statute something neither expressly nor by necessary implication contained therein. This we may not do.

The trial judge, in passing upon the demurrer, seemed to be of the opinion that the complaint failed to state a cause of action because it not only did not appear that any claim had ever been presented to the board of supervisors, but it did affirmatively appear that the county auditor had never issued any warrant for the payment of the money demanded, and had never given any statement to the controller of any amount due the state, as required by section 2193, Pol. Code. It is alleged that the controller did issue his orders to the defendant to pay the amounts claimed, which aggregate the sum of \$1,460, and cover the years 1903, 1904, 1905, and 1906. Whether or not the county treasurer may be compelled to pay money from the county funds to the state upon the controller's order, without any warrant or statement from the county auditor, presents an interesting question, but one not necessary to be decided upon this appeal.

[3] There is in the complaint no allegation that there was any money in the county treasury, or in the custody of defendant as such county treasurer, with which to pay the demand sued for, which defect is expressly pointed out in the demurrer. Such an allegation is necessary in a petition for a writ of mandate to compel a county treasurer to pay money from the public funds. In the case of *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397, the rule is thus stated: "There was no duty put upon appellant, as treasurer, to pay the order, unless he had funds in his control applicable to that purpose, and whether he had the ability to comply with the order ought to have been shown. The rules of pleading in seeking the extraordinary aid of mandamus require the petitioner to show a clear prima facie case to warrant the alternative writ. There should be sufficient facts stated in the petition to show that the defendant is under legal obligation or duty to perform the required act. High's Extraordinary Legal Remedies, §§ 449, 450;

Wood on Mandamus, 18; Redding v. Bell, 4 Cal. 333. The complaint failed to allege that there was any fund out of which plaintiff could be paid, and was therefore insufficient."

*People v. Reis*, 76 Cal. 269, 18 Pac. 309, was a proceeding in mandamus against the treasurer of the city and county of San Francisco. The court said: "It is well settled that an officer cannot be compelled to pay a sum of money by mandate unless the money is in his official custody legally subject to the payment of the demand made when the steps are initiated to enforce the payment of such demand by writ of mandate. See *Redding v. Bell*, 4 Cal. 333; *Bates v. Porter*, 74 Cal. 224 [15 Pac. 732]. See, also, *Day v. Callow*, 39 Cal. 593. Where an officer's duty to issue a warrant for the payment of money is dependent upon there being money in the fund applicable to the payment of the warrant, a petition that is silent upon the subject of money in the treasury is insufficient to entitle the plaintiff to a writ of mandate. *Cramer v. Supervisors*, 18 Cal. 335.

[4] In the case at bar defendant's duty to pay was dependent upon his having money in his custody as county treasurer applicable to the payment of the demand; and under the rule of pleading laid down in the above-cited case such fact was an essential allegation of the petition for the writ. The cases of *Robertson v. Library Trustees*, 136 Cal. 403, 69 Pac. 88, *Babcock v. Goodrich*, 47 Cal. 488, and *Worthington v. Breed*, 142 Cal. 102, 75 Pac. 675, cited by appellant, were cases against an auditor, where the right to the warrant is not dependent upon the fact of money being in the treasury, and are not in point.

Appellant also relies upon certain expressions used by the court in *Connor v. Morris*, 23 Cal. 447, and *Jones v. Morgan*, 67 Cal. 308, 7 Pac. 734, which were proceedings against the treasurer; but in each of those cases the court was dealing with attacks made upon the petition for failing to aver facts authorizing the issuance of the auditor's warrant, and no question was presented as to any allegation as to the condition of the funds upon which the warrant was drawn. The cases are therefore not in point.

For the reasons above stated, the amended petition, when filed and when demurred to, did not state facts sufficient to constitute a cause of action against defendant.

[5-7] Appellant, however, contends that, even if the objections to the petition above discussed were good at the time of the commencement of the action and the filing of the demurrer, they were obviated by an amendment to the statute which took effect a few days before the demurrer was ruled upon. This amendment consisted of the re-enactment of section 2193, Political Code, with the addition thereto of the following words: "In the event of the failure of the county au-

ditor or county treasurer to do or perform any of the things required in this section, the State Commission in lunacy may require the county treasurer by writ of mandate to pay to the state treasurer, upon the order of the controller, all amounts found to be due to the state as aforesaid at the time of the next settlement of the said county treasurer with the state; and it shall be no defense to such a proceeding that the county auditor has failed to include such sums in his report rendered to the controller; and it shall not be necessary for the said commission to allege or prove any fact with relation to the condition of the funds of the county. The said commission may, in its discretion, recover sums due from counties as in this chapter provided, by the presentation of claims against the board of supervisors, and recovery may be had on all sums due the state for a period of three years next prior to the presentation of such claims." St. 1911, p. 86.

It is quite true that the Legislature has power to pass retroactive laws, that do not impair the obligation of contracts or vested rights; but it is equally true that laws are not construed as intended to have a retroactive or retrospective effect, so as to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the statute. In *Smith v. Lyon*, 44 Conn. 175, the court was considering the effect of a statute enlarging the scope of an action in replevin, passed since the beginning of the action then before the court. The court held that no retroactive effect could be given to the statute, which was broad enough in its language to embrace all cases, past and future. The court said: "One of the firmly established canons for the interpretation of statutes declares that all laws are to commence in the future and operate prospectively, and are to be considered as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The rule is one of such obvious convenience and justice as to call for jealous care on the part of the court to protect and preserve it. Retroaction should never be allowed to a statute unless it is required by express command of the Legislature, or by an unavoidable implication arising from the necessity of adopting such a construction in order to give full effect to all of its provisions."

There is nothing in the language of the statute relied on by appellant in this case that justifies us in giving it any retroactive effect under the rule above stated. That the rule above stated is quite correct, with one possible or rather apparent exception to be hereinafter stated, is abundantly established by adjudicated cases. The latest one to which our attention has been called is *Vanderbilt v. All Persons* (S. F. No. 5,960) 126 Pac. 158, decided by the Supreme Court of this state in bank, August 14, 1912, where it

is said: "When a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit. *Wetzler v. Kelly Co.*, 83 Ala. 440 [3 South. 747]. Retroaction is never allowed to a statute unless required by express legislative mandate or unavoidable implication. *Smith v. Lyon*, 44 Conn. 178." In *Baines v. Jemison*, 86 Tex. 118, 23 S. W. 639, the court held that a statute affecting venue could not be given retroactive effect, in the absence of express words giving it such effect, so as to vest a court with jurisdiction of an action then pending, but tried after the statute took effect. This case is interesting, in that the court distinguishes it from a previous case (*Railroad Co. v. Graves*, 50 Tex. 181), in which it was held that where an amended complaint had been filed without objection, after the new statute had taken effect, the filing of the amended complaint might be treated as the beginning of a new action, and therefore governed by the new statute. In *Wetzler v. Kelly Co.*, 83 Ala. 440, 3 South. 747, it was decided "that when a suit is instituted, or a defense is interposed, which is at the time unauthorized by the law, a subsequent statute giving such remedy does not operate on the existing suit, especially when it does not provide it shall so operate." See, also, *Sanborn's Estate*, 96 Mich. 606, 56 N. W. 25, *Gates v. Salmon*, 28 Cal. 321.

The cases of *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, and *Dieterich v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L. R. A. (N. S.) 696, cited by appellant, were cases in equity, where injunctive relief was sought, and are apparent, and only apparent, exceptions to the general rule. In such cases the injunction operates to control the future and oftentimes continuous action of the defendant, and may be granted as required by the law in force when granted. *Bensley v. Ellis*, 39 Cal. 309, is an example of a case where retroactive effect was called for by necessary implication, and was only given effect to allow a remedial motion to be made under a statute passed, before the motion was made, but after the action was brought. In *Lee v. Buckhelt*, 49 Wis. 55, 4 N. W. 1077, cited by appellant, the statute (revised statutes) expressly provided that it should apply to pending suits. This is made apparent by an examination of *Kopmeyer v. O'Neill*, 47 Wis. 593, 3 N. W. 365, cited in *Lee v. Buckhelt*, where it is said: "Section 4980, R. S. 1878, provides that subsequent proceedings in actions pending at the time the Revised Statutes of 1878 took effect, shall conform to the provisions of the Revised Statutes of 1878 when applicable." In *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250, cited by appellant, an act was passed providing that an action for libel should not abate by the death of the plaintiff. The plaintiff died after the passage of the stat-

ute, and it was held that the action did not abate. We do not think that this was in any just sense giving the statute a retroactive effect. The case of *Kansas Pacific Ry. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550, cited by appellant, simply holds the repeal of a statute, under which an action had been brought and judgment recovered and not appealed from, did not affect the judgment. If the case has any bearing upon the case at bar, it is distinctly against the position taken by appellant. *Judd v. Judd*, 125 Mich. 228, 84 N. W. 134, cited by appellant, simply holds that a person who refuses to pay a judgment for alimony after the passage of a law authorizing contempt proceedings, may be punished under the act, although the judgment which he refused to pay was rendered before the passage of the law authorizing the contempt proceedings. We do not think this was in any proper sense giving the law in question a retroactive effect.

At any rate, the correct rule supported by the great weight of authority is as laid down in *Smith v. Lyon*, 44 Conn. 175, and approved in *Vanderbilt v. All Persons*, supra; and under this rule the position of appellant is not helped by the amendment to the law passed after the filing of the complaint and the demurrer thereto.

The judgment appealed from must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

STATE COMMISSION IN LUNACY v.  
WELCH, County Treasurer et al.  
(Civ. 1,065.)

(District Court of Appeal, First District, California. Dec. 13, 1912. Rehearing Denied by Supreme Court Feb. 11, 1913.)

Appeal from Superior Court, San Benito County; M. T. Darling, Judge.

Petition for a writ of mandate by the State Commission in Lunacy against John Welch, as Treasurer of the County of San Benito, and another. From a judgment denying relief, petitioner appeals. Affirmed.

Robert L. Beardslee, of Stockton, John W. Stetson, of Oakland, and C. P. Cotten, of San Francisco, for appellant. Briggs & Hudner and H. W. Scott, all of Hollister, for respondents.

HALL, J. This is an appeal from a judgment entered against plaintiff after order sustaining defendants' demurrer to plaintiff's complaint. The action is in all respects similar to action No. 1,066 (129 Pac. 974), this day decided, except that it covers a different period of time, and the auditor is joined with the treasurer. For the same reasons stated in the opinion in the action against the treasurer (No. 1,066), plaintiff had no capacity to sue either the treasurer or the auditor, and no cause of action is stated against the treasurer. The court, therefore, did not err in sustaining the demurrer, and the judgment must be affirmed.

It is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

**CALLAN v. EMPIRE STATE SURETY CO.**  
et al. (Civ. No. 1,102.)

(District Court of Appeal, First District, California. Dec. 3, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. PRINCIPAL AND SURETY (§ 59\*)—CONTRACT OF SURETY—NATURE.**

A bond to secure the performance of a building contract attached thereto, which provided that it should be void if the contractors faithfully complied with the conditions of the contract, made the surety a party to the contract.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**2. PRINCIPAL AND SURETY (§ 59\*)—CONDITIONS OF BOND—INCORPORATION OF OTHER INSTRUMENTS.**

A surety bond may incorporate by reference other contracts or written instruments, or be conditioned for the performance of agreements contained in such instruments, in which case the bonds and contracts should be construed together.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**3. PRINCIPAL AND SURETY (§ 82\*)—BUILDING CONTRACT—LIABILITY OF SURETY—MECHANICS' LIENS.**

Under the bond of a surety company to secure the performance of a building contract, conditioned on compliance with all of the terms and conditions of the contract, the surety was liable for necessary excess cost to the owner of completing the building on abandonment by the contractor after furnishing material and labor, for which liens had been filed as well as for loss of rentals by failure to complete within the time fixed.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 127; Dec. Dig. § 82.\*]

**4. PRINCIPAL AND SURETY (§ 59\*)—CONSTRUCTION OF CONTRACT—STATUTORY PROVISIONS.**

Under Civ. Code, § 2837, providing that, in interpreting suretyship contracts, the same rule should be observed as in other contracts, such a contract should be fairly construed to effectuate its object, not distorting the natural meaning of its language or raising unreasonable implications.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**5. APPEAL AND ERROR (§ 1073\*)—HARMLESS ERROR—AMOUNT OF JUDGMENT.**

Mere error in computing the amount of the judgment is not reversible, where all of the items entering into it are established, since it may be corrected by modifying the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Callan against the Empire State Surety Company and others. From a judgment for plaintiff, and an order denying a motion for a new trial, the Surety Company appealed. Judgment modified, and, as modified, affirmed.

For opinion of Supreme Court denying rehearing, see 129 Pac. 981.

George F. Hatton and Hartley F. Peart, both of San Francisco, for appellant. William S. Downing, of San Francisco, for respondent.

**KERRIGAN, J.** The plaintiff herein entered into a building contract with certain contractors, by the terms of which the latter promised and agreed for and in consideration of the sum of \$7,000 to furnish all the material and labor necessary to build and complete, according to plans and specifications, a two-story frame building within 75 working days. Plaintiff agreed to pay in installments as the work progressed. Upon the execution of the contract the defendant Empire State Surety Company (appellant), as surety, executed a bond in the sum of \$1,750, which recited that the contractors had entered into this contract with plaintiff, describing it and having a copy thereof attached, and which was conditioned that, if the principals "shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on their part to be kept and performed according to its tenor, then this obligation to be null and void, otherwise to be and remain in full force and virtue in law." The contractors, after performing a portion of the work and receiving the first payment as prescribed in the contract, abandoned it, leaving debts for materials and labor, for which liens and claims accrued. These were paid by the plaintiff, who completed the structure. The action was brought to recover the sum of \$921.80 as damages from the Empire State Surety Company and the contractors, such sum being claimed to be the reasonable and necessary excess cost to plaintiff of completing the building, together with the further sum of \$380 damages for loss of rentals caused by the delay and failure of the contractors to complete the structure within the time fixed by the contract. No appearance was made on behalf of the contractors. Plaintiff recovered judgment against the appellant herein as surety upon its bond in the sum of \$1,301.80, the full amount prayed for in the complaint.

Several points are urged by the appellant for a reversal of the judgment and order denying a new trial; the main contention, however, being that the surety company is not bound, by the terms of its undertaking, to indemnify the plaintiff against loss arising from the payment by him of claims and mechanics' liens. It is contended by appellant that its bond and undertaking was for the performance of the agreement of the contractors to furnish materials and labor, and that, as neither the agreement nor the bond provided that the contractors or surety should pay or discharge any claims or liens for materials or labor furnished upon the structure, it is not incumbent upon appel-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

lant to perform this condition. In other words, the appellant claims that, when the material and labor were furnished, their contract was complied with, and that it had not obligated itself to protect the owner against the costs of material and labor used in the construction of the building. In support of this contention, we are cited to the elementary proposition of law that sureties are never bound beyond the strict letter of their contract, that they have a right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves.

[1, 2] What was the contract? Upon the execution of the bond appellant became a party to the contract and was bound by its provisions. A bond may incorporate, by reference expressly made thereto, other contracts or written instruments; or it may be conditioned for the performance of agreements set forth in such instruments, in which case the bond and papers referred to should be read together and construed as a whole. 5 Ency. of Law and Proc. 757, and cases cited. This being so, what construction should be put upon the agreement, of which the bond was a part, to furnish all labor and material necessary to build and complete the house? Can it be said that, where a contractor agrees to furnish all the labor and materials necessary to build and complete a house, he may comply with this requirement by simply placing the materials upon the ground, engaging the labor, and leaving the owner to pay therefor, or permit a lien to stand against his property?

[3] Under its contract the surety company bound itself that the contractors would furnish the materials and erect the structure, and faithfully comply with all the terms, covenants, and conditions of the contract. To our mind this case would be easy of solution were it not for the decision in *Boas v. Maloney*, 138 Cal. 105, 70 Pac. 1004, where the precise question arose and was determined. There the contract provided that, in consideration of a sum to be paid in certain installments, Maloney was to furnish the necessary labor and materials, and perform and complete in a workmanlike manner all the new work and repair, etc., according to plans and specifications. The bond given, after reciting certain conditions of the contract, provided: "Now, therefore, if said Maloney shall well and truly perform, observe, abide by each and all the covenants, provisions and obligations contained in said contract, then this obligation shall be discharged and of no further force or effect, but otherwise it shall remain in full force and effect," etc. It will be noticed that the facts are on all fours with the present case so far as the contract itself is concerned. The court said: "The sureties are to be held according to the

strict terms of their contract, and it cannot be extended by implication so as to make them liable beyond its terms. Maloney agreed to build and construct the house for \$2,850. He did the work according to the contract, and has not claimed any more than the \$2,850. He furnished the labor and materials, and did not pay for them, and hence the liens were filed. The amount due for the labor and materials was due from Maloney, and not by the plaintiff. The bond did not provide that the building should be delivered up free from liens. The plaintiff did not require nor did Maloney put such clause in the bond. The fact that the debts due by Maloney became, by virtue of the statute, liens upon the plaintiff's property did not make the sureties liable. They had not agreed to pay such liens nor to be responsible therefor." The court cited to sustain this conclusion the case of *Gato v. Warrington*, 37 Fla. 542, 19 South. 883. The *Maloney Case* has not been followed in this state or elsewhere, and it, with the *Gato Case*, have been referred to with disapproval in various jurisdictions.

In view of the conclusion we have reached that the *Maloney Case* does not lay down the correct doctrine, a somewhat extended review of the authorities seems appropriate. In the case of *Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357, the court rejects the doctrine expressed in *Boas v. Maloney*, supra, and *Gato v. Warrington*, supra. In the course of the opinion the court says: "That the effect of these decisions is that an agreement to furnish work and material to the owner of property for a price paid, which is commensurate with the full value thereof, is performed when the contractor furnishes the work and material at the expense of the owner, so that the latter is compelled to pay for them twice, while the former gets the price for little or nothing. This view failed to commend itself to the Supreme Courts of Indiana and Kentucky, and they held that an agreement to furnish was an agreement to pay for such work and material, and that the owner of the property was entitled to recover of the surety the money paid to discharge liens therefor under a similar contract and bond"—citing *Mackenzie v. School Trustee*, 72 Ind. 189, 196; *Mayer v. Lane*, 116 Ky. 566, 76 S. W. 399, 400. The Michigan Supreme Court in *Stoddard v. Hibbler et al.*, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075, deciding a similar case to the one at bar, commented upon *Boas v. Maloney* as follows: "The court (California) cited to sustain the contention the case of *Gato v. Warrington*. The reasoning of these cases does not commend itself to the court. In view of the statute of this state which entitled laborers and materialmen to liens, it seems to us a most narrow construction to say that, when the



contractor agrees to furnish all labor and material necessary to build and complete a house, he may comply with the requirements by simply placing the material on the ground, engaging the labor, and leaving the owner to pay for it, or to permit a lien to stand against his property. This is not furnishing the materials in any substantial way, and we find that other courts have taken a very different view from that expressed in the cases referred to." In *Mayes v. Lane*, 116 Ky. 566, 78 S. W. 399, the court had this same question under consideration, and it was claimed, as here, on behalf of the sureties, that the terms of their bond were complied with when the material and labor were furnished; that their contract did not require them to protect the owner against the costs of the material and labor. The court held that the contractor had not complied with his contract when he furnished the material and labor unless he also paid for it.

So, also, in the case of *Kiewit v. Carter*, 25 Neb. 460, 41 N. W. 286, where the contractor for the erection of a building gave a bond with sureties to faithfully perform all the covenants and agreements of a building contract, which provided that he was to furnish all materials, it was held that a failure to pay for such materials, whereby a mechanics' lien was filed on the building and lot, was a breach of the condition of the bond, and rendered the builder and his sureties liable thereon. This case was cited with approval in *Friend v. Ralston*, 35 Wash. 424, 77 Pac. 794. To the same effect is *Closson v. Billman*, 161 Ind. 610, 69 N. E. 449. In that case the contract was to furnish all materials and to build and construct a residence. The bond was to construct and complete according to contract and within a time limit. The court held that the provisions of the bond to construct and complete according to contract required the contractor to furnish and pay for the necessary materials so as to deliver them free of lien. The court added: "To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums in excess of the amount stipulated in the contract to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear, but to break it to the hope." The same doctrine is sustained in *McRae v. University of the South* (Tenn. Ch. App.) 52 S. W. 463, where it was decided that although the bond was silent as to liens, and provided for forfeiture merely in case all the requirements of the contract were not carried out, nevertheless it was to be construed as an indemnity bond protecting the obligee against claims for labor and materials furnished.

And again, in *Crowley v. U. S. Fidelity &*

*Guaranty Co.*, 29 Wash. 268, 69 Pac. 784, where it was contended, under a bond with the same conditions as here, that an amount received by lien claimants should not be allowed, because the terms of the bond did not contemplate such damages, it was held that a bond providing that the contractor should perform his contract—which required him to furnish materials and labor—should be construed to obligate him to pay for them, not simply to supply them. The court said: "This is the only reasonable doctrine from such an agreement. If the contractor furnished materials under the contract, for which he did not pay and on account of which liens were filed, it became the duty of the contractor, or in default thereof the surety, to pay these liens; and neglecting to do so and thereby causing damage to the respondent he can recover." To the same point is *Wheeler Osgood v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316, where it was claimed that the provision in the bond requiring the contractor to furnish the material did not mean that he was to pay for it; but the court rejected this contention. It will thus be seen that *Boas v. Maloney*, upon which appellant relies, has not met with approval in other jurisdictions; nor has it been followed by our Supreme Court. The case was decided upon the strict doctrine that sureties are never bound beyond the strict letter of their contract, and that claims against them are strictissimi juris.

[4] Section 2837 of the Civil Code provides that in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. As was said by Mr. Justice Lorigan in *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 Pac. 352: "While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that by an implication something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of strictissimi juris applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that a contract shall not be reasonably interpreted as other contracts are." See, also, to the same effect *Pratt v. Matthews*, 24 Hun (N. Y.) 387.

The obligation of the surety here was that the contractor should faithfully perform the conditions of his contract, and this he did not do. The case of *Russell v. Ross*, 157 Cal. 174, 106 Pac. 583, involved a bond con-

ditioned as here for the faithful performance of a contract. In that case Russell contracted with Ross to build a vessel, and a surety company executed a bond, as here, for the faithful performance of the contract. An examination of the record on appeal in that case will disclose that there was no provision made for the payment of liens in the contract or bond. The contractor abandoned his contract; and Mr. Justice Melvin, speaking for the court in affirming the judgment of Judge Sloss, before whom the case was tried, held the surety company to be liable for the amount of the bond. We are thus of the opinion that the case of *Boas v. Maloney* does not lay down the prevailing doctrine in this state.

It is further claimed by appellant that the record does not show by competent evidence that any of the claims for labor or material satisfied by the owner were valid, or that any of the labor or material alleged to be represented by those claims were furnished to be used, or were used, in the erection of the building, and that the only evidence presented in regard to the same was hearsay and inadmissible. An examination of the record does not support this contention. Plaintiff testified without objection as to the investigation of each of the claims, and was examined by the court as to whether or not the materials were used in the building.

The further objection is made that the evidence fails to disclose proof of the reasonable cost of completion. There is ample evidence to support this finding, as also the finding as to the damages of \$380 for the delay in the completion of the building.

[5] There is, however, a discrepancy between the computation of respondent's claim and the judgment. The items going to make up the cost of the completion of the building appear to be \$907.13, while the judgment was for \$921.80, a difference of \$14.67. This sum deducted from \$1,301.80, the full amount of the judgment, leaves the sum of \$1,287.13. It is not necessary to reverse the judgment or order for this reason, as the error may be corrected by a modification of the judgment. *McConnell v. Water Co.*, 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; *Klokke v. Raphael*, 8 Cal. App. 1, 96 Pac. 392.

It is therefore ordered that the judgment be modified by deducting from the amount thereof the sum of \$14.67, and with this modification the judgment and order denying a new trial are affirmed.

We concur: LENNON, P. J.; HALL, J.

**CALLAN v. EMPIRE STATE SURETY CO.**  
et al. (S. F. 6,444.)

(Supreme Court of California. Feb. 1, 1913.)

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Callan against the Empire State Surety Company and others. Judgment for plaintiff in the District Court of Appeal (129 Pac. 978), and defendant named petitions for hearing in the Supreme Court. Petition denied.

George F. Hatton and Hartley F. Peart, both of San Francisco, for appellant. William S. Downing, of San Francisco, for respondent.

**PER CURIAM.** The petition for hearing in the Supreme Court is denied and we agree with the reasoning of the District Court of Appeal, to the effect that *Boas v. Maloney*, 138 Cal. 105, 70 Pac. 1004, is no longer to be regarded as authority.

### BOHN v. BOHN. (L. A. 2,743.)

(Supreme Court of California. Jan. 18, 1913.)

#### 1. VENUE (§ 32\*)—WAIVER OF OBJECTION.

Although, under the express provisions of Code Civ. Proc. § 396, a defendant has an absolute right to have an action in claim and delivery tried in the county in which he resided at the commencement of the action, this right is waived, unless asserted in the proper manner.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.\*]

#### 2. VENUE (§ 58\*)—CHANGE—PROCEDURE.

Although Code Civ. Proc. § 396, requires a defendant desiring a change of venue to the proper county to file an affidavit of merits and a demand in writing for the change, the filing of the demand and affidavit does not in itself change the place of trial; a motion being necessary under section 397, providing that the court may, on motion, change the place of trial, when the county designated is not the proper county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 88-90; Dec. Dig. § 58.\*]

#### 3. VENUE (§ 63\*)—CHANGE—NOTICE OF MOTION.

A motion to change the place of trial of an action in claim and delivery to the county where defendant resided at the commencement of the action must be on notice to the adverse party.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104-108; Dec. Dig. § 63.\*]

#### 4. VENUE (§ 63\*)—CHANGE—NOTICE OF MOTION—SUFFICIENCY.

Under Code Civ. Proc. § 1010, providing that notice must be in writing, and that notice of a motion, other than for a new trial, must state when and the grounds upon which it will be made, a formal motion for change of venue, served on the attorneys for the adverse party, is insufficient as a notice of motion, where it does not state when the motion will be brought on for hearing, although the court has designated certain days for the hearing of motions.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104-108; Dec. Dig. § 63.\*]

#### 5. COURTS (§ 91\*)—RULES OF DECISION—DECISIONS OF INTERMEDIATE COURT.

The Supreme Court, by refusing to transfer a cause from the District Court of Appeal for hearing and determination, does not adopt the opinion of the Court of Appeal, so as to

give such opinion the authoritative effect of a Supreme Court decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 813, 825, 826; Dec. Dig. § 91.\*]

**6. COURTS (§ 90\*)—RULES OF DECISION—PREVIOUS DECISIONS AS PRECEDENTS.**

An order properly made will be affirmed, even though the court has, in another case, reversed an order similar in all respects.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 813-821, 351; Dec. Dig. § 90.\*]

**7. MOTIONS (§ 23\*)—NOTICE—WAIVER.**

While the want of proper notice of a motion is waived, where the opposing party appears and contests the motion on the merits, the opposing party does not waive want of notice by merely appearing for that purpose and objecting to consideration of the motion because of the insufficient notice.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 20; Dec. Dig. § 23.\*]

**8. APPEAL AND ERROR (§ 882\*)—REVIEW—IN- VITED ERROR.**

Where defendant persisted in presenting his motion for a change of venue in the face of plaintiff's objection to its consideration for want of notice, he cannot complain because the court denied the motion, instead of deferring action to enable him to give the proper notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Samuel Bohn against John L. Bohn. From a judgment for plaintiff, and from an order denying a change of venue, defendant appeals. Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant. Williams & Rutan, of Santa Ana, for respondent.

**SLOSS, J.** A hearing in bank was ordered after judgment in department. Upon the former submission, the following opinion, prepared by Lorigan, J., was filed:

"This action is in claim and delivery, and was brought in the superior court of Orange county.

"Defendant, being served, filed a demurrer to the complaint on April 22, 1910, and on the same day filed and served, on the attorneys for plaintiff, an affidavit of merits, and a demand that the action be transferred for trial to the superior court of Los Angeles county, on the ground that, at the time of the commencement of the action, defendant was a resident of the city and county of Los Angeles. At the same time he filed and served the following motion, entitled in the court and cause: 'Now comes \* \* \* the defendant \* \* \* and moves this honorable court to transfer the above-entitled action \* \* \* to the superior court of Los Angeles county, upon the ground [setting it forth as above]. Said motion will be based on the pleadings and papers on file herein, and the affidavit and demand of the defendant herewith served and filed.'

"On the filing of these papers, the clerk of

the court placed said motion on the regular law and motion calendar of said court for Friday, April 29, 1910. On that date defendant presented his motion for transfer of the cause, and plaintiff objected to the granting thereof on the ground that the notice of motion was insufficient in that no time of hearing was designated in said notice of motion, and on the further ground that no sufficient service of notice of motion had been given. In support of the last ground, an affidavit of one of the attorneys for plaintiff was filed, showing that, when service of the above papers were made on which the motion for a transfer was based, the attorneys for plaintiff and the attorney for defendant resided and had their offices in Orange and Los Angeles counties, respectively.

"The court heard said motion, the above papers and no others being used on the hearing thereof, and then and there entered an order denying said motion for a transfer of said cause, to which ruling and order the defendant excepted.

"Subsequently the demurrer to the complaint was sustained, and plaintiff filed an amended complaint. The time stipulated within which defendant might answer having expired, and no answer being filed, his default was entered and judgment given for plaintiff for the recovery of the property or its value and damages. Defendant appeals from the judgment; the appeal being based on the judgment roll, accompanied by a bill of exceptions, under which (and this is the only question presented) the validity of the order denying the motion for transfer of the cause is attacked.

"Several sections of the Code of Civil Procedure are to be considered in determining this question. Section 395 thereof provides, as to actions of the character brought here, that 'the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.' Section 396 provides that, 'if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless defendant at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.'

"The claim of appellant is that, under the first section referred to, an absolute right is given a defendant to have the action brought against him tried in the county where he resided when it was commenced, and that, under section 396, all that is necessary to be done by a defendant to secure that right is to serve and file the affidavit, and demand that the trial be had in the proper county, as provided in the section; that no motion as such, or notice of motion, is necessary or provided for; that the demand is all the notice that is required to bring it on for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hearing, where the court has established regular law and motion days, as was the case in Orange county. We state these points as appellant makes them.

[1, 2] "Undoubtedly, as he claims, a defendant has the absolute right to have the action brought against him tried in the county where he resided at the time it was brought. But this pertains to the right, not to the remedy by which it may be secured. While an absolute right, if it is insisted on, it is one which a defendant may waive, and which he does waive, unless he follows the procedure provided for asserting it. This procedure, however, is not regulated solely by section 396, but by section 397, also, which provides, among other things, that: 'The court may, on motion, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county.' Under the position which appellant takes, he necessarily denies, and consistently so, the application of this latter section, contending that his rights are to be measured by the terms of section 396 alone. But it is quite obvious, on a little reflection, that this cannot be so. Our attention has not been called by counsel on either side to any decision directly involving this point. Our own research discloses numbers of decisions on appeal where the validity of orders granting or refusing a transfer were involved; but the point considered was generally the sufficiency of the demand or affidavit of merits, a motion and notice of hearing thereof being given, as is the practice. That this is the proper and required procedure, we think quite plain.

"The demand and affidavit which are required to be filed under section 396 are not addressed to the court, nor do they of themselves, by virtue of such filing, call for or require any action by the court. They advise the plaintiff that the right of transfer shall be insisted on, and their service and filing are the initial steps required to be taken as between the parties to secure that transfer. The filing of the demand and affidavit do not operate ipso facto to change the place of trial. They have no such force. The change can only be effected through an order of the court, after its judicial action has been invoked by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer. Such application is a motion (section 1003, Code Civ. Proc.); and under section 397, *supra*, a motion for the change must be made, in addition to the demand and affidavit, as one of the necessary steps in the procedure to obtain the order of transfer.

[3] "Having determined that a motion is necessary, we now come to the question of notice and its character. It is, of course, beyond question that, where a motion is required to be made for an order in a cause

whereby the right of an adverse litigant may be affected, it must be upon notice to such party.

[4] "Now as to the character of the notice necessary to be given to authorize a court to entertain a motion. This is clearly shown by section 1010, Code of Civil Procedure, as follows: 'Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based.'

"In the present matter, if the formal motion which appellant served on the attorneys for plaintiff be treated as a notice of motion, it was radically defective, as such, in the very essential particular that it did not state any time when the motion would be made or brought on for hearing, and for that reason the motion for a change of the place of trial was properly denied.

"In this view, we do not deem it necessary to consider the objection urged by respondent at the hearing below, and insisted on here, of insufficiency of service of the notice to warrant a hearing on the day when appellant presented his notice. Nor is it necessary to particularly discuss the claim made by appellant, based on the existence of the rule of the superior court of Orange county respecting law and motion days. Rules of court have usually to do with the conduct and orderly dispatch of the business of the court, and cannot control or be substituted for statutory provisions as to procedure. The rule relied on by appellant simply provides when the court will take up, for consideration, motions of the contemplated presentation of which proper notice has been given. It could not, and of course does not, pretend to dispense with the notice which the Code declares shall be given to authorize it to hear a motion.

"Appellant suggests that, as the provisions of section 396 are remedial, a liberal construction in favor of the remedy should prevail. It would, if there was any room for such a construction, but there is not. The rule of liberal construction may not be applied to excuse a failure to adopt the rules of necessary procedure under which alone the remedy may be invoked.

"The judgment and order appealed from are affirmed."

[5, 6] Our further examination of the case has led us to the conclusion that the department opinion was correct. The principal reason for granting a hearing in bank was that, in a case between the same parties, presenting precisely the same issues of fact and law, the District Court of Appeal for the Second appellate district had reversed an order like the one here appealed from, and that a petition to have the appeal transferred to this court for hearing and determination had been denied. *Bohn v. Bohn*, 16 Cal. App. 179, 116 Pac. 568. It is, of course, much to be

regretted that opposite rulings should be made in two cases which present identical questions. But an order by this court, refusing to transfer a cause after judgment in the District Court of Appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the District Court of Appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects.

[7] One or two further observations concerning the disposition of the former appeal may properly be made. The justices of the District Court of Appeal did not agree upon the reasons for reversing the order appealed from. Two of them based their conclusion upon the ground that a written notice of intention to move is not required in the case of an application to change the place of trial to the proper county. This position is, we think, fully met in the foregoing department opinion. The third justice held that the conduct of plaintiff's counsel in appearing to oppose the granting of the application was a waiver of notice. There are several decisions to the effect that want of proper notice of a motion is waived where the opposing party appears and contests the motion. *McLeran v. Shartzler*, 5 Cal. 70, 63 Am. Dec. 84; *Reynolds v. Harris*, 14 Cal. 687, 76 Am. Dec. 459; *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. "Where the object of notice was accomplished," said the court in *McLeran v. Shartzler*, *supra*, "it is immaterial whether there was notice or not." But, in all the cases in which this rule was applied, the party entitled to notice had appeared and contested the motion on the merits. His position was analogous to that of a defendant who, although not regularly served with summons, files an answer, or does any other act amounting to a general appearance. Under such circumstances, any defect in the service of process is waived. Here, however, the plaintiff made no opposition to the motion,

except to object to its consideration upon the ground of the insufficiency of notice. The affidavit presented by him had reference to this objection alone. His attitude is to be compared to that of a defendant appearing specially to question the court's jurisdiction of his person. It is difficult to see how a defendant can be held to have waived a valid objection, when he has done no more than to insist upon it in the only manner that is open to him. Where the appearance in opposition to a motion is for this limited purpose, it does not constitute a waiver. 28 Cyc. 8; *Curtis v. Walling*, 2 Idaho (Hasb.) 416, 18 Pac. 54; *Wood v. Critchfield*, 1 Dowl. 587.

[8] It is suggested that, if sufficient notice had not been given, the court below should not have denied the application for change of venue, but should have deferred action to enable the defendant to give a proper notice. This would, no doubt, have been a proper course, if the defendant had requested it. But, instead of so requesting, he persisted, in the face of the objection of want of notice, in presenting his motion. No doubt he then took the position which he now advances, viz., that no notice was required. Under these conditions, he cannot claim that the court erred in passing upon the motion which he had thus pressed upon it for determination. It may be, too, that a denial of the motion for want of notice would not be a bar to a subsequent motion upon proper notice. But the question of defendant's right, if seasonably asserted, to renew his motion is not involved here.

The department opinion states that the appeal is from the judgment. It omits to mention, except inferentially, that there is also an appeal from the order denying a change of place of trial. Since the latter order is itself appealable (Code Civ. Proc. § 939), its correctness cannot be reviewed on the appeal from the judgment. Code Civ. Proc. § 956. Under the views herein expressed, both the judgment and the order will have to be affirmed, the former because the points raised cannot be considered on appeal from the judgment, the latter because there is no merit in said points.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

**O'BRIEN v. NELSON et al.** (S. F. 6,119.)  
(Supreme Court of California. Jan. 21, 1913.  
Rehearing Denied Feb. 20, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 20\*)—  
PROCEEDINGS FOR APPOINTMENT—TITLE OF  
PROCEEDING.**

On an appeal from an order denying a new trial of an application for letters of administration, the title of the cause should be "In the Matter of the Estate of N. Deceased," and not "O. [the petitioner] v. N. [the contestant]."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 23\*)—  
APPOINTMENT AFTER FINAL SETTLEMENT OF  
PRIOR ADMINISTRATION.**

After final settlement of an estate, the court having probate jurisdiction is not bound to, and should not, issue further letters of administration, unless there still remains property not fully disposed of, or some act to be done relating thereto which only an administrator can do, especially in view of Code Civ. Proc. § 1698, providing that the settlement of an estate shall not prevent the issuance of further letters, if other property be discovered, or if good cause appear therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 128-131; Dec. Dig. § 23.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 315\*)—  
SETTLEMENT OF ESTATE—CONCLUSIVENESS.**

An administration proceeding, or the decree of final settlement, was not void because the court erroneously held that all the property was community property and distributed it to the surviving husband's grantee; but such error should have been corrected by motion for a new trial, or an appeal, and, in the absence of such proceedings for a review, the decree was final and conclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding by P. J. O'Brien against C. O. Nelson and another for letters of administration on the estate of Annie Nelson. From an order denying the application, the petitioner appeals. Affirmed.

J. C. Black, of San Jose, for appellant.  
A. A. Caldwell, of San Jose, for respondents.

SHAW, J. [1] We give the title as above set forth, because it so appears in the transcript and papers filed in this court. The correct title of the cause would be: "In the Matter of the Estate of Annie Nelson, Deceased." The appeal is taken from an order denying the appellant's motion for a new trial in the matter of his application for letters of administration upon the estate of said Annie Nelson. The application was contested by C. O. Nelson and Annie Reardon, the matter was duly tried, findings were made and filed, and the order denying said petition was entered on March 13, 1911.

[2] Annie Nelson died intestate on February 19, 1910. The application of the appel-

lant for letters of administration upon her estate was filed on December 2, 1910. The evidence showed that there had been a previous administration of the estate, that the same had been fully completed and distribution thereof made, and that the decree of distribution had become final at the time of the hearing of the contest. Annie Reardon was appointed administratrix thereof on March 19, 1910, and the decree of distribution was made on September 30, 1910. The proceedings were in all respects regular. It is admitted that the petition upon which she was appointed contained a statement of all the facts necessary to confer upon the court jurisdiction of the matter of the administration of the estate and that the required notices were duly given. It is not claimed that there remains any estate not administered. Indeed, the property described in the petition of the appellant as the property of said decedent is precisely the same as that described in the former petition of Annie Reardon and in the said decree of distribution. It is well established that, after final settlement of an estate, the court having probate jurisdiction is not bound to issue further letters of administration, and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. *Murphy v. Menard*, 14 Tex. 67; *San Roman v. Watson*, 54 Tex. 254; *Wilcoxon v. Reese*, 63 Md. 545; *Myers v. Baltimore, etc., Co.*, 73 Md. 425, 21 Atl. 58; *Grayson v. Weddle*, 63 Mo. 539; *Long v. Joplin, etc., Co.*, 68 Mo. 427; *Haven v. Haven*, 69 N. H. 204, 39 Atl. 972; *Glover v. Hill*, 85 Ala. 41, 4 South. 613. This is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate, as provided in the Code, shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor. The implication is that there should be no issue of subsequent letters, where no other property is discovered, and no good cause appears therefor.

[3] The appellant claims that the former administration was void or ineffectual, because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and C. O. Nelson, her surviving husband, and distributed it all to Annie Reardon, to whom Nelson had conveyed all his title and interest therein. This does not make the proceedings or decree void. At the most it was a mere error, a mistake injurious to the persons who would have inherited the property from Annie Nelson, if it had been her separate estate, and which they could correct only by moving for a new trial, or by taking an ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

peal from said decree. In the absence of such proceedings for a review of that decree, it became final and conclusive upon all heirs, legatees, and devisees. Code Civ. Proc. § 1668. If, as a matter of fact, the property did belong to C. O. Nelson, as the survivor of the community, it did not form any part of the estate of his wife, it is no part of that estate at the present time, and no administration of her estate should be had to interfere with it. If it was her separate estate, then, as before stated, the distribution of it to the grantee of Nelson was final and conclusive, and no further administration of it can be made.

We do not deem it necessary to notice the other points made in support of the appeal. There is no dispute regarding the facts above stated, and they conclusively sustain the decision of the court below.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

BAUMANN et al. v. KUSIAN et al. (FISCHER, Intervener). (Sac. 2,010.)

(Supreme Court of California. Jan. 23, 1913.)

1. WILLS (§ 58\*)—CONTRACT TO DEVISE.

An agreement to rear and educate, in a suitable manner, two children procured from an orphans' home, and to treat them in all respects as their own, was not an agreement to will property to the children; no legal obligation resting on any parent to will any property to any child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.\*]

2. SPECIFIC PERFORMANCE (§ 25\*)—CONTRACT TO DEVISE—VALIDITY.

To warrant specific enforcement of a contract to will property, the contract must be definite and certain, and also just and fair.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-58, 60; Dec. Dig. § 25.\*]

3. SPECIFIC PERFORMANCE (§ 49\*)—CONTRACT TO DEVISE—CONSIDERATION.

That plaintiffs, who, while children, were taken from an orphans' home by the deceased, agreed to remain with her for an indefinite time, conducting themselves as dutiful children and rendering dutiful services, without making any sacrifice of present or prospective advantage or doing more than it was their duty in return for the care taken of them, was not such a sufficient consideration for a contract by the deceased to will them her property as to warrant a court of equity in enforcing such contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Mrs. Minnie Baumann and another against F. G. Kusian and others, in which Lucie Fischer intervened. From a judgment that plaintiffs take nothing, they appeal. Affirmed.

McCoy & Gans, of Red Bluff, for appellants. W. P. Johnson and W. A. Fish, both of Red Bluff, for respondent intervenor. John J. Wells, of Red Bluff, for other respondents.

ANGELLOTTI, J. The demurrers of the defendants and intervenor to plaintiffs' amended complaint, on the ground that the same does not state facts sufficient to state a cause of action, having been sustained without leave to amend, judgment was given that plaintiffs take nothing. This is an appeal by plaintiffs from such judgment.

The action is one to obtain a decree declaring the plaintiffs to be the owners of, and entitled to receive, all the property of one Christiane W. Fischer, deceased, subject to the administration of her estate pending in the superior court of Tehama county; their claim being substantially that deceased had contracted to leave all of her property to them when she died, and had failed to do so. The defendants are heirs of deceased, and the intervenor is an adopted daughter. The action is thus practically one against the heirs of deceased to specifically enforce an alleged contract of deceased, by which she agreed to make a will in favor of plaintiffs.

The amended complaint substantially alleges as follows: On September 28, 1892, deceased and her husband, Herman A. F. W. Fischer, executed mutual wills, each leaving to the other all of his or her property. On October 8, 1892, each executed a codicil providing that no part of his or her estate should go to a specified adopted daughter, and reaffirming the will in all other respects. Mr. Fischer died November 29, 1908, and under his will all of the property of his estate was distributed to Mrs. Fischer. Mrs. Fischer died December 28, 1910, leaving no lineal descendant, and leaving all the property acquired from her husband's estate and other property, the same being of the value, after the payment of debts and expense of administration, of not exceeding \$12,000. She made no other will than that above referred to, and this will has been admitted to probate. On April 9, 1896, plaintiffs, who were in no way related to either of the Fischers, were, and for some years had been, orphan children, and were inmates of "the Five Points House of Industry" of the city of New York, state of New York, being cared for thereby. They were respectively 11 and 14 years of age. On or about April 9, 1896, the Fischers, who then lived in the state of Iowa, took them from said institution to their home. Plaintiffs remained with the Fischers at their home in Iowa until January, 1901, when the Fischers moved to Corning, Cal.; the plaintiffs accompanying them. They continued to live with the Fischers in California until their respective marriages. Plaintiff Minnie Baumann was married in October, 1905, and plaintiff Jennie Eriksson

was married in September, 1903. From April 9, 1896, until their respective marriages, each bore the name of Fischer as her family name, and during the whole of said period each treated the Fischers as her lawful parents, and rendered to them "dutiful service."

At the time the Fischers took the plaintiffs from said institution, they promised and agreed that "they would take said plaintiffs to their home and would take good care of them, and would rear and educate them in a suitable and proper manner, and that they would treat them in all respects as their own children." The plaintiffs were then being well cared for and well reared and educated in said institution; and, if the Fischers had not taken them, they would have continued to have been well cared for and educated therein, or placed in some suitable family for such care and education. The authorities of said institution would not have permitted the Fischers to take plaintiffs, if it had not been for such promises and agreements on their part. Such promises and agreements were made by the Fischers for the purpose of securing plaintiffs from said institution.

On divers occasions, while plaintiffs were living with the Fischers in Iowa, they "became homesick to return to the said Home in New York." The Fischers promised and agreed to and with them that, "if they would remain with them at their said home in Iowa, they would rear and educate them in a suitable and proper manner, and treat them in all respects as their own children, and that they (said plaintiffs) should have the property of the said Fischers," and frequently told them that they had adopted them, and that they should have their property, and that they had made a will for them. Plaintiffs believed all these statements, and on account thereof remained with the Fischers. They would not have so remained but for said promises and agreements. The Fischers made such promises for the purpose of inducing plaintiffs to remain with them as their own children. When, in 1901, the Fischers were about to move to California, they renewed such promises, and because thereof plaintiffs came to California with them, and would not otherwise have come. After coming to California, the Fischers renewed said promises, "from time to time, \* \* \* and up to the time of and even after the marriage of plaintiffs."

It was substantially alleged that plaintiffs can be adequately compensated for the injury caused by the failure of the Fischers to leave them their property only by being awarded the residue of the property of Mrs. Fischer after the payment of debts and expenses of administration. Although a failure on the part of both the Fischers to perform any of their promises and agreements is alleged, we do not understand that plaintiffs claim any part of the estate, or, indeed, any

relief whatever, on account of any alleged failure on the part of the Fischers, except that relating to the alleged promise to leave their property to them. Obviously, plaintiffs are seeking specific enforcement of the alleged contract only in so far as that part thereof is concerned; and, in determining whether they are entitled to such relief, it cannot at all assist them that the Fischers failed and neglected to perform other alleged promises and agreements. The general allegations as to such other failures and neglects may therefore be entirely disregarded.

[1] It is clear enough, from what we have said, that the complaint does not show any promise or agreement on the part of the Fischers before they received these orphan children from the New York institution and took them to their home in Iowa, to the effect that they would bequeath or devise to them any of their property. Upon this point, we cannot do better than to quote from the opinion of the learned trial judge, which is contained in respondents' brief. He said: "The terms on which they were to take and rear and educate the plaintiffs were fixed before they left the home in New York. Those terms were, on the part of the Fischers, that they would take the plaintiffs to their home in Iowa and take good care of them and rear and educate them in a suitable manner, and treat them in all respects as their children. This was the whole offer on their part; and, by its acceptance by those acting on behalf of the plaintiffs, it became the terms of the contract. There is nothing in this contract about making a will and leaving the plaintiffs property. Property is not mentioned. It does state that the Fischers agreed to treat them as their own children. But this does not imply that they would get the Fischers' property. There is no legal obligation resting on any parent to will any property to a child, if he does not feel so disposed; and, if he does not, the child has no cause of action."

[2] It is well settled that, to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. See *Owens v. McNally*, 113 Cal. 444, 451, 45 Pac. 710, 33 L. R. A. 369, and cases there cited. Certainly there is nothing alleged in the complaint, as to the agreement made in New York, that warrants a conclusion that such agreement is definite and certain to the effect that the Fischers undertook to bequeath or devise any property to plaintiffs, or even to make them their heirs, by legally adopting them as their own children.

[3] We are thus brought to what subsequently took place in Iowa between 1896 and the removal to California in 1901 as the sole basis of plaintiffs' claim. On divers occasions plaintiffs "became homesick to return to the said home in New York," and would not have remained with the Fischers but for



the promises and agreements then made by them to and with plaintiffs, to induce them to remain. Those promises and agreements were that, "if they (plaintiffs) would remain with them at their said home in Iowa," in addition to the fulfillment of the promises made in New York by the Fischers, plaintiffs should have the property of the Fischers, and that they (the Fischers) had adopted them and made a will for them. When about to come to California in 1901, the Fischers renewed said promises and statements, and because thereof plaintiffs came with them, and would not otherwise have come. During all the time plaintiffs were with the Fischers, they were "dutiful children" to them, and rendered "dutiful service" to them. Said promises and agreements, and statements were renewed from time to time after the said coming to California, and even after the marriage of plaintiffs.

It is to be noted that there is no express allegation in the complaint as to what plaintiffs agreed to do in consideration of the alleged promises on the part of the Fischers, except in so far as such undertaking may be implied from the allegations as to what they in fact did, namely, remained with the Fischers, both in Iowa and California, as a part of the family, until their respective marriages, and during all of said time conducted themselves as "dutiful children" to them, and rendered "dutiful service" to them. It is nowhere expressly alleged that there was ever any stipulation on the part of plaintiffs as to the time during which they were to continue to live with the Fischers, or as to the kind of service they were to render them.

The principle applicable to cases of this character was stated by this court in *McCabe v. Healy*, 138 Cal. 81, 84, 70 Pac. 1008, quoting from *Pomeroy on Specific Performance*, as follows: "Courts of equity will, under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition; and this may be done, even when the agreement was parol, where, in reliance upon the contract, the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud upon him. The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement." The same doctrine had been substantially declared in an earlier case (*Owens v. McNally*, 113 Cal. 444, 448, 45 Pac. 710, 33 L. R. A. 369), and the views expressed in these two cases have been followed in subsequent cases. It is entirely unnecessary in this case to consider to what extent the doctrine of these

cases has been affected by the amendment of section 1624 of the Civil Code in the year 1905, by which a new subdivision was added to said section, including such contracts among those declared by the section to be invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent.

The facts alleged in the amended complaint are not such as to serve as a basis for a very strong appeal to the sense of justice of a court of equity, on the theory that there was such a change of conditions and relations on the part of plaintiffs, made in reliance on any promise or promises of the Fischers, that it would be a fraud upon them not to give them the Fischer property. When originally taken by the Fischers, they were orphan children, aged, respectively, 11 and 14 years, without a single relative on earth, so far as appears, and without any friend or home, except such as was afforded them by the charitable institution of which they were inmates. They could expect nothing therefrom, except such care, support, and education as are ordinarily afforded by such an institution, until such time as they might be placed in some family under such terms as the Fischers agreed to with the authorities of the institution. It is not to be assumed that they would have fared better in any other family than they did with the Fischers. They were furnished by the Fischers with a home until their respective marriages. So far as appears, they gave up and sacrificed absolutely nothing in the way of present or prospective advantage by remaining with the Fischers. This is especially true as to the situation when any alleged promise as to property was made; none of which promises is alleged to have been given until after they went to Iowa. Up to this time, certainly, as was stated by the learned judge of the court below: "It seems to have been just the ordinary case of a person taking a child from an orphan asylum to rear and educate it for whatever services it might render and for its companionship." There is nothing to indicate that it would have been to plaintiffs' advantage in any way to leave the Fischers, or to return to the charitable institution in New York, if they could have done so, or to remain in Iowa when the Fischers came to California. While with the Fischers, they are not alleged to have rendered any unusual service. They simply conducted themselves as "dutiful children" and rendered "dutiful service." They certainly have received, so far as appears, what would ordinarily be considered adequate compensation for all they have given.

As we have said, it is settled that, to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. It is also settled that it must be just and fair. It was said in

Owens v. McNally, supra: "But the question whether relief should be granted or denied in a particular case addresses itself to the conscience of the chancellor; and, before a plaintiff entitles himself to it, many considerations enter and are to be weighed. \* \* \* Where a contract such as this, resting in parol, and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract."

We have already pointed out wherein the alleged contract is vague and uncertain as to the undertaking of plaintiffs, in consideration of which the alleged promises on the part of the Fischers were made. From what we have said as to the facts of this case, as alleged in the complaint, we are of the opinion that it also sufficiently appears that there was no such showing of adequacy of consideration for the alleged promise of the Fischers in regard to their property as to appeal to a court of equity as requiring specific enforcement, in the face of the rule that the contract must be just and fair. That plaintiffs agreed simply to remain with the Fischers for some unspecified and indefinite time, conducting themselves during said time as "dutiful children" and rendering "dutiful service," which is substantially all that appears, is, under all the circumstances of this case, far from such a fair and adequate consideration as would appeal to a court of equity as being fair and just. And, finally, we agree entirely with what was said by the learned judge of the trial court, to the effect that it is not perceivable how the plaintiffs made such a sacrifice of present or prospective advantages, in reliance upon the alleged statements of the Fischers, that it would now be a fraud upon them not to give them the Fischer property.

In one or two of the cases cited by learned counsel for plaintiffs, relief in the nature of specific enforcement was given, although it does not appear from the opinion that there was any explicit promise in the matter of property. Such a promise appears to have been implied in one case from an undertaking to provide for the child and bring her up as her own (*Van Tine v. Van Tine* [N. J. Ch.] 15 Atl. 249, 1 L. R. A. 155), and in the other from a written statement in adoption proceedings, which proved abortive to the effect that the deceased and his wife intended to make the child their heir. *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 193. Both cases were, by reason of their peculiar circumstances, what are called "hard cases," and the opinion in the last case cited was by a divided court; two out of five

justices dissenting. We cannot at all accede to the view that relief may be given in such a case, in the absence of a clear and definite promise, on the part of the deceased, to the effect that the child shall have his property, or some specified portion thereof, when he dies. We say this much with reference to the understanding and agreement at the time the Fischers took the plaintiffs in New York.

We find nothing in any of the other cases cited that requires notice. Each case must necessarily depend upon its own peculiar circumstances. We are satisfied that the lower court did not err in sustaining the demurrer to the amended complaint.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

### PRITCHARD v. WHITNEY ESTATE CO. (S. F. 5733.)

(Supreme Court of California. June 13, 1912.  
On Rehearing in Bank, Jan. 20, 1913.)

#### 1. DEATH (§ 14\*)—RIGHT OF ACTION FOR WRONGFUL DEATH—STATUTES—"RECEIVED AS AFORESAID."

Civ. Code, § 1970, provides that an employer is not liable for an injury to his employé caused by the negligence of another servant, unless he has not used proper care in selecting the other servant, or the negligent servant was a superior, or was engaged in another line of work; that knowledge by an employé injured because of defective character of any appliances shall not be a bar to a recovery, unless such employé appreciated the danger; and that when death, whether instantaneous or otherwise, results to an employé from an injury received as aforesaid, the personal representative of such employé shall have a right of action on behalf of a widow, children, dependent parents, and dependent brothers and sisters in the order of precedence as stated. *Held*, that the phrase "received as aforesaid," used in the third clause of the act, refers, not only to injuries from defective ways and appliances, but to injuries because of the negligence of fellow servants, and therefore the administrator of an employé killed by reason of the negligence of a servant in another line of work is given no right of action to recover damages suffered by a dependent nephew.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

#### 2. DEATH (§ 9\*)—WRONGFUL DEATH—RIGHT OF ACTION.

Code Civ. Proc. § 377, which was enacted long prior to Civ. Code, § 1970, provides that, when the death of a person is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person, then also against such other person. *Held*, that as the Civil Code, which supersedes the Code of Civil Procedure in case of conflict, gives no right of action for the benefit of a nephew, the administrator of a deceased servant killed because of the negligence of a servant in another line of work can maintain no action for the damages suffered by a dependent nephew of the decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## On Motion for Rehearing.

## 3. STATUTES (§ 117\*)—TITLE—CONSTITUTIONAL PROVISION.

St. 1907, p. 119, entitled "An act to amend section 1970 of the Civil Code relating to the responsibility of employers for injuries or death to employes," is not in violation of Const. art. 4, § 24, declaring that every act shall embrace but one subject, which shall be expressed in its title, because, in addition to fixing the responsibility of the employers, it declares who may sue for damages resulting from the death of employes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 154-157; Dec. Dig. § 117.\*]

## 4. ABATEMENT AND REVIVAL (§ 54\*)—PERSONAL INJURY.

At common law an heir has no right of action for an injury to his ancestor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-258, 260-278; Dec. Dig. § 54.\*]

## 5. DEATH (§ 9\*)—STATUTES (§ 72\*)—CONSTITUTIONAL LAW (§ 205\*)—CLASS LEGISLATION—UNIFORM OPERATION.

St. 1907, p. 119, amending Civ. Code, § 1970, and giving a right of action for damages against an employer in favor of the widow, children, dependent parents, and brothers and sisters of an employe whose death is caused from negligence of a fellow servant, is not in violation of Const. art. 1, §§ 11, 21, requiring general laws to have uniform operation, and forbidding a grant of special privileges to one citizen or class which are not given on the same terms to all because failing to grant such right in favor of the husband, nephews, nieces, or other collateral heirs of the deceased employe, for at common law an heir had no right of action for an injury to his ancestor, and in creating new rights of action the Legislature may in its discretion determine how far it will extend them.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\* Statutes, Cent. Dig. § 72; Dec. Dig. § 72.\* Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

## 6. CONSTITUTIONAL LAW (§ 205\*)—STATUTES (§ 72\*)—SPECIAL PRIVILEGES.

A law establishing rules of liability for negligence applying only to actions arising from the relation of master and servant does not violate Const. art. 1, §§ 11, 21, forbidding grant of special privileges, and requiring general laws to have uniform operation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\* Statutes, Cent. Dig. § 72; Dec. Dig. § 72.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Joseph A. Pritchard, as administrator of the estate of Albert D. Shepard, deceased, against the Whitney Estate Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Rothchild, Golden & Rothchild, and J. A. Pritchard, all of San Francisco, for appellant. Samuel Rosenheim and Bernard Silverstein, both of San Francisco, for respondent. Frank H. Short and F. E. Cook, both of Fresno, and L. A. Redman, of San Francisco, amici curiae.

MELVIN, J. A demurrer to the complaint in this case having been sustained without

leave to amend, and the judgment having been accordingly entered in favor of the defendant, an appeal therefrom is taken by plaintiff.

[1] The action was commenced by the administrator of the estate of Albert D. Shepard on behalf of a nephew of the deceased for damages alleged to be due by reason of the death of said Shepard caused by the negligence of defendant's servant. There were three counts in the complaint, all of them setting forth the alleged interest of Wayne Shepard, the minor in whose behalf the action was brought. According to these averments, Albert D. Shepard was over the age of 21 years. He was a housesmith, earning from \$7.50 to \$20 a day, was employed to place certain iron fittings in and about the elevator shafts in defendant's building, and in the performance of said work it became necessary for him to project himself into the elevator shafts, as defendant well knew. While he was so performing his duties, defendant's night watchman negligently set in motion one of the elevators, which, striking Albert D. Shepard, caused his death. There was no contributory negligence on the part of said Albert D. Shepard. It was further alleged that Albert D. Shepard left surviving him two brothers and Wayne Shepard, aged six, the son of a deceased brother; that Wayne's mother was in impoverished circumstances, and was unable to maintain her child; that Wayne Shepard was supported by his uncle Albert; that the latter regularly contributed sums varying from \$50 to \$75 per month for the maintenance of his said nephew; that plaintiff knew of no damage sustained by the brothers of the deceased; and that Wayne Shepard was damaged in the sum of \$25,000 for the carelessness of defendant in causing the death of Albert D. Shepard.

Appellant insists that section 1970 of the Civil Code, which was adopted many years after section 377 of the Code of Civil Procedure went into effect, does not repeal the latter section, but that the right of action is cumulative with that conferred by the Code of Civil Procedure. Appellant's theory of the relation between these two sections is that while the third paragraph of section 1970, Civil Code, may in some degree modify the right of action conferred by section 377, Code of Civil Procedure, it restricts that right of action only so far as it would arise from a state of facts contemplated by the second paragraph of section 1970, Civil Code, and in no manner changes the right of action conferred by the Code of Civil Procedure arising by reason of the death of an employe caused by the negligence of a fellow servant in a different department of labor. In order that we may the better analyze these theories it may be well to quote the two sections:

"Sec. 1970 (Civ. Code). An employer is not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured, and also when such injury results from the wrongful act, neglect or default of a coemployé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employé injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop or other industrial establishment. Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof. When death, whether instantaneous or otherwise, results from an injury to an employé received as aforesaid, the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of, the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery. Any contract or agreement, express or implied, made by any such employé to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employé or his personal representative of any right or remedy to which he is now entitled under the laws of this state. The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

"Sec. 377 (C. O. P.). When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

We can see no reason for adopting the reading which would make the words "received as aforesaid" refer only to the second paragraph of section 1970 of the Civil Code. The main purpose of the amendment to that section, adopted in 1907, was the modification of the "fellow servant" doctrine, whereby only pleading and proof that the injury or death was caused by the negligence of a coemployé in the same department of labor with the person injured or killed was available as a defense. The Legislature might well have believed that in thus curtailing this defense it should in fairness to defendants more accurately than did section 377 of the Code of Civil Procedure designate the persons for whose benefit the personal representative of one who had been killed because of another's negligence might prosecute an action, but, whatever may have been the purpose the words "received as aforesaid" neither in themselves nor because of their location in the section indicate the intention of giving them a special limitation to the paragraph preceding the one in which they are used. Giving to these words their ordinary meaning, they apply as well to the case of an employé killed through the negligence of a fellow servant as to one whose death is caused by the defective or unsafe condition of machinery or appliances furnished by an employer.

[2] The complaint here, as appellant insists, is one which charges the death of plaintiff's decedent through the negligence of a fellow servant engaged in another department of labor; but in such a case no right of action accrues to an administrator on behalf of a nephew of his decedent. As Wayne Shepard does not come within any of the classes mentioned in paragraph 3 of section 1970 of the Civil Code, no cause of action is stated in the complaint, no matter what pecuniary loss said nephew might suffer by reason of his uncle's death. This reading of section 1970 of the Civil Code does not interpret that section as repealing section 377 of the Code of Civil Procedure. The last-named section appears in that part of the Code relating to "parties to civil actions." Section 1970 of the Civil Code does not take away the "right of action" by a personal representative as outlined in section 377 of the Code of Civil Procedure, but it does affect the "cause of action" when such representative

seeks damages on behalf of a collateral relative of his decedent of the third degree. In such a case no recovery is possible. It is to be noted, also, that section 377 still gives a right of independent action to heirs which is not granted by the Civil Code; but, when an administrator brings suit, his powers are limited by section 1970 of the Civil Code, which is the last declaration of the Legislature on the subject.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

#### On Rehearing.

SHAW, J. After the decision of this case in department 2, a rehearing was granted before the court in bank. With the exception of the statement in the department opinion to the effect that the heirs of a deceased person may maintain an action under section 377 for an injury causing his death against an employer who is liable only because of the new provisions contained in the amended section 1970 of the Civil Code, we adhere to the department opinion. Said statement was not necessary to the decision.

Upon the argument before the court in bank it was contended that the paragraph of the amendment to section 1970, declaring who may sue for an injury causing death, is unconstitutional, because that subject is not embraced in the title of the act, that the entire act is unconstitutional because it embraces two subjects, and that said paragraph is also invalid because it is discriminatory and not uniform in its operation. Additional briefs have also been filed upon the question of the effect of this paragraph upon 377 of the Code of Civil Procedure, claiming that section 1970 covers the entire subject and wholly supersedes and repeals section 377.

[3] 1. The title is as follows: "An act to amend section 1970 of the Civil Code of the state of California, relating to the responsibility of employers for injuries to or death of employes." Stats. 1907, 119. The Constitution declares that every act shall embrace but one subject, which subject must be expressed in its title. Article 4, § 24. It is not necessary to discuss this question at length. The act relates to the responsibility of employers for the death of employes. This general subject properly includes provisions declaring who may sue the employer for damages resulting from such death. The details need not be expressed in the title. *Ex parte Liddell*, 93 Cal. 637, 29 Pac. 251; *Abeel v. Clark*, 84 Cal. 229, 24 Pac. 383; *Matter of Miller*, 162 Cal. 700, 124 Pac. 427. It follows also that the act embraces but one subject.

[4, 5] 2. The paragraph does not violate the constitutional provision requiring general laws to have uniform operation, nor that forbidding a grant of special privileges to one

citizen or class which are not given on the same terms to all. Article 1, §§ 11, 21. Upon this point the argument is that it gives a right of action for damages against an employer in favor of the widow, children, dependent parents, and dependent brothers and sisters of an employe whose death is caused by an injury received from negligence of a fellow servant, and does not grant such right in favor of the husband, nephews, and nieces, or other collateral heirs of the person so killed. A right of action to an heir for an injury to an ancestor does not exist at common law. It is not an inherent right. It exists only so far and in favor of such person as the legislative power may declare. The constitutional provisions aforesaid were not intended to make it necessary that the Legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Many considerations of public policy affect the question of the propriety and extent of such laws, the weight and effect of which, and the method of meeting or avoiding them, are matters resting exclusively in the legislative discretion. The probable number of husbands, or of collateral heirs of the third degree, who may suffer damage from such deaths, their probable necessitous circumstances and the consequences of extending the right to a more numerous and remote class, are among the circumstances to be considered. The decision of the Legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor. *Matter of Miller*, supra, 162 Cal. 699, 124 Pac. 427; *Ex parte Martin*, 157 Cal. 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242. It cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of the act. Hence we must give it effect as an act within the legislative discretion.

[6] A law establishing rules of liability for negligence applying only to actions arising from the relations between employes and employers does not violate the constitutional provisions in question. The relation of employer and employe is sufficiently peculiar and distinct from others to warrant legislation for it as a class distinct from other relations.

3. We do not consider it necessary in this case to determine the precise extent to which section 1970 may prevail over section 377 so far as they authorize actions for injuries causing death. The latter is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employe. So far as injuries

arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action. The language of the opinion in department is to be understood to refer only to such actions. Farther than this we need not go. The present case arose out of the newly created liability.

The judgment is affirmed.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.

**GARDELLA v. AMADOR COUNTY et al**  
(Sac. 1,912.)

(Supreme Court of California. Jan. 20, 1913.  
Rehearing Denied Feb. 19, 1913.)

**1. BRIDGES (§ 26\*)—TOLLS—EXPIRATION OF PRIVILEGE.**

Where the Legislature granted a franchise to construct a bridge across a river between two counties, and to collect tolls thereon for 20 years, the bridge, at the expiration of the 20 years, became a free public highway, even if Pol. Code, § 2619, providing that when a franchise for a toll bridge, etc., expires by limitation or nonuser the bridge becomes a free public highway, does not apply to bridges extending from one county into another, since the construction of a road or bridge upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls, and subject to such right the road belongs to the public.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 67, 68; Dec. Dig. § 26.\*]

**2. JUDGMENT (§ 725\*)—CONCLUSIVENESS—MATTERS DETERMINED.**

In 1862 the Legislature granted a franchise to construct a bridge, and for 20 years to collect such tolls as might be fixed by the board of supervisors of C. county. In 1885 the board of supervisors of C. county passed an order declaring the bridge to be a free public highway, which was annulled by a proceeding in certiorari, because in excess of the board's jurisdiction. *Held*, that this was not an adjudication that the bridge was not at the time a free public highway, since, under Code Civ. Proc. § 1911, only that is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257; Dec. Dig. § 725.\*]

**3. TURNPIKES AND TOLL ROADS (§ 9\*)—RIGHT TO ESTABLISH.**

There is no power to grant a franchise to take tolls on a free public highway, except that given by Pol. Code, § 4041, subd. 33, authorizing boards of supervisors to grant such a franchise, when, in their judgment, the expense necessary to operate or maintain the highway as a free public highway is too great to justify the county in so operating it.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 5, 12-18; Dec. Dig. § 9.\*]

**4. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.**

Pol. Code, § 4041, subd. 33, authorizing boards of supervisors to grant franchises for taking tolls on public highways, when, in their

judgment, the expense necessary to operate such highways as free public highways is too great to justify the county in so operating them, if applicable to bridges at all, does not apply to bridges across waters separating two counties.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

**5. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.**

Under Pol. Code, § 2843, requiring application for authority to construct a toll bridge over waters dividing two counties to be made to the board of supervisors of the county situated on the left bank, such authority cannot be granted unless section 2870, requiring publication of notice of the intended application, and section 2872, requiring a certified copy of the order granting the application, together with the application, to be recorded in the office of the county clerk before proceeding under it, are complied with.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

**6. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.**

The Legislature having made specific provision for the granting by boards of supervisors of authority to construct toll bridges, and having limited the extent of the power and the mode of its exercise, a grant of such authority, not in accordance with the statute, cannot be upheld under the general powers of boards of supervisors to make contracts.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

**7. BRIDGES (§ 15\*)—POWERS OF BOARDS OF SUPERVISORS—ESTOPPEL.**

A county is not estopped to deny the validity of a franchise for the construction of a toll bridge, granted by its board of supervisors, because it has received the benefits of the grantee's expenditures in reliance on such franchise.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

In Bank. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Angella Gardella against the County of Amador and another. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. G. Snyder, Dist. Atty., of Jackson, and Will A. Dower, of San Andreas, for appellants. Frank J. Solinsky, of San Andreas, and Paul C. Morf, of San Francisco, for respondent.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff.

The action was brought to quiet plaintiff's title to a bridge, called "the Big Bar Bridge," crossing the Mokelumne river, and to quiet title to a portion of the road leading to the bridge at either end. At Big Bar, where the bridge crosses, the thread of the Mokelumne river forms the boundary between Amador and Calaveras counties. The latter county is on the left bank of the river. The plaintiff claims under two ordinances passed by the supervisors of Calaveras and Amador counties on the 4th and 5th days of April, 1898, respectively, purporting to grant to her a franchise permitting her, for the period of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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30 years, to collect tolls from the public traveling upon said roads and over said bridge. The counties defendant assert, on the other hand, that the bridge, with its approaches, is a free public highway, and that the alleged franchises to collect tolls are void.

In March, 1862, the Legislature passed an act (Stats. 1862, p. 76) granting to Louis Soher and his associates the right to construct a bridge at Big Bar, with a road crossing said bridge from Mokelumne Hill, in Calaveras county, to Butte, in Amador county, and to collect thereon for 20 years such tolls as might annually be fixed by the board of supervisors of Calaveras county. The bridge was constructed and tolls collected by Soher & Co. until, in October, 1885, the supervisors of Calaveras county passed an order declaring the bridge to be a free public bridge, and the road leading thereto in said county a free public highway. In February, 1886, Soher & Co. filed a petition in the superior court of Calaveras county for a writ of certiorari to review such order, and the proceeding resulted in a judgment declaring the action of the board to be in excess of its jurisdiction, and annulling the order complained of. No appeal was ever taken from this judgment.

In July, 1886, the board of supervisors of Calaveras county granted to Soher & Co. a license to collect tolls on the bridge until the first Monday in October of the same year. Thereafter the rights of Soher & Co., whatever they were, became vested by transfers in Joseph Gardella, who died in 1891. The plaintiff and her four children succeeded to his interest. After October, 1886, no license was granted, but the supervisors continued, from year to year, to fix the tolls to be collected by the successors of Soher & Co.

In April, 1898, the plaintiff filed with the board of supervisors of Calaveras county a petition praying for a franchise to collect tolls on the Big Bar Bridge for 30 years. The petition averred that it was necessary to repair the bridge and replace a large portion thereof with a combination iron bridge; that the expense of reconstruction would be about \$4,000. The petitioner alleged her willingness to reconstruct the bridge, and to keep it in repair during the term of such franchise. A similar petition was presented to the supervisors of Amador county. The orders granting the franchises were adopted, as already stated, on the 4th and 5th days of April, 1898. In neither case did the order of the board, or its records, contain, by way of recital, or otherwise, a finding or declaration that in the judgment of the board "the expense necessary to operate or maintain" the bridge was "too great to justify the county in so operating or maintaining" it. Pol. Code, § 4041, subd. 33. The court, however, admitted, over the objection of the defendants, parol testimony tending to show that the respective boards did make a determina-

tion of this fact. Thereafter Mrs. Gardella repaired and reconstructed the bridge and its approaches, expending thereon some \$8,000; and she has ever since, until the present controversy arose, made all necessary repairs, and has collected tolls at the rates fixed, from time to time, by the supervisors of Calaveras county.

[1] In this state of facts, the bridge unquestionably was, when the orders of the 4th and 5th days of April, 1898, were made, a free public highway, and not, as declared in one of the conclusions of law, a toll bridge, with respect to which the plaintiff was the owner of a valid franchise. By the act of 1862, under which the bridge was originally constructed, the right to collect tolls was granted for the period of 20 years. Upon the expiration of that period, the right ceased by limitation. Pol. Code, § 2619; *People v. Anderson, etc., Co.*, 76 Cal. 190, 18 Pac. 308; *People v. Davidson*, 79 Cal. 166, 21 Pac. 538; *Blood v. Woods*, 95 Cal. 78, 86, 30 Pac. 129; *People v. Auburn, etc., Turnpike Co.*, 122 Cal. 335, 55 Pac. 10. The construction of a road upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls. *Blood v. Woods, supra*. The road belongs to the public, and the only interest of the holder of the franchise is the right to collect tolls as a compensation for building the road. *Wood v. Truckee Turnpike Co.*, 24 Cal. 475; *Kellett v. Clayton*, 99 Cal. 210, 33 Pac. 885. There is no right to compensation when the right to take tolls has ceased by expiration of the term for which it was granted, or by abandonment. *McMullin v. Leitch*, 83 Cal. 239, 23 Pac. 294. The same rule applies to bridges (*Sears v. Tuolumne County*, 132 Cal. 167, 64 Pac. 270), which are highways under the definition of the statute. Pol. Code, § 2618.

It is argued that section 2619 of the Political Code, providing that, "whenever the franchise for any toll bridge, trail, turnpike, plank or common wagon road has expired by limitation or nonuser, such bridge \* \* \* becomes a free public highway," applies only to bridges or roads wholly within a single county. The section was relied upon in *Blood v. Woods, supra*, where the road in question extended from one county into another. But, if we were to disregard the Code section, the result would be the same. In the absence of any statute, a toll road, upon the expiration of the time for which the franchise to take tolls was granted, would become a free public highway. *People v. Davidson, supra*.

[2] It is claimed, however, that the judgment in the certiorari proceeding brought by Soher & Co. in 1886 was an adjudication that the bridge was not a free public highway, and that this adjudication, whether erroneous or not, has become final and conclusive. We think the judgment had no such

effect. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Code Civ. Proc. § 1911; *Fulton v. Hanlow*, 20 Cal. 456; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. All that was adjudged in the judgment in certiorari was that the board of supervisors had no jurisdiction to make an order declaring the bridge to be a free public highway. The want of such jurisdiction may have rested on any one of a variety of grounds. Certainly the ownership by Sober & Co. of a franchise to collect tolls was not a necessary part of the adjudication.

[3] If, then, the bridge in question was, on the 4th and 5th days of April, 1898, a free public highway, there was no power, unless by virtue of subdivision 33 of section 4041 of the Political Code, to grant a franchise to take tolls thereon. This subdivision is, in effect, a re-enactment of a provision which appeared for the first time in subdivision 41 of section 25 of the "Act to establish a uniform system of county and township governments," approved March 24, 1893. Stats. 1893, pp. 346, 359. Prior to the enactment of this statute, no franchise to collect tolls upon a public highway could be granted at all. *El Dorado County v. Davison*, 30 Cal. 520. As was said in the case last cited, where the board of supervisors had undertaken to grant such a franchise to the defendant: "A tollgate erected upon a highway which belongs to the state or the people thereof is a nuisance, and might be abated as such. The grant to the defendant was to do an illegal act."

[4] Since 1893, however, boards of supervisors have had power to grant franchises for taking tolls on public highways, "when in their judgment the expense necessary to operate or maintain such public roads or highways as free public highways is too great to justify the county in so operating or maintaining them." *Blood v. McCarty*, 112 Cal. 561, 44 Pac. 1025. In the present action the court made a finding to the effect that the board of supervisors of each of the counties of Calaveras and Amador did, before granting the franchises of April 4 and 5, 1898, make a determination that the expense of maintaining and operating the bridge was too great to justify the respective counties in so maintaining and operating it. This finding is attacked by appellants; their position being that the determination in question, which is prerequisite to the validity of the order (*Bedell v. Scott*, 126 Cal. 675, 59 Pac. 210), must appear affirmatively upon the record of the board, and if not so appearing, cannot be proven otherwise. The records of the respective boards do not, as already stated, show such determination. While the point thus urged finds some sup-

port in the case last cited, the weight of authority seems to be to the effect that parol evidence is admissible to show that a court or board of limited power has acted within its jurisdiction, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings. *Jolley v. Foltz*, 34 Cal. 321; *Reclamation Dist. v. Goldman*, 65 Cal. 638, 4 Pac. 676; *In re Williams*, 102 Cal. 70, 77, 36 Pac. 407, 41 Am. St. Rep. 163; *Freeman on Judgments* (4th Ed.) § 523; *Black on Judgments*, § 282. But it is unnecessary to decide this question here. The respondent herself suggests, and we think correctly, that subdivision 33 of section 4041 has no application to the case of a bridge across waters separating two counties. In *Croley v. Cal. Pac. R. R. Co.*, 134 Cal. 557, 66 Pac. 860, the court held that subdivision 4 of section 25 of the county government act (Stats. 1891, p. 300), giving the supervisors power to erect bridges, but providing that when the cost of erection of any bridge exceeds the sum of \$500 the board must advertise for bids, etc., had no bearing upon the authority of the board to contract for the construction of a bridge crossing a stream which separated two counties. It was pointed out that, as the authority of the board was limited to the construction of bridges "within the county," the construction of a bridge, only one-half of which would be in the county, was not included in the grant of power, or controlled by the limitations upon such grant. "It is also evident," says the court, "that neither county would have the right to construct a bridge beyond its own boundary line, and there is no provision in the subdivision for any concert of action between the boards of two counties, or for harmonizing any difference between them, if such should exist." The reasoning applies with equal force to the case before us. By the introductory words of section 4041, the supervisors are vested with enumerated powers "in their respective counties." A bridge across a river dividing two counties is an entirety. In the nature of things, it calls for unity of control. This is illustrated by the Code sections authorizing the construction of toll bridges over waters dividing two counties. Pol. Code, § 2843 et seq. By these provisions the grant of the right to construct, the fixing of license taxes and tolls, and all details of regulation, are placed in the jurisdiction of the supervisors of the county on the left bank of the stream or other water. That no similar provision is found in the general enactment (Pol. Code, § 4041, subd. 33), authorizing the grant of a right to take tolls upon a public highway, is persuasive evidence that the subdivision was not designed to include the case of a bridge over waters dividing two counties. It was certainly never contemplated that the board of supervisors of the county in which one-half of such bridge was located should have au-



thority to grant a franchise to take tolls over such half, while the remainder of the bridge might be free and open. Here, as in the case of the construction of a new bridge (the case considered in *Croley v. Cal. Pac. R. R. Co.*, supra), there is no provision for concerted action between the two counties. The reasonable interpretation of subdivision 33 of section 4041 is that the section, if it covers the case of a bridge at all, has reference only to bridges situated entirely within the limits of a county.

[5] The respondent urges, however, that the transaction of April, 1898, may be viewed in another aspect. The claim is that what was offered by plaintiff in her petition, and subsequently carried out by her, was, in effect, the construction of a new bridge in return for the grant of a right to take tolls thereon. As has already been suggested, authority to so construct a toll bridge may be granted by the board of supervisors of the county situated on the left bank of the river. Pol. Code, § 2843. But such grant may be made only upon compliance with various requirements, such as the publication of a notice of the intended application. Pol. Code, § 2870. The applicant must also cause a certified copy of the order granting the application, with the application, to be recorded in the office of the county clerk before "proceeding under it." Pol. Code, § 2872. It is not claimed that there was any compliance with these provisions, and the grant to plaintiff cannot, therefore, be sustained under the power conferred upon the board of supervisors by the sections just cited.

[6] There is no force in the contention that the proceedings constituted a contract, which the respective boards of supervisors were authorized to make with plaintiff under their general powers. In *Croley v. Cal. Pac. R. R. Co.*, supra, it was held that section 2713 of the Political Code gave to the supervisors of the counties bordering upon streams plenary powers, in the matter of the construction of bridges crossing such streams, to such extent as to permit the county to agree to pay to a railroad corporation constructing such bridge a given sum in return for the furnishing, on the bridge, of a separate roadway for teams and pedestrians.

The decision is based upon the ground that there is no legislation limiting the power of the board in the matter, "nor upon the extent or mode in which it is to be exercised." But, obviously, this reasoning has no application to the grant of a franchise to construct a toll bridge; for with respect to this subject the Legislature has made specific provision, limiting both the extent of the power and the mode of its exercise. Pol. Code, § 2843 et seq. On the other hand, if this be regarded, not as the construction of a new bridge, but as the grant of a franchise to take tolls upon an existing public and open bridge, the power to grant such franchise cannot be implied from any general expression in the statute defining the powers of boards of supervisors (*Blood v. Woods*, supra), since, as we have seen, there is, in the absence of statute expressly granting it, no power to authorize the taking of tolls upon a public highway. *El Dorado County v. Davison*, supra; *Blood v. Woods*, supra.

[7] Finally, it is argued that the counties, having received the benefits of plaintiff's expenditures, are estopped to deny the validity of the franchise forming the consideration of such expenditures. But the doctrine of estoppel cannot, we think, be applied so as to validate, as against the public, grants in excess of the limited powers conferred upon the public agents who assumed to make them. If there be any estoppel in cases of this character, its effect must be limited to permitting the plaintiff to retain what she has received (*Sacramento County v. Southern Pacific Co.*, 127 Cal. 217, 59 Pac. 568, 825), or to recover the reasonable value of what she has conferred upon the defendants in reliance upon their action. To grant further relief, such as that sought in this action, would obliterate the distinction between powers conferred upon public officers or boards and those expressly withheld from them. The mere assumption of a power would, if acted upon to his cost by a third person be equivalent to the exercise of a power actually possessed.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

## In re MOLLENKOPF'S ESTATE.

(S. F. 6,258.)

(Supreme Court of California. Jan. 22, 1913.)

## 1. WILLS (§ 277\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

Code Civil Proc. §§ 1306-1308, 1312, providing that at the time appointed for the hearing of the petition for the probate of a will or the time to which the hearing may have been postponed the court must hear the proof of the will, and that any person interested may appear and contest the will, that, if no person appears to contest, the court may admit the will to probate on the testimony of one of the subscribing witnesses, and that, if any one appears to contest, he must file written grounds of opposition to the probate, do not in terms prescribe when written opposition to probate must be filed in the case of a contest before probate to entitle it to be considered, but to be effectual as a contest before probate, the written opposition must be filed before the will is admitted to probate, and a contest initiated after the time originally appointed for the hearing of the petition, but before the hour to which the hearing has been postponed, is in time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 632-635; Dec. Dig. § 277.\*]

## 2. WILLS (§ 277\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

Where the court at the time fixed for the hearing of the petition for the probate of a will took the testimony of witnesses for their convenience without prejudice to the rights of a contestant, and then adjourned the hearing to a subsequent hour, a contest filed before such hour was in time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 632-635; Dec. Dig. § 277.\*]

## 3. WILLS (§ 384\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

The disregard of a contest before probate initiated in time is prejudicial, though contestant may institute a new contest within one year after probate, especially where the contest before probate, if successful, would prevent the petitioner for probate from acting as executor without bonds, while contestant was the owner of one-half of the property of testator if the will was invalid, and hence interested in having proper security from the person administering the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 855-858; Dec. Dig. § 384.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings for the probate of the will of Constancia Mollenkopf, deceased. From an order admitting the will to probate and appointing William Mollenkopf as executor, the party agreed appeals. Reversed.

Isidore B. Dockweiler, of Los Angeles, Costello & Costello, of San Francisco, and Robert B. Murphy, of Los Angeles (A. W. Brouillett, of San Francisco, of counsel), for appellant. F. G. Hentig, of Los Angeles (Haas & Dunnigan, of Los Angeles, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from an order admitting a certain document to probate as the last will of deceased, and appointing the petitioner William Mollenkopf

executor thereof without bond as specified therein.

The material facts on this appeal are substantially as follows: The petition for the probate of said alleged will came on for hearing on March 19, 1912, at 10 o'clock a. m. At that time no written grounds of opposition had been filed. One of the attorneys of the contestant (Juliana R. de Long, mother of deceased) announced to the court that written grounds of opposition to the probate had been mailed in Los Angeles to the clerk of said court the day before, and were then due in San Francisco, and that a copy thereof had been served on petitioner's attorney the day before. The court announced that, "as some of the witnesses had come from Los Angeles, he would hear their testimony, preliminarily, and without prejudice to the rights of the contestant." Witnesses were then called and examined on behalf of the petitioner, and gave testimony that the will was duly executed, and that deceased was of sound mind, and not acting under duress, fraud, etc. The court then stated that it would continue the further hearing of the matter to 2 o'clock p. m. of the same day, which was done. Prior to that time the written opposition to the probate was filed in the office of the clerk of said court, and the same showed, by affidavit attached thereto, that it had been served by copy on the attorney for the petitioner by the leaving of such copy in his office with a person in charge thereof under the circumstances and in the manner specified in subdivision 1 of section 1011 of the Code of Civil Procedure. This written opposition was in proper form, and to use the language of *In re Stewart*, 100 Cal. 249, 34 Pac. 707, "set forth many alleged facts which, if true, established the invalidity of the asserted will." When the matter came on for further hearing at 2 p. m., the written opposition on file, with proof of service, was brought to the attention of the court. The court then ruled that, as the written opposition was not on file at 10 a. m. of that day, the same should be disregarded, and also that the attorney for petitioner had not received sufficient notice. Thereupon the order admitting the will to probate and appointing petitioner executor was made, without any other disposition of the written opposition to probate.

It is not disputed that if the written opposition was properly served on petitioner's attorney, and was not filed too late to entitle it to be considered, it was a bar to the admission of the alleged will to probate until disposed of in the manner provided by law. Such disposition involved an opportunity to those interested in the will to answer the opposition, and a trial of the issues thus made, by a jury if either party so requested.

It is not suggested by respondent that

service of the written opposition by copy, was not made on petitioner on March 18, 1912, in all respects as required by law, and we are satisfied that the affidavit attached to the written opposition sufficiently showed due service.

[1] Our law nowhere in terms prescribes when the written opposition must be filed, in the case of a contest before probate, in order to entitle it to be considered. Notice of the time appointed for the probate having been provided, it is declared in section 1306 of the Code of Civil Procedure that "at the time appointed for the hearing, or the time to which the hearing may have been postponed, \* \* \* the court must hear the testimony and proof of the will." In section 1307 of the Code of Civil Procedure it is declared that "any person interested may appear and contest the will," and in section 1308 of the Code of Civil Procedure that, "if no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only," etc. By section 1312 of the Code of Civil Procedure it is declared that, "if any one appears to contest the will, he must file written grounds of opposition to the probate thereof," etc. Obviously, to be effectual as a contest before probate, the written opposition must be filed before the alleged will is admitted to probate, but there is nothing in the provisions of our Code that in terms makes it ineffectual if filed at any time prior to the admission of the will to probate. The statute contemplates, of course, that it will be filed at or before the time designated in the notice for the hearing of the petition for probate, and inasmuch as, in the absence of a contest, the formal proofs as to execution, etc., may be and are ordinarily then received and the alleged will admitted to probate, a party desiring to contest will naturally file his opposition at or prior to the time so designated. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing.

It has been held that, if the contest is properly instituted before the time to which the hearing on the petition is continued, it is in time, and must be considered. This is practically held in *Estate of Stewart*, 100 Cal. 246, 34 Pac. 706. It is true that in that case the opposition was on file at the original time fixed for hearing, but there was then lacking proof of service thereof on certain parties other than the petitioner who were required by the statute to be served. A motion to strike the opposition from the files on the ground that the same had not been filed or served as required by law was made, and this motion was taken under advisement until 2 p. m. of the same day. Before that time arrived, contestant supplied

such proofs, but the lower court held that they should have been filed at 10 a. m. and came too late. It therefore struck the opposition from the files, and admitted the will to probate. This court held, first, that the absence of such proof of service was no warrant for a disregard of the contest as to the petitioner for probate, as to whom proof of service was on file; and, second, assuming that such absence of proof rendered the opposition ineffectual, nevertheless, the furnishing of such proof "before the hour to which the matter had been continued" sufficiently answered the objection of petitioner. In other words, that, if all the requirements of the law as to the institution of a contest are complied with at or prior to the time to which the hearing on the petition is continued, the contest is in time, even though none of such requirements was complied with at or prior to the time designated for hearing by the notice. In the case just cited this court said that, "under these circumstances, we see no ground upon which the order appealed from (the order admitting the will to probate) can be affirmed." That a contest initiated after the time originally appointed for the hearing of the petition, but before the hour to which such hearing has been postponed, is in time, has twice been held by the Supreme Court of Montana, upon statutes substantially similar to ours. See *Raleigh v. District Court*, 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; *State v. District Court*, 25 Mont. 355, 65 Pac. 120. We think that there can be no doubt as to the correctness of these rulings, in view of the statutory provisions in California and Montana on the subject.

[2] The record on appeal, fairly construed, brings this case within the doctrine of these decisions. Much reliance is placed by respondent upon the fact that the court did receive testimony in support of the will at the morning session and before continuing the further hearing to 2 p. m., and he claims that the record shows that the hearing was then completed; no further testimony having been given at the afternoon session. But the bill of exceptions shows that, in response to the statement of counsel for the contestant as to the proposed contest, the learned judge of the trial court announced that "as some of the witnesses had come from Los Angeles he would hear their testimony preliminarily and without prejudice to the rights of the contestant," and that after doing this he continued the further hearing of the matter to 2 o'clock p. m. This was practically, for all the purposes of a contest, a continuance of the whole hearing from the time originally set until 2 o'clock p. m. of the same day, and it was a continuance that the court had power to grant. Under the authorities already cited, the contest was therefore filed in time. The mere receiving of testimony at the morning session under the circumstances stated in no wise affects the question, even though

thereby a prima facie case for the admission of the will to probate was shown.

We are by no means prepared to concede that a failure to file a contest before the commencement of the taking of testimony on a petitioner's application would under any circumstances preclude the filing of the same subsequently, and before the matter was finally submitted to the court for decision. But we are not called upon to determine this question here, as we are satisfied that, upon any fair construction of the record, the contest must be held to have been instituted before the time to which the matter had been continued for hearing from the time originally fixed; the testimony actually received at the first session being expressly declared to be received preliminarily or in advance, merely for the convenience of the witnesses from Los Angeles, and "without prejudice to the rights of the contestant."

[3] Although contestant was not barred by the order admitting the will to probate from instituting a new contest at any time within one year after the alleged will was admitted to probate, it cannot be held, and indeed is not claimed, that she is not substantially prejudiced by the disregard of her contest before probate. One result of such contest, if successful, would have been to prevent the petitioner for probate from acting as executor without bonds, and, if appointed administrator of the estate of deceased, he would be required to give security for the faithful performance of his duties. As the owner of half of the property of the decedent if the will was invalid, contestant was substantially interested in having proper security for the discharge of his duties by the person administering the estate. She would have no such security under the order appealed from during the pendency of any contest instituted by her after probate. We do not mean to suggest that this is the only reason for holding the order prejudicial to contestant's substantial rights.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

#### In re YOELL'S ESTATE.

YOELL v. LEVY.

(S. F. 6,201.)

(Supreme Court of California. Jan. 20, 1913.  
Rehearing Denied Feb. 19, 1913.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 194\*) —FAMILY ALLOWANCE TO WIDOW—CONTEST —ISSUES.

In opposition to a wife's petition for a family allowance, based on her relationship, the administrator pleaded an executed separation agreement between husband and wife, fully performed by the husband until his death, and acts of the wife as to the property set off to her by the agreement which should estop her to question its validity. *Held*, that the question of fraud by the husband in obtaining it

was not in issue, not having been pleaded, but that the only issues were the validity of the agreement on its face, the effect of the agreement to bar the allowance, either by its terms or because under it the wife had ceased to be a member of the family, and whether the superior court sitting in probate had jurisdiction to give effect to the agreement, if valid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

#### 2. FRAUD (§ 50\*)—NECESSITY OF PLEADING.

Fraud is not presumed, but must be pleaded.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

#### 3. APPEAL AND ERROR (§ 169\*)—ISSUES BELOW—REVIEW.

Issues not made or found upon in the trial court are not open to review on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.\*]

#### 4. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY—PUBLIC POLICY.

An agreement between husband and wife to live separate and apart, with property provision for each, is not against public policy, and may be entered into and enforced according to its terms, when no undue advantage is taken of either spouse.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

#### 5. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY.

The fact that, when a separation agreement was made, there were minor children, whose right to a family allowance from the husband's property pending administration of his estate could not be contracted away, is immaterial on the issue of the validity of the agreement after all the children have reached majority.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

#### 6. EXECUTORS AND ADMINISTRATORS (§ 185\*) —FAMILY ALLOWANCE—WAIVER BY ANTENUPTIAL OR POSTNUPTIAL AGREEMENT.

By either an antenuptial or postnuptial contract, a widow may waive her right to a family allowance, when the rights of minor children are not involved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. § 185.\*]

#### 7. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—ESTOPPEL TO QUESTION.

Where a separation agreement provided that deeds by a husband and wife should be made to a third person, who, in turn, should execute the deeds contemplated by the agreement, the parties after execution of such deeds and the receipt of the benefits thereunder, and after invoking the courts to declare their validity, are equitably estopped while retaining the benefits to question the validity of the agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

#### 8. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY—MEANS.

Where the provision for deeds to and from a third person was a mere means to carry into effect the purposes of a separation agreement between husband and wife, and not an essential part of the agreement, the validity of the agreement after execution and accept-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ance of the deeds by the parties will not be affected by any alleged invalidity of the means adopted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

**9. EXECUTORS AND ADMINISTRATORS (§ 185\*)  
—FAMILY ALLOWANCE—RELINQUISHMENT—SEPARATION AGREEMENT.**

Under an agreement between a husband and wife in contemplation of a permanent separation, making a complete and final disposition of their property rights, and providing that the execution of the agreement should be a final adjustment of such rights, and that neither should claim any other rights in the property of the other, and stipulating that neither party would assert any right against the will or estate of the other as heir, or as surviving husband or wife, the wife renounced and released her right to make application for a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. § 185.\*]

**10. EXECUTORS AND ADMINISTRATORS (§ 188\*)  
—FAMILY ALLOWANCE—RIGHTS OF WIFE—SEPARATION.**

A wife who voluntarily severs her connection with the family is not entitled to a widow's allowance out of her husband's estate; her right to support resting upon the family relationship.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 698-700; Dec. Dig. § 188.\*]

**11. HUSBAND AND WIFE (§ 281\*)—SEPARATION AGREEMENT—JURISDICTION—EQUITY.**

During the lives of a husband and wife a court of equity is the proper forum for the enforcement of any rights conferred by a separation agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1061; Dec. Dig. § 281.\*]

**12. EXECUTORS AND ADMINISTRATORS (§ 194\*)  
—FAMILY ALLOWANCE—SEPARATION AGREEMENT—JURISDICTION OF PROBATE COURT.**

Where a separation agreement between husband and wife, making complete disposition of their property rights, has been fully executed, and the wife is making an unwarranted claim to a widow's allowance, the probate court has equitable jurisdiction to pass upon the validity and effect of such agreement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of J. Alexander Yoell, deceased. On petition of Emily C. Yoell for a family allowance. From an order awarding petitioner a family allowance in the sum of \$100 a month, dating from the death of her husband, Evaline A. Levy, special administratrix, appeals. Reversed.

Carl Westerfeld, Sullivan & Sullivan, and Theo. J. Roche, all of San Francisco, for appellant. J. L. Taugher, of San Francisco, for respondent.

HENSHAW, J. J. Alexander Yoell died in July, 1904. In 1909 his widow, Emily C. Yoell, petitioned for a family allowance. Her petition was opposed by the special adminis-

tratrix, but the court, after hearing, awarded a family allowance in the sum of \$100 a month, dating from the death of the husband. From this order the appeal under consideration is taken.

As ground of opposition the special administratrix set up a postnuptial agreement between the deceased and his wife, with appropriate averments, to the effect that it had been faithfully carried out according to its tenor and terms by the deceased during his lifetime, and with further allegations tending to show upon the part of Emily C. Yoell, respondent herein, a full acceptance of all of the benefits and considerations moving to her under the agreement. Thus it is alleged that during the lifetime of the parties Emily C. Yoell sold certain real property which, under the articles of separation, was hers, subject to a life estate in the husband, and caused her grantee to begin a suit to quiet his title to the property so conveyed, which action resulted in a decree so doing, in confirmation of the terms of the articles of separation. The validity of the articles of separation it is further alleged was established in another action brought by the husband against the wife and others, which action was to settle conflicting claims to certain of the real estate disposed of under the articles of separation, and which action resulted in a valid and subsisting decree establishing the title to the property in accordance with the terms of the articles of separation. Again, it is alleged that after the death of J. Alexander Yoell, his wife, this respondent, took appropriate proceedings in certain of the superior courts of the state to have decrees entered declaring the termination of the life estate of her husband in the property, and vesting the fee thereof, untrammelled by the life estate, in her, all in accordance with the terms of the articles of separation, and that decrees to this effect in favor of the widow were duly given and made.

Under these pleadings, herein before sufficiently indicated, the matter came on for hearing. The court found that immediately after the execution of the separation agreement Yoell and his wife separated as husband and wife by mutual consent and continued to live apart until the death of the husband; that the husband paid to his wife continuously during many years and up to the time of his death \$350 a month, as called for by the articles of separation. Then by finding 12 the court declared: "That there is no covenant, term, or condition in the said separation agreement which deprives Emily C. Yoell of the right to a family allowance during the progress of the administration of the said estate, and that she is entitled to such allowance to be paid to her out of the said estate, notwithstanding such separation agreement or anything done thereunder or in pursuance thereof." Thus

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the award of the family allowance was made. The evidence disclosed that J. Alexander Yoell and his wife, Emily C. Yoell, had been married for 35 years, and that to them seven children had been born, when differences arose between them culminating in an action for divorce brought by the wife against the husband. A reconciliation was effected, the action was dismissed, but within a year harmony was once more destroyed, the wife left the home, and began a second action for divorce in April, 1898. This action was never tried, and, in fact, was finally dismissed. Negotiations were opened looking to an adjustment of their differences without divorce, and the articles of separation were entered into. It appears that throughout Mrs. Yoell was fully cognizant of the nature, character, and value of her husband's properties, besides which, as to those values and as to the terms of the agreement of separation, she had acted upon the advice of her counsel, an attorney at law. The articles of separation, as formulated, agreed upon and executed, described the husband as the party of the first part, the wife as party of the second part, and proceeded as follows: "Whereas, unhappily there exist marital differences between the said parties of the first and second parts, which, in their opinion, render it impossible that they can longer live together as man and wife, and in consequence thereof they have agreed to live separate and apart from each other, and, whereas, it is the desire of said party of the first part to make a permanent provision to the party of the second part, and it is the desire of both parties hereto that all of the property rights of the parties of the first and second parts respectively, shall be finally adjusted, settled and determined, it is now mutually agreed and understood as follows: (1) That the parties hereto have agreed and do now agree to an immediate separation as husband and wife and do now agree to live for the future separate and apart from each other." The agreement then made provision to the effect that the real property of the community (and all of the property of the husband was community property) should be divided in moieties, the husband and the wife each taking an undivided half of the fee of each piece or parcel, but that the husband should have a life estate in the one-half so conveyed to the wife, and, in lieu of the income which otherwise the wife would derive from her property, the husband was to pay her \$350 per month, the explanation of this being that it was thought the husband could better manage the properties by having control over them all, and that \$350 per month represented the full net rental value of the undivided one-half. Next (so proceeds the agreement) it is declared that: "The true intent and meaning of this agreement is that upon the death of the said party of the first part, the said party of the

second part shall be entitled to the full, entire, undivided one-half of said four described pieces and parcels of land, in fee simple." And "It is further covenanted and agreed \* \* \* that the execution of this agreement and the consummation thereof by the execution and delivery of said various instruments shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party hereto shall or will at any time hereafter make or attempt to make any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto and neither of the parties hereto will claim as against the other or as against their heirs or legal representatives or otherwise, the increase in value of the undivided one-half of any of said property or make or advance any claim that any portion thereof is community property. It is further covenanted and agreed that either of the parties hereto shall have an immediate right to devise or bequeath by will their respective interests in the property belonging to each other under the provisions of this agreement; and that the devisees and legatees under any such will shall and may have the same privileges and rights as the respective testators may have had or exercised. It is further expressly covenanted and agreed that neither party hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; that neither of them will at any time hereafter assert any right, interest, or title as heirs at law of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate and all claim as such heir, or as surviving husband and wife, respectively, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other."

It has been pointed out that the court's award of a family allowance was based upon its legal construction of the tenor and effect of these articles of separation, the court stating this legal conclusion as a finding that the articles contained no covenant, term, or condition depriving Emily C. Yoell of the right to a family allowance. In addition this respondent insists that the agreement is void or voidable or nonenforceable by reason of the fraud practiced upon Emily C. Yoell by her husband in the very procurement of the execution of the articles of agreement, and in his conduct subsequent thereto. Of the nature of this fraud it is unnecessary here to

say more than that, under the views of respondent's counsel, it was so comprehensive and apprehensive in its perfidiousness that it would have excited the envious admiration of Machiavelli. To this appellant, protesting that the matter may not here be considered, makes answer that no fraud is shown in any wise vitiating the agreement, that no fraud is shown in any wise justifying the respondent in the repudiation of the agreement, that the asserted fraud was fully known to the respondent shortly after the execution of the agreement, and that after this knowledge she reaffirmed it in every possible particular, both by failure to rescind, by accepting all the benefits conferred upon her by it, by the invocation of judicial process and judicial decree establishing her rights under it, by the submission and assent to like judicial decrees brought to establish the validity of it by her husband, and, finally, by the petition and assertion of her rights under it after her husband's death in terminating the life estate and securing to herself the untrammelled fee of the properties, so that finally, by estoppel, by laches and by the statute of limitations she is forever debarred from asserting its invalidity.

[1, 2] These matters have thus been indicated because of the emphasis placed upon them in respondent's brief necessitating a reply in kind from appellant. But into the consideration of them, for the following reasons, we may not and will not enter. Respondent's petition for an allowance for family support made no mention of the articles of separation. It did not disclose their existence. Still less did it disclose a desire upon the part of the petitioner to have them set aside and declared null and void upon the ground of fraud. It is fundamental that fraud is not presumed, and, whenever it constitutes an element of a cause of action which is of an affirmative nature or is invoked as conferring a right, it must be alleged. *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045; *Burris v. Adams*, 96 Cal. 664, 31 Pac. 585; *Burris v. Kennedy*, 108 Cal. 333, 41 Pac. 458; *Estate of Vance*, 141 Cal. 627, 75 Pac. 323. If, therefore, petitioner, who at the time she signed her petition had full knowledge of all of these matters, believed that the existence of the articles of separation stood as an obstacle in the way of her receiving a family allowance, and that that obstacle was removable for fraud, she should so have pleaded. Not having so pleaded, the result is that the agreement stood before the trial court unimpeached for fraud, and the rights of the parties were left to be adjudicated in accordance with its legal terms and effect. Thus, if petitioner believed that, notwithstanding the terms of the separation agreement, she was still entitled to the family allowance, this was a position tenable under her pleading, since it called only for a legal construction of the agreement, and un-

der that legal construction she would or would not be entitled to the allowance. This seems to have been the view taken by the judge in probate, who held that nothing in the agreement debarred her from the right to the family allowance.

And, from another point of view, no different result is reached if it be said that the petitioner was not obliged to anticipate a reliance by the administratrix upon the terms of the separation agreement, and that, therefore, when, in the answer and opposition of the administratrix, the agreement was set forth, the petitioner was allowed the implied replication of section 462 of the Code of Civil Procedure. Assuming that under such an implied replication evidence of fraud might be given, it necessarily follows that by the same implication of law there is given to the defendant (in this case the administratrix in opposition) an implied rejoinder, under which she may prove estoppel, a failure to rescind, laches, the statute of limitations, or any other matter of defense.

[3] But, assuming that all these new issues may thus be injected into the case without pleading, nevertheless it follows that before a judgment can be entered under such circumstances, and before these matters can be reviewed upon appeal, the court must have made specific findings one way or the other thereon. *American-Hawaiian Engineering & Construction Co. v. Butler*, 130 Pac. — (S. F. No. 5,888), filed January 6, 1913. This the court did not do, and so, as has been said, from this point of view, the matters are not open to consideration on this appeal. There is left then for consideration only the legal questions which group themselves under these heads: First. Is the agreement itself legal and binding upon the parties? Second. Does the agreement itself bar petitioner of a right to a family allowance (a) under its very terms, or (b) by virtue of the fact that by conduct under it she ceased to be a member of the deceased's family? Third. Has the court in probate jurisdiction to give effect to such an agreement, if it finds it to be valid?

[4] 1. Upon the first proposition, notwithstanding the confidential relations which exist between husband and wife, it may not be disputed that such agreements are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. We need not go outside of the decisions of our own state for the complete establishment of this, though it may be added that the decisions of other states are in harmony therewith. *In re Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *In re Davis*, 106 Cal. 453, 39 Pac. 756; *Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 106 Pac. 102;

Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231. In this case the evidence is undisputed, as above set forth, that the division of the property was advisedly entered into by Mrs. Yoell, she thoroughly understanding the condition of her husband's affairs, the values of the properties, the incomes which they returned, and having throughout the negotiations and to their consummation the advice of her own attorney and counselor at law. Further, as has been indicated, it is shown that in numerous and indeed in all ways Mrs. Yoell accepted the benefits of the agreement, and that the husband fully performed his part thereof, faithfully paying the \$350 per month as contemplated. This continued through many years, and therefore no question can here arise of the fairness of the transactions between the parties.

[5] To the argument of respondent that at the time these articles of agreement were entered into there were minor children whose rights upon the estate of their father could not be contracted away by the mother, the answer is that this is very true, but the question of the limitation of the power of the parties to contract in this regard arises only when it is shown that the rights of minor children are presently involved. At the time of the death of J. Alexander Yoell there were no minor children. A family allowance under our law is given only for the support of the widow or of the widow and minor children or of the minor children.

[6] Where there are no minor children, then the family allowance is for the widow alone, and, as is said in the well-considered case of *Rieger v. Schaible*, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700: "The rule seems to be that a widow may by appropriate and sweeping provisions of an antenuptial contract (and so of course of a postnuptial contract) waive her right to an allowance when the rights of minor children are not involved." In the present case it is for herself alone that the widow makes application for the allowance.

[7] The separation agreement provided, as a mode of establishing title and separate estate in the undivided moieties of the real property, that deeds by Yoell and his wife should be made to one Buckbee, who, in turn, should make to the Yoells the deeds contemplated by the agreement. It is said that here was a void trust to convey, rendering the whole agreement void. But to this it must be answered, first, that this was not an executory trust, but an executed one. Buckbee made the deeds, both parties assented to them, received the benefits of them, acted under them, sought the courts to enforce their validity, and so both, upon the simplest principles of equitable estoppel, will be forbidden, while retaining the benefits, to question the validity of the agreement under which they received them. *Los Angeles v. Los Angeles City Bank*, 100 Cal. 24, 34 Pac.

510; *Pixley v. W. P. R. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Burris v. Adams*, 96 Cal. 668, 31 Pac. 565.

[8] And, finally, upon this point, it may be said that the provision for deeds to and from Buckbee was a mere means of carrying into effect the principal purposes of the agreement. It was not an integral nor an essential part of it. The method provided was executed and accepted by both parties, and the whole contract in itself valid will not be permitted to fall because of the supposed invalidity attaching to the means adopted. *Estate of Heywood*, 148 Cal. 194, 82 Pac. 755; *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430. This disposes of the imperfections asserted to exist in the agreement itself which respondent insists are of such gravity as to destroy the instrument. We pass then to the second consideration.

[9] 2. It has been pointed out that the separation agreement made complete disposition of the property of the spouses, dividing it equally between them; that the contemplated separation was a permanent one, and the disposition of the property was designed and declared to be final and complete. A complete release and relinquishment of all rights, present and prospective is indicated, first, by the general scope and intent of the instrument, and, second, by the following language: "The execution of this agreement and the consummation thereof \* \* \* shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party shall or will at any time hereafter make, or attempt to make, any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto. It is further expressly covenanted and agreed that neither party will \* \* \* interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; and that neither of them will, at any time hereafter, assert *any right, interest or title as heirs at law of the other*, to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate, and *all claim as such heir, or as surviving husband and wife respectively*, and all right to contest or oppose the last will of the other *is hereby expressly waived*."

Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family, and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance.

(a) To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not



in terms and by name relinquish the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as heir of the husband or as his surviving wife. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced. In the leading case in this state upon the subject—*In re Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829—under the articles of separation, the husband was to pay and did pay to the wife \$10,500, the contract providing that the \$10,500 should be in full satisfaction of "all her marital claims," etc. This was held to be a relinquishment upon the part of the wife of her right to family allowance. In *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358, the wife having received an allotted sum under the agreement of separation, which provided that she "relinquish all right as his wife in law or equity or by descent and each party shall have hereafter no claim upon the other for support or sustenance," it was held that the agreement was binding upon the parties, and deprived the wife of the right thereafter to select a homestead out of the husband's separate property either during his life or after his death. In this case *Eproson v. Wheat*, 53 Cal. 715, is distinguished; it being pointed out that in the latter case "the wife relinquished no right to property and the setting apart to her of a homestead after his (the husband's) death was not in contravention of any express or implied term of the agreement." In somewhat different form the question arose in *Re Davis*, 106 Cal. 453, 39 Pac. 756, where the spouses "relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired and to immediately separate and live apart from each other during their natural lives," the wife stipulating as to certain moneys to be paid her "that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire; and hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now or may hereafter in any manner acquire." The wife applied for letters of administration upon the estate of her husband, the right to such letters depending upon the relative's right to succeed to the personal estate or some portion thereof. It was held that the articles of agreement worked the disinheritance of the wife, and she was therefore not entitled to letters; this court saying: "Of course she remains the widow, since the parties could not by their contract change their matrimonial status; but it was perfectly competent for them to alter their legal relations as to their property, and this they accomplished.

The wife contracted away her inheritable interest in her husband's property, and with that right went the right to administer." In *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362, the agreement provided that it should operate "as a complete settlement and adjustment of all their property rights, relations, and affairs." There was property affected by a homestead. The husband paid to the wife one-half of the agreed valuation of this homestead property. The spouses lived apart up to the time of the husband's death. There were no children. The widow petitioned the court that the homestead property should be set aside to her, claiming that the homestead had never been abandoned, and that she was entitled to the same as the survivor of the marital community. The court in probate granted the application, and its order was reversed upon appeal, this court pointing out that it was declared that the agreement should operate as a complete settlement and adjustment of all their property rights, relations and affairs, that it was executed, and that it operated as an abandonment of the homestead. Elsewhere, language not so strong as that contained in this agreement has been held to bar the widow under similar applications. Thus in *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801, by terms of an antenuptial contract, each party released, conveyed, and quitclaimed to the other "all interest in the property of the other, both real and personal, renouncing forever all claims, in law and equity, of curtesy, dower, homestead and survivorship." It was contended by counsel for the widow that these terms of the contract did not embrace the widow's award, to which she was therefore entitled on application. But the court said: "The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other, in the property or estate of the other, and clearly embraced the widow's award." In *Appeal of Staub*, 66 Conn. 127, 33 Atl. 615, where the wife in an antenuptial agreement received a certain sum "in lieu of dower and all other rights and interest and claims which she would but for the agreement have had in the estate covenanted to receive this money 'in lieu and as full payment for her dower right and of all other claims and interest she otherwise would have had in his estate,'" this language was held to bar her right to the statutory allowance during the settlement of the estate. To the same effect are *Cowles v. Cowles*, 74 Conn. 24, 49 Atl. 195; *Paine v. Hollister*, 139 Mass. 144, 29 N. E. 541; *Tiernan v. Binns*, 92 Pa. 248; *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; *Young v. Hicks*, 92 N. Y. 235; *Johnston v. Spicer*, 107 N. Y. 191, 13 N. E. 753; *Pavlicek v. Roessler*, 222 Ill. 83, 78 N.

E. 11; *Brown v. Brown's Adm'r* (Ky.) 80 S. W. 470; *Deller v. Deller*, 141 Wis. 255, 124 N. W. 278, 25 L. R. A. (N. S.) 751.

Of the cases in this state which respondent contends support the contrary view, *Eproson v. Wheat* has already been considered, and shown not to be in point. In *Re Vance*, 100 Cal. 425, 34 Pac. 1087, no separation agreement was under consideration. The same is true of *In re Bump*, 152 Cal. 274, 92 Pac. 643. *Warner v. Warner*, 144 Cal. 615, 78 Pac. 24, did not involve the consideration of a separation agreement, but of an antenuptial agreement by which the wife "does hereby relinquish and disclaim any and all right, claim and interest in and to the property of said first party (the plaintiff) either as heir or otherwise." It was held that a declaration of homestead which the wife placed upon the separate property of the husband was not in violation of the terms of this agreement. Construing it, the court said that it was an agreement upon the part of the wife "not to seek to deprive him of any of his property or to assert any claim thereto adverse to him during his lifetime, or any claim of inheritance therein after his death. Her declaration of homestead was not a violation of this obligation thus assumed by her." It is concluded, therefore, that by the very language of the separation agreement the wife renounced, surrendered, and released her right to make application for a family allowance.

[10] (b) The wife, however, was not entitled to succeed in her application by reason of the fact that she had voluntarily and deliberately severed her relationship as a member of the husband's family. The separation agreement, as we have said, makes plain that such is her intent, while the proved facts of her conduct after the execution of these papers, including the fact, that, though in the same city with the husband at the time of his death, she did not even attend his funeral, emphasize the absolute severance of all family ties. In *re Noah*, supra; *Wickersham v. Comerford*, supra; *Estate of Miller*, 158 Cal. 420, 111 Pac. 255. In *Bose v. Bose*, 158 Cal. 428, 111 Pac. 258, it is held that under the statutes pertaining to a homestead and making provision for maintenance and support of the family, setting aside estates of small value, and property exempt from execution, the widow, to take, must

come within the definition of the "family," must have been a member thereof "or at least must, without fault of her own, have been entitled to maintenance and support from the husband during his lifetime." This language, of course, means that she must have been entitled to support as a member of his family. In the case at bar, the agreement being valid, the widow had voluntarily severed her connection with the family, and her right to support did not rest upon the family relationship at all, but upon the terms of the articles of agreement.

[11] 3. Finally, respondent contends that the court in probate may not consider the separation agreement; that the widow is entitled to all rights in and to the estate of her husband until, in an action in equity, the court has entered its decree specifically enforcing the contract against the widow. *Bridge v. Kedon*, 126 Pac. 149, is cited as authority in support of this view. The position is not sound, nor is it supported by the case mentioned. Of course, during the lives of the parties a court of equity would be the forum for the enforcement of any violated rights conferred by the agreement.

[12] But here the agreement has been fully executed, and one of the parties to it is dead. The other is making unwarranted claims in probate upon the estate of the deceased, and his representative interposes this agreement as a defense by way of estoppel to those claims. That the probate court has equitable jurisdiction for the purpose of passing upon the validity and effect of such agreements our cases not only recognize, but declare. In *re Noah*, supra, and *Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, are typical, while in *Estate of Edelman*, supra, discussing the bar of such an agreement, it is said: "While it is true that the law was unable to, and therefore did not, give effect to such transfers, releases, or extinguishments of heirship, it is equally true that they were always cognizable in equity, and that in proper cases they afforded a complete defense by way of estoppel. And this equitable defense by way of estoppel is cognizable by the court in probate."

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

**GREEN VALLEY DITCH CO. et al. v.  
FRANTZ et al.**

(Supreme Court of Colorado. Feb. 3, 1913.)

**1. WATERS AND WATER COURSES (§ 151\*)—  
IRRIGATION — ABANDONMENT OF WATER  
RIGHTS.**

The abandonment of the right to divert and use the water of a stream may be express or implied; it may be effected by a plain declaration of an intention to abandon, or may be inferred from acts or omissions so inconsistent with an intention to retain it as to convince the unprejudiced mind that it has been abandoned.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.\*]

**2. WATERS AND WATER COURSES (§ 151\*)—  
ABANDONMENT OF IRRIGATION RIGHTS —  
NONUSE.**

An individual or corporation, not asserting a water right for a period of 20, or even 18, years, or attempting to convert, control, or in any manner to apply it to a beneficial use during some part of that time, and allowing other owners and consumers to invest money and to divert and apply the water to a beneficial use, in the absence of some excuse other than making a claim thereto down through a continuous chain of paper title, may not thereafter claim a prior appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.\*]

**3. EVIDENCE (§ 313\*)—DECLARATIONS NOT FOL-  
LOWED BY ACTS.**

An oral statement or declaration, not followed by any act, cannot change conditions.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1166, 1167; Dec. Dig. § 313.\*]

**4. WATERS AND WATER COURSES (§ 152\*)—  
IRRIGATION RIGHTS — ABANDONMENT—ACTS  
CONSTITUTING.**

In an action to quiet title to an irrigation ditch, it appeared that defendants, who affirmatively claimed an interest in the ditch and waters carried therein, were successors in title to parties having and using appropriation rights in 1887 and 1889, but who thereafter had not taken or claimed any water from the ditch, and who had not objected to plaintiffs' use of all the waters that the ditch carried, but had stood by and saw them partially reconstruct the ditch at a considerable expense and also continue its maintenance, and that one predecessor a town-site company, attempted the destruction of the entire ditch, but agreed that pending a suit plaintiffs might have exclusive use of it. *Held*, that these acts showed a waiver of the prior appropriation without any intention of resuming it, and constituted an abandonment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**5. WATERS AND WATER COURSES (§ 152\*)—  
IRRIGATION—DECREE.**

A decree for plaintiffs, in an action to quiet title to an irrigation ditch and its appropriation therefrom, should be limited to the amount theretofore actually carried through the ditch and applied to a beneficial use, making the necessary allowance for seepage and evaporation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by the Green Valley Ditch Company and others against George S. Frantz and another, with cross-action by defendants. Judgment for defendants, and plaintiffs bring error. Reversed.

John W. Helbig and D. B. Kinkaid, both of Denver, for plaintiffs in error. Bartels & Silverstein and Allen & Webster, all of Denver, for defendants in error.

**HILL, J.** This action was brought by the Green Valley Ditch Company, a corporation, on behalf of itself and its stockholders, against the defendants in error, Frantz and Benton, for the purpose of quieting its title, and that of its stockholders, in and to a certain ditch and the appurtenances thereunto belonging, including appropriations. The defendants, by their answer, claim an interest in the ditch and the waters carried therein. They prayed that they be adjudged the owners of a certain interest in the ditch and water. The allegations in the answer are denied. The judgment was in favor of the defendants quieting their title to one twenty-sixth of the water theretofore used upon any or all of the lands lying under the ditch. It also gave them the right, without interference, to its use and enjoyment through the ditch, subject to prorating in times of scarcity. The plaintiffs bring the case here for review upon error.

Upon September 23, 1907, the defendants entered into a contract with its then owners to purchase block 5, Manchester, which, including streets and alleys, contains about five acres. They are in possession, and claim that a certain interest in the ditch and waters carried therein belongs to this land. Upon October 1, 1907, they made written demand upon the plaintiff company to have such interest recognized and water furnished therefor. Upon January 24, 1908, this demand was formally refused. This suit was instituted upon the same date.

The main contention pertains to the abandonment by the predecessors in interest of the defendants to that portion of the ditch and waters theretofore appertaining to this land. There is but little conflict in the evidence. There is an absence of evidence pertaining to some matters, although apparently sufficient to satisfy both sides. This pertains particularly to the amount of water to which the ditch is entitled, and the date of its appropriation. No decree covering these questions was pleaded or offered in evidence. It appears to be assumed by counsel (and for the purposes of this case we shall so treat it) that the pleadings and evidence disclose that this ditch has, or did have, an appropriation of 2.25 cubic feet of water per second of time from the South Platte river, and 2 cubic feet of water per second of time from a small tributary, called Sand creek. The dates of these appropriations, so far as

the pleadings or any evidence is concerned, are not attempted to be fixed.

The record discloses that between 1868 and 1880 a small ditch was constructed, about 2½ miles in length; that its head gate was located on the west bank of the South Platte river, from whence it runs in a northerly direction; that it crosses this so-called Sand creek about halfway down; that as early as 1885 Hiram and Artemesia Epperson (husband and wife) were the owners of 80 acres of land in section 21 and of 70 acres in section 15, all in township 4 S., range 68 W.; that this ditch, called the Epperson ditch, was used exclusively for irrigating some portions of this land, and was evidently considered as appertaining thereto; that the house in which the Eppersons then lived was situate in section 21; that the portion covered by the building thereafter became a part of block 5, Manchester; that in 1887 the Eppersons began to sell off portions of this land, which sales included water out of or an interest in the ditch therefor; that considerable of this land was sold and has ever since been used for gardening purposes, and has been continuously irrigated through this ditch; that these are the lands owned by the stockholders of the plaintiff company; that they are lower down the ditch than block 5, in Manchester; that in 1888 the ditch was in a dilapidated condition; that in 1888 or 1889 a meeting of consumers was held, for the purpose of devising ways and means to repair and put the ditch in proper condition, it being then partially obliterated in places and out of repair; that Hiram Epperson and wife were present at this meeting, and, when requested to assist in such repairs and maintenance for the benefit of lands then owned by them, including block 5, Manchester, they refused to do so, and, in substance, said that they did not need the ditch; that they were not using water from the Platte river, and had no further use for it, and told the plaintiffs that the ditch was theirs—to take it.

The evidence discloses beyond contradiction that the Eppersons did not use the ditch from the South Platte river to where it crosses Sand creek, or secure any water from the South Platte river, or in any manner assist in its maintenance, or participate in its control above Sand creek, since 1886. There is evidence that they used the ditch below Sand creek and ran a small amount of water through it, obtained from Sand creek, during the years 1887, 1888, and possibly 1889. The contention of the defendants is that the Eppersons' refusal to contribute was limited to that portion of the ditch above Sand creek; but it is undisputed that they never used, or contributed to repair, or thereafter assisted in maintaining, the ditch above Sand creek after 1886, or below that point after 1889, but that during 1888 and 1889 and thereafter the company's stockholders, or their prede-

cessors in interest, reconstructed, repaired, and cleaned out, wherever necessary, the entire ditch at considerable expense; that they constructed a dam in the Platte river at a cost of about \$2,000, and thereafter maintained the ditch at an expense of from three to five hundred dollars a year, and ever since have had the exclusive use and enjoyment of the entire ditch and waters run therein. The record is not clear as to the amount of water, from where secured, or upon what portions of these lands used, or the extent of such use upon any of them prior to 1887.

In November, 1889, the original plat of Manchester, or Manchester addition, was filed. This was signed by Hiram and Artemesia Epperson, with the usual dedications of streets, alleys, etc. It covers portions of these lands then owned by the Eppersons, including what is termed their old home site, covered by block 5. About November, 1889, the land then owned by the Eppersons covered by this plat was conveyed to A. McCallum, who, in November or December, same year, conveyed it to the Manchester Land Company. This included block 5. In June or July, 1890, this company proceeded to destroy the whole length of this ditch, where it crossed the streets and blocks in Manchester. Upon August 2, 1890, a suit was instituted by the stockholders of this plaintiff and some of their predecessors in interest against the Manchester Land Company to restrain it from destroying the ditch upon its lands, or in any manner interfering with their running water through it. This resulted in an agreement between the then owners of the land (which included this block 5) and the consumers, whereby the land company allowed them to reconstruct the ditch in a certain manner, and have the exclusive use and enjoyment thereof during the pendency of the action. What disposition was made of this suit is not disclosed; but the consumers continued to operate and have the exclusive use and control of the ditch, as before, without any adverse claim being made by any one, until about the time of the institution of this suit, during which period they increased their acreage irrigated from 33¼ to about 50 acres.

It is proper to observe that the stipulation entered into in the suit between the land company and the consumers recognizes the latter as being the owners of the ditch, in the following language, "The Manchester Land Company will convey all water which the plaintiffs may bring down in their old ditch." It will be noted that at this time it made no claim to either ditch or water, but was attempting the destruction of the former.

In October, 1906, these consumers incorporated the plaintiff, and executed a deed to it for the ditch, etc., accepting its stock in payment therefor, reserving, however, the water rights and appropriations as theretofore own-

ed and enjoyed by them. This evidently was for the purpose of providing a regular system for the maintenance of the ditch and the distribution of water to those entitled thereto. This ditch company, at all times thereafter, continued to operate and manage the property. Other than the deed to it by its stockholders, there does not appear to have ever been any deeds executed by any one for a right of way for the ditch. In addition to the stipulation referred to in the other suit, there are some reservations, in some of the instruments executed by the Eppersons pertaining to some of this land, recognizing this ditch as having a right of way.

The record further discloses that about 1891 these water consumers had trouble with a paper mill company, which, in building a large plant, destroyed a part of the canal, and to avoid litigation they, under protest, allowed the company to substitute a pipe line for eight or nine hundred feet, and to change this right of way from where it originally was situate upon the Manchester and other lands, and for this distance to run the pipe line upon the right of way of a railway company; that since which time there has never been any flume, pipe, or laterals or other means by which water could be conveyed to block 5, Manchester.

The defendants' evidence discloses that a deed of trust was given back to the Eppersons, or one of them, upon the Manchester land; that the Manchester Land Company, failing to pay, in 1897 deeded back in lieu of foreclosure, the premises in question to Mrs. Epperson; that thereafter she conveyed to L. Cook, trustee, who thereafter, in April, 1901, conveyed to William P. Epperson and Frank Steinmetz, who thereafter, in 1904, conveyed them to Leonora Epperson, who thereafter conveyed them to Louis and Theodore Bartels, who shortly prior to the bringing of this action, entered into the agreement of sale with the defendants in error. It is proper to state that these sundry conveyances and others included therein declarations of all water rights belonging and appertaining to the land conveyed. This chain of paper title is all the uncontradicted evidence that the defendants introduced pertaining to nonabandonment or intention by any of the owners of this land to claim any interest in the ditch or water. The only other evidence upon this subject is that of William P. Epperson, a son of Hiram Epperson and stepson of Mrs. Epperson, who states that in a conversation with sundry of these water consumers, about six or seven years prior to the bringing of this suit, he asserted a right to the use of this water. This was denied by the plaintiffs' witnesses. It is further disclosed that the contract of purchase from Bartels to the defendants concludes with the following paragraph: "In the event that no water rights belong to said land, then the

above one hundred (\$100) dollars to be refunded, and this receipt to be null and void."

[1] In *North American Exploration Co. v. Adams*, 104 Fed. 404, 45 C. C. A. 185, wherein rights to water in Colorado were involved, it is said: "The abandonment of the right to divert and use the waters of a stream is not different in its nature or character from the renunciation of any other right which is asserted and maintained by its use. It may be express or implied. It may be effected by a plain declaration of an intention to abandon it; and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation."

In *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989, it was held that a corporation may not divert water from a stream and make beneficial use of a portion thereof, and as to the residue so diverted never make any use whatever for over 20 years from the time of the original diversion, for more than 18 years from the time of an additional diversion, and for more than 9 years after its rights to the quantity theretofore diverted have been judicially established, and then be heard to assert its claim to such excess after subsequent appropriators have continuously, adversely, openly, and notoriously been enjoying the use thereof for such lengths of time.

In *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112, this court held that nonuse of water, continued for a considerable time, coupled with other acts showing an intention on the part of the owner not to resume or to repossess himself of the thing whose use he has relinquished, constitutes abandonment.

In *Sieber et al. v. Frink et al.*, 7 Colo. 148, 2 Pac. 901, it was held that a failure to use water is competent evidence of an abandonment of the right thereto, and if continued for an unreasonable period it creates a presumption of an intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proof.

[2] When these well-known rules are considered in connection with our recognized doctrine of priority by appropriation, without attempting to lay down any definite rule pertaining to the length of time necessary to create the presumption of abandonment upon account of nonuse, coupled with other acts, although slight, disclosing an intention to abandon, it may well be said that a period of 20 years, or even 18 years, is too long a time for an individual or corporation to be permitted to thereafter make claim to an appropriation without having asserted a right thereto, or attempting to convert, control, or in any manner to apply it to a beneficial use during some portion of that period, unless some peculiar fact or condition can be shown by which the party or parties might be excused during that length

of time; and such excuses must be other than making a claim thereto down through a continuous chain of paper title. Here no excuse is given or peculiar circumstances attempted to be shown; but, to the contrary, during all this time the predecessors of these defendants sat silently by and allowed, not only the plaintiffs to act as above set forth, but allowed other consumers, both up and down the river, to construct many ditches and reservoirs and invest large amounts in the construction thereof, and the diversion and application of waters to a beneficial use, without any assertion of right upon behalf of the predecessors of the defendants to the ownership or right to use any of the waters from said streams.

[3] Outside of the alleged paper title, the only conflict in the evidence pertaining to abandonment is in the alleged declaration of one of the predecessors in interest of the defendants, who says that some seven or eight years before suit he claimed the right to a portion of the water in said ditch. This was disputed; but if true it was but an oral statement followed by no act, for which reason it could not change conditions. *Hewitt v. Story*, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265. While, upon the other hand, the undisputed declaration of his predecessors, to wit, his father and step-mother, is to the fact that they declined to participate in the expenses of the reconstruction of the ditch and the repairs and maintenance therefor, or in its use thereafter, stating, in substance, that they had no use for it; that it belonged to the plaintiffs; for them to go take it, etc. Later their grantees made an effort at the complete destruction of the canal by plowing it in for about 1,200 feet wherever any street or alley in Manchester was to cross it; and they persisted in thus having it destroyed until a suit was instituted against them, with the view of restraining them from accomplishing such destruction. This contention was thereafter adjusted under some arrangement by which the plaintiffs were allowed to reconstruct, and have enjoyed its use ever since, as theretofore.

It is also undisputed that the grantors of these defendants never made any claim to any interest in the ditch or waters, and that the defendants, in buying, had notice of conditions, and protected themselves by the clause referred to in their contract of purchase. It is evident that the trial court misconstrued the legal effect of the evidence.

[4] The facts are along the same lines as those in *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. 693. The conclusion is irresistible, upon a review of the whole record, that the appropriation acquired by the Eppersons for the lands now claimed by the defendants by means of the application of water upon a portion of it, through this ditch, on and be-

fore 1887, 1888, and 1889, was afterwards abandoned. The testimony shows that no water was thereafter taken through this ditch from either the Platte river or Sand creek for this land, and no claim made by any owners of it that they be furnished with any water, until after the contract of purchase by the defendants in October, 1907, a period of over 20 years, when applied to the South Platte river, and that portion of the ditch above Sand creek, being about one-half of the ditch, and a period of 18 years or over, when applied to the lower end of the ditch and the waters derived from Sand creek. During this entire period the Eppersons, as well as all subsequent owners, interposed no objections to the plaintiffs' application of all the waters that the ditch would carry, but, to the contrary, not only stood by and saw them partially reconstruct the ditch at considerable expense, also continue its maintenance, but permitted them, during all these years, to divert all the waters carried through the ditch, without even notifying them of their claim thereto, other than the one alleged statement of the son, William P. Epperson, which is in dispute. It is undisputed that the town-site company attempted the destruction of the entire ditch through the land platted by the Eppersons while the company was the owner and in possession. These facts all tend to show a voluntary yielding up and waiver of the priority acquired by Eppersons (not sold to the other consumers) without any intention of resuming it, and constitute a clear case of abandonment.

[5] The plaintiffs are entitled, as against the defendants, to a decree quieting their title to the ditch and waters appropriated by them and their predecessors in interest, heretofore carried therein, to the extent of such appropriations, from both the South Platte river and Sand creek. These should be limited to the amount that they have heretofore enjoyed, as disclosed by the evidence, which is to be tested by the amount heretofore actually carried through the ditch and pipe line and applied to a beneficial use, making the necessary allowance for seepage and evaporation. When the amount of land heretofore irrigated, the capacity of the pipe line constituting a part of the ditch, and the waters heretofore carried are considered, it is evident that it does not exceed 2.90 cubic feet of water per second of time from both sources.

The judgment is reversed and the cause remanded, with instructions that a decree be entered in harmony with the views herein expressed.

Reversed.

MUSSER, C. J., and GABBERT, J., concur.

## HENWOOD v. PEOPLE.

(Supreme Court of Colorado. Feb. 3, 1913.)

## 1. HOMICIDE (§ 17\*)—MURDER—HOMICIDE IN ATTEMPT TO KILL ANOTHER.

Where defendant committed an offense in taking the life of a person at whom he shot, he was guilty of a like offense in causing the death of a bystander by accident in the course of the affray.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 23; Dec. Dig. § 17.\*]

## 2. HOMICIDE (§ 33\*)—MANSLAUGHTER—"VOLUNTARY MANSLAUGHTER."

Under Rev. St. 1908, §§ 1625-1628, the unlawful killing of a human being without malice and deliberation, and upon sudden heat of passion caused by a provocation apparently sufficient to excite irresistible passion in a reasonable person, constitutes "voluntary manslaughter."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 54; Dec. Dig. § 33.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7350, 7351.]

## 3. HOMICIDE (§ 74\*)—"INVOLUNTARY MANSLAUGHTER."

Under Rev. St. 1908, §§ 1625-1628, "involuntary manslaughter" may consist in the taking of a human life without any intent to do so while in the commission of a lawful act without due caution or circumspection.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 97-101; Dec. Dig. § 74.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3762, 3763; vol. 8, p. 7692.]

## 4. INDICTMENT AND INFORMATION (§ 189\*)—MURDER—DEGREES.

An information for murder in the first degree includes all the lower grades of criminal homicide.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

## 5. HOMICIDE (§ 282\*)—TRIAL—QUESTIONS OF LAW OR FACT.

Where there was any evidence relevant to the issue of manslaughter, its credibility and force were for the jury, and not as matter of law for the decision of the court.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.\*]

## 6. HOMICIDE (§ 271\*)—MANSLAUGHTER—SUDDEN HEAT OF PASSION.

Where, immediately preceding the shooting of a bystander, defendant and another were engaged in a conversation in a barroom, where many others were present, and such person knocked defendant down with his fist by a blow so violent that defendant struck the floor hard, there was a question for the jury as to whether the circumstances were such as tended to excite a "sudden heat of passion."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 565; Dec. Dig. § 271.\*]

## 7. HOMICIDE (§ 271\*)—QUESTION FOR JURY—DEGREE OF OFFENSE.

Whether circumstances tending to excite a sudden heat of passion amounted to the statutory provocation, and were sufficient to cause that passion which the statute denominates irresistible, was not for the court to determine either as a question of law or fact.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 565; Dec. Dig. § 271.\*]

## 8. HOMICIDE (§ 60\*)—ELEMENTS OF INVOLUNTARY MANSLAUGHTER.

Where defendant, though justified in shooting to protect his life, did so without due caution, or taking into consideration the presence

of others, he could be found guilty of involuntary manslaughter in causing the death of a bystander.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 84; Dec. Dig. § 60.\*]

## 9. HOMICIDE (§ 39\*)—TRIAL—INSTRUCTIONS.

Defendant, who claimed to have acted in self-defense, is not thereby precluded from asserting that a homicide was committed under circumstances reducing it to manslaughter, where there is evidence tending to show both that defendant acted under the influence of sudden heat of passion, and also that he acted in self-defense, but is entitled to have the entire *res gestæ* laid before the jury to be considered as a whole, without distinction as to which party introduced the several matters of evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59-61; Dec. Dig. § 39.\*]

## 10. HOMICIDE (§ 282\*)—TRIAL—QUESTION FOR JURY—UNLAWFUL INTENT.

On evidence in a trial for the murder of a bystander, *held*, that the question of whether defendant sought out a third person for the purpose of taking his life and shot him in pursuance of a pre-conceived design was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.\*]

## 11. JURY (§ 34\*)—RIGHT TO TRIAL BY JURY—MURDER.

Since the Constitution and laws of the state provide a jury trial for a person charged with murder, it is for the jury alone to determine the weight of the evidence and the credibility of the witnesses, so that, where there was testimony tending to reduce the killing to manslaughter, the taking of that issue from the jury was an infringement of defendant's right to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 233-235; Dec. Dig. § 34.\*]

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Harold F. Henwood was convicted of murder in the second degree, and he brings error. Reversed and remanded.

John T. Bottom, of Denver (Milnor E. Gleaves, of Denver, of counsel), for plaintiff in error. Benj. Griffith, Atty. Gen., Archibald A. Lee, Deputy Atty. Gen., Theo. M. Stuart, Jr., Asst. Atty. Gen., Willis V. Elliott, Dist. Atty., and John Horne Chiles, Chief Deputy Dist. Atty., all of Denver, for the People.

GABBERT, J. The plaintiff in error, whom we shall hereafter designate as defendant, was convicted of murder in the second degree, and sentenced to the penitentiary for life. He maintains that prejudicial error was committed at the trial in several particulars, only a few of which, however, will be considered.

[1] The defendant shot and killed Sylvester L. Von Phul. For this homicide an information was filed charging him with murder. It was claimed that some of the shots fired by defendant at Von Phul struck George E. Copeland and caused his death, and an information was also filed charging the defendant with the murder of Copeland. The defendant was tried for the offense so charg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed, with the result above noted. Copeland was a bystander, taking no part whatever in the difficulty between the defendant and Von Phul, so that, if the defendant committed an offense in taking the life of Von Phul, he was guilty of a like offense in causing the death of Copeland. *Ryan v. People*, 50 Colo. 99, 114 Pac. 306, Ann. Cas. 1912B, 1232. At the outset counsel for defendant contends the evidence does not establish that any of the shots fired by defendant took effect in the body of Copeland, and for this reason urges the court should have sustained a motion to instruct the jury to return a verdict of not guilty at the conclusion of the testimony on the part of the people. We do not deem it necessary to either review or go into an extended discussion of the testimony bearing on this subject, as, in our opinion, it was ample to sustain the finding of the jury that shots fired by defendant at Von Phul struck and caused the death of Copeland. The testimony on the part of the prosecution bearing on the taking of the life of Von Phul is substantially as follows: Several persons, including Von Phul, Copeland, and the defendant, were in the barroom of the Brown Palace Hotel. The latter and others, with him, at his invitation, were about to take a drink at the bar. Von Phul and a friend or acquaintance of his were also standing at the bar, waiting to be served. After the defendant had ordered the drinks for his guests, he approached Von Phul, to whom he made a remark, which the witnesses for the people did not hear or understand, when Von Phul turned, and with his fist struck him in the face, knocking him down, his head, as one of the witnesses for the people expressed it, striking the floor hard. As to what then occurred the witnesses do not altogether agree. On behalf of the prosecution the testimony is to the effect that Von Phul, after knocking the defendant down, turned his back upon him, and faced the bartender; that he did not attempt to pursue the defendant, or to draw a revolver, or put his hand to his hip pocket, or make any demonstration that he intended to pursue the defendant; that the latter raised from the floor, and attempted to draw his revolver; that it caught in his clothing; that he unfastened it; that two men seized, and tried to prevent him from shooting; that he pushed both aside, and commenced to shoot at Von Phul; and that during this time Von Phul did not advance on defendant, or make any hostile demonstration whatever. The defendant testified that on the afternoon preceding the shooting he had gone to Von Phul's room in the Brown Palace Hotel, where they were both guests, for the purpose of inducing him to return letters a woman had written to Von Phul, and which she had commissioned him to obtain; that on this occasion Von Phul struck him on the left temple with a shoe-tree, and drew a revolver, saying that he would kill the defend-

ant if he were armed, but, as he was not, would not do so because, as Von Phul expressed it, "They would have it on me." The defendant also testified that on the following day and preceding the night of the encounter in the barroom he was informed that Von Phul had threatened to kill him; that these threats were communicated to him orally and by a note written by the woman mentioned; and that, after learning of these threats, he purchased the revolver with which he did the shooting. With respect to the affray in the barroom the defendant testified that Von Phul entered the room with a friend after he did, and stood at the bar, talking with this friend; that he changed positions, which brought the defendant and Von Phul quite close; that he, the defendant, then said to Von Phul, "Won't you consider what happened yesterday afternoon?" to which Von Phul replied: "I am going upstairs and I am going to grab that grey-haired (using a foul epithet) by the hair and pull him out of there, and show him who is master here"; that he, the defendant, then said, "I am not going to allow you to get that over me," and that Von Phul then said, "I will get you first, you understand," following this remark with a blow with his right hand on the point of defendant's chin, which felled him to the floor and dazed him for a minute. As to what then occurred, the defendant stated: "As I lifted myself up from the ground, I remember this part, and that was, to see that man reach for the gun. I am sure he reached for it, and it was only a movement on my part to protect my life, and I pulled my pistol and shot him. I fired all the shots the gun contained, but I don't know how many." In brief, as we understand the testimony of defendant, it is that as he was rising from the floor Von Phul looked at him and placed his right hand at his right hip pocket as though to draw a revolver, and that for this reason he drew his weapon and fired at Von Phul. Three of the shots fired struck Von Phul, one in his right wrist and the other two in his back. The defendant also testified he thought Von Phul was armed. There was testimony on the part of the people to prove that he was not, and probably some evidence tending to prove that the defendant knew he was not. The bartender testified that Von Phul stepped from his friend's left to his right; that this change of position placed him next to the defendant; that Von Phul asked his friend to be permitted to make this change, saying to him: "There is a dirty ——. I licked him once, and will lick him again, but he won't fight." This witness also stated, "Henwood did not go over to Von Phul. Von Phul went over to Henwood;" and that Von Phul was looking at the defendant at the time the shots were fired. Another witness on behalf of defendant testified that Von Phul, after knocking the defendant down, was almost facing him, with his right hand



on his hip pocket, when the defendant commenced shooting; while a third witness for the defendant testified that Von Phul, after knocking defendant down, looked at him with a sneer, and had one hand resting on the bar and the other on his hip, and that at the time the defendant was drawing his revolver Von Phul was looking directly at him. There was also testimony on the part of the people to the effect that defendant had threatened to kill Von Phul. This the defendant denied. The testimony stands undisputed that the defendant did not fire a single shot until after he was knocked down, and that he commenced shooting as soon thereafter as he could draw his revolver. The court instructed the jury on the law of murder in the first and second degree, and also on the law of self-defense, but stated to the jury: "There is no manslaughter in this case."

[2, 3] Sections 1625 to 1628, inclusive, R. S. 1908, are as follows:

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection."

"In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing."

"The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

"Involuntary manslaughter shall consist in the killing of a human being without any intent so to do; in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence in an unlawful manner, provided always, that where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

These statutory provisions are a recognition of the frailty of human nature, the purpose of which is to reduce a homicide committed in the circumstances therein contemplated to the grade of manslaughter, either voluntary or involuntary, as the facts may warrant. From the statutes above quoted it appears that the unlawful killing of a human being, without malice and deliberation, upon

a sudden heat of passion caused by a provocation apparently sufficient to excite an irresistible passion in a reasonable person, constitutes manslaughter, and that involuntary manslaughter may consist in the taking of a human life without any intent so to do in the commission of a lawful act without due caution or circumspection.

[4] The information charged murder in the first degree, and therefore included all the lower grades of criminal homicide. If there was no evidence upon which a verdict of manslaughter could be based, then the trial court was justified in instructing the jury to that effect.

[5] On the other hand, if there was evidence relevant to the issue of manslaughter, its credibility and force were for the jury to consider in determining the facts, and not as a matter of law for the decision of the court. *Crawford v. People*, 12 Colo. 290, 20 Pac. 769; *Stevenson v. U. S.*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980. So that, whether it was proper to withdraw from the jury the question of the guilt of the defendant of any particular grade of the offense included in the information must be answered by considering whether there was any evidence tending to establish such grade. *Allison v. State*, 74 Ark. 444, 86 S. W. 409.

[6, 7] The evidence shows without question that immediately preceding the shooting the defendant and Von Phul were engaged in a conversation in a public barroom, where many were present, that Von Phul knocked defendant down with his fist by a blow so violent that defendant struck the floor with great force, his head striking "hard," and that as defendant raised up he drew a revolver and commenced firing at Von Phul. This statement of what occurred shows circumstances tending to excite a "sudden heat of passion." Whether they amounted to the statutory "provocation" and were sufficient to cause passion on the part of the defendant which the statute denominates "irresistible" was not for the court to determine, either as a question of law or of fact, but one of fact for the jury to determine from the evidence in the case.

[8] The defendant claimed to have fired the shots at Von Phul with the intention of striking him for the purpose of protecting his life. If the facts justified him in so doing, his action in this respect would be lawful, but, if he did so without due caution or circumspection, taking into consideration the presence of others in the barroom, he was not guiltless, but might be adjudged guilty of involuntary manslaughter in causing the death of Copeland; but with the question of manslaughter taken from the jury there was nothing left for them to do but to find him guilty of murder when they found, as they evidently did, that defendant was not justified in firing the shots in self-defense, thus depriving them of their exclusive province

to determine the grade of the offense from the evidence in the case, notwithstanding that there was evidence upon which a verdict of manslaughter might have been based.

[9] We do not mean to intimate what the verdict should have been; but, as there was not an entire absence of evidence tending to establish the crime of manslaughter, it was error for the court to take that question from the jury by instructing them "that there is no manslaughter in this case." Counsel for the prosecution insist that it was not error to so instruct, for the reason the defendant stated that at the time he shot at Von Phul he had no feeling of either passion or revenge. An examination of the record convinces us that what the defendant meant by this statement was that he had no feeling of passion or revenge when he purchased the revolver, and was not referring to the time when he fired the shots at Von Phul. It is also contended on behalf of the people that, as the defendant testified he shot to protect his life, manslaughter was not involved. In other words, the contention is that, defendant having claimed that he acted in self-defense, he is precluded from asserting that the shooting was done under circumstances which reduce the homicide to manslaughter. In the circumstances of this case, we do not regard this contention as tenable, as there was evidence tending to prove that the homicide was manslaughter. In *Stevenson v. U. S.*, supra, the testimony tended to establish that the deceased, by his conduct, had provoked passion on the part of the defendant, and also that the latter had acted in self-defense. There, as here, it was urged that the two defenses were incompatible. On that subject the court said (162 U. S. at page 322, 16 Sup. Ct. at page 842, 40 L. Ed. 980): "It is objected that, while the evidence above set forth was proper to be submitted to the jury upon the issue of self-defense, it was not of that character to even raise an issue as to the grade of the crime, if the theory of self-defense were not sustained. We do not see the force of the objection. The fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with a claim that it also raised an issue as to whether or not the plaintiff in error was guilty of manslaughter, instead of murder. It might be argued to the jury under both aspects, as an act of self-defense and also as one resulting from a sudden passion, and without malice. The jury might reject the theory of self-defense as they might say the shot from the pistol of the deceased had already been fired, and the plaintiff in error had not been harmed, and therefore firing back was unnecessary and was not an act of self-defense. But why should the other issue be taken from the jury, and they not be permitted to pass upon it as a question of fact." As there was testimony tending to

prove that defendant acted under the influence of passion provoked by Von Phul, and that he also acted in self-defense, we think the rule announced in *Kent v. People*, 8 Colo. 563, 9 Pac. 852, applicable, which is to the effect that the defendant was entitled to have the entire *res gestæ* laid before the jury, to be considered as a whole, without distinction as to which party introduced the several matters of evidence.

In this connection the *Crawford Case*, supra, is instructive. In that case Chief Justice Helm, after stating what had occurred between the deceased, his father, who was with him, and the defendant, from which it appeared there was an affray between the parties, stated what then occurred as follows: "That in the confusion and excitement, and further incensed by these additional epithets, defendant took a small shotgun loaded with a single charge of fine shot, and went to the door, not designing, as he asserts, to take the life of Pratt, but with a view of defending himself and protecting his premises. The gun was, however, discharged, and the son was unintentionally killed." The trial court had refused to instruct on manslaughter. In the opinion, the learned Chief Justice, after enumerating instances when it would be proper to withdraw from the consideration of the jury the question of the grades of manslaughter, said: "But where there is an affray, and where self-defense is a defense relied on, the court exercises an exceedingly dangerous prerogative in refusing to charge upon the minor, as well as the graver, offenses covered by the indictment. \* \* \* By statute the accused in criminal cases is permitted to become a witness, and, when once upon the stand, all the ordinary rules of evidence apply to him. He is subject to cross-examination; his testimony may be impeached; the circumstances under which he testifies may be considered; and perjury on his part can be as readily disclosed as in the case of other witnesses. The jury are to give his testimony such credit and such weight as, in their judgment, shall, under all the circumstances, be proper. They may accept it as true, or they may reject it as false. \* \* \* The evidence shows without question that at the time of the homicide there was a quarrel between defendant and Gideon Pratt, followed by an affray, during which violent, profane, and angry words were used by both parties, and in which they engaged in a physical rencounter of considerable duration, grappling and exchanging blows. The firing of the fatal shot grew out of this affray, and was directly connected with and a part of it. There were circumstances tending to excite a 'sudden heat of passion.' Whether such circumstances amounted to the statutory 'provocation,' or caused the passion which the statute denominates 'irresistible,' was not for the court to determine."

[10] It is also urged by the prosecution

that, if there was a preconceived design on the part of the defendant to kill Von Phul, the homicide was murder, notwithstanding the fact that there was provocation. This contention is based upon the fact that defendant had purchased a revolver after the difficulty in Von Phul's room, and the testimony to the effect that defendant had threatened to kill Von Phul. We cannot determine as a fact that defendant sought Von Phul in the barroom with the intention of taking his life. The defendant did buy a revolver the day preceding the shooting. He says he bought it for his protection. There was evidence on the part of the people that he had threatened to kill Von Phul. This the defendant denied, so that whether he sought out Von Phul for the purpose of taking his life, and pursuant to a preconceived design to do so, shot him, or whether he spoke to him without such design and the shooting was the result of such a degree of passion caused by a provocation on the part of Von Phul as would reduce the homicide to manslaughter, were questions for the jury to determine, and neither the trial court nor this court can invade that province.

Counsel for the people cite many cases wherein it is held that the trial court did not err in taking the question of manslaughter from the jury. It can serve no useful purpose to review them. They are all based on the principle that, when there is no evidence to establish manslaughter, it is not error to take that question from the jury, and point out from the testimony in each of the cases that such was the fact. This constitutes the distinguishing feature between these cases and the one at bar. All authorities, both text-writers and reported cases, uniformly hold that, where there is testimony tending to prove manslaughter, it is error to refuse to instruct the jury on that offense, or by an instruction, to take that question from them, for the reason, as held in the *Stevenson Case*, *supra* (quoting from the syllabus): "On the trial of a person indicted for murder, although the evidence may appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense, yet, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court." In *Rutherford v. State*, 18 Tex. App. 649, the case had once been before that court, and reversed for the reason that the trial court had refused to give an instruction on manslaughter. At the second trial the trial judge again refused to instruct on this subject. In reviewing the case a second time, the appellate court said: "We still think that a charge upon the law of manslaughter is demanded by the evidence. We have never held, as the learned judge seems to think

we have, that the evidence would justify a verdict for manslaughter. It was not, and it is not, our province to determine that question when considering the law of the case, nor was, or is it, the province of the trial judge to determine that question when instructing the jury. That was a question exclusively for the jury to decide. His idea seems to be that if the evidence, in his opinion, would not justify a verdict of manslaughter, then he ought not to charge the law of that offense. Such is not the rule of the law. If there is evidence in the case tending to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence would justify a conviction for said offense. It is the business of the jury, and not the court, to pass upon the sufficiency of the evidence. Our Constitution and laws guarantee a citizen charged with felony the right of trial by jury, and it is made the duty of the jury, and not of the judge, to pass upon the credibility of the witnesses, and determine the weight of the testimony. \* \* \* When the judge assumes the power of determining the sufficiency of the evidence to support an issue presented by it, and refuses to charge the law relating to that issue, he invades the exclusive province of the jury, and denies to the citizen on trial the full benefit of the trial by jury, and thus deprives him of a trial by due course of the law of the land."

[11] The results of the affray between Von Phul and the defendant are deplorable in the extreme, but this did not deprive the defendant of the right to have his guilt or innocence determined by a jury according to the law of the land. The Constitution and laws of the state provide for the trial of a person charged with murder by a jury. They, and they alone, must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts, and thus invade the province of a jury. No matter how lightly the court may regard the testimony offered on behalf of the defense, the question of its weight and the credibility of the witnesses is to be determined by the jury, properly instructed as to the law. Unless this course is followed, a defendant is deprived of his constitutional right of a trial by jury. It is manifest there was testimony tending to prove manslaughter. Whether or not it was sufficient to justify a verdict of that character was for the jury to determine, and not the court. By advising the jury that there was no manslaughter in the case, the trial judge deprived the defendant of his unquestioned right guaranteed by the fundamental and statutory law of the state to have a jury determine the grade of the offense for which he was on trial.

The judgment of the district court is re-

versed, and the cause remanded for a new trial.

Reversed and remanded.

SCOTT, J., not participating.

**CITY AND COUNTY OF DENVER v.  
PITCHER, City and County Assessor.**

**COLORADO TAX COMMISSION v. SAME.**

(Supreme Court of Colorado. Feb. 3, 1913.)

**1. TAXATION (§ 438\*)—ASSESSMENT—REDUCTION—REDUCTION BY COUNTY ASSESSOR—AUTHORITY.**

The assessor of the city and county of Denver has no authority, under the statutes and constitutional provisions applicable, to make a horizontal reduction in the total assessed valuation of the county taxes after delivering an abstract of his assessment to the State Auditor; only the taxing authorities having such power.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 768, 769; Dec. Dig. § 438.\*]

**2. INJUNCTION (§ 74\*)—ASSESSMENTS—REDUCTION BY COUNTY ASSESSOR—AUTHORITY TO PROHIBIT.**

Since the assessor of the city and county of Denver has no power to make a horizontal reduction of the total assessed valuation for county purposes, after he has delivered the abstract of his assessment to the State Auditor, but must extend the levy upon the assessment made by the taxing officials, and deliver the completed tax roll to the treasurer for collection, the courts have power to compel the performance of such ministerial act and to restrain a reduction by him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 142, 150; Dec. Dig. § 74.\*]

**3. TAXATION (§ 438\*)—ASSESSMENT—CHANGE BY ASSESSOR.**

A county assessor cannot alter the completed tax roll, in the absence of express statutory authority.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 768, 769; Dec. Dig. § 438.\*]

**4. INJUNCTION (§ 74\*)—PURPOSE OF RELIEF—ACTS OF PUBLIC OFFICIALS.**

If public officials exceed their authority under the law, and the resulting injury cannot be adequately prevented by proceedings at law, equity will enjoin such illegal act.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 142, 150; Dec. Dig. § 74.\*]

**5. INJUNCTION (§ 16\*)—ADEQUACY OF LEGAL REMEDY.**

Since it is the duty of a county tax assessor to extend a levy upon an assessment by the taxing officials and to deliver the completed tax roll to the treasurer for collection, equity will compel him to perform such ministerial duty, and hence the assessor for the city and county of Denver will be restrained from making a horizontal reduction of the total assessment, where he has no authority under the statutes to do so; a statutory remedy not being provided by Rev. St. 1908, § 5636, providing that, if, in the opinion of the State Board of Equalization, any county assessor has assessed the property below its true value, it may on reasonable notice to the assessor require him to conform to the statutes, as the section does not apply to an assessor making a horizontal reduction of a completed assessment, but only where the valuations of property assessed, as orig-

inally returned, do not comply with the statutes.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.\*]

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Suits by the City and County of Denver and by the Colorado Tax Commission against Clair J. Pitcher, as assessor of the City and County of Denver. Judgments dismissing the actions, and plaintiffs in each case bring error. Reversed and remanded, with directions.

The defendant in error in each of these cases is the assessor of the city and county of Denver. He was engaged in making a horizontal reduction of 10 per cent. on the valuations of property theretofore assessed, valued, and listed by him for the year 1912, and extending the tax roll accordingly, when each of the plaintiffs in error brought an action to restrain him from so doing, and, for such other, further and general relief as to the court should seem meet and proper in the premises. In the case of the city and county of Denver, an ex parte restraining order was issued by the district court. The defendant filed a general and special demurrer in each suit, which was sustained, and the restraining order in the one case dissolved, and denied in the other. Thereupon the plaintiffs in each case stood upon their respective complaints, and their actions were dismissed. The plaintiffs have brought their respective actions here for review on error, and severally ask for a restraining order against the assessor, until the causes can be determined on their merits. Both parties appeared at the oral argument and stipulated that the arguments on the application for the restraining orders, asked for by the plaintiffs, should be treated as arguments on the merits, and that the causes should stand submitted for final determination. As the causes present practically the same questions, they will be disposed of in one opinion.

On behalf of the city and county of Denver, the complaint filed in the court below alleged, in substance: That the plaintiff is, and at all times mentioned was, a municipal corporation, existing by virtue of the Constitution and laws of the state of Colorado; that the defendant is, and at all times since June 1, 1912, has been, the duly elected, qualified, and acting assessor of the city and county of Denver, and has at all times since that date had, and now has, the actual possession, custody, and control of the office of the assessor, and of all books, records, matters and things pertaining to that office; that pursuant to law, and prior to August 1, 1912, he made, and caused to be made, an assessment of the real and personal property within the city and county of Denver, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereafter, and on or about the first Tuesday in August, 1912, met with the assessors of the different counties of the state, as provided by law, and compared his assessment with the assessments of the property in other counties of the state, and, after such comparison, did not change or correct his assessment, as theretofore made; that he made an assessment roll of the property in the city and county of Denver, and on or about August 30, 1912, produced an abstract of his assessment roll, and subscribed and swore thereto, at the city of Boulder, in the presence of the Auditor of State, which assessment roll showed a total valuation of the property within the city and county of Denver, subject to assessment, in the sum of \$133,835,120; that, after the authentication of such assessment roll the Auditor of State presented it to the State Board of Equalization and to the Colorado Tax Commission, and thereafter, and prior to October 1, 1912, the State Board of Equalization held a meeting for the purpose of adjusting and equalizing the valuation of real and personal property among the several counties of the state; that at this meeting no objection or complaint was made by the defendant, or any one, to the assessment made by the defendant, as verified before the Auditor of State; that the Colorado Tax Commission, after the presentation to it of such assessment roll, held various meetings for the purpose of examining the assessment of the real and personal property in the several counties, as made by the respective assessors, and certified the same to the State Auditor, as provided by law; that neither the board of equalization nor the Tax Commission made any change or correction in the assessment made by the defendant, nor requested him to make any change or correction; that during the month of September, 1912, the board of supervisors of the city and county of Denver sat as a board of equalization; that at such meetings only two complaints upon petition were presented to the board of equalization with respect to the assessment made by defendant, which, after a hearing, were denied; that, after the assessment roll for the year 1912, prepared by defendant, was ready for the extension of taxes, he certified the total amount of property assessed within the limits of the city and county of Denver to the city council, showing the assessment so made by him, and also the assessment upon the property of telegraph, telephone, and railroad companies, as certified to him by the Tax Commission; that thereafter the council passed an ordinance levying taxes on all taxable property within the limits of the city and county of Denver for the year 1912, which was duly and regularly passed, and signed and approved by the mayor; that at various times subsequent to the acceptance by the State Board of Equalization and Colorado Tax Commission of the

assessment of real and personal property, made by defendant, and prior to December 20, 1912, the Auditor of State and State Treasurer issued warrants in payment of appropriations theretofore made by the General Assembly, which warrants were based upon, and in anticipation of, the revenues to be derived from taxes collected upon property within the city and county of Denver in accordance with the assessment made by the defendant; that on December 2, 1912, the mayor of the city and county of Denver presented to the council what is known as the "mayor's budget" for the year 1913, which budget was based upon the revenue to be derived from taxes collected in accordance with the assessment so made by defendant, and the appropriation ordinance for the city and county of Denver during the year 1913; that on or about the 20th day of December, 1912, the defendant wrote to the Auditor of State a letter, notifying him that he desired to withdraw the assessment theretofore made by him, and that he had concluded to make a horizontal reduction of 10 per cent. of all assessments under his jurisdiction, and notified the Auditor that the assessed valuation of the property within the city and county of Denver for the year 1912 would be reduced 10 per cent., and would stand at approximately \$121,709,835; that at about the same time the defendant notified the mayor of the city and county of Denver of his proposed horizontal reduction on the assessment of property within his jurisdiction; that defendant has not delivered to the treasurer of the city and county of Denver the tax list and warrant under his hand and official seal, setting forth the assessment roll, with the taxes extended, and is proceeding to prepare a tax list and warrant setting forth the valuation arrived at by a horizontal reduction of 10 per cent. from the valuation and assessment made and certified to the Auditor of State and city council.

The complaint then charged that certifying and delivering to the treasurer the tax list and assessment roll and warrant, prepared in accordance with the proposed horizontal reduction of assessments, will subject the government of the city and county of Denver and that of the state to great embarrassment and difficulties, would create unutterable confusion in the administration of the financial department of these governments in the collection of taxes, and will cause delay in such collection, and that, as plaintiff is informed and believes, the assessor, through persons acting under his direction and control, has for some time past been working in making the horizontal reduction of 10 per cent., and extending taxes based thereon, to the end that the tax list and warrant for the collection of taxes may be delivered by him to the treasurer of the city and county of Denver before any order of

court, commanding him to desist therefrom, can be applied for and secured.

The complaint on behalf of the Colorado Tax Commission, after alleging that it is created by the laws of the state, and is authorized to bring in its own name such suits as are necessary to enforce all laws of the state for the assessment, levying, and collection of taxes, alleges substantially the matters set up in the complaint of the city and county of Denver. To each of these complaints the defendant filed a special demurrer, based upon the ground that the court was without jurisdiction of the subject-matter of the action in that the statutes provide a method of procedure for the hearing and trial of the questions set up in the complaint, and that no showing is made that the plaintiff has or has not availed itself of these statutory provisions; that the defendant is a public officer of the city and county of Denver and state of Colorado, and that the acts which the plaintiff is seeking to enjoin him from performing are acts required of him by the statutes of the state; and that the defendant is a constitutional and state officer, performing duties of a quasi judicial nature, and the effect of the relief sought is to control him in the exercise of his official functions of a governmental and executory nature, and prevent him from exercising his discretion and judgment in the matter of assessment. The defendant also demurred upon the ground that the respective complaints did not state facts sufficient to constitute a cause of action.

In this court each plaintiff has filed what is denominated a petition for a temporary injunction or restraining order. To these petitions the defendant has answered, and also demurred, and the respective plaintiffs have demurred to the answer. We do not deem it necessary to give a synopsis of these pleadings, as the case must be determined on the pleadings presented to the trial court, and not on new pleadings filed here. In determining the questions presented, it is necessary to consider the following constitutional, statutory, and charter provisions:

"There shall be elected in each county, at the same time at which members of the General Assembly are elected, commencing in the year 1904, \* \* \* one county assessor. \* \* \*" Article 14, § 8, Constitution.

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal. \* \* \*" Article 10, § 3, Ibid.

"On the first day of January in each year, or as soon thereafter as practicable, the assessor or his deputy shall call upon each inhabitant of his county, at the residence or

place of business of such inhabitant, and deliver or leave for him or her the proper blanks for the return of the property of such inhabitant for assessment. \* \* \* Every such inhabitant shall make and deliver to the assessor, between the first day of April and the 20th day of May in each year a full and correct schedule and description upon the blanks furnished as aforesaid of all the personal property of which such person was the owner on the first day of April of the current year. \* \* \*

"In every such schedule and description the person making the same shall set down the full cash value of each item of the property therein mentioned for the guidance of the assessor. But the assessor shall determine for himself the value of each item after an examination of the schedule. \* \* \*" Section 5573, R. S. 1908.

"At the hour of ten o'clock a. m. on the first Tuesday in August in each year, all the county assessors of this state shall meet at the capitol, and the Auditor of State shall provide a place for them to meet, where they may have opportunity to compare their assessments before making affidavit thereto, and if, upon such comparison, and from other information obtainable, any assessor is satisfied that his valuation of any class of property is too high or too low, and that it does not correctly set forth the proper value thereof, it shall be his duty to correct the same and thereafter make affidavit thereto, as is required by section 84 of this act. \* \* \*" Section 5633, Ibid.

"The assessor of each county of the state, except assessors of counties having more than one hundred thousand population, upon the completion of the assessment roll in each year, and prior to the indorsement of the tax list and warrant thereon, and on or before September first of each year, shall produce the abstract of the same in person, and not by deputy, to the Auditor of State, and he shall there, in the presence of the Auditor, subscribe his name to the following statement, which shall be appended to said assessment roll and constitute a part thereof, to wit:

"State of Colorado, County of —, ss.: I, —, the assessor of — county, Colorado, do solemnly swear that in the above and foregoing assessment roll I have assessed all the taxable property in the county of — for the current year and at the true value thereof.

"Subscribed and sworn to before me this — day of —, A. D. 19—.

"—, Auditor of State."

"The assessor so subscribing the statement aforesaid shall thereupon be sworn to the truth of the facts set forth in said statement by the Auditor. The Auditor is authorized to administer the oath to said assessor, so subscribing said statement. \* \* \*" Section 5628, Ibid.

"Immediately after the assessment is com-

pleted and the affidavit provided for in section 84 hereof (section 5628, supra) is subscribed by the assessor and sworn to before the Auditor of State, the county assessor shall make out an abstract thereof stating in detail the following facts with reference to the assessment in his county: [Then follow directions as to what such details shall exhibit, which are to the effect that the assessor shall state in such abstract the amount, kind and value of the property assessed in his county, and provides:] The said abstract the county assessor shall make out in duplicate, and transmit one copy forthwith to the Auditor of State. The State Board of Equalization is authorized to diminish or add to the above list and to require such different or further matters to be returned as it may deem advisable." Section 5659, *Ibid*.

"The Auditor of State, upon receipt of the abstract of assessment from any assessor, shall, without delay, examine the same, and if found to be correct, shall send the assessor a certificate stating the fact therein." Section 5662, *Ibid*.

"The State Board of Equalization shall sit on the first Monday of October in each year, at the executive office, for the purpose of examining, adjusting and equalizing the assessments in the several counties of the state." Section 5764, *Ibid*.

"If, in the opinion of the State Board of Equalization, upon satisfactory information submitted, any county assessor has omitted taxable property in his county from the abstract of assessment, or has assessed the property of his county palpably and manifestly below its true value, or has failed to verify his return, as herein required, and if said State Board of Equalization is likewise, of the opinion that such delinquency operates as a fraud upon the state revenues, and that such revenues will be seriously impaired thereby, then and in such case the State Board of Equalization shall, upon reasonable notice to the assessor, and after summary hearing, shall require the delinquent assessor to forthwith make such corrections and additions to the said assessment as will make the same in accordance with the statutes \* \* \* provided that in such case, before any such corrections or additions to said assessment shall be required, if desired by the assessor, he may have an appeal from the decision of the State Board of Equalization to the district court of the county of which he is the assessor. \* \* \*" Section 5636, *Ibid*.

"Immediately upon the receipt by the assessor of each county of the statement of changes in the assessment of his county made by the State Board of Equalization, he shall immediately make such correction of the assessment and assessment roll as may be necessary to carry out the directions of the State Board of Equalization." Section 5664, *Ibid*.

"On or before the third Monday of October in each year the Board shall complete the Equalization and the State Auditor shall transmit to the clerk of each county a statement of the changes, if any, which have been made in the assessment, and the rate of tax which is to be levied and collected within his county, which shall not exceed the limit permitted by the Constitution; \* \* \* and the assessor of each county, in making up the tax list, shall compute and carry out in the proper column, a state tax at the rate aforesaid. \* \* \*" Section 5767, *Ibid*.

"On the first day of the meeting of the county commissioners of each county as a board of equalization, the county assessor shall submit to said board the complete assessment of his county, together with a list of property returned to him. \* \* \*" Section 5658, *Ibid*.

"The county commissioners of each county shall constitute a board of equalization for the adjustment and equalization of the assessment among the several taxpayers of their respective counties. Said board shall hold two regular meetings in each year at the office of the county clerk, at the county seat, as follows, viz.: Commencing on the first Tuesday in September and continuing not less than three, nor more than ten consecutive days, and on the third Tuesday of September, and continuing not less than two nor more than ten consecutive days. The board shall notify the assessor to supply any omissions in the assessment roll which may come to their notice. In case any material changes are made or directed by said board in the assessment of any person or persons at said first meeting, the county clerk shall, as soon as may be, after the close of said meeting, mail to each of said persons, prepaying the postage thereon, a notice of such change. \* \* \* The board shall, at its second meeting, sit to hear complaints only from those dissatisfied with said changes, and to adjust the assessment so as to equalize the same among the several taxpayers of the county. \* \* \*" Section 5761, *Ibid*.

"Except as an incident of equalization, the county board of equalization shall have no power whatever to make any increase or decrease in the total amount of the valuation of the property of the county as set forth in the assessment roll. The power of said board shall be to adjust and equalize the valuation of the property set forth in the assessment roll, and shall exercise no other power, and shall have no other authority in the premises." Section 5638, *Ibid*.

"If, in the opinion of any taxpayer, his property has been twice assessed, or if the property exempt from taxation has been assessed, or if personal property has been assessed of which said person was not possessed at the time of the assessment, or if any property has been assessed too high, or if any property has been otherwise illegally assessed, such person having such grievance

may appear before the assessor and make known to the assessor the facts in the premises, and if in any particular the assessment complained of is erroneous under the statutes, the assessor shall correct the same. \* \* \* The assessor shall continue such hearing from day to day and time to time until all grievances shall be heard, but all hearings shall be concluded before the day of the first meeting of the county board of equalization." Section 5639, *Ibid*.

"Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the treasurer, or by the treasurer at any time before the receipt of the said roll. \* \* \*" Section 5722, *Ibid*.

By section 1204, *Ibid*, the board of county commissioners is empowered to order the levying of taxes, as provided by law.

"On the first Monday of November in each year the board of county commissioners shall, by an order to be entered of record among their proceedings, levy the requisite tax for the year for school and other county purposes, as required by law, and the same may be levied at any time prior to the first Monday of November, if the statement of the rate of tax to be levied for state purposes has been received from the auditor. \* \* \*" Section 5760, *Ibid*.

"The fiscal year of each county in the state of Colorado shall commence on the first day of January in each year. The board of county commissioners of each county in this state shall, within the last quarter of each fiscal year, and at the same time that the annual levy of taxes is made, pass a resolution, to be termed the annual appropriation resolution, for the next fiscal year, in which said board shall appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such county for the next fiscal year, and any such resolution shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year." Section 1215, *Ibid*.

"As soon as practicable after the taxes are levied and not later than the first day of January annually, every county assessor shall deliver to the county treasurer the tax list and warrant under his hand and official seal, setting forth the assessment roll, with the taxes extended, containing in tabular form and alphabetical order the names of the persons and bodies in whose names property has been listed in his county, with the several species of property, and the value, and the total amount of taxes, and with the column of numbers and value footed, and

commanding the treasurer to collect said tax, and in a column to be provided for that purpose, he shall write the words, 'By the assessor,' when the list was made by himself." Section 5666, *Ibid*.

In the case of the city, the following charter provisions of the city and county of Denver are to be considered:

"The assessor shall assess all taxable property within the city and county at the time, and in the manner, prescribed by the general laws of the state. \* \* \*" Section 46.

"Except as otherwise herein provided, the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution and general laws in all cases not specifically provided for, so far as applicable, shall be as follows: \* \* \* The board of supervisors shall act as a board of equalization, and perform the acts and duties required of a board of county commissioners when sitting as a board of equalization; the assessor, the acts and duties required of county assessor. \* \* \*" Section 156.

By section 213 it is made the duty of the assessor, as soon as the assessment roll is ready in each year for the extension of taxes, in accordance with the general law, to certify the total amount of property assessed within the limits of the city and county to the council, whereupon it is made the duty of the council to proceed to make the proper levy upon such valuation to meet the expenses of the municipality, and at the same time cause the total levies, including school, state, and special levies, to be certified by the clerk to the assessor, who shall then extend the same upon the tax list of the current year.

By section 212 the council is directed to levy a tax not in excess of a specified rate for all general, state, and county purposes, upon the total assessed valuation of the property within the state, and shall also, in addition, levy the state and school district tax. "The fiscal year of the city and county shall commence on the first day of January and end on the last day of December of each year." Section 211.

By section 217 the mayor is required, on or before the 1st day of December in each year, to present to the council a detailed statement of the amount necessary to defray the expenses of the city and county government, and each department thereof, for the ensuing fiscal year, and also the amount to be raised by taxation to pay interest on bonded indebtedness and to provide for sinking funds.

By section 218 the council shall meet in joint session annually between the first and third Mondays in December, and make a budget of the estimated amounts required to pay the expenses of conducting the public business of the city for the next ensuing fiscal year, based upon the mayor's budget, and for the other purposes required by the



charter. After this estimate is made, section 219 requires that it shall be signed by the mayor and clerk, and filed in the office of the auditor, and that appropriations shall then be made by ordinance for the ensuing fiscal year, to the several purposes and departments therein named.

"The council shall not order the payment of money for any purpose whatsoever, nor shall any warrant or other evidence of indebtedness issue, in excess of the amount appropriated for the current year, and at the time of said order remaining unexpended in the appropriation of the particular class or department to which such expenditures belong; nor shall any liability or indebtedness incurred in any one fiscal year be a charge upon or paid out of the income or revenue of any other fiscal year." Section 246.

W. H. Bryant, City Atty., J. A. Marsh, and Paul Knowles, all of Denver, for plaintiff in error City and County of Denver. Fred Farrar, Atty. Gen., and Frank C. West and Norton Montgomery, Asst. Attys. Gen. (Philip W. Mothersill, of Denver, of counsel), for plaintiff in error Colorado Tax Commission. Fred W. Parks, of Denver, for defendant in error.

GABBERT, J. (after stating the facts as above). The main contention on the part of the respective plaintiffs in error is that the defendant, in making the 10 per cent. horizontal reduction, is committing an act which the statutory provisions prescribing his duties do not authorize, and that, in so doing, he is acting directly contrary to such provisions; while, on the part of the defendant, the claim is made that he is performing an act of a governmental and executive nature, which the courts are without authority to control. Which of these contentions is correct turns upon the consideration of the constitutional, statutory, and charter provisions above quoted, or to which reference has been made, and applicable to the facts stated in the complaints.

An assessor is a constitutional officer; but his duties are prescribed by statutes, which provide that he shall list and value property in his county for the purpose of taxation. The statutes evidently contemplate that this shall be completed before the first Tuesday in August of each year, as on that date all county assessors are required to meet at the state capitol for the purpose of comparing their assessments before making affidavit thereto, when, if any assessor is satisfied that the value of any class of property in his county is too high or too low, it is made his duty to correct the same. When such correction is made, if necessary, or if it is found a correction is not required, then the assessment roll is considered completed, for we find the next step required is that, when the assessment roll is completed, each assessor, on or before the 1st day of September in each year, shall make an affidavit thereto

before the State Auditor, to the effect that in such roll he has assessed all the taxable property in his county at its true value. Immediately thereafter, each assessor is required to make in duplicate an abstract of the assessment in his county, showing the amount, kind, and value of the property therein assessed, one copy of which shall forthwith be transmitted to the Auditor of State. The State Board of Equalization is required to convene on the first Monday in October, in each year, for the purpose of examining, adjusting, and equalizing the assessments in the several counties, which it does by an examination and comparison of the abstracts furnished by the county assessors. If, from such examination, or from any other source, the board is satisfied that taxable property in any county has been omitted, or property assessed too low, then the board, upon reasonable notice to the delinquent assessor, may require him to forthwith make such corrections as will make the assessments in his county conform to the statutes; and, unless the assessor so directed desires to appeal from such order, he shall at once make the corrections necessary to comply with the directions of the State Board of Equalization.

In its logical order, the next and final act of the State Board of Equalization consists in a compliance with the statute which requires this board, on or before the third Monday of October, in each year, to transmit to the clerk of each county a statement, which among other things, shall state the rate of tax to be levied in each county for state purposes. This statute makes it the duty of the assessor of each county, in making up the tax list, to compute and carry out, in the proper column, a state tax at the rate certified by the board. The evident purpose of the statutory provisions so far considered is twofold: First, to secure a uniform valuation of property in the state upon which to levy a tax for state purposes in compliance with the Constitution, which requires that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and, next, to furnish the state authorities with the total assessed valuation of the taxable property in the state, so they may be advised as to what tax rate is necessary in order to raise sufficient revenue for state purposes.

In 1911 (Session Laws of that year, p. 612 et seq.), the General Assembly passed an act entitled "Tax Commission"; but, so far as advised from the briefs of counsel, no changes were made affecting any question involved in this case, although the Tax Commission is now vested with some of the powers formerly possessed and exercised by the State Board of Equalization. They do not appear to be antagonistic to any of the sections which we have quoted, or to which we have referred, but are merely additional, or

impose upon the Commission some of the duties which the State Board of Equalization was theretofore required to perform; but, as stated, our attention has not been directed to any of the provisions of the act which could in any manner affect the cases under consideration, except that, by sections 13, 15, and 36, general supervision over the administration of assessing officers is conferred upon the Commission, and to this end the commission is empowered to enforce all laws for the assessment, levying, and collecting of taxes, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the tax laws of the state, and may compel compliance with the provisions of the act and with the orders of the Commission by proceedings in mandamus, injunction, or other proper civil remedies.

We now come to the duties and functions of the assessor and county commissioners of each county, in connection with the assessment and the levy of taxes. The statute makes it the duty of the assessor to submit to the county commissioners of his county, on the first day they meet as a board of equalization, the complete assessment of his county. These officials constitute the county board of equalization for the purpose of equalizing and adjusting assessments among the taxpayers of their respective counties. They are required to hold two meetings each year, one commencing on the first Tuesday in September, and the other on the third Tuesday of the same month. By reference to the time when each assessor is required to transmit the Auditor of State an abstract of the assessment in his county, it will be seen that the assessor is required to submit his assessment to the county commissioners of his county at substantially the same time. This board shall require the assessor to supply any omissions in the assessment roll which may come to their notice; but, except as an incident of equalization, they have no authority to make any increase or decrease of the total valuation of the property of the county, as exhibited by the assessment roll furnished them by the assessor.

The fiscal year of each county commences on the 1st day of January of each year. It is the duty of the board of county commissioners, and within the last quarter of each fiscal year, and at the same time the annual tax levy is made, to pass what is termed the annual appropriation resolution for the next fiscal year, by which there shall be appropriated such sums as may be deemed necessary to meet and defray the necessary expenses and liabilities of the county for the next fiscal year. This resolution shall specify the object for which the appropriations are made, the amount appropriated for each purpose, and further appropriations at any other time within such fiscal year are expressly inhibited. The board is authorized to levy

taxes; and this authority may be exercised, on the first Monday in November in each year, by the levy of the requisite tax for school and other county purposes, or earlier, if the rate of tax to be levied for state purposes has been received from the auditor. The purpose of these provisions is to secure a uniformity of taxation in each county for county purposes, and also to enable the commissioners in each county to determine what rate of tax is necessary to meet the county expenses for the ensuing fiscal year. As soon as practicable, after the taxes have been levied by the commissioners, and not later than January 1st each year, it is made the duty of the assessor to extend the taxes on the assessment roll and deliver the same to the county treasurer. By the charter provisions of the city and county of Denver, the board of supervisors are required to perform the acts and duties required by boards of county commissioners, as a board of equalization, and the assessor, the acts and duties of a county assessor. It is also made the duty of the assessor, as soon as the assessment roll is ready in each year, for the extension of taxes, in accordance with the general law, to certify the total value of the property assessed within the limits of the city and county of Denver to the city council. The fiscal year of the city and county begins on the 1st day of January, and ends December 31st, each year. The mayor is required, on or before the 1st day of December each year, to present to the city council a detailed statement of the amount necessary to defray the expenses of the city and county government for the ensuing fiscal year, and also the amount necessary to raise, by taxation, with which to pay interest on bonded indebtedness, and to provide for sinking funds. The council shall then meet in joint session between the first and third Mondays in December of each year, and make a budget of the estimated amounts required to pay the expenses of the city and county for the next ensuing fiscal year, based upon the mayor's budget, and for other purposes required by the charter. After this estimate is made, it is signed by the mayor and clerk and filed in the office of the auditor. Appropriations shall then be made by ordinance, for the ensuing fiscal year, to the several purposes named. The necessary taxes are then levied to meet these appropriations, including state, school, and special levies, which are then certified to the assessor, who is then required to extend the same upon the tax roll and deliver to the treasurer for collection. The purpose of these several provisions is the same as stated in considering the duties and acts of commissioners and assessors in assessing the property in counties and the levy of taxes upon property therein. In this connection, it should be noted that, in the city and county of Denver, the total amount appropriated in any one year shall in no case

exceed 90 per cent. of the anticipated revenues for that year, as estimated upon the tax levied on the assessor's valuation, and from other sources of revenue, and that the council is inhibited from ordering the payment of money for any purpose in excess of the amount appropriated for the current year, and that any liability incurred in any one fiscal year shall not be a charge upon, or paid out of the income or revenue of, any other fiscal year.

According to the averments of the respective complaints, the defendant made the assessment required by law, thereafter met with the assessors of the counties of the state, compared his assessment with the assessments of property in other counties, but did not change his assessment; that he prepared an abstract of the assessment made by him, and delivered it to the State Auditor; that this abstract was delivered to the State Board of Equalization; that no changes were made therein by this body; that it was certified to the proper officials; that he certified the total assessment made by him to the city council; that the board of equalization of the city and county of Denver made no changes; and that thereafter the taxing authorities of that municipality levied a tax for the ensuing year, based upon the valuation certified by the defendant. By the complaint on behalf of the Tax Commission, it is not expressly averred that the state authorities have levied a state tax; but as the time for doing so had expired when the Commission brought its action, and as it is averred that state officials have issued warrants based upon and in anticipation of the revenue to be derived from taxes collected upon property of the city and county of Denver, it will be assumed that such tax was levied. According to the respective complaints, the reduction in the assessed valuation of property was proposed and attempted to be made after all these steps had been taken; so that the next question to consider, in connection with these facts, is the changes in the assessment roll which an assessor is authorized to make, after delivering the abstract of assessment to the State Auditor.

The statutes bearing on this subject require him to make such changes as the State Board of Equalization direct, to supply omissions in the assessment roll as may come to the notice of the board of county commissioners of his county, and necessarily perform the same act, when directed by the board of supervisors of the city and county of Denver, in their capacity as a board of equalization. He may also, on the application of a taxpayer whose property has been twice assessed, or whose property has been assessed, which is exempt, or of which the taxpayer was not possessed when assessed, or has been assessed too high, correct such assessment; but these applications must be

made, and hearings thereon concluded, before the first day of the meeting of the county board of equalization. He may also supply omissions and correct errors or defects in the tax roll, when it can be ascertained therefrom what was intended, at any time before the return of the assessment roll to the treasurer; but these corrections are merely clerical. This embraces all the changes he is authorized to make after the abstract has been delivered to the State Auditor, so that it is evident he is not authorized by statute, either directly or indirectly, to make the horizontal reduction complained of, and hence it must logically follow that, except in the particulars above mentioned, his roll is deemed complete upon delivery of the abstract of assessment to the State Auditor. If the defendant assessor desired to make a uniform reduction on the valuation of property in the city and county of Denver, the time for him to have done so was when he was vested with that power, which was after meeting with the county assessors, and before he delivered his abstract to the State Auditor, for after such act, according to the statutes, his assessment roll was completed, and he could make no change thereafter, except as specifically authorized. That other changes than those mentioned are inhibited is made manifest by the fact that a board of county commissioners (and, in the city and county of Denver, the board which performs its functions) is expressly inhibited from making any change in the way of increasing or decreasing the total valuation of the property of a county, as exhibited by the assessment roll furnished by the assessor, except as an incident of equalization, and that any changes which the assessor is authorized to make, on the application of a taxpayer, must be made before the first meeting of the county board of equalization.

[1] The wisdom of these provisions is evident. The assessors meet at the state capitol for the purpose of comparing assessments, so that there may be a uniform valuation of property of the same classes in the state. If such uniformity does not exist, they make the corrections which will bring about this result. The abstracts of assessment are then delivered to the State Auditor. The State Board of Equalization may order changes, if they find the different classes of property in the state have not been uniformly assessed. Upon the total valuation, as shown by the abstracts of assessment, a state tax is levied. Upon the total valuation of the assessments in each county, the county authorities levy taxes for county purposes; and, should the assessors, after these levies are made, have the authority to make a horizontal reduction in the total assessed valuation of their respective counties, the revenues which the state and county authorities are required to provide, by specific rate of taxation, would be reduced accord-

ingly. The defendant has no authority to do this. If the taxes are too high for state purposes, or too high for the city and county of Denver, the fault lies with the taxing authorities, who, alone, are responsible to the people for this result; and he cannot correct these mistakes if they have been made by doing an act which the statutes do not require him to do, but which they inhibit him from doing. We reiterate that the time for him to have made the reduction he is now attempting to make, if justified at all, was when he met with the county assessors.

[2] The next question to determine is whether a court can inhibit the defendant from making the proposed reduction. It is true, as contended by counsel for defendant, that the judicial department of the state has no power, by an injunction, to control an official in the exercise of his official functions of a governmental and executive nature (*People v. District Court*, 29 Colo. 182, 68 Pac. 242), but that is not this case. On the contrary, it clearly appears that the defendant is violating the law relating to assessments by doing, or proposing to do, an act which the law inhibits him from doing, and with respect to which he has no authority or discretion whatever. In other words, he is attempting to undo a completed act.

[3] After an assessment has been completed, the assessor may not alter or change it, unless he has express statutory authority to do so. *Cooley on Taxation* (3d Ed.) 765.

[4] In applications for relief by injunction against the acts of public officials, the material question, generally speaking, is whether they are acting within the scope of their authority, or whether they are transcending that authority. If they are doing the latter, and the resulting injury is not susceptible of reparation by proceedings at law, they may be enjoined from the commission of such illegal act. *High on Injunctions* (4th Ed.) §§ 1308, 1309.

[5] It is manifest that an action at law cannot give the plaintiffs adequate relief, or any relief whatever, and that an injunction to restrain the defendant is the only remedy which will prevent the wrongful acts of the defendant and give plaintiffs the relief to which they are entitled, for the obvious reason that it is the duty of the defendant to extend the levy upon the assessment acted upon by the officials authorized to levy such tax, and deliver the tax roll, as thus completed, to the treasurer for collection. This is a duty imposed on the defendant by law, with respect to which he has no discretion, and is therefore ministerial, and hence a duty which a court can compel him to perform. *Cooley on Taxation* (3d Ed.) 1359.

Counsel for defendant contend that a statutory remedy is provided, and that therefore the actions at bar cannot be maintained. This contention is based on section 5636, R. S.,

which provides that if, in the opinion of the State Board of Equalization, any county assessor has assessed the property of his county manifestly below its true value, then the Board, upon reasonable notice to the delinquent assessor, may require him to make it conform with the statutes. In our opinion, this section does not apply to an assessor who is making a horizontal reduction in a completed assessment, but covers a case where the valuations of property assessed, as originally returned, and from which the abstract of assessment is compiled—that is, lodged with the State Auditor—when it appears that such assessment does not, for any of the reasons enumerated in the section, comply with the statute. It is also urged on behalf of defendant that there is no allegation of facts in either complaint from which it appears that irreparable injury will result to plaintiffs, or either of them, by the act of the defendant in reducing the assessed valuation, in that it is not charged upon the part of either the state or city that they will not have sufficient revenue to pay the expenses and debts of the several departments of government. That question is in no sense involved, as the case turns entirely upon the proposition that the proposed reduction by defendant is ipso facto illegal, for the reason that the law inhibits him from making it.

The judgments of the district court are reversed, and the causes remanded, with directions to overrule the demurrers, and for such further proceedings as will harmonize with the views expressed in this opinion.

Reversed and remanded, with directions.

#### DEAN v. OMAHA-WYOMING OIL CO.

(Supreme Court of Wyoming. Feb. 17, 1913.)  
APPEAL AND ERROR (§ 833\*)—APPLICATION FOR REHEARING—TIME.

Supreme Court rule 23 (104 Pac. xiv), requiring petitions for rehearing to be filed within 30 days after the decision is rendered, has the force of a statutory enactment, as provided by Comp. St. 1910, § 881, and petitions filed after the time so specified are unavailing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. § 833.\*]

On rehearing. Denied.

For former opinion, see 128 Pac. 881.

SCOTT, C. J. The plaintiff in error on February 7 and 8, 1913, filed petitions for a rehearing in this cause. The decision was rendered January 7, 1913 (128 Pac. 881), and the petitions were each filed more than 30 days thereafter. Rule 23 (104 Pac. xiv) of this court is in part as follows: "Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred. Such peti-

tion shall be filed within thirty days after the decision is rendered. \* \* \* Excluding the day on which the decision was rendered, the petitions in this case were filed on the thirty-first and thirty-second days thereafter. Rule 23, having been adopted by this court, has the force of a statutory enactment. Section 881, Comp. Stat. 1910. In *Bank of Chadron v. Anderson*, 6 Wyo. 536, 48 Pac. 197, there was a petition for rehearing filed after the expiration of the time allowed by the rule. This court held that the petition for rehearing was not properly before it for consideration. We have, however, examined the questions presented, and find that they were considered and determined in the opinion filed. The petitions will be denied.

Rehearing denied.

POTTER and BEARD, JJ., concur.

### CARNEY COAL CO. v. BENEDICT.

(Supreme Court of Wyoming. Feb. 17, 1913.)

#### 1. MASTER AND SERVANT (§ 273\*)—INJURIES TO SERVANT—ASSUMED RISK—EVIDENCE—SERVANT'S BELIEF.

Where a coal miner was injured by a fall of certain coal loosened by a prior blast, he was properly permitted to state his belief prior to the injury as to whether he was working in a safe place, as bearing on the question whether he appreciated the danger, on the issue of assumed risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 936-938; Dec. Dig. § 273.\*]

#### 2. APPEAL AND ERROR (§ 203\*)—REVIEW—NECESSITY OF OBJECTION.

A ruling on evidence not objected to at the trial will not be reviewed on a writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1064; Dec. Dig. § 203.\*]

#### 3. MASTER AND SERVANT (§ 153\*)—INJURIES TO SERVANT—COAL MINER—INEXPERIENCE—DUTY TO WARN.

Where plaintiff, 23 years of age, and inexperienced as a miner, was employed by defendant as such, with knowledge of his inexperience, the fact that plaintiff worked as a miner in another mine, during a previous summer, and had been previously employed in and about defendant's mine as a car driver, did not relieve defendant of the duty to warn him of the dangers when he changed his occupation from car driving to mining for defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

#### 4. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—MINING—OBVIOUS DANGER—ASSUMED RISK.

Plaintiff, a young man without experience, was employed by defendant as a miner. He and his coemployee fired a shot to loosen the coal, after which they discovered a large piece partially loosened, with a three-inch crack in the vein. A bar was inserted in the crack, and they tried to pry the coal down, but, being unable to do so, proceeded with their work, and while so working the piece fell, and injured plaintiff's foot and ankle. Plaintiff testified that they attempted to pry the coal down so as to load it, and also to avoid the danger of its falling, it being part of their duty after firing

a shot to loosen pieces of coal and smooth off the face of the vein. Held that, since plaintiff was charged with knowledge of the law of gravitation, the risk of injury from the fall of the coal was obvious and assumed by plaintiff as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

#### 5. MASTER AND SERVANT (§ 158\*)—INJURIES TO SERVANT—MINERS—FALL OF MATERIAL—DUTY TO WARN—PROXIMATE CAUSE.

Where, after blasting, plaintiff, an inexperienced miner, and his fellow workman, discovered a block of coal loosened by a three-inch crack in the vein, and unsuccessfully attempted to break it down with a bar, after which plaintiff continued to work until the block fell and injured him, defendant's negligence, if any, in failing to inform plaintiff that loose material might be discovered by tapping, was not a proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 304; Dec. Dig. § 158.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by Charles B. Benedict against the Carney Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Enterline & Le Fleiche, of Sheridan, for plaintiff in error. Burgess & Kutcher, of Sheridan, for defendant in error.

SCOTT, C. J. The defendant in error as plaintiff, and who will be referred to as the plaintiff, brought this action in the district court of Sheridan county against the Carney Coal Company as defendant, which will be referred to here as the defendant, to recover damages for a personal injury alleged to have been sustained while mining coal in defendant's coal mine. The case was tried to a jury, which found for the plaintiff, and assessed his damages at the sum of \$1,000. A motion for a new trial was filed by the defendant and submitted to the court, which motion the court overruled, and, judgment having been rendered upon the verdict, the defendant brings the case here on error.

(1) It is urged that the court erred in the admission and exclusion of certain evidence over defendant's objection; (2) that the petition failed to state facts sufficient to constitute a cause of action; (3) that the evidence was insufficient to support a judgment; and (4) that the court erred in refusing to instruct the jury to find for the defendant. The first three of these alleged errors are grouped and discussed together in plaintiff in error's brief, and for convenience the four may be here considered together.

The case was brought and tried upon the theory that the plaintiff, who was 23 years of age at the time of the injury, was inexperienced in coal mining, which fact was well known to the company, and that the company failed to instruct or warn him of the danger incident to his employment, and put him to work with a man who was unable

to talk or converse in the English language, and which language was the only one in which plaintiff could converse, and that the injury was the proximate cause of the failure of the company to warn and instruct him of the danger, and how to discover and avoid such danger; that upon the day of the accident he and his coemployé in the room in which they were engaged in mining drilled a hole in the vein of coal, and put in a charge which they fired for the purpose of loosening and throwing down the coal; the shot threw down some of the coal, after which they discovered a large piece of coal partially loosened with a crack in the vein and inserted an iron tamping bar in the crack and tried to pry the coal down, but, being unable to do so, they proceeded with their work, and while so working the piece of coal fell and injured plaintiff's foot and ankle, so that the same had to be amputated.

[1] The plaintiff, over the objection of the company, was inquired of as to what his belief was just prior to the injury as to whether or not he was working in a safe place, and answered that he believed he was working in a safe place, free from danger, and that there was nothing to indicate that he was in the presence of any danger. His acts just before and at the time of the injury were competent as a part of the res gestæ, and as bearing on the question as to whether as a reasonably prudent man he ought, under the circumstances, to have appreciated the danger. Evidence tending to show his skill and ability as a coal miner to discover danger, and how to avoid it, was competent, as bearing on the question as to whether he acted as a reasonably prudent man should or ought to have acted when similarly situated.

The case of *Stewart v. Pittsburg & Montana Copper Co.*, 42 Mont. 200, 111 Pac. 723, was an action for personal injury. In that case Stewart was injured in emptying a slag pot while executing the order of a superior to enter into a dangerous place, and while acting under the personal direction of his employer. He was permitted over objection to testify that he did not appreciate the danger into which he was ordered by Zachman, the shift boss. The court say: "Contention is made that the witness was thus called upon to determine for himself the very question which it was the duty of the jury to decide; but with this we cannot agree. The question for determination at the trial was not whether plaintiff appreciated the danger, but whether, as a reasonably prudent person, under the circumstances, he ought to have appreciated it. The standard in all such cases is that of a reasonably prudent person similarly situated. The plaintiff might say that he did not appreciate the danger, and yet his answer would not avail him if the jury concluded from all the facts and circumstances that, as a reasonably prudent

person, he ought to have appreciated it; and the fact that plaintiff prevailed indicates that his lack of appreciation of the danger was deemed by the jury no greater than that of the average prudent person similarly situated. All the facts and circumstances were before the jury: a description of the place, the character of the work, the abnormal condition prevailing with respect to this particular slag pot, and the experience or inexperience of the plaintiff. We think the evidence was properly admitted. The manifest purpose of the question was to negative the idea that the plaintiff assumed the risk when he went into the place and attempted to pry out the contents of the slag pot. We have repeatedly said that it is not sufficient that plaintiff knows of the risk. He must appreciate the danger as well. *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45. What, then, is meant by saying that plaintiff appreciates the danger? In *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542, the court said: 'When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right.' If this be correct, and we think it is, how, then, may the jury know whether the plaintiff appreciated the danger or formed a judgment with respect to it, except by the answer he gives to the direct question asked him? As said before, his answer is not controlling upon the jury. It indicates his state of mind at the time he acted; but it is still for the jury to say whether as a reasonably prudent person he ought to have reached a conclusion that the place into which he was ordered was dangerous, when considered in the light of the surrounding circumstances."

[2] In the case here plaintiff in addition to the foregoing testimony was permitted without objection to say in answer to a direct question that he did not appreciate the danger of the falling coal from which he was injured. The jury were not concluded by the answer, but were required to find from all the evidence whether as a reasonably prudent man he ought to have appreciated the danger or was able to form a judgment with respect to it as to whether or not he was in danger at and just prior to his injury. As there was no objection to this question or the answer, we here express no opinion as to whether it was open to objection or not. It is here urged and the evidence tends to show that the company's pit boss who employed the plaintiff at the time plaintiff commenced mining coal in its mine knew that he was inexperienced, and, notwithstanding such knowledge, failed to warn him of the dangerous character of the work or instruct him, or to place an experienced miner with him in the room where he work-

ed and where he was injured. In so far as the alleged inexperience of Rotolo and his inability to converse and with whom plaintiff was directed to work by the pit boss is concerned, the plaintiff testified that he discovered that he was unable to converse with him at the time he first went to work, and on the second day thereafter and before he was injured he became convinced that Rotolo was inexperienced as a miner. If, therefore, the company was negligent in failing to place an experienced miner to work with him, that fact became apparent, and was known to plaintiff before the injury occurred, and notwithstanding such knowledge the plaintiff continued to work in the room with Rotolo up to the time of the injury. The question, however, as to Rotolo's inexperience as a coal miner and his inability to speak the English language and all evidence bearing thereon was withdrawn from the jury.

[3] It is alleged in the petition, and there is evidence to the effect, that plaintiff worked and was paid miner's wages while working with his father in mining coal in another coal mine during the summer of 1903, and also as to his previous employment in and about the defendant's mine as a car driver, but it may be said that of itself did not relieve the company with knowledge of his inexperience, if, in fact, he was inexperienced, from the duty of warning him when he changed his occupation from car driving to mining. 4 Thompson on Negligence, § 4065; Olson v. Neb. Tel. Co., 87 Neb. 593, 127 N. W. 916. It is said in 26 Cyc., at page 1165, as follows: "It is the duty of the master to warn and instruct his servant as to defects and dangers of which he knows or ought in the exercise of reasonable care and diligence to know, and of which the servant has no knowledge, actual or constructive." Following this paragraph on page 1167, Id., the following language is used, viz.: "The duty of warning and instructing a servant is a primary duty of the master, and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve him of the responsibility imposed on him by law." On page 1169, Id., it is further said: "To be sufficient, a warning or instruction must be so plain and explicit that the servant will understand and appreciate the danger and know how to avoid it by the exercise of due care. \* \* \* In an action for personal injuries alleged to have resulted from the failure of the master properly to warn and instruct the servant, a recovery can only be had when the master's negligence was the proximate cause of the injury." See Bell v. N. P. Ry. Co., 112 Minn. 488, 128 N. W. 829; Sidwell v. Economy Coal Co. (Iowa) 130 N. W. 729; Jones v. Florence Min. Co., 66 Wis. 268, 28 N. W. 207, 57 Am. Rep. 269; Hosking v. Cleveland Iron Min. Co., 163 Mich. 538, 128 N. W. 777; Hanley

v. California Bridge & Cons. Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597. When the employment is changed, the same rules obtain. 4 Thompson on Negligence, § 4065; Olson v. Neb. Tel. Co., supra.

[4] It is here urged that the danger was not latent, but was obvious and brought about by the act of plaintiff in the course of his work, and for that reason the plaintiff was charged with knowledge of the danger. Whether the danger was obvious to the servant is ordinarily a question of fact for the jury, and in determining that question the jury could and should take into consideration the nature of his employment, his experience and capacity to understand and appreciate the danger of his employment, and how to avoid such danger. It is conceded that there was danger accompanying the plaintiff's work, and the evidence tends to show that plaintiff realized the hazard of his employment, for both he and his father told the agent of the company who employed him that he had never had experience in mining coal. On the day of the injury, after the shot was fired, the crack in the face of the coal vein was obvious to the plaintiff and his coemployee, and an attempt was made to pry down the coal by inserting an iron bar in the crack. Evidence was introduced tending to show that a test unknown to plaintiff and used by experienced miners would have disclosed liability and danger of the coal falling. It is contended that this test was not resorted to by reason of plaintiff's inexperience. It is known as the "sounding test," and by which, as the evidence tends to show, an experienced miner by tapping the coal can tell from the sound whether the coal is firm or liable to fall. Plaintiff was not instructed, and was ignorant, of such test. Conceding these facts to be true, still the plaintiff could not recover unless the failure of the company to so instruct him was the proximate cause of his injury. It is said in 26 Cyc., at page 1170, that: "Although a master is negligent in not giving instructions as to the dangers of his employment, if the servant receives such information from other sources, whether from other persons or from his own observation, and is thereafter injured, the master is not liable, since his negligence is not the proximate cause of the injury. When, however, the servant has knowledge of the facts, but is entirely ignorant of the risks involved, it is the duty of the master to warn him."

[5] There is nothing in the evidence tending to show that had the sounding test been used it would have enabled an experienced miner to discover more than the fact that the coal had been loosened by the blast and the crack which was apparent to the naked eye, and known to plaintiff and Rotolo, his coemployee, showed that fact. The block of coal which fell was variously estimated to be from 600 to 2,500 pounds in weight. Unless supported, it would be dangerous for any

one to work close to or under it. This fact we think was appreciated by the plaintiff, for he testified that one of the reasons for attempting to pry it down was to protect himself from its falling. The crack was large enough, as testified to by him, to insert the tamping bar which he and Rotolo used in their attempt to pry down the coal, and Rotolo testified that the crack was about three inches wide. Such a crack must, we think, be deemed to have been notice that the block of coal had become at least partially detached from the vein and its support necessarily weakened. It is not shown that the sounding test would have disclosed more than the existence of the crack to an experienced miner, nor is it shown that the crack would have failed to indicate danger to a reasonably prudent man similarly situated. If the sounding test had been known and used, and would have indicated to a reasonably prudent man that the block of coal was partially detached from the vein and its support weakened, knowledge that it would be liable to fall would be imputed to plaintiff, for every one is supposed to know the law of gravitation. In *Swanson v. Great Northern Ry. Co.*, 68 Minn. 184, 70 N. W. 978, it is said to be the universal rule "that in performing the duty of his place a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself according. Failing to do so, he takes the consequences. He cannot charge such consequences upon the master, when he can see that which is open and apparent to a person of ordinary intelligence." The condition was obvious and discernible by the plaintiff. He was not in a position to complain that he was not instructed by the company how to detect such condition, for he had discovered and upon his own evidence sought to protect himself from the falling of the coal in the attempt to pry it down. The danger would be predicated upon the condition, and such condition as here shown was obvious, and not latent. 26 Cyc. 1179, 1180. It is said in 1 Labatt on Master and Servant, p. 531, § 238, as follows: "The juridical consequences of constructive knowledge being the same as those of actual knowledge, it follows that no duty to instruct a servant can be predicated in a case in which the instruction will not add to the knowledge, which, under the circumstances, is attributed to him. In other words, the master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinary careful use of such knowledge, experience, and judgment as he possesses. The failure to give instruction, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger, or, as the rule is expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered." It would

make this opinion unnecessarily long to discuss at length the cases illustrating the rule as announced by that learned author as to what danger is open, obvious, or apparent or plainly visible to a servant who is an adult, and presumed to be sound physically and mentally, and is chargeable with knowledge of the danger. As satisfying that rule, the following have been held sufficient, viz.: "Dangers which the servant can at a glance observe for himself." *Simms v. South Carolina R. Co.*, 26 S. C. 490, 2 S. E. 486. "Elements of the danger so obvious to a careful person of average intelligence that ordinary prudence should make him avoid them without warning." *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214, 41 N. E. 265. "Danger so simple that it can as well be ascertained at a single view as at many." *Hathaway v. Mich. Cent. R. Co.*, 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569. "Dangers which the servant may see and guard against as well as could the master himself, if present, or any one else deputed by him." *Houston & T. C. R. Co. v. Strycharski*, 6 Tex. Civ. App. 555, 26 S. W. 253, 642. "Dangers obvious to even a casual observer." *Findlay v. Russell Wheel & Foundry Co.*, 108 Mich. 286, 66 N. W. 50. "Dangers obvious to any one of ordinary capacity." *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469. We refer in this way to only a few of the cases cited by plaintiff in error in its brief. In *Montgomery Coal Co. v. Barringer*, 218 Ill. 327, 75 N. E. 900, the court refused the company's request for a peremptory instruction to the jury to find in its favor, and the Supreme Court, speaking of assumed risks, say: "The theory \* \* \* is that when the servant had full and complete knowledge of the condition of \* \* \* the place in which he is doing work, and no special knowledge is required on his part to apprise him of the danger which he incurs while \* \* \* working in such place, he will be presumed to have assumed the risk of being injured \* \* \* while working in such place, and that, in case of injury, the master, by reason of such assumption of risk, is not liable. In the case at bar the defect was obvious and open to the observation of every person of ordinary intelligence who would take the pains to observe the conditions which the appellant knew to exist. The appellee had full opportunity for such observation, and, in the language of the *Wilson Case* (Lake Erie & Western Railroad Co. v. Wilson, 189 Ill. 89, 59 N. E. 573), this was 'sufficient to charge him with knowledge' of the defect and its attendant danger, and he was therefore barred, by reason of such knowledge, from a recovery." It is also said in 26 Cyc., at page 1170, that: "Although a master is negligent in not giving his servant instructions as to the dangers of his employment, if the servant receives such information from other sources, whether from other persons or from his own observation, and is



thereafter injured, the master is not liable, since his negligence is not the proximate cause of the injury."

The danger being obvious, the question recurs, What would a reasonably prudent man similarly situated have or ought to have done under like circumstances? Not alone what plaintiff did, but whether he acted as a reasonably prudent man would or ought to have acted when similarly situated. It is here urged that, although the danger was obvious, the question of whether the plaintiff appreciated the danger was one which ought to have been, as it was, submitted to the jury. It may be conceded that the question as to whether the danger is obvious is ordinarily one for the jury, but, in the absence of a showing, a presumption obtains in this class of cases that the servant is possessed of a sound mind and body. It was not pleaded, nor is there any showing or attempted proof, that plaintiff was an exception to the rule in this respect other than by inference by reason of want of instruction as to how to avoid the danger. He was an adult 23 years of age. In *Maki v. Union Pacific Coal Co.*, 187 Fed. 389, 109 C. C. A. 221, an order of the United States Circuit Court of this state dismissing the case on the ground that the plaintiff in the opening statement of his counsel to the jury failed to state facts expected to be proven which taken together would be sufficient upon which to predicate a recovery, the court say: "Finally, attention is called to the rule that a recovery may sometimes be had where the risk is obvious, but the danger is not fully appreciated by the party injured; and counsel argue the question whether or not the decedent appreciated the danger should have been submitted to the jury. But the decedent was a man presumably possessing the ordinary faculties of an adult who has a sound mind and body. It is true that he was a Finlander; but the statement of his counsel contained no intimation that he could not see these engaging wheels, or could not understand or know that they would crush a human being drawn between them, that a person upon the revolving horizontal wheel might be caught between them, and that the clothes of one caught between the engaging cogs would draw him between the wheels; and, in the absence of any claim or declaration that he had not the ordinary intelligence, ability, and prudence of men in like situations, he must be presumed to have been a Finlander of ordinary prudence and intelligence. And one cannot be heard to say that he did not know or appreciate a danger, whose knowledge and appreciation were so unavoidable that a person of his prudence and intelligence could not have failed to perceive and appreciate it."

The plaintiff is presumed to have known the law of gravitation—that the coal would fall of its own weight if its support was removed, and that, if it fell on him, it would cause injury. *Swanson v. Great Northern*

*Ry. Co.*, supra; *Walsh v. Railway Co.*, 27 Minn. 367, 8 N. W. 145; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Pederson v. City of Rushford*, 41 Minn. 289, 42 N. W. 1063; *Quick v. Iron Co.*, 47 Minn. 361, 50 N. W. 244. In *Thurman v. Pittsburg & M. Copper Co.*, 41 Mont. 141, 155, 108 Pac. 588, 591, the Supreme Court of Montana say: "While under the general rule it is the duty of the master to use ordinary care to furnish a reasonably safe place to work, and, while this duty cannot be delegated, in mining one of the necessary incidents of the employment of the servant is the making of the place in which he works; and any danger arising from the work as it progresses, caused by changing conditions, or the making of dangerous places safe, is assumed by the employé." In the case here there is no question that the room in which plaintiff was put to work was safe at the time he went to work. The conditions changed as the work of himself and Rotolo progressed, and such conditions so changed as a necessary incident of their work. The plaintiff and his co-employé tried to pry down the coal by inserting the iron bar in the crack. Prudence dictated to them the necessity of so doing just as any reasonably prudent man would have done under like circumstances in order to avoid the danger of falling coal. True, plaintiff testified that he did not appreciate the danger of falling coal. His testimony must be considered in the light of his conduct and other evidence given by him as to what occurred at the time. His attempt to pry down the coal must have been for some reason. Of course, it was primarily for the purpose of loading it, and in doing so it was also necessary to get it down safely and without injury to any one. He testified that the attempt to pry down the coal was for two purposes: (1) To get the coal down so as to load it, and (2) to avoid the danger of its falling, and further testified that it was a part of their duty after firing a shot to clean up, remove loose pieces of coal, and smooth off the face of the vein. The burden was upon the plaintiff to show that he did not appreciate the danger from the coal falling. His own evidence to the effect that he attempted to pry it down for the purpose of avoiding danger from its falling showed, we think, that he did so appreciate the danger, and concluded him upon that question, or at least would not support a finding that he did not appreciate the danger, otherwise it would be necessary for the jury to disregard his evidence.

Defendant contends, and its theory is, that upon the allegations of the petition and the evidence it was an assumed risk on the part of the plaintiff. Such risk is not assumed by a servant when the latter is inexperienced, and his employer, knowing that fact, has failed to warn and instruct him of the danger from latent defects in the place of the employment, and the method of detecting and

avoiding the same, and such failure is the proximate cause of injury to such servant. Such is the established rule. The issue of negligence here tendered cast the burden upon the plaintiff to prove that he was not only inexperienced, uninstructed, and not warned under such circumstances as to constitute negligence on the part of his employer, but that such negligence was also the proximate cause of his injury. If it was not the proximate cause of his injury, then the failure to warn and instruct the servant was not actionable negligence, and, as already stated, we think the plaintiff failed to prove that the company's negligence, if any, was the proximate cause of his injury. We deem it unnecessary to discuss at length the sufficiency of the petition, for, if it be sufficient as stating a cause of action, the failure in the proof as already indicated would be fatal to the judgment.

Other specific assignments of error are presented, but, in view of what we have already said, we consider it unnecessary to discuss them other than to say that we have examined and considered the alleged errors in refusing to instruct the jury as requested by defendant and in giving instructions over defendant's objection, and find as to them no prejudicial error, and but for the failure of proof as indicated the instructions would have fairly presented the case to the jury. For such failure of proof, the defendant was entitled to the peremptory instructions requested by it for a finding in its favor, and the court erred in overruling its motion for a new trial upon that ground. The judgment will be reversed, and the case remanded for further proceedings in the lower court.

Reversed and remanded.

POTTER and BEARD, JJ., concur.

### GRUBB v. LASHUS.

(Supreme Court of Utah. Jan. 29, 1913.)

#### 1. CHATTEL MORTGAGES (§ 138\*)—AGISTER'S LIEN—PRIORITY.

Comp. Laws 1907, § 1401, provides that any livery stable keeper to whom a horse shall be intrusted for feeding shall have a lien thereon for the amount due therefor, and shall be authorized to retain possession until the amount is paid. *Held*, that such lien is not prior in right to a prior recorded, valid chattel mortgage on the animal.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. § 138.\*]

#### 2. CHATTEL MORTGAGES (§ 97\*)—VALIDITY—TERM—RENEWAL—AFFIDAVIT AND STATEMENT—FILING—FAILURE TO FILE—EFFECT.

Comp. Laws 1907, § 155, provides that a chattel mortgage, duly filed, shall be void as against creditors, and the mortgagee or subsequent purchasers or mortgagees in good faith, after a year from the filing thereof, unless within 30 days after the expiration of the year the mortgagee, his agent or attorney, shall file an affidavit and statement containing specific facts

with reference to the debt, etc.; and section 156 declares that if the affidavit is made and filed before any purchase of the property shall be made or other mortgage or lien thereon it shall be valid to continue the mortgage in effect as if the same had been made and filed within the period prescribed. *Held*, that the affidavit and statement required by section 155 may be filed at any time subsequent to the expiration of the 30 days, provided they are filed before any rights have attached to the mortgaged property; time not being of the essence of the right, except where rights exist or are acquired on the mortgaged property before the 30-day period has expired.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 177; Dec. Dig. § 97.\*]

#### 3. CHATTEL MORTGAGES (§ 156\*)—FILING—RENEWAL—NECESSITY.

Where a chattel mortgage on a stallion was duly filed, and before the expiration of a year and 30 days after such filing the mortgagee took possession to foreclose his mortgage, plaintiff was not required thereafter to file an affidavit and statement required by Comp. Laws 1907, §§ 155 and 156, in order to keep the mortgage in force after the expiration of a year and 30 days, in order to render the mortgage enforceable as a prior lien on the horse to that of a livery stable keeper for board of the horse, subsequent to the recording of the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 265, 271; Dec. Dig. § 156.\*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by C. J. Grubb against George W. Lashus. Judgment for plaintiff, and defendant appeals. Affirmed.

J. N. Kimball and S. T. Corn, both of Ogden, for appellant. Stephens, Smith & Porter, of Salt Lake City, for respondent.

FRICK, J. This was an action in claim and delivery to recover possession of a stallion of the alleged value of \$540, which, it is alleged, was unlawfully detained from respondent by appellant after demand therefor had been duly made upon the latter.

The respondent's right to possession is based upon a chattel mortgage, which he alleged was executed, delivered, filed, and recorded as provided by the statutes of this state. The appellant denied respondent's right to possession and set up a counterclaim, in which he claimed the right to the possession of said stallion by reason of an agister's lien, which he alleged was in full force, for feeding and caring for said stallion at the request of the owners thereof, and which he claimed was a prior and superior lien upon said stallion. Respondent denied the allegations contained in the counterclaim in his reply, and again alleged that his mortgage lien was prior in time and prior in right.

The controlling facts, which are practically undisputed, are, in substance, as follows: On the 20th day of February, 1911, respondent was the owner and in possession of the stallion in question; that on that day he sold the same to W. H. and Rhoda Hayes, who, to secure the purchase price thereof, on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said day executed and delivered to respondent their two promissory notes, one for \$200, payable to the order of respondent on the 1st day of August, 1911, and the other for \$300, payable to respondent or order on the 15th day of October, 1911, both notes bearing interest at the rate of 8 per cent., and payable at a particular bank in Ogden, Utah; that to secure the payment of said notes said purchasers also executed and delivered to respondent a chattel mortgage, whereby they mortgaged said stallion to him; that said mortgage was executed and filed in the recorder's office and recorded on the 27th day of February, 1911, in Weber county, Utah, as provided by law; that the appellant, at all the times aforesaid, was, and thereafter continued to be, engaged in the livery and feed business in Ogden, Utah; that on the 20th day of April, 1911, the purchasers of said stallion delivered the same to appellant to be kept, fed, and cared for by him, and then promised to pay him for keeping, feeding, and caring for said stallion at the rate of \$20 per month; that pursuant to said promise appellant did keep, feed, and care for said stallion from the 20th day of April, 1911, to and including the 16th day of March, 1912, and that there was a balance due and owing to appellant for keeping, feeding, and caring for said stallion from said purchasers amounting to the sum of \$176.77; that said stallion was placed in the custody of appellant, and he kept, fed, and cared for the same during all of said time "without the knowledge, authority or consent of the plaintiff," respondent here; that no part of the notes, as aforesaid, was paid to respondent, and on the 16th day of March, 1912, he demanded possession of said stallion by virtue of the chattel mortgage, aforesaid, which was refused, whereupon respondent, on the 16th day of March, 1912, commenced this action and obtained possession of said stallion and advertised the same for sale under said mortgage, as provided by our statute, and on the 6th day of April, 1912, duly sold the same to himself for the sum of \$250, being the highest bidder therefor; that the amount due on said notes at the time of said sale amounted to \$543. The court also found that appellant had an agister's lien on said stallion for the amount aforesaid for keeping, feeding, and caring for the same. As conclusions of law the court found that respondent, at the commencement of this action, had a special ownership in said stallion by virtue of said chattel mortgage, and that he had a lien on said stallion, and that his lien and right to the possession thereof was superior to the lien and right of appellant. The court entered judgment accordingly. Appellant brings the case to this court by appeal, and insists that the district court erred in adjudging his agister's lien to be inferior to the mortgage lien of respondent, for the reasons (1) that under our statute creating an agister's lien appel-

lant's lien was superior to the mortgage lien; and (2) that under our statute the chattel mortgage in question, as against appellant's claim, for the reasons hereinafter stated, was invalid, and hence respondent had no lien upon nor right to the possession of the stallion when he commenced this action.

[1] In order to determine the first proposition, it becomes necessary to construe Comp. Laws 1907, § 1401, under the provisions of which appellant claims his lien. That section reads as follows: "Any ranchman, farmer, agister, or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle, sheep, or asses shall be intrusted for the purpose of feeding, herding, pasturing, or ranching, shall have a lien upon such animals for the amount that may be due him for such feeding, herding, pasturing or ranching, and shall be authorized to retain possession of such animals until the said amount is paid."

It will be observed that the statute does not, in express terms, fix or determine the effect of the agister's lien with respect to other existing liens upon the same property. Appellant concedes that respondent's mortgage was duly and properly executed, filed, and recorded according to law before the stallion was delivered to him for the purposes before stated. Under our chattel mortgage statute, therefore, respondent's lien was prior in time. The question, therefore, is, Was it also prior in right? The question in its present form is novel in this state. Many courts of the Union, within the last 25 years, have, however, passed upon similar statutes, and with very few exceptions (which will be noted hereafter) they have held that the agister's lien created by the statute is inferior to the mortgage lien, provided the mortgage was executed, delivered, and filed or recorded, as required by the chattel mortgage statute before the agister's lien attached. The following cases are directly in point: *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208; *Sullivan v. Clifton*, 55 N. J. Law, 324, 26 Atl. 964, 20 L. R. A. 719, 39 Am. St. Rep. 652; *McGhee v. Edwards*, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452; *Howes v. Newcomb*, 146 Mass. 76, 15 N. E. 123; *Chapman v. Bank*, 98 Ala. 528, 13 South. 764, 22 L. R. A. 78; *Erickson v. Lampl*, 150 Mich. 92, 113 N. W. 778, 121 Am. St. Rep. 607; *Blackford v. Ryan* (Tex. Civ. App.) 61 S. W. 161; *Cable v. Duke*, 132 Mo. App. 334, 111 S. W. 909; *National Bank of Commerce v. Jones*, 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310, 11 Ann. Cas. 1041, note 1043-4.

In the first case cited the statute was in terms precisely like ours, and in all the other cases the statute was in legal effect the same. See, also, *Jones on Chattel Mort-*

gages (5th Ed.) §§ 472, 474, where the cases are collated.

While sometimes other cases are referred to as sustaining a rule contrary to the one laid down in the foregoing cases, yet we have been able to find only two cases that really hold to the contrary, namely, *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425, and *Smith v. Stevens*, 36 Minn. 303, 31 N. W. 55. The latter case is, however, based upon the fact that the Minnesota statute is to the effect that if any one having lawful possession of any live stock places it in charge of another, for the purpose of feeding and caring for it, a lien is created in favor of the latter. It is accordingly held that the possession of the mortgagor, so long as it is lawful, is sufficient to authorize him to make arrangements for feeding and caring for the live stock which is left in his possession by the mortgagee, and that under the terms of the statute the latter is bound by any reasonable arrangement that is made for the feeding and caring of the live stock, and that the mortgagee's lien is subordinate to that of the person who fed and cared for the same. That case is therefore based upon the peculiar provisions of a local statute. The only case that is based squarely upon the inherent equities, and in which it is directly held that such equities are in favor of the agister, is *Case v. Allen*, supra. In many of the cases to which we have referred *Case v. Allen* is discussed, and the courts are practically unanimous in disapproving the views therein expressed. It should not be overlooked that the chattel mortgage, if the statutory conditions with respect to the execution and delivery, filing, or recording of the mortgage are complied with, gives the mortgagee a lien upon the mortgaged property, although the mortgagor retains possession thereof. This lien, if first in time, is generally held by the courts also to be first in right. Such a lien, therefore, should not be displaced without the consent of the party in whose favor it exists, unless there is some positive statute which in terms declares the lien subordinate to another one. If such a statute exists, the mortgagee can always protect his interests in the mortgaged property by seeing to it that it is being fed and cared for. As the statute now stands, he has no such notice. The agister, on the other hand, always has ample opportunity to protect himself. He is not bound to take care of and feed any one's live stock. Where it is sought, however, to make arrangements for feeding and caring for another's live stock, the agister, in this day of easy and rapid communication, may always ascertain within a short period of time whether a mortgage is on file or recorded, which is a lien on the live stock in question. If none is filed or recorded, his lien is first; and if there is one filed or recorded it will disclose upon its face just who is the mortgagee and what his claim amounts to. The agister may

therefore refuse to feed or care for any live stock, unless he is protected. Under such circumstances courts should not, by a strained construction, seek to protect his interests, when he himself has neglected to make any effort to do so. We are of the opinion that appellant's lien is inferior to the mortgage lien of respondent. The district court committed no error, therefore, in its conclusions of law upon that point.

[2] Proceeding now to a consideration of the second proposition, namely: Was respondent's mortgage in force and effect, when this action was commenced, as against appellant's agister's lien? We think it was. Comp. Laws 1907, § 155, is as follows: "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof; unless within thirty days after the expiration of the term of one year from such filing, and within thirty days after the expiration of each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if such mortgage is to secure the payment of money, the amount yet due and unpaid, and shall file the same with the county recorder, to be attached to the instrument or copy on file to which it relates; provided, that no mortgage of personal property shall be valid as against creditors of the mortgagor or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the date of the original filing."

Section 156 reads as follows: "If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided."

From the provisions contained in the foregoing sections, it is apparent that a chattel mortgage in this state continues in full force and effect for a period of 30 days after the expiration of one year from the time it was filed in the county recorder's office; and if the affidavit and statement required by the statute are filed within the 30 days mentioned therein, then the mortgage continues in full force another year, and so on until 5 years have elapsed. From the provisions contained in section 156, it is also apparent that the affidavit and statement required by section 155 may be filed any time subsequent to the 30 days, provided they are filed before any rights have attached to the mortgaged property. Time is therefore not of the essence, except where rights exist or are acquired against the mortgaged property before the 30-day period has expired.

[3] In the case at bar the affidavit and statement required by the statute were not filed at any time, and for that reason appellant contends the mortgage ceased to be of any force, as against his agister's lien, after the expiration of the year. The undisputed facts are that respondent's mortgage was duly filed on the 27th day of February, 1911. One year expired on the same day in 1912, and the 30-day period within which the statutory affidavit and statement had to be filed to keep the mortgage alive, as against existing claims, under the statute, expired on the 28th day of March, 1912. The respondent, however, took possession of the mortgaged property to foreclose his mortgage on the 16th day of March, 1912, or 12 days before the mortgage ceased to be in full force and effect as against existing claims. Appellant, however, insists that, unless the affidavit and statement were filed within the 30-day period, the mortgage ceased to be effective as against his lien, upon the expiration of 1 year after it was first filed. The statute does not so state in terms; nor is the language used therein subject to such an interpretation. Under the language of the statute the mortgage is clearly in full force and effect, as against all existing claims, for one year, and for 30 days in addition thereto, and as against after-acquired claims, up to the time such claims accrue, provided the affidavit and statement are in fact filed at any time before such claims have accrued. On the 16th day of March, 1912, when respondent took possession of the stallion under the writ of replevin, the mortgage in question was still in full force and effect, and we can see no reason why he should thereafter have filed any affidavit and statement. Such is the effect of the decisions.

In passing upon this point the Supreme Court of North Dakota, in *National Bank v. Oium*, 3 N. D. at page 212, 54 N. W. at page 1040, 44 Am. St. Rep. 533, says: "Filing is a substitute for possession. \* \* \* If possession is taken by the mortgagee before the period arrives at which the mortgage is required to be renewed, there is no reason why the failure to renew it should affect its validity." In that case, as in the case at bar, no renewal affidavit was filed by the mortgagee, but he, like respondent had taken possession before the time within which the affidavit should be filed had expired; and the court accordingly held that the failure to file the affidavit under such circumstances did not affect the validity of the mortgage, nor affect the mortgagee's right to enforce the same. This seems to us to be both good law and good sense. Why file an affidavit if it is not desired to renew the mortgage and keep it in force beyond the period that it is in full force and effect by reason of the first filing? *Frank v. Playter*, 73 Mo. 672, and *Dayton v. Savings Bank*, 23 Kan. 421,

are directly in point; the only difference between those two cases and the one at bar being that the renewal affidavit and statement were required to be filed 30 days before the year expired, while under our statute, as we have seen, this was required to be done within 30 days after the year had actually expired. The mortgages in the cases referred to, as in the case at bar, were however, in full force and effect when the mortgagee took possession of the mortgaged property; and hence there is no difference between those cases and this one in that regard. The case of *Dayton v. Savings Bank*, supra, is referred to and approved upon this point by the same court in a later case, *Swiggett v. Dodson*, 38 Kan. 707, 17 Pac. 594. We have been referred to no case, and have found none, where, under a statute like or similar to ours the courts have arrived at a contrary conclusion. The district court therefore also determined the second proposition in accordance with the law.

In view of the conclusions reached, we need not pass upon the further question insisted upon by respondent, namely, that in no event does appellant come within the class mentioned in our statute which may assail the validity of his mortgage; and hence his mortgage, as against appellant's claim, is valid at all events. We express no opinion upon that question.

For the reasons stated, the judgment is affirmed, with costs to respondent.

**MCCARTY, C. J., and STRAUP, J., concur.**

#### BALL v. DANTON.

(Supreme Court of Oregon. Feb. 11, 1913.)

##### 1. FRAUDULENT CONVEYANCES (§ 115\*)—PREFERENCES—VALIDITY.

A creditor may secure himself or collect his debt from the debtor to the exclusion of other creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 370, 375-377; Dec. Dig. § 115.\*]

##### 2. PARTNERSHIP (§ 12\*)—EXISTENCE OF RELATION.

Persons engaged in buying, selling, and improving real estate, sharing in the profits and losses, are partners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 27; Dec. Dig. § 12.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5191-5202; vol. 8, pp. 7646, 7647.]

##### 3. PARTNERSHIP (§ 181\*)—FIRM AND INDIVIDUAL CREDITORS—RIGHTS.

Firm debts must be paid out of firm property before any part thereof may be applied to the debts of individual partners, and a creditor of a partner has no right to any more of the firm property than the actual interest of the partner therein.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 310, 316, 317; Dec. Dig. § 181.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. PARTNERSHIP (§ 189\*)—SETTLEMENT OF FIRM AFFAIRS—RIGHTS OF PARTNERS.

A partner may settle the firm affairs by buying the interest of his copartner in order to escape litigation over a claim about to be brought against the latter, and the transfer may not be attacked as in fraud of creditors of the copartner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 343-354, 348; Dec. Dig. § 189.\*]

#### 5. PARTNERSHIP (§ 217\*)—CONFIDENTIAL RELATIONS—FRAUD—EVIDENCE.

Evidence held not to show that a conveyance by a debtor to a brother in settlement of their rights as partners in a business was in fraud of a creditor of the debtor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419-425; Dec. Dig. § 217.\*]

#### 6. FRAUDULENT CONVEYANCES (§ 155\*)—KNOWLEDGE AND INTENT OF GRANTEE—STATUTORY PROVISIONS.

L. O. L. § 7401, providing that the provisions of the chapter relating to fraudulent conveyances, declaring in sections 7397 and 7400 that every conveyance, made with intent to defraud creditors, shall be void, shall not affect the title of a purchaser for a valuable consideration, unless he had notice of the fraudulent intent of his grantor, is a statutory rule of equity; and, to invalidate a conveyance to a purchaser for valuable consideration, it must appear that he had prior notice of the fraudulent intent of the grantor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. § 155.\*]

#### 7. FRAUDULENT CONVEYANCES (§ 301\*)—KNOWLEDGE AND INTENT OF GRANTEE—EVIDENCE.

The fact that a purchaser had actual notice of the intent of his grantor to defraud his creditors, essential to invalidate the conveyance at the suit of a creditor, may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

#### 8. FRAUDULENT CONVEYANCES (§ 271\*)—KNOWLEDGE AND INTENT OF GRANTEE—EVIDENCE—PRESUMPTIONS.

Equity will not presume that a conveyance is fraudulent as against the creditors of the grantor, where the transaction is clearly susceptible of good faith and fair dealing.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 796-798, 821; Dec. Dig. § 271.\*]

#### 9. EVIDENCE (§ 253\*)—CONSPIRACY—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Declarations of persons engaged in a conspiracy, made prior to its consummation, are binding on all of the conspirators; but, after the conspiracy is accomplished, a declaration of one of them is binding on him alone.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.\*]

#### 10. EVIDENCE (§ 230\*)—HEARSAY EVIDENCE.

Where, in a suit by a judgment creditor to set aside a conveyance of the debtor as fraudulent, the debtor is made a party defendant, the default or confession of the debtor is hearsay as against the grantee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.\*]

#### 11. FRAUDULENT CONVEYANCES (§§ 74, 168\*)—EVIDENCE OF FRAUD—INADEQUACY OF CONSIDERATION.

Gross inadequacy of price is a circumstance to show fraud in the conveyance as against the creditors of the grantor; but in-

adequacy alone is insufficient to invalidate a conveyance made in good faith for a valuable consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190, 494, 520; Dec. Dig. §§ 74, 168.\*]

#### 12. FRAUDULENT CONVEYANCES (§ 277\*)—INADEQUACY OF CONSIDERATION—EFFECT.

L. O. L. § 7401, providing that the provisions of the chapter making conveyances in fraud of creditors void shall not affect the title of a purchaser for a valuable consideration, unless he had prior notice of the fraud of his grantor, does not make adequacy of consideration essential to sustain a conveyance; and, where the grantee shows good faith and a valuable consideration, he need not show affirmatively that the consideration was adequate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.\*]

#### 13. PLEADING (§ 1\*)—NATURE AND PURPOSE.

In equity, as at law, the office of a pleading is to inform defendant of plaintiff's cause of suit or defendant's grounds of defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 14. FRAUDULENT CONVEYANCES (§ 269\*)—ISSUES, PROOF, AND VARIANCE.

Under L. O. L. §§ 725, 726, providing that the evidence shall correspond with the substance of the allegations and be relevant to the questions in dispute, the court, in a suit by a judgment creditor to set aside a conveyance by the debtor as fraudulent, on the ground that the conveyance was without consideration, may not set aside the conveyance subject to payment to the grantee of the consideration actually paid by him, on proof that the grantee paid a substantial sum for the property, and such relief is applicable only where the creditor calls for an accounting and decree subjecting the property to the payment of his debt after payment of the sum paid by the grantee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 789-795; Dec. Dig. § 269.\*]

#### 15. FRAUDULENT CONVEYANCES (§ 301\*)—KNOWLEDGE AND INTENT OF GRANTEE—EVIDENCE—SUFFICIENCY.

Evidence held not to show that a grantee, paying a valuable consideration for the conveyance, had prior notice of the intent of the grantor to defraud his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by W. F. Ball against R. C. Danton and others. From a judgment for plaintiff, defendant named appeals. Decree modified, and bill dismissed.

The plaintiff in his own right, and as assignee of other claims, recovered a judgment against the defendant A. Lane for \$2,800, which, being unsatisfied, he brought this suit against the judgment debtor and Jennie Lane, his wife, Frank Lane and May Lane, his wife, and R. C. Danton to set aside certain conveyances of realty made by A. Lane to Danton and Frank Lane. The property deeded to Danton was two lots in Vernon, a suburb of the city of Portland, said to be about 2½ miles from the Willamette river,

together with 160 acres of timber land in Jackson county, about 40 miles from the railroad, and 2 miles distant from the nearest highway. That passing to Frank Lane consisted of an undivided half of the N. E.  $\frac{1}{4}$  of section 30 in township 3 south, range 5 east, of Willamette meridian, in Clackamas county, and a like estate in eight lots in different suburbs of the city of Portland. Besides alleging that the defendant A. Lane is wholly insolvent, and that there is no property, other than that mentioned, out of which the plaintiff's judgment could be satisfied, the complaint alleges: "That said conveyances from said defendants A. Lane and Jennie Lane to said defendant R. C. Danton, and each thereof, were voluntary and without consideration, and were made in trust for the defendant A. Lane, with the understanding and agreement by and between the said defendants A. Lane and Jennie Lane and defendant R. C. Danton that the said defendant R. C. Danton should hold the title to said premises in trust for the sole use and benefit of defendant A. Lane; that said conveyances from defendants A. Lane and Jennie Lane to defendant R. C. Danton, and each thereof, were made with the intent on the part of the said defendants A. Lane and Jennie Lane and R. C. Danton to hinder, delay, and defraud the creditors of said defendant A. Lane, including this plaintiff, of their lawful debts and demands; that said defendant R. C. Danton, at the time of said conveyance had full knowledge of such intent of said defendants A. Lane and Jennie Lane to so hinder, delay, and defraud the creditors of said defendant, and that said defendant R. C. Danton, at the time of said conveyances, had full knowledge that defendant A. Lane had conveyed said premises to defendant Jennie Lane with the intent on the part of said A. Lane and Jennie Lane to hinder, delay, and defraud the creditors of defendant A. Lane." Practically identical allegations are made concerning the conveyance from A. Lane to Frank Lane. The answers traversed the allegations of the complaint in all material particulars affecting the defendants. Danton averred that he paid to A. Lane and Jennie Lane, the owners of the property, on the 9th day of November, 1910, \$500 for the two lots in Vernon, then incumbered by mortgage of \$3,000, which he agreed to assume and pay as a part of the purchase price thereof, and that he paid \$1,500 for the land in Jackson county; both payments being in cash. He alleges that he had no notice of the matters and things alleged in this complaint wherein fraud is charged against the defendants, and that he purchased the property in good faith, without any knowledge of the claim of any other person thereto, or the claim of any fraudulent transaction of the parties connected with the title. Similar allegations are made in the answer of Frank Lane; and, in addition

thereto, he goes into detail in stating what he paid for each lot and parcel of land mentioned in the complaint. Besides this, he avers that he and the defendant A. Lane were, in effect, partners in the buying and selling of real property; and, in relation to the lands in dispute, that he (Frank Lane) had advanced all of the purchase price, except \$250, and all the money for the improvements on this property, except what was borrowed by them jointly and secured by mortgages on the several lots. The reply traverses the new matter in the answers. We find in the record that the defendant A. Lane, by his attorney, accepted service of a motion for entry of his default, but made no answer, and a decree was entered against him pro confesso. The circuit court, after hearing the evidence of the parties, entered a decree, in substance, upholding the deed from A. Lane to his brother Frank, and setting aside the grant to the defendant Danton. Both the plaintiff and the defendant Danton appeal.

Guy C. H. Corliss, of Portland (C. M. Idleman, of Portland, on the brief), for appellant. C. M. White, of Portland (Farrington & Farrington, of Portland, on the brief), for respondent Ball. J. F. Sedgwick, of Portland (C. W. Fulton, of Portland, on the brief), for respondents Lane.

BURNETT, J. (after stating the facts as above). As to the defendant Frank Lane, it appears from the testimony that he and his elder brother A. Lane were engaged together in buying and selling real property, taking joint title to that purchased. The property was mainly in lots in the outlying suburbs of Portland. In one instance, A. Lane paid \$50, and Frank Lane \$450, of the purchase price of \$500 for a single lot. In another case, each paid one-half of the purchase price of \$400. No other payments were made by A. Lane on any of the property purchased by the two brothers in common. The procedure apparently in each case was to buy a lot and mortgage it for money with which to aid in the construction of a dwelling and other improvements thereon. Besides this, in each instance, Frank Lane advanced considerable amounts from his own means, none of which was ever repaid by the elder Lane. In addition to all of this, from time to time Frank Lane had loaned his brother A. Lane different sums of money, amounting, at the time of the settlement between them, to \$1,217.65.

The plaintiff, Ball, and the defendant A. Lane are brothers-in-law, having married sisters. It appears in evidence that Ball and other parties were owners of certain tracts of land in Eastern Oregon, and had secured A. Lane to obtain a purchaser for that realty. The landowners alleged that A. Lane secured purchasers for each tract at \$1,600, which he collected, and paid them only \$1,000

each. Six of them assigned their claims against Lane to Ball, who commenced an action against A. Lane, resulting in the judgment already mentioned. About the time the action was commenced, Frank Lane, hearing of the impending litigation, and being apprehensive that he would be involved in some way to his prejudice, sought A. Lane and demanded settlement of their partnership affairs and payment of the debt due from his brother to himself. It appears that A. Lane scouted the idea that anything could be recovered from him by the plaintiff Ball or his assignors, and refused to settle any of the affairs between himself and Frank Lane; but the latter insisted, and finally, after much persistence on his part, effected an adjustment discharging the debt of \$1,217.65, and dissolving the partnership relations existing between them, and paid him \$750 in cash, receiving the conveyance attacked in this suit. Frank Lane claims that the \$750 covered what cash had been actually advanced by the defendant A. Lane in the purchase of the property, together with \$500 for his interests in the possible profits in their realty venture. Frank Lane very candidly states that he knew about the pending litigation between Ball and his brother A. Lane, and urged settlement with his brother because he feared to be involved in the matter to his own prejudice. He stoutly denies that he took the property with intent to defraud any creditors, but solely for his own protection, and without any agreement or understanding that A. Lane should have any subsequent interest or benefit in the property. Considerable effort, by opinion evidence, was made on the part of the plaintiff to show that the property conveyed to Frank Lane by A. Lane was much greater in value than the price allowed for the same in the settlement. This was combated by Frank Lane with other evidence putting the prices lower, and by his own testimony, given in detail, of what was actually invested in each particular piece of property, including the improvements.

In respect to the property claimed by Danton, it appears that about the time the action of Ball against Lane was commenced, or soon afterwards, the defendant A. Lane conveyed to his wife the west half of the two lots in Vernon; it being their residence property. That action was pending several months; and, shortly before it was brought to trial, A. Lane represented to Danton that he (A. Lane) was in need of money, and, wishing to realize quickly, offered to sell him the timber land in Jackson county and the two lots in Vernon, which were subject to a mortgage of \$3,000, as before stated. According to Danton's testimony, Lane represented to him that the timber land in Jackson county was 40 miles from a railroad, the last 2 miles of which distance had to be traveled without a trail, and that the timber was not large or first class, by any means. They

dickered several days about the price to be paid; the owner first demanding \$3,000 and Danton holding aloof. They finally settled upon \$2,000; and the undisputed testimony of Danton and another witness, whose deposition is in evidence, shows that Danton paid A. Lane that amount in actual gold coin, and took the conveyance in dispute here.

As before stated, the decree against A. Lane went by default, and, as appears in testimony, he left the state, and his whereabouts was unknown during the pendency of this suit. There is no testimony in the record tending to show that Danton knew anything about the litigation between Ball and A. Lane, or that the latter had divested himself of his other property. No witness appears who testifies to any one ever having said anything to Danton about the pendency of the litigation between Ball and A. Lane. This distinguishes the present case from that of *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139, where the fact that the action was pending and the circumstances upon which the subsequent judgment was obtained were noised abroad throughout the city, and discussed with the defendant in the family with whom he boarded, thus imparting to him actual notice. On the other hand, Danton testifies that he knew nothing whatever of the troubles between Ball and A. Lane, and that he paid the sum of \$2,000 in coin from his own money, in good faith, without any notice whatever of any wrongful or fraudulent intent on the part of A. Lane. It does not appear that either of the parties consulted an attorney, or that Danton had the title examined, or the land in Jackson county inspected by any one. He testifies that he was more or less familiar with the lots in Vernon, having visited at the house of A. Lane several times. Danton had for many years been a barber, earning good wages, and was a preceptor in an institution teaching that trade. He had speculated some in real estate, and claimed to have drawn the \$2,000 in question from \$2,400 in coin which he had in the vault of a safe deposit company in Portland. He admitted that, while he had this deposit on hand, he was paying interest at the rate of 7 per cent. per annum on \$2,600, which was secured by a mortgage on his family home. He explains, with a tolerable degree of accuracy, the sources from which he accumulated the \$2,400 from which he paid for the property in question. As in the matter of the lands conveyed to Frank Lane, several witnesses were called to give their opinion about the value of the property conveyed by A. Lane to Danton, and, as usual in such cases, a great variety of opinion was expressed; one witness placing the two lots in Vernon at the value of \$6,000, and others putting it as low as \$3,500. One of these testifying to a high estimate had assigned to Ball one of the claims going to make up the latter's unsatisfied judgment. Only one witness spoke



who knew anything about the timber land in Jackson county. In his direct examination, he appraised it at \$4,000, but on cross-examination reduced it to half that sum, which he said he himself would be unwilling to give. There is no testimony whatever that A. Lane reserved any interest to himself in either of the transactions with Danton or with his brother Frank Lane, and both the grantees deny that any such reservation was ever made in either parcel of property.

[1] As to the defendant Frank Lane, it is admitted that a creditor may secure himself or collect his pay from his debtor, even to the exclusion of other creditors. This principle has been well settled in this state. *Jolly v. Kyle*, 27 Or. 101, 39 Pac. 999; *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 34 Pac. 692, 35 Pac. 854, 42 Am. St. Rep. 756; *Mendenhall v. Elwert*, 36 Or. 384, 52 Pac. 22, 59 Pac. 805; *Currie v. Bowman*, 25 Or. 382, 35 Pac. 848. This principle is conceded by plaintiff; but he urges that the vigilant creditor has no right, as against other creditors, to take more property than will fairly satisfy his claim against the common debtor, and that if he does, or so pays the difference in money, with knowledge of the common debtor's purpose to hinder, delay, or defraud others, the transaction is utterly void.

It will be noticed, in passing, that, in the case of *Garnier v. Wheeler*, 40 Or. 198, 60 Pac. 812, this court upheld a transaction between two brothers, where the creditor brother bought property from the debtor brother, setting off, as a part of the purchase price, a debt due from the one to the other, and paying the difference in cash; the court basing its decision on the general fairness of the transaction and the adequacy of the price, although the defendant was unable to account within \$700 of how he paid the purchase price. If the debt from A. Lane to Frank Lane was the only element of the transaction between them, we might consistently apply the principle contended for by the plaintiff, and hold that the transaction was fraudulent by reason of Frank having paid to A. Lane the difference of \$750 in cash. This, however, is not all of the matter involved.

[2] Engaged, as they were, together in buying and selling real estate and improving the same, they were partners within the meaning and intent of *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149. Ball, as a creditor of A. Lane, one of the individuals of this partnership, had no right to any more of the partnership property than the actual interest of A. Lane therein.

[3] It is a well-settled principle of law that the partnership debts must be first paid out of the property of the concern; and, if anything is left for the individual partners, individual creditors may claim the same, but not otherwise. As a creditor of A. Lane, Frank Lane had a right, by diligence and foresight, to secure the payment of his debt,

if he could, in advance and to exclusion of the other creditors.

[4] With like sagacity and prudence he had the right to wind up and settle the partnership existing between them, so as to extricate himself from what promised to be embarrassing litigation with respect to the claims against his partner. In short, in the matter of winding up the partnership affairs, he had a right to buy his peace with his partner for a given sum of money, and the transaction cannot be assailed if it was done fairly and legally.

[5] When we remember that the undisputed testimony is that all the money which A. Lane invested in the partnership affairs was \$250, that the only interest he had, besides that, was the prospect of an undivided one-half of the possible profits, and that all the property involved was subject to sundry mortgages, which they had placed upon it for the purpose of raising money for improvement thereof, we are not prepared to say that the transaction between the two brothers was fraudulent or designed to hinder, delay, or defraud creditors of the defendant A. Lane. It is fairly apparent that the partnership between the two brothers, and the indebtedness of one to the other, could not have been adjusted in any other way; and we think the court decided rightly in upholding the conveyance to Frank Lane.

[6] In respect to the defendant Danton, we observe that by section 7379, L. O. L., every conveyance of any estate or interest in lands made with the intent to hinder, delay, or defraud creditors of their lawful suits or demands, as against the person so hindered, delayed, or defrauded, shall be void. The ensuing sections here quoted also appear in the same chapter:

"Sec. 7400. The question of fraudulent intent in all cases arising under the provisions of this statute shall be deemed a question of fact and not of law."

"Sec. 7401. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of the immediate grantor or of the fraud rendering void the title of such grantor."

This last section is a statutory rule of equity in this state, and much has been written, and many authorities have been cited, without due regard to its particular terms. Many of those precedents are from states having enactments on the subject couched in other terms. The rule which our Code establishes is that the provisions of the chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration. The exception is that, if it shall be made to appear that the purchaser had previous notice of the fraudulent intent of the grantor, the rule shall not apply. In *Garnier v. Wheeler*, 40 Or.

198, 66 Pac. 812, Mr. Justice Moore, upholding a conveyance from one brother to another, which was alleged to be in fraud of creditors of the grantor, quotes with approval the language of Wait on Fraudulent Conveyances as follows: "Three things must concur to protect the title of the purchaser: (1) He must buy without notice of the bad intent on part of the vendor; (2) he must be a purchaser for a valuable consideration; (3) he must have paid the purchase money before he had notice of the fraud." Out of the mouths of two witnesses, uncontradicted in any respect, it is established that Danton paid to A. Lane \$2,000 at the time of the delivery of the conveyances from the latter to the former.

A crucial question of the case is to determine whether or not Danton is within the exception to the rule laid down in section 7401; that is to say, whether it appears that he had previous notice of the alleged fraudulent intent of his grantor. In the early case of Coolidge v. Heneky, 11 Or. 327, 8 Pac. 281, it is held that notice of the fraudulent intent of the grantor must be actual.

[7] In later cases, like Lyons v. Leahy, 15 Or. 10, 13 Pac. 643, 3 Am. St. Rep. 133, the court holds that while notice must be actual, yet it may be proven by circumstantial evidence. In Raymond v. Flavel, 27 Or. 219, 240, 241, 246, 40 Pac. 158, 164, 166, Mr. Justice Wolverton, in discussing the question, says: "We have decided in a late case (Bowman v. Metzger, 27 Or. 23, 39 Pac. 3 [44 Pac. 1090]), wherein it was sought to charge the purchaser of a promissory note before due with notice of its infirmities in the title, that the question for the determination of the jury was whether Bowman purchased in good or bad faith, and that it was error for the court to instruct the jury that notice of the facts and circumstances that a prudent man would take notice of and inquire about, and which, if followed up, would disclose the truth, was equivalent to notice. The principle is applicable here. Circumstances which one man might look upon with suspicion, and which might cause him to make a careful inquiry, might escape the notice of another person of equal prudence and caution, so that the incidental question of common prudence is not a safe criterion by which to determine the question of notice. It might be, and often is, a circumstance tending to show bad faith, as fraud or guilty knowledge may be imputed either by direct proof or evidence of a circumstantial nature, the same as any other fact; but the real and ultimate question for determination is the mala fides of the transaction. \* \* \* The notice must be more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property"—citing Hall v. Livingston, 3 Del. Ch. 348.

[8] Another rule applicable to the matters under consideration is laid down by Mr. Justice Watson in the case of Hurford v. Harner, 6 Or. 362, 365, to this effect: "That a court of equity will never presume a fraud when the transaction under investigation is equally susceptible of two explanations, one of which is consistent with a fraudulent intent, and the other with good faith and fair dealing. In such cases, that construction of the acts of the parties which is consistent with good faith and fair dealing will be preferred." The same principle is laid down in Sabin v. Columbia Fuel Co., 25 Or. 15, 34 Pac. 692, 35 Pac. 854, 42 Am. St. Rep. 756.

Counsel for the plaintiff laid much stress upon the fact that Danton paid \$2,000 in coin, which he claimed to have taken from the safe deposit vault; that at the same time he was paying interest at 7 per cent. on a mortgage for \$2,600 on his home; that he bought the land without having an abstract prepared, and without examining the timber land; that he and A. Lane were personal friends; that the latter had defaulted in answering, and had not been called to testify. These were pressed upon our attention at the hearing, and the Socratic peroration of counsel was an argument aptly stated and very persuasive. All of these, however, are susceptible of an explanation consistent with good faith. It is permissible for a man to keep his coin in a safety deposit vault, and many people of undoubted wealth pursue that practice. The memory of the money panic in a time of plenty in 1907, with its consequent nonjudicial days by executive appointment, was yet green. Danton, as a speculator in real estate, could with all propriety mortgage his homestead and keep the money, where a series of suddenly proclaimed holidays, when banks close, would not prevent him from using it to secure an advantageous bargain. Men often do legitimate business on borrowed capital. Knowing, as he did, that the two lots were subject to a \$3,000 mortgage, Danton had a right to presume that the title had been examined by one taking them as security, and that search on his part would be superfluous. That A. Lane was not called as a witness is explained by other testimony, which clearly shows that he had left the state and his whereabouts was unknown. His making default does not in the judgment of the writer affect Danton one way or another. True enough, as to the defendant A. Lane, his failure to answer was a confession by him of the truth of the allegations of the complaint as against him, but him only. If the theory of the complaint is true, Danton and A. Lane conspired together to hinder, delay, and defraud the plaintiff, Ball.

[9] Conceding the conspiracy, the declarations of those engaged in it made, prior to its consummation, would bind all of them; but after the conspiracy is accomplished, and the criminal partnership is at an end,

the subsequent confession of one of them, Lane's default in this instance, can only bind the one making it, and as to the other one constitutes *res inter alios acta*.

[10] Indeed, according to many precedents, A. Lane was not a proper party to this suit for, if he retained any interest in the land, that interest was bound by the lien of the unsatisfied judgment against him, while if he had parted with the whole estate, as his deed indicates, he was like any other stranger whose default or confession would be pure hearsay. The language of Mr. Justice Strahan as to the defaulting defendant in *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139, is not at variance with the rule laid down here.

As to the timber land, it was of doubtful value; and being far remote from the city of Portland, where he lived, Danton had a right to rely upon the representations of his friend, A. Lane, about its quality and condition. Speculating in a small way in real estate, as the evidence shows Danton was at the time, he might well consider that his friend was in need of money and willing to sacrifice his property, as men often do to discharge honest debts; that here was a chance to buy real property on speculation; and that it was a question of taking the current while it served, or losing the venture. It may be that his friendship for Lane made him an easy mark for the latter's craftiness. It is easy to look back now, when we have all the facts before us, and found, upon A. Lane's actions, the presumption that he intended to defraud his creditors, although no direct proof is offered on the subject. From the standpoint of Danton at the time, with the information he possessed, we have only a case of a man, with some money on hand, meeting an opportunity to buy property advantageously, upon which he took the chance of any other speculator. It is quite as legitimate to say that A. Lane was bent on swindling Danton by getting \$2,000 away from him, under such ostensible circumstances as would leave him loser at the suit of A. Lane's brother-in-law creditor, as to hold that Danton invested his money to help Lane swindle Ball. To defeat the deed would be to found a presumption of Danton's fraud upon the presumption of unfair dealing on the part of A. Lane. In other words, we must infer from circumstances that A. Lane committed fraud in selling his property to Danton, and, based upon the presumption, further infer that Danton was likewise guilty. Section 796, L. O. L.

[11] We are not unmindful of the rule that gross inadequacy of price is a circumstance tending to show fraud in a transaction as against creditors. No case, however, is cited where that element alone is sufficient to overthrow a conveyance otherwise made in good faith for a valuable consideration. In *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612,

3 Am. St. Rep. 139, the defendant paid \$1,800 for property worth nearly three times that much; but he had actual notice of the very litigation which it was designed to defeat on execution by means of the sale. In *Weber v. Rothchild*, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162, the property was valued at \$8,000 or \$9,000, and sold for \$2,500; but the grantor took an instrument of defeasance for his own benefit, and the whole transaction was clearly shown to be confessedly an effort to defeat alimony in a threatened divorce case against the grantor. In *Conn. Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656, the defendant paid \$100 for \$15,000 worth of property, besides occupying, at the time, a fiduciary relation as to the grantor, which he used to her disadvantage. Many other cases are cited by the plaintiff; but they are all based upon dealings among near relatives, where either no consideration or merely a nominal one passed between the parties. On the other hand, in *Brown v. Case*, 41 Or. 221, 69 Pac. 43, this court, speaking by Mr. Justice Moore, held that property worth \$11,000, for which the sister of the grantor paid in cash only \$7,500, and agreed to take care of the grantor during his life, was fairly conveyed, and that the inadequacy of consideration was not so great as to shock the conscience of the court and render the deed void as to creditors.

Finally, it was urged upon us in the brief and at the argument that the consideration must be adequate; and, although the grantee shows good faith and a valuable consideration, the burden is still upon him to show affirmatively that the consideration paid was adequate, so that, if he failed to establish the latter element, the transfer will be set aside, subject to the payment to the grantee of the consideration actually advanced by him. There are two reasons against this solution of the case.

[12] The rule established by section 7401, L. O. L., says nothing whatever about adequacy of consideration; but, on the contrary, it states that the provisions of the chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration. Adequacy is not made an element of the rule. Again, we recall that the plaintiff lays his case on the allegation that the conveyances from Lane to Danton were voluntary and without consideration, and were made in trust for the former with the understanding and agreement, by and between the two, that Danton should hold the title in trust for the sole use and benefit of Lane. As we have seen, the testimony is clear and convincing that Danton paid \$2,000 in gold coin for the property in dispute. This entirely exonerates the transaction from the charge of the complaint that it was "voluntary and without consideration." There is no intimation in the testi-

mony whatever, on either side, that the transfer of the property was made in trust for the defendant A. Lane; neither is there any showing whatever that there was any agreement between Lane and Danton that the latter should hold the property in trust for the benefit of the former. On the contrary, the only testimony in the case is directly opposed to this charge found in the complaint.

[13] In equity, as in law, the office of a pleading is to inform the opposite party of the plaintiff's cause of suit or the defendant's grounds of defense.

[14] It is also a rule in equity, as in law, that the evidence "shall correspond with the substance of the material allegations, and be relevant to the questions in dispute." L. O. L. §§ 725, 726. The relief suggested would be applicable to the case in hand, if the plaintiff had manifested a willingness to do equity as well as to seek it, alleged the circumstances attending the conveyance and the payment by the defendants of their money, and called for an accounting and decree subjecting the property to the payment of his debt, after the liquidation of the amounts advanced by the defendants. On the other hand, plaintiff charges fraud and knowledge of the same upon all parties, and wants all the property, without regard to the rights or interests of others, the defendants. To grant him relief when he has utterly failed to prove his case, as he states it, would be for the court to do equity for him when he was unwilling to do it for himself. As against the defendants, it would be to make for them a contract which they never contemplated. In other words, it would be to change what they contracted to be a sale of property into a mortgage. There are several cases in the reports of this court where property has been subjected as to a prior lien for money advanced by defendant, and the plaintiff has been allowed to take the residue; but this is not such a case. It is not a proceeding in bankruptcy. If the complaint is true, the defendants actively and knowingly participated in the deceit and wrongdoing of the defendant A. Lane, and should have no consideration whatever from a court of equity. If, in the language of the statute already quoted, they were purchasers for a valuable consideration, they are entitled to hold the property thus acquired, unless it shall appear that they had previous notice of the intent of their grantor.

[15] Irrespective of where the burden lies, the testimony, in our judgment, is not sufficient to bring the defendants within the exception of the statute showing them to have had previous notice of the fraudulent intent of the grantor, when we apply the rules of construction in favor of good faith, to which we have already called attention in the precedents established by this court. It may be that the circumstances thrust upon our at-

tention would excite suspicion of a cautious and wary person, when strongly actuated by self-interest; but, to an impartial observer, they do not amount to the clear and undoubted proof which is necessary under the doctrine of *Raymond v. Flavel*, supra, to establish the existence of fraud on the part of the answering defendants. Equity will go far and do much to uncover concealed property, and subject it to the owner's debts; but it will not issue a search warrant on suspicion.

In our judgment there is no halfway ground in this case. The plaintiff is entitled to all or nothing. As we have seen, however, he has failed to establish the allegations of his complaint in very essential particulars. Hence his bill must be dismissed. The decree will be modified accordingly.

### BERNARD v. WILLAMETTE BOX & LUMBER CO.

(Supreme Court of Oregon. Feb. 18, 1913.)

#### 1. HIGHWAYS (§ 159\*)—OBSTRUCTION—INJUNCTION—INADEQUACY OF REMEDY AT LAW.

The remedy for obstruction of a highway by a criminal prosecution under L. O. L. § 2210, making such obstruction a criminal offense, is not such an adequate remedy for the protection of the rights of abutting owners as prevents equitable relief by injunction under L. O. L. § 389, providing that, where there is no plain, adequate, and complete remedy at law, the protection of private rights or the prevention of or redress for injuries shall be by a suit in equity.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 430, 431, 435; Dec. Dig. § 159.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 697\*)—PUBLIC NUISANCE—SUIT BY STATE OR MUNICIPALITY.

A state or a municipal corporation may maintain a suit for a mandatory injunction to compel the removal of obstructions from public streets independent of statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 671\*)—PUBLIC NUISANCE—REMEDY OF PRIVATE PERSON.

The owner of a town lot suffers peculiar and special damages differing in kind from that suffered by the public by the obstruction of part of a public street immediately in front of his premises preventing ingress thereto and egress therefrom, and hence may maintain a suit in equity for its removal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 671\*)—SUFFICIENCY OF EVIDENCE.

In a suit to compel the removal of an obstruction in an alleged public highway or street, it is necessary to prove that the place obstructed is a public road or street by a preponderance of the evidence only, and it is not necessary that the existence of the street or highway should be uncontradicted as intimated in a previous case.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

### 5. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS.

In a suit to compel the removal of an obstruction from a street where the recorded plat of the town was received in evidence without objection, but a copy thereof was substituted, and sent up with the record on appeal which copy contained no dedication of the streets, it would be presumed that the original plat was properly executed under L. O. L. § 3264, requiring plats to be duly acknowledged and recorded in view of section 799, subd. 34, requiring a presumption until overcome by evidence that the law has been obeyed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

### 6. NUISANCE (§ 72\*)—PUBLIC NUISANCE—REMEDY OF PRIVATE PERSON—"IRREPARABLE DAMAGES."

A private party cannot enjoin a public nuisance, even though he suffers an injury differing in kind from that sustained by the community at large, unless his detriment is irreparable, or at least not capable of full and complete compensation in damages, but the term "irreparable damages" in this connection includes wrongs of a repeated and continuing character, of which occasion damages estimable only by conjecture, and not by any accurate standard.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

### 7. MUNICIPAL CORPORATIONS (§ 671\*)—STREETS—OBSTRUCTIONS—RIGHTS OF ABUTTERS.

The owner of a lot abutting on a street is entitled to a mandatory injunction for the removal of an elevated roadway in the street obstructing ingress to and egress from his lot.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

### 8. INJUNCTION (§ 195\*)—RECOVERY OF DAMAGES INSTEAD OF INJUNCTION.

In a suit to compel the removal of an obstruction from a street which is removed after the institution of the suit, a court of equity will retain its jurisdiction to determine the question of damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 415; Dec. Dig. § 195.\*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Charles Bernard against the Willamette Box & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit by a private individual to prevent and remove an alleged public nuisance and recover damages asserted to have been caused by the inconvenience. The complaint charges generally that the defendant is a private corporation engaged in manufacturing lumber and boxes at Linnton, Or.; that on June 3, 1893, the plaintiff secured the legal title to and is now the owner of lots 3 and 4, in block 26, as indicated on the recorded plat of that town; that these lots abut upon F street which is a public highway 60 feet wide; that, after the plaintiff obtained the title to such real property, the defendant constructed an elevated railroad along F street in front of and adjacent to these lots, and also piled lumber in that

street thereby obstructing travel thereon and preventing ingress to and egress from such premises, greatly reducing their value to plaintiff's damage in the sum of \$1,000. A demurrer to the complaint on the ground *inter alia* that the plaintiff had an adequate remedy at law was overruled, whereupon the answer was filed denying the material allegations of the complaint, and setting forth others as a defense. A reply put in issue the averments of new matter in the answer, and the cause having been tried resulted in a decree as prayed for in the complaint, except that the plaintiff was awarded only \$200 as damages, and the defendant appeals.

George F. Felts, of Portland (Geo. L. Masten, of Portland, on the brief), for appellant. M. J. MacMahon, of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] It is maintained that for the redress of the injuries alleged the plaintiff had an adequate remedy at law, and, such being the case, an error was committed in overruling the demurrer. The statute declares that in all cases where there is not a plain, adequate, and complete remedy at law the protection of a private right or the prevention of or redress for an injury thereto shall be by a suit in equity. L. O. L. § 389. The obstruction of a highway is a crime, and upon conviction thereof a sentence of imprisonment or a fine may be imposed. Id. § 2210. The remedy thus prescribed may prove inadequate where the barrier is allowed to remain notwithstanding a judgment formerly pronounced by the court upon a defendant after his conviction in a criminal action for a violation of that statute. If a party's need temporarily to impede travel on a public road seemed to him to outweigh the punishment reasonably to be apprehended for a commission of the offense, the hindrance might possibly be continued until the apparent exigency ceased. The means thus given by the statute to prevent the violation of a right is not an adequate remedy at law precluding equitable intervention by injunction to restrain the perpetration of a common nuisance. 21 Am. & Eng. Law (2d Ed.) 704. Any person whose property is affected by a private nuisance may maintain an action at law against the person causing the annoyance to recover the damage inflicted, and, if a judgment therefor be given and an execution issued thereon, a warrant may also be obtained to abate the nuisance. L. O. L. § 341. It has also been intimated that the right to recover damages for a "public" nuisance is also predicated on that statute. City of Roseberg v. Abraham, 8 Or. 509. A text-writer in discussing the subject under consideration says: "Except in those states where special provision is made therefor by statute, no power exists in a court of law in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an ordinary action upon the case for damages to direct the abatement of the nuisance, after a verdict establishing it. \* \* \* It is proper to say, however, that courts hesitate to employ these statutory remedies, and do not generally encourage them; and parties in a proper case will find far more easy redress for their grievances from nuisances in a court of equity than in a court of law." Wood, Nuisance (3d Ed.) § 843.

[2] Any act of a party that trenches upon the rights of the public may be redressed by a suit in equity instituted by or in the name of the state as an exercise of its police power to prevent or remove a common nuisance. The power thus vested in a state to enact laws that are deemed to be for the general good and welfare of its citizens, and are not inconsistent with or repugnant to its Constitution, may be delegated to and exercised by a municipal corporation, as expressly specified or necessarily implied in a city charter, which instrument emanating from the sovereign in the nature of a grant is the measure of the authority bestowed. Joyce, Law of Nuisances, §§ 437-439. The right of a state to protect and preserve its supreme political authority when it is abridged by the creation of a public nuisance is not dependent upon the statute to which reference has been made, nor does the remedy prescribed by the enactment necessarily govern the procedure to be involved. If resort cannot be had to the decrees of courts recognizing, affirming, and enforcing the principles of law relating to the government and security of persons and property, and the word "private" as used in section 341, L. O. L., is to receive a strict construction, it might seem to follow that for any act of a party constituting a public nuisance no remedy exists. A nuisance, however, may be at the same time both public and private. The public wrong is redressed by an indictment, and the private injury by an action at law or a suit in equity. Wood, Nuisance (3d Ed.) § 674; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Stamm v. City of Albuquerque, 10 N. M. 491, 62 Pac. 973. The equitable maxim that wherever there is a right there is also a remedy justifies the assertion that a suit in equity can be maintained, independent of the statute, to abate a public nuisance. As a disavowal of this proposition would amount to a renunciation of sovereignty, it results that a state, or its creature, a municipal corporation when so authorized by its charter, as an exercise of its inherent police power, can maintain a suit in equity to obviate or suppress a public nuisance. It will therefore be taken for granted that the proper officers of Linnton were authorized to maintain a suit, and by a mandatory injunction could have caused to be removed an obstruction from a public street in that village, and what the persons charged with the right and duty of exercising certain functions were empowered to perform a private party who sustained a special

injury, differing in kind from that suffered by the community at large from a public nuisance, may also do. Luhrs v. Sturtevant, 10 Or. 170; Van Buskirk v. Bond, 52 Or. 234, 96 Pac. 1103; Moore v. Fowler, 58 Or. 292, 114 Pac. 472.

[3] The owner of a town lot suffers peculiar and special damages, differing in kind from that to which the public is subjected by the obstruction of a part of a public street immediately in front of his premises, whereby ingress and egress to and from such abutting property is prevented, and such owner may maintain a suit in equity to prevent or remove the common nuisance. Harniss v. Bulpitt, 1 Cal. App. 140, 81 Pac. 1022; Wilder v. De Cou, 28 Minn. 10, 1 N. W. 48; Baines v. Marshfield & Suburban R. Co., 124 Pac. 672. The complaint herein states facts sufficient to constitute a cause of suit, and no error was committed in overruling the demurrer.

It is contended that the evidence shows that the plaintiff was not entitled to equitable intervention, and, this being so, an error was committed in not dismissing the suit. The testimony discloses that the defendant owns and operates at Linnton a sawmill erected on the left bank of the Willamette river. Immediately west of the mill is First street, a public highway extending north and south. About 150 feet further west and parallel with First street is a railway. Extending from the river and crossing at right angles First street and the railroad is F street, on the north side of which one of the plaintiff's lots borders for a distance of 100 feet. This lot is joined on the north by plaintiff's other lot of the same length. The railroad grade at the crossing of F street is about eight feet above the surface of the ground immediately east of the embankment. A strip of land 50 feet in width extending along the west line of plaintiff's lots is owned by the defendant which erected on its premises a warehouse one floor of which is about 3 feet and 6 inches above the track of the railway. Extending from the south end of such building and on a line with the floor thereof the defendant constructed to its mill an inclined roadway on which it caused to be hauled lumber which was stored in the warehouse in order to be transported on cars. This passageway bordered on plaintiff's lots, and at the southwest corner of his premises it was elevated nearly 12 feet, while at the southeast corner it was about 3 feet, so that the obstruction prevented ingress and egress to and from the south side of his property. No building has been erected on these lots, access to which could have been had from First street. The plaintiff on October 11, 1909, and in June of the next year, notified the defendant in writing that he was the owner of the real property hereinbefore particularly described, and requested it to remove the roadway but no attention was paid

to the demand. It further appears from the testimony that the defendant had for some time allowed to remain in F street, immediately south of its warehouse, piles of lumber which blockaded the highway, except a narrow passage for persons, but that no lumber had been piled in front of plaintiff's lots in that street. No grade has ever been established for F street, and, if no lumber had been piled therein south of the warehouse, it is quite probable that teams could not have crossed the railroad track at that place by reason of the embankment. It also seems that the plaintiff had intended to build on his lands several tenement houses, but by reason of the elevated railway he concluded not to make such improvements. After this suit was commenced, but before the decree was rendered, the defendant removed the inclined driveway from in front of the plaintiff's lots. The foregoing is deemed to be a fair synopsis of the material testimony relating to the plaintiff's right to injunctive relief. "When the right to the use of the street," says Mr. Justice Lord in *Walt v. Foster*, 12 Or. 247, 249, 7 Pac. 24, "is admitted, or easy of ascertainment, an injunction will be granted to restrain its obstruction by building a house thereon, in favor of adjacent owners, when such an obstruction works a special injury to them. \* \* \*

But where the right to the use of the street or highway has not been established at law, or is not clear nor easy of ascertainment, but is questioned and contested on every ground on which the plaintiff puts it, not only by the answer of the defendants, but by proofs in the suit, the remedy by injunction will not be granted." See, also, *Kothenberthal v. City of Salem Co.*, 13 Or. 604, 11 Pac. 287.

[4] In *Van Buskirk v. Bond*, supra, it was ruled that a fence built across a public road was a nuisance only when it was admitted by the pleadings or it satisfactorily appeared from the uncontradicted testimony that the barrier obstructed a highway. The word "uncontradicted," as thus employed, was evidently used without the exercise of that degree of care which the importance of the case demanded, as is clearly disclosed by the opinion in another case. *Morse v. Whitcomb*, 54 Or. 412, 423, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832. The denial in an answer of the existence of a public highway alleged in a complaint to have been obstructed ought not to defeat equitable intervention to remove the barrier at the suit of a private party who has sustained special damages differing in kind from that suffered by the community at large by the erection or maintenance of a common nuisance. A different rule would almost place such cases beyond the pale of chancery jurisdiction, for it is safe to predict that, if the contrary doctrine were to prevail, it would reasonably be ex-

pected that a defendant who was charged in a complaint with having obstructed a public road or street would deny in his answer the existence of the highway. A plea to the merits on this subject ought to be heard and determined as any other disputed fact in a civil case, and from a preponderance of the evidence the question of equitable jurisdiction should be ascertained. *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Union Power Co. v. Lichty*, 42 Or. 563, 71 Pac. 1044.

[5] The answer herein denied the averment of the complaint that F street was a public highway. In order to substantiate the affirmative of this issue, there was received in evidence at the trial the recorded plat of the town of Linnton, and what purports to be a copy thereof has been substituted and sent up with the record. F street is represented on such assumed duplicate as a public highway. Such counterpart, however, does not contain any dedication of the streets, but, since the law requires the plat of a town to be duly acknowledged and recorded and prescribes a penalty for a failure to comply therewith (L. O. L. § 3264), it will be presumed, in absence of any objection to the admission of the evidence on that account, that the law has been obeyed (*Id.* § 799, sub. 34) and that the original recorded plat was properly executed, and, this being so, F street is a public highway. *Id.* § 3260.

[6] In suits by a private party to enjoin a public nuisance, it is generally held that he must not only suffer an injury differing in kind from that sustained by the community at large, but his detriment must also be irreparable, or, at least, not capable of full and complete compensation in damages. *Elliott, Roads & Streets* (3d Ed.) § 850. In referring to this legal principle the author there observes: "This is no doubt a fair statement of the general rule, but the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be great. And the fact that no actual damages can be proved, so that in action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." The term "irreparable damages," to prevent which injunction may issue, includes wrongs of a repeated and continuing character, or which occasion damages that are estimable only by conjecture, and not by any accurate standard. *Commonwealth v. Pittsburgh, etc., R. R. Co.*, 24 Pa. 159, 62 Am. Dec. 372. See, also, upon this subject the notes to the case of *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

[7, 8] The plaintiff's right to ingress and egress to and from that street to his lots

has been clearly established, and as the invasion of that right, by the construction of the elevated roadway, has also been substantiated, he is entitled to the relief demanded in the complaint. This redress cannot be defeated by the defendant's removal of the obstruction after this suit was instituted, for a court of equity, having obtained jurisdiction to grant injunctive relief, will retain the right to hear and determine the cause upon the question of damages. *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Fflieschner v. Citizens' Investment Co.*, 25 Or. 119, 35 Pac. 174.

It follows from these considerations that the decree should be affirmed, and it is so ordered.

### CLARK et al. v. LATOURETTE.

(Supreme Court of Oregon. Feb. 18, 1913.)

#### 1. DEEDS (§ 207\*)—EXECUTION—EVIDENCE.

In an action to quiet title by the widow and children of a former owner who claimed that a deed executed by him was executed in blank, evidence held to show that he made a deed to the company from whom defendant derived title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614-624; Dec. Dig. § 207.\*]

#### 2. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.

A purchaser of land from a corporation in which he owned one share of stock, and of which his son was clerk or secretary, but who had never participated in its management, was not charged with constructive notice of any fraud perpetrated by the corporation's president in acquiring title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

#### 3. ACKNOWLEDGMENT (§ 47\*)—CURING DEFECTS—CURATIVE STATUTES.

The acknowledgment of a conveyance to a corporation before a notary public who was president of the corporation, and the actual beneficiary of the conveyance, was cured by Sess. Laws 1907, c. 174, p. 330, § 1 (L. O. L. § 7154), providing that all deeds affecting real property theretofore executed which were signed by the grantor should be effective without sealing or other execution, acknowledgment, or witnesses, and that all such instruments which should have been acknowledged or attempted in good faith to be acknowledged before an officer with a seal or one without a seal whose authority should be proved by a certificate of a clerk of a court of record should be entitled to record and receivable in evidence, and that, when so recorded, the record, when duly certified by the county clerk, should be evidence in all courts, and hence the conveyance was properly received in evidence.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Tillamook County; Robert G. Morrow, Judge.

Action by John B. Clark and others against C. D. Latourette. From a judgment for defendant, plaintiffs appeal. Affirmed.

H. T. Botts, of Tillamook, for appellants. Dolph, Mallory, Simon & Gearin, of Portland, on the brief, for respondent.

McBRIDE, C. J. In October, 1898, one J. Fay Clark executed a deed to the Clackamas Abstract & Trust Company, purporting to convey a quarter section of land in Tillamook county to the grantee. John F. Clark, who was not in any way related to J. Fay Clark, the grantor, was the president, manager, and principal stockholder in the company, and testifies that the grantor, being in failing health, offered to convey the land to him in recognition of certain friendly services rendered him, and that among other reasons he assigned for this course was the fact that his wife and children in the East were indifferent to him, and that he did not want them to have the property in case of his death. John F. Clark prepared a deed to the land, naming the abstract company as grantee, but, as he says, intending that it should be held for him. He was a notary public, and, as such, took the acknowledgment and also signed as one of the witnesses. The deed was not recorded. J. Fay Clark died in Oregon City in 1902. Neither he nor John F. Clark gave any attention to the land or paid the taxes upon it from 1896 until its purchase by defendant Latourette. In the fall of 1907, Latourette, having had his attention called to this land by an inquiry from another party, and supposing from the similarity of names that it was the homestead of John F. Clark, made inquiry of Clark in regard thereto. Clark told him that he owned the land, showed him the patent from the United States, the deed from the original patentee to J. Fay Clark, and the deed from J. Fay Clark to the abstract company, and assured him that the title was all right, except the liens for unpaid taxes. Latourette purchased the land, paying \$400 therefor, and assuming the burden of the unpaid taxes. Later his deed was lost or mislaid, and the abstract company executed a new deed to the property.

The plaintiffs, who are the widow and children of J. Fay Clark, brought this suit to quiet title to the land, and Latourette sets up his title through the conveyance mentioned. The plaintiffs by way of reply deny the execution of the conveyance from J. Fay Clark to the abstract company. They further allege that, if J. Fay Clark ever executed a conveyance to the abstract company, it was executed with the name of the grantee left blank, so as to enable John F. Clark, as the agent of J. Fay Clark, to insert the name of any purchaser he might find for the land, that he found no purchaser, and that his authority to insert a name ceased upon the death of J. Fay Clark, which occurred October 4, 1902.

[1] There is no evidence to sustain plain-



tiffs' theory that the name of the abstract company was inserted after the acknowledgment of the deed. It is a theory resting upon mere conjecture. It may be granted that John F. Clark's want of frankness in his replies to the inquiries of J. Fay Clark's relatives concerning the property casts an air of suspicion over his testimony, and the alleged reason given by J. Fay Clark for making the conveyance seems peculiar to say the least; yet in one respect he is supported by the testimony of Judge Campbell, who was a friend and roommate of J. Fay Clark, and testifies that J. Fay Clark told him, in effect, that he positively had no use for any member of his family; that when he was broke his family had no use for him. This is disinterested and reliable testimony, and, if we add to this the undeniable fact that Clark was a man of a peculiar and "cranky" disposition, the conveyance by him to John F. Clark does not seem so improbable as would appear at first blush. It is evident that neither he nor his grantee, nor any one else, attached any particular value to the land, or they would not have allowed it to be sold year after year for taxes. But, whatever may have been the good faith or lack of good faith of John F. Clark in the transaction, we are satisfied that a deed was actually made by J. Fay Clark to the abstract company, and there is nothing to indicate anything but entire good faith on the part of the defendant Latourette. He paid \$400 in gold for the land, and spent \$130 in clearing up the tax liens against it. The deeds exhibited to him indicated a good title in the abstract company, and the price asked and paid was not under the circumstances so inadequate as to excite suspicion.

[2] It is true that he owned one share of stock in the abstract company, making him a nominal stockholder, and that at one time his son was a clerk or secretary of the company; but he himself never actually participated in its management, and there is nothing in these relations with the company to charge him with actual or constructive notice of any fraud that might have been perpetrated by its president.

[3] The deed was irregularly acknowledged and witnessed. The irregularity consisted in the fact that John F. Clark, as a notary public, took the acknowledgment to a conveyance to the company of which he was the president, and of which conveyance he was the actual beneficiary. We think this irregularity was cured by the provisions of section 1, c. 174, Session Laws of 1907 (section 7154, L. O. L.), which is as follows: "All deeds or other instruments affecting or purporting to affect real property heretofore executed, in this state, or in any state or territory of the United States, or in any foreign country, which shall have been signed by the grantor, shall be effective according to the terms of such instrument without sealing or other ex-

ecution, acknowledgment of witnesses thereto whatever, and all such instruments which shall have been acknowledged or attempted in good faith to be acknowledged before an officer having a seal, whether within or without the state of Oregon, or an officer without a seal, whose authority to take acknowledgments within the state where the acknowledgment was taken or attempted to be taken shall be proved by certificate of the clerk of a court of record in such state, shall be entitled to record, and such instruments so executed shall be received in evidence in all courts in this state and be evidence of the titles of the lands therein described against the grantors, their heirs and assigns. When such deed or other instruments so executed are recorded in the records of deeds in the proper county of this state, the record thereof duly certified by the county clerk of such county shall be evidence in all courts and have the same effect as the original thereof." We are of the opinion that this section was intended to render valid for all purposes the class of instruments mentioned therein, and that all such deeds after the passage of said act, if not theretofore recorded were entitled to record, and that certified copies of such record are entitled to be received in evidence upon the same footing as conveyances regularly witnessed and acknowledged. This being the case, there was no error committed in receiving the certified copy of the deed in evidence.

The decree is affirmed.

#### STEVENS v. CARROLL

In re STEVENS.

(Supreme Court of Oregon. Feb. 18, 1913.)

##### 1. WILLS (§ 629\*)—CONSTRUCTION—INTEREST CREATED—VESTED OR CONTINGENT.

A legacy or an interest created by devise should always be construed as vested rather than contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.\*]

##### 2. WILLS (§ 630\*)—CONSTRUCTION—VESTED OR CONTINGENT INTEREST.

Where a testator devised all of his real property to his wife for life, directing that part of it should be sold at her death, and out of the proceeds a legacy should be paid to his daughter, the interest of the daughter in the legacy vested at the death of the testator, and her death prior to that of the wife did not cause a lapse of her legacy, which might be enforced in favor of her heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.\*]

Appeal from Circuit Court, Lane County; John S. Coke, Judge.

Settlement of the final account of Welby Stevens, as executor of James A. Stevens, in which Anna Carroll, as administratrix of M. L. Sommerville, filed objections. From an order of the County Court denying discharge, the executor appealed to the Circuit Court,

which sustained the order, and he appeals. Affirmed.

James A. Stevens died, leaving a will, which contains, among others, the following provisions: "I hereby give, devise and bequeath unto my wife, Emily F. Stevens, all my real estate wheresoever situate to have, possess and use during the lifetime of said Emily F. Stevens, and after the death of said Emily F. Stevens, my said wife, I hereby direct, give and devise unto my son Lenn L. Stevens the seventy-five acre tract of land to become the absolute property of said Lenn L. Stevens upon the death of my said wife, Emily F. Stevens. \* \* \* I hereby give and bequeath unto my daughter Maggie Sommerville the sum of two thousand (\$2,000.00) dollars to be paid upon the death of my said wife Emily F. Stevens and to be paid out of proceeds that may be derived from my home place consisting of about one hundred and fifty acres in Lane county, Oregon, where I am now living. If my son Welby Stevens so desires he can pay said two thousand (\$2,000.00) dollars out of his private, individual funds at or before the death of my said wife Emily F. Stevens instead of paying said sum out of proceeds to be derived from my home place. \* \* \* I give, devise and bequeath unto my son Welby Stevens my home place consisting of about one hundred and fifty acres in Lane county, Oregon, to become and be his property absolutely upon the death of my said wife Emily F. Stevens, and upon payment of said \$2,000.00 as above." Subsequent to the death of the testator, Maggie Sommerville died, and later her husband, M. L. Sommerville, died, both without issue. Emily Stevens, the wife of the testator, still survives. Welby Stevens, the executor of the will, filed his final account, and asked to be discharged. Anna Carroll, administratrix of the estate of M. L. Sommerville, resisted the application for a discharge on the ground that the estate of M. L. Sommerville had a vested interest in the \$2,000 bequeathed to Maggie, his wife, in her father's will, which, by the terms of said will, the executor was directed to pay, and that he should be required, for that purpose, to continue in his office until the death of Emily Stevens and the payment of the legacy. From an order of the county court refusing to discharge the executor, he appealed to the circuit court, which sustained the order of the county court; and from this decision the executor appeals to this court.

George B. Dorris, of Eugene, for appellant.  
A. C. Woodcock and E. O. Potter, both of Eugene, for respondent.

MCBRIDE, C. J. (after stating the facts as above). It is conceded that if, under the terms of the will, the bequest to Maggie Sommerville became a vested legacy upon the death of her father, the decree of the circuit

court is correct. If the legacy did not become vested upon the death of the testator, then it has lapsed, and there is no reason why the executor should not be discharged.

[1, 2] We are of the opinion that the legacy became vested upon the death of the testator. A legacy or interest created by devise should always be construed as vested rather than contingent. *Winslow v. Rutherford*, 59 Or. 124, 114 Pac. 930. A vested estate is an estate where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of some intermediate or precedent estate. See *Words and Phrases*, title "Vested Estate," and cases there cited. It seems clear that, upon the death of the testator, Maggie Sommerville had an immediate right to the legacy bequeathed to her, subject only to the termination of her mother's interest in the property. "Where real or personal estate is devised or bequeathed to a person, and though the vesting in right or interest at first sight appears to depend upon the attainment of a given age or upon the arrival or occurrence of an event or time which is sure to happen or arrive, or, in the case of residuary bequest without any limitation over, upon marriage, yet if the attainment of such age or the arrival or occurrence of such event or time does not form part of the original description of the devisee or legatee, and the suspensive expressions are of such a nature that they may be construed to refer, not to the vesting in right or interest, but to the vesting in possession or enjoyment, and it appears from the form of the limitation, when more closely considered, or from the intermediate disposition of the property, or from other passages, to be probable that it was only intended to delay the vesting in possession or enjoyment, in such case, the suspensive expressions will be referred to the vesting in possession or enjoyment, and the interest of the devisee or legatee will be actually vested in right before the age or period specified." *Smith, Exec. Int.* § 309.

In *Jackson v. Jackson*, 1 Ves. Sen. 217, a father bequeathed to his son £400 to be paid to him at the end of one year after the testator's death, and a further sum of £100 to be paid to him at the death of his mother. The son died before the mother. The court held that he took a vested interest in the £100, saying that the legacy was plainly vested, though the time of payment was postponed. See, also, *Warren v. Hembree*, 8 Or. 118; *Winslow v. Rutherford*, supra, and cases there cited. *Fairly v. Kline*, 3 N. J. Law, 754, 4 Am. Dec. 414, is in point upon this proposition, in which case a testator directed his lands to be sold after his wife's death, and the proceeds to be divided among his children. One of the children died before the mother, and it was held that the legacy became vested, and that the husband of the child so dying became entitled to the legacy as the administrator of his wife. In that

case the court say: "It is certain that legacies charged upon land are subject to different rules from those charged upon the personal estate only. If a legacy charged upon personal estate only be given unconditionally, and dependent upon no future contingency, then though the day of payment be postponed, as if it be to be paid when the legatee attains the age of 21 years, or marries, or other contingency happens, yet if the legatee died before that day, his representatives shall take. It is a vested legacy. It cannot fall. But if the legacy be charged upon lands in the hands of the heir, and that whether it be the *heres natus* or the *heres factus*, and the legatee died before the day of payment, it will not go to his representatives, but will merge in the land for the benefit of the heirs. This is the general rule. But there is an exception to this rule, as well settled at this day as the rule itself. It is this: That when the payment is postponed merely for the convenience and benefit of the estate and family, and not on account of considerations relating to the legatee himself, then, though the legatee die before the day of payment, yet the legacy shall not merge for the benefit of the heirs, but shall go to the representative. It is a vested legacy." The same rule is announced in *Cropley v. Cooper*, 19 Wall. 167, 22 L. Ed. 109; *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302.

In the case at bar, as in those last cited, the legacy is given absolutely. Its payment is postponed for no reason personal to or in the interest of the legatee, but solely for the benefit of the widow. For these reasons we hold that the right to receive this legacy became vested in Maggie Sommerville upon the death of her father, and descended to her husband at her death, and that upon his death this right passed to his representatives.

The decree of the circuit court is affirmed.

THORNTON et al. v. HALLAM et al.  
(Supreme Court of Oregon. Feb. 18, 1913.)

1. AGRICULTURE (§ 11\*)—STATUTES—APPLICATION.

Statutes conferring a lien on property for services in clearing land being in derogation of the common law, and therefore strictly construed, one seeking to charge with a lien the property of another with whom he has not contracted must show a strict compliance with the statute conferring the lien.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. § 11.\*]

2. AGRICULTURE (§ 11\*)—LIENS—STATUTES—"PERSON IN POSSESSION."

L. O. L. § 7439, provides that any person who shall clear any land at the request of the owner or "person in lawful possession" shall have a lien for his wages and charges which shall be preferred, etc. *Held*, that a mere contractor who goes on land to perform services thereon for the owner does not thereby acquire possession within such section, so as to

confer on his servants the right to a lien for wages and charges for clearing the land.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. § 11.\*]

3. EJECTMENT (§ 35\*)—LIABILITY OF PARTIES—POSSESSION OF SERVANT.

Since the possession of a servant is the possession of the master, ejectment will not lie against a mere servant of a landowner.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 126; Dec. Dig. § 35.\*]

4. AGRICULTURE (§ 15\*)—CLEARING LAND—LIEN—DESCRIPTION.

Where a description of a tract of land on which it was sought to impose a lien for clearing services did not close, and was therefore vague and unintelligible, it did not constitute a description of the land by metes and bounds or by legal subdivisions, as required by L. O. L. § 7440, providing for a lien by the filing of a bill for the services and a statement of the contract with a sufficient description of the land by metes and bounds or legal subdivisions, and was therefore insufficient.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.\*]

5. AGRICULTURE (§ 11\*)—CLEARING LAND—LIEN.

Under L. O. L. § 7439, providing that a person who shall clear any land at the request of the owner or person in lawful possession shall have a lien on the "said land so improved or cleared" for his wages and charges, etc., no lien can be sustained on a particular tract of land for clearing services rendered with reference to a different tract.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. § 11.\*]

Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Suit by J. Thornton and another against A. C. Hallam and others to enforce a logger's lien. From a decree in favor of complainants, defendants Charles S. Chapmar and Thos. H. Sherrard appeal. Reversed and dismissed.

The complaint alleges that the defendants Chapman and Sherrard are the owners, or reputed owners, of the following described tract of land, to wit: "Beginning at a point which is 778 feet west of a point on east section line of section 1, township 1 N., of range 10 E. of the Willamette meridian, 534 feet north of quarter corner on east side of said section 1; thence north parallel with said east line of said section 1; 223 feet to a stake; thence 924 feet to another stake; thence south parallel with east side 950 feet to a stake; thence to place of beginning, less 1 acre, and containing 22 acres. Also a tract described as follows: Beginning at a point on north side of section 1, 890 feet east of the quarter of the said section 1; thence east 230 feet; thence south parallel with north and south center line of said section 1, 670 feet; thence west 418 feet; thence north 670 feet to place of beginning, containing 5 acres. All of said land above described lying and being in the N. E.  $\frac{1}{4}$  of section 1, township 1 N., of range 10 E. of the Willamette meridian, in Hood River county, Or."

The complaint also states that Chapman and Sherrard "entered into a contract with the said A. C. Hallam, by the terms of which Hallam was to clear and improve the land aforesaid; that at all times thereafter Hallam had legitimate right and authority to clear and to employ and contract with others to clear said land; that subsequent to entering into said contract with Chapman and Sherrard to clear and improve said land Hallam on the 13th day of January, 1911, then in possession of said land, entered into a subcontract with plaintiffs to slash the timber down to six inches in diameter on said land; that, in pursuance of said contract so entered into with Hallam, plaintiffs slashed all the timber down to six inches diameter on said land and fulfilled said contract; that by the terms of said contract it was expressly understood and agreed that Hallam would pay and plaintiffs would receive for slashing the timber on said lands \$15.00 per acre." Claiming from Hallam an unpaid balance of \$300, the complaint sets out the preparation and filing by the plaintiffs of a claim of lien and recording of the same in the records of mechanics' liens in the county wherein the land is situated, and prays a decree subjecting the premises to sale under the lien thus claimed. The answer of the defendants Chapman and Sherrard traverses all the allegations of the complaint, except as otherwise stated in the affirmative matter of their answer. They avow ownership of the N. E.  $\frac{1}{4}$  of section 1, township 1 N., range 10 E., of the Willamette meridian, within which is included all the land mentioned in the complaint. They set out in their very words certain contracts which they had with the defendant Hallam to clear certain lands in the quarter mentioned for which in part payment he was to receive from them a conveyance of a certain other 10-acre tract in that same subdivision, and declare these to be the only contracts between them and Hallam for the clearing of any tract of land. They then quote in full the notice or claim of lien filed by the plaintiffs, and charge that it "is defective, insufficient, and void for the reason that said claim or lien does not contain a sufficient description of land by metes and bounds or legal subdivisions, and for the further reason that it described a kind of work as performed by plaintiffs for which there is no lien given by any statute of the state of Oregon." This last allegation, amounting to the defendants' legal conclusion about the construction of the plaintiffs' claim of lien, is denied by the plaintiffs in their reply, but they admit that the contracts quoted in the answer are the agreements between the answering defendants and the defendant Hallam. The circuit court heard the testimony of the parties, and, without any pleading calling for a correction of the description, entered a decree foreclosing the

lien in favor of the plaintiffs by a closing description from which decree the defendant Sherrard and Chapman have appealed.

William L. Brewster, of Portland (Kingman Brewster, of Portland, on the brief), for appellants. S. W. Stark, of Hood River, for respondents.

BURNETT, J. (after stating the facts as above). "Any person or persons who shall hereafter clear any land or improve the same by ditching, diking or tiling the same at the request of the owner or person in the lawful possession of the same shall have a lien on the said lands so improved or cleared for his wages and charges for the said service, which lien shall be preferred to every other lien, mortgage or incumbrance of a subsequent date." L. O. L. § 7439. "It shall be the duty of every person claiming the benefits of this act to file with the county clerk of the county where the land is situated within sixty days after the completion of the clearing or improvement of any lands provided for in section 7439 or after the completion of any contract to clear or improve any land in this act provided, a bill of the wages due such person for such service and a statement of the contract, the name of the contractor together with a sufficient description of land by metes and bounds or legal subdivisions. The said bill so filed shall exhibit the total amount of his demand, after dividing (deducting) all set-offs and counterclaims, and shall be verified by the oath of such claimant that the same is true and an actual, bona fide, and existing debt." L. O. L. § 7440.

[1] One seeking to take or charge with a lien the property of another with whom he has not contracted must be able to show a strict compliance with any statute giving such privilege. The statutes conferring a lien upon property for services have always been strictly construed, being in derogation of the common law. *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407; *Pils v. Killingsworth*, 20 Or. 432, 26 Pac. 305; *Gordon v. Deal*, 23 Or. 153, 31 Pac. 287; *Rankin v. Malarkey*, 23 Or. 593, 32 Pac. 620.

[2] The contracts which both parties admit constituted the rule governing the relations between the owners and Hallam show that the second described tract in the complaint was to be taken by Hallam as part compensation for clearing the larger tract mentioned in the contract. Nothing is said in those contracts about Hallam taking possession of the land which he was to receive as compensation. The defendants contend that under these circumstances, at least as to the smaller tract described in the complaint, Hallam was not in lawful possession of the same so as to give him authority to contract with the plaintiffs so as to bind the title of the owner in fee. The mere fact that a contractor goes upon land for the purpose

of performing services thereon for the owner does not give him possession. It is manifest that Hallam could not have maintained ejectment against Chapman and Sherrard to recover possession of any of the land described in the complaint. He stood in no better relation to the owners in fee than any employé or servant of theirs, and therefore is not a person in lawful possession of the land in that sense which would authorize him to contract with a stranger so as to charge owners of the fee or affect their estate.

[3] The weight of authority is that ejectment will not lie against a mere servant of the landholder. *Polack v. Mansfield*, 44 Cal. 36, 13 Am. Rep. 151; *Chiniquy v. Catholic Bishop*, 41 Ill. 148. The reason is that in such cases the possession of the servant or the employé is the possession of the employer. Liens of the kind under consideration are plainly distinguishable from those arising under the general law relating to mechanic's liens set out in section 7416 et seq., L. O. L., providing that several classes of persons therein named "shall have a lien upon the property for the work or labor done \* \* \* or material furnished at the instance of the owner of the building or improvement or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration or repair in full or in part of any building as aforesaid shall be held to be the agent for the purposes of this act." In the statute under which this suit is instituted there is no provision for making a contractor the agent of the owner. The only one entitled to charge the lands with a lien is the owner or person in lawful possession of the same.

[4] Again, it will be observed that the tract first described in the complaint has a description which does not close, and hence is vague and unintelligible. It does not constitute a description of lands by metes and bounds or by legal subdivisions as the statute expressly requires. Although in *Bogard v. Barhan*, 52 Or. 124, 96 Pac. 673, 132 Am. St. Rep. 676, this court held that specific performance would lie to compel the conveyance of property described by certain names, and that parol testimony would be received to identify such property so as to enforce specific performance, yet in that same case it was held in an opinion by Mr. Justice Eakin that a description by metes and bounds which would not close was void. More than that there was no issue raised on the subject of mistake, and, even if there had been, there could not have been any ground for calling it a mutual mistake which equity would correct, for the plaintiffs were proceeding at their peril, and not by virtue of any contractual relation with the defendant owners.

[5] It appears in the testimony without

dispute that the labor performed by the plaintiffs on the five-acre tract described in the complaint was done at the instance and request of Hallam for his own purposes, and that this five-acre tract was not included or intended to be included for clearing in the contracts between Hallam and the defendants Sherrard and Chapman. Excluding the first-mentioned tract, as we must under the authority of *Bogard v. Barhan*, supra, the lien must fail even if the five-acre tract were properly included within the claim, because the statement prescribed by the statute must be true and for an actual bona fide existing debt for labor performed on the land sought to be charged at the request of the owner or person in lawful possession. As to the five-acre tract, the claim is not true, because it seeks to charge that tract with clearing done elsewhere, and must fail for that reason as well as the one already noted.

The decree is reversed, and the suit dismissed.

#### FORREST v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Feb. 18, 1913.)

##### 1. WITNESSES (§ 219\*)—COMPETENCY—PHYSICIANS—PRIVILEGE—WAIVER.

Where plaintiff in an action for injuries testified to her physical condition, alleged to have resulted from the injury sued for, and admitted that she consulted a physician, submitted herself for examination, and obtained his opinion as to her condition, but did not call him as a witness, she waived her right to object to the physician testifying as a witness for the defendant, under L. O. L. §§ 783, 784, providing that a regular physician or surgeon shall not without the consent of his patient be examined in a civil action as to any information acquired in attending the patient necessary to enable him to prescribe or act therefor, provided that, if the party to the action offer himself as a witness, then he shall be deemed to have consented to the examination of the physician.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.\*]

##### 2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—RECEPTION OF EVIDENCE—CUMULATIVE TESTIMONY—QUALIFICATION OF WITNESSES.

Where, in an action for injuries, plaintiff called ten witnesses, including three physicians whom she had consulted, and who testified with reference to her physical condition, and defendant called three witnesses, such fact did not render innocuous an erroneous ruling excluding the testimony of a physician to whom plaintiff submitted herself for examination, but whom she did not call, whose testimony was offered by defendant, on the theory that such witness' testimony was cumulative only, under L. O. L. § 856, providing that the court may stop the production of further evidence on any particular point when the evidence on it is already so full as to preclude reasonable doubt.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. APPEAL AND ERROR (§ 987\*)—REVIEW—VERDICT—"TRIAL BY JURY."

Const. art. 7, § 3, as amended in 1910 (L. O. L. xxiv), provides that, in actions at law, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court, unless the court can affirmatively say there is no evidence to support the verdict. *Held*, that the term "trial by jury," as so used, means a verdict reached under the forms of law prescribed for a jury trial, and hence such section does not preclude the Supreme Court from reversing a judgment based on a verdict returned after the erroneous exclusion of material evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7103-7107, 7821.]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Gertrude H. Forrest against the Portland Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed.

The plaintiff was a passenger in one of the defendant's street cars, and claims to have been injured in a collision between that car and another one on the same line. She alleged "that the shock of said collision greatly injured the nervous system of the plaintiff, caused a displacement of her uterus, rendered her sick and sore, caused her to be confined to her room almost constantly for two months, caused her great physical pain and suffering, necessitated the employing of physicians and paying and incurring expenses for medical treatment, \* \* \* and left her weak and nervous and permanently injured to her damage" in a sum named. The answer traversed all the allegations of the complaint except that of the defendant's own corporate character, but at the trial the liability of the defendant was admitted, and the only question left for determination was what, if any, injury or damage was sustained by the plaintiff. At the hearing the plaintiff offered herself as a witness, and testified at length about the extent and nature of her injuries and physical condition, and detailed how she had consulted several physicians, some of whom she called as witnesses in support of her case. Among others, she consulted Dr. Marsh, to whom she submitted herself for examination, and obtained his opinion as to her condition, but did not take treatment from him. After plaintiff had rested without calling Dr. Marsh, the defendant had him sworn, and undertook to elicit from him testimony relating to what he had discovered about the plaintiff's physical condition at the examination mentioned. The plaintiff objected to his testifying, claiming that the physician could not be allowed to disclose any information which he had thus acquired. The court sustained the objection, and refused to allow Dr. Marsh to testify, and this is the error complained of by

the defendant on its appeal from the subsequent judgment in favor of the plaintiff.

R. A. Leiter, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Jerry E. Bronaugh, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] In chapter 4 of title 9 of the Oregon Code of Civil Procedure, it is said (section 731, L. O. L.) that "all persons without exception, except as otherwise provided in this chapter who having organs of sense can perceive and perceiving can make known their perceptions to others may be witnesses. \* \* \*" In section 733, L. O. L., it is stated that "there are particular relations in which it is the policy of the law to induce confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: \* \* \*

(4) A regular physician or surgeon shall not without the consent of his patient be examined in a civil action, suit or proceeding as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. \* \* \*" In section 734 it is provided that "if a party to the action, suit or proceeding offer himself as a witness that is to be deemed a consent to the examination of a wife, husband, attorney, clergyman, physician or surgeon on the same subject within the meaning of subdivisions 1, 2, 3, and 4 of the last section." It is only by virtue of the statute that the testimony of an attending physician or surgeon relating to the physical condition of his patient is excluded, for at common law the medical man was required to testify practically the same as any other witness. *Pierson v. People*, 79 N. Y. 424, 432, 35 Am. Rep. 524; *Winters v. Winters*, 102 Iowa, 53, 57, 71 N. W. 184, 63 Am. St. Rep. 428. In *re Young's Estate*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596. Originally privileged communications were limited to those between an attorney and client, and many statutes have been passed in the various states extending this rule to physician and patient. Some enactments impose this restriction without any qualification. Others make an exception where the patient shall definitely waive the privilege or give an express consent. Under laws of the latter sort, the authorities are not in accord on the subject of what shall be deemed a consent to the examination of the attending physician. Some hold that there must be an express waiver at the time of the trial. Such a case is *Western Travelers' Accident Association v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068; also, *Met. St. Ry. v. Jacobi*, 50 C. C. A. 619, 112 Fed. 924. Others, like *Hunt v. Blackburn*, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488, hold that a party tes-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tifying on the subject himself must be held to have waived the privilege independent of any statute defining what shall be a waiver. In all the cases cited in the briefs before us the statutes have either required an express consent to the examination of the physician, or have failed to define what is meant by the terms "waiver" and "consent," or have made no exception to the restriction. Our attention has not been directed to any other statute like section 734, L. O. L., supra, which provides that a party offering himself as a witness shall be deemed to have consented to the examination of a physician or surgeon on the same subject. This section stills the confusion among the precedents based on statutes not having such a provision, and gives legislative sanction to the common-sense reason that if a party of his own accord shall withdraw the privileged veil of privacy which, for his own protection, the law has placed around the relation of physician and patient, the whole matter is thereby set at large. As we have seen from the quotations of our Code, all persons may be witnesses. This is the rule except as otherwise provided in the chapter mentioned, and, if a party would exclude a witness, it is incumbent upon the objecting litigant to show that the person asked to testify is within the exception named. The subject under consideration as stated in the complaint and about which the plaintiff spoke herself as a witness was her physical condition, including a displacement of her uterus and injuries to her nervous system. When she testified on that subject, under the provisions of section 734, L. O. L., she consented to the examination of her physician or surgeon on the same subject. This section was construed by Mr. Justice McBride (In re Young's Estate, 118 Pac. 95) in a case involving confidential communications between an attorney and client in these words: "The proponent, having voluntarily gone upon the stand as a witness upon the general subject, waived the right in any event to the examination of Judge Phelps." The defendant offered to prove by Dr. Marsh that the plaintiff came to his office attended by her attorney; that he made a thorough examination of her, including her uterus; that from the position of that organ he was of the opinion that its condition was one of long standing, and not of recent years; that in his judgment from what he had learned of her its abnormal condition was not attributable to a street car accident, and had existed long prior to the date of the casualty. Under the circumstance of her having offered herself as a witness and testified on the subject under consideration, the testimony of Dr. Marsh, as indicated by the offer, was clearly admissible in the trial of the case.

[2] It is urged, however, that the testimony sought to be adduced from Dr. Marsh was merely cumulative, and hence no error was committed in excluding it. It is said in

section 856, L. O. L., that "the court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt"; but no such case is presented here, and it is not pretended that such a situation existed. That newly discovered evidence is cumulative will destroy its efficiency as a reason for a new trial; but it is not an objection to testimony in the first instance except under the condition specified in this section. The record discloses that the plaintiff had called ten witnesses, including three physicians whom she had consulted. The defendant called but three witnesses besides Dr. Marsh, whose testimony was excluded. Under these circumstances, considering the admissibility of the testimony of Dr. Marsh as covered by the offer mentioned, the court cannot occupy the position at the behest of the plaintiff of saying to the jury, "You may have an opportunity to consider the testimony of Drs. A. and B., but you will not be allowed either to believe or distrust that of Dr. C., who is similarly qualified as a witness." It would be equivalent to allowing an objecting party at his discretion to select from a number of equally competent witnesses offered by the opposite party those only whom the objector would permit to speak and to reject the others arbitrarily. This would unduly and unfairly restrict the operation of the jury trial so highly prized by English speaking people.

[3] Finally, it is urged that as a verdict was rendered it cannot be disturbed, and for this the plaintiff relies upon section 3 of article 7 of the Constitution of this state as amended at the general election of November, 1910: "In actions at law \* \* \* the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. \* \* \*" L. O. L. xxiv. The Constitution, as so amended, does not purport or intend to change the signification of the term "trial by jury," as it has been known ever since the birth of constitutional government in this country. On the contrary, it expressly preserves that time-honored institution. A verdict that is immune from re-examination except for an entire want of evidence is not any and every decision that may be reached by a body of 12 men who happen to sit in a jury box and hear the testimony in the presence of a court, but it means one reached under the forms of law as prescribed for a jury trial within the meaning of the Constitution from the beginning. In *State v. Rader*, 124 Pac. 195, Mr. Justice McBride, in construing this section, said: "But for the jury to find the fact the court must see that they receive only legal evidence and no good finding of fact can ever be predicated upon illegal evidence." It is equally true that

the suppression of legal evidence will vitiate a verdict. An invulnerable verdict must be a conclusion of fact by a jury regularly impaneled, as the result of a trial in which the rights of all parties in respect to the admission or exclusion of testimony have been observed in all material particulars under proper instructions of the court as to the law. By so much as the elements of this standard were wanting, namely, by the exclusion of competent testimony offered by the defendant, the procedure culminating in the decision of the jury in this case fell short of the trial by jury which the Constitution says shall be preserved. For the error assigned, the judgment is reversed.

McBRIDE, C. J., concurs in the result.

### STATE v. RUSSELL

(Supreme Court of Oregon. Feb. 18, 1913.)

#### 1. INCEST (§ 15\*)—EVIDENCE—CORROBORATION.

Evidence on a trial for incest of statements by defendant held to sufficiently corroborate the testimony of the prosecuting witness, with whom the crime was alleged to have been committed.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 13; Dec. Dig. § 15.\*]

#### 2. CRIMINAL LAW (§ 409\*)—EVIDENCE—ADMISSIONS.

While, under the express provisions of L. O. L. § 868, subd. 4, the jury should be instructed to view oral admissions of a party with caution, this affects their weight merely, and not their admissibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972; Dec. Dig. § 409.\*]

#### 3. CRIMINAL LAW (§ 404\*)—DEMONSTRATIVE EVIDENCE—EXHIBITION OF PERSON.

On a trial for incest alleged to have been committed with the daughter of accused's sister, the exhibition of a child which the prosecutrix testified was the issue of the illicit intercourse to the jury to corroborate her testimony by means of the resemblance was proper; the fact that such resemblance might have been due to the relationship between accused and the child's mother affecting only its weight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Ed. Russell was convicted of incest, and he appeals. Affirmed.

W. W. Cardwell, of Roseburg, for appellant. George M. Brown, of Roseburg (L. A. Liljeqvist, of Coquille, on the brief), for the State.

BEAN, J. [1] The crime is alleged to have been committed by defendant having incestuous intercourse with Lena Macklin, the daughter of the defendant's sister. At the close of the state's case, defendant's counsel moved the court to direct a verdict of acquittal on the ground of insufficiency of the

evidence to be submitted to the jury. The contention of counsel is that the testimony of the prosecutrix, Lena Macklin, who is an accomplice, is not corroborated by any evidence tending to connect the defendant with the commission of the crime, in compliance with section 1540, L. O. L. Corroborative evidence is additional evidence of a different character to the same point. Section 701, L. O. L.; State v. Scott, 28 Or. 331, 42 Pac. 1. See, also, State v. Wong Si Sam, 127 Pac. 683. The offense was charged to have been committed December 1, 1909. The girl was then of the age of 16 years, and the defendant 29 years of age. At the time of the trial, November 16, 1911, a child, then about 14 months old, which the prosecutrix testified was the child of the defendant and the issue of the illicit intercourse, was, over the objection and exception of the defendant, exhibited to the jury in evidence. This was for the purpose of corroborating her testimony. It was claimed by the prosecutrix that the child resembled the defendant.

The deputy sheriff who arrested the defendant testified that, when the defendant was arrested, he stated, "I will make some of the rest of the s—s of b—s smoke." C. O. White, a witness for the state, testified that soon after that time the defendant, referring to the case, said to his brother and another as they passed the witness, in effect, "that others were implicated as well as him in it, and that he would make it lively for them." It is maintained by the prosecution that the evidence referred to corroborates sufficiently the testimony of the accomplice. Counsel for the defendant contends that such evidence does not comply with the statute, or tend to connect the defendant with the commission of the offense. The evidence of the officer and Mr. White was fairly susceptible of being construed by the jury as an admission by the defendant that he, as well as others, had had improper relations with the prosecutrix. The jury may well have believed that the defendant had in mind, when he made the statement, the paternity of the child, and was endeavoring to minimize the chance of his being the father of it.

[2] While under our statute (L. O. L. § 868, subd. 4) the oral admission of a party ought to be viewed with caution, this goes to the weight of the evidence, and is a matter for the jury to determine under proper instructions.

[3] Counsel for the defendant earnestly contends that the resemblance of the child to defendant, if any there was, is no proof of parentage, for the reason that Lena Macklin's mother was a sister of defendant, and there might be a family resemblance taken from the mother's side. This we think was also a question as to what reliance the jury would place upon the resemblance if any between the child and defendant. There is a



conflict of authorities upon the question of whether a person may be exhibited to the jury, although some of the counts which prohibit testimony on resemblance as not proper opinion evidence permit the jury to determine from inspection whether any personal resemblance exists. The rule in favor of such exhibition to the jury has been adopted in this state in the case of *Anderson v. Aupperle*, 51 Or. 556, 85 Pac. 330, where the opinion in the case of *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, 6 Ann. Cas. 557, is quoted from and approved. The propriety of permitting this evidence rests upon the well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child. While it may be true, as asserted by the learned counsel for defendant, "that the children often resemble their grandparents or cousins, or bear a family resemblance to all," this we think would lessen the force of this evidence in the case at bar, and would be a fair argument to the jury, but it would not entirely destroy the value of the evidentiary fact of resemblance. *Wigmore on Evidence*, § 166, and notes. See, also, note to *State of Iowa ex rel. Scott v. Harvey*, 52 L. R. A. 500. According to the command contained in section 3 of article 7, as recently amended (see *Laws 1911*, p. 7), the verdict of a jury should not be disturbed, unless the court can affirmatively say there is no evidence to support the same. The jury may have found that the features of the child strongly indicated that the defendant was its parent. We think the other evidence referred to corroborated the testimony of the prosecutrix, and tended to connect the defendant with the commission of the crime. The case was therefore properly submitted to the jury.

Finding no error in the record, the judgment of the lower court is affirmed.

#### LOVELL v. WILLIS.

(Supreme Court of Montana. Jan. 29, 1913.)

#### JUDGMENT (§ 159\*)—SETTING ASIDE DEFAULT—AFFIDAVITS—CONCLUSIONS.

An affidavit that defendant failed to appear in an action by reason of his excusable neglect, in that his attention was so absorbed by his devotion to important business, and by matters of public interest, that he forgot about the action, but which does not state the nature of the business or explain the matters of public interest, was not sufficient to support an order setting aside a default judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 310, 312, 313; Dec. Dig. § 159.\*]

Holloway, J., dissenting.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

Action by W. D. Lovell against C. C. Willis.

Judgment by default. From an order setting aside the default, the plaintiff appeals. Reversed.

A. S. Ainsworth, of Thompson, for appellant. I. R. Blaisdell, of Plains, for respondent.

BRANTLY, C. J. Plaintiff brought this action to recover the sum of \$178.50, which he alleges to be the reasonable value of services rendered by him as a civil engineer, at the request of the defendant and one J. A. McGowan, now deceased, in investigating and reporting upon the merits of a water power site on the Missoula river, in Sanders county. The defendant was regularly served with summons and a copy of the complaint on March 4, 1912, but failed to appear and make defense. On March 26th his default was, upon application of plaintiff, duly and regularly entered, and thereupon, under the authority conferred upon him by the statute (*Rev. Codes*, § 6719), the clerk entered judgment for the amount specified in the complaint, with costs. On March 28th the defendant, through his counsel, served and filed his motion to set aside the default and vacate the judgment, on the ground that he failed to appear in the action by reason of his mistake, inadvertence, and excusable neglect. The motion was accompanied by an affidavit by the defendant in excuse for his inadvertence or negligence, and setting out in detail the facts upon which he would rely for his defense, in case he should be allowed to answer. It appears therefrom that at the time he was served with process at Plains, the place of his residence, he was about to take a train for a visit to Helena; that having examined the copy of the complaint sufficiently to inform himself as to the purpose and character of the action he put it, with the copy of the summons, into his valise; and that he thereafter forgot all about it, with the result that he did not employ counsel or take any steps to prevent default. He alleges that during the intervening time he made trips to Helena, Cascade, and Missoula; that his attention was so much absorbed by his devotion to important domestic and business duties, besides matters of public interest, that he did not unpack his valise until after his default had been entered, and that for this reason the fact of the pendency of the action passed entirely out of his mind until the receipt of a letter from plaintiff's counsel, informing him that judgment had been taken against him. The affidavit does not, by a statement of facts, disclose the nature of the business in which he was engaged, nor explain what the matters of public interest calling for his attention were. It is a statement of defendant's own conclusion that they were important and pressing, and hence induced his forgetfulness. Upon this showing the court made an order setting aside the de-

fault, and permitting the defendant to answer. The plaintiff has appealed.

We think the court erred in opening the default. Mere forgetfulness is not a sufficient excuse. *Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677. If the affidavit had made a disclosure of facts showing that the character of defendant's business was such as to absorb his attention, and was so pressing that the average man would, under similar circumstances, have been likely to forget his other important interests, the conclusion of the court thereon might have been justified. As it was, the court accepted the conclusion of the defendant and acted upon it. This it should not have done.

The order is reversed.

Reversed.

SANNER, J., concurs.

HOLLOWAY, J. I dissent. Anticipating that parties to litigation might be careless, thoughtless, or inattentive, and as a result that judgments by default might be taken against them in cases where they had meritorious claims or defenses which they intended to assert, the Legislature enacted section 6589, Revised Codes, for the express purpose of relieving such parties. Paraphrased, that section reads: The court may, in its discretion, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. A mistake is an unintentional error. Inadvertence is the lack of attentiveness; inattention; the result of carelessness. The synonyms are "heedlessness," "carelessness," "thoughtlessness." "Neglect" is a broader term than "inadvertence," in that it comprehends as well the idea of culpability or willfulness; and doubtless because of this broader signification the statute attaches to the term the qualifying word "excusable."

In considering the propriety of setting aside judgments obtained by default, these declarations of the courts have been repeated so often that they have become trite, if not axiomatic: "Every application of this character must be determined by its own facts." "Every presumption is in favor of the trial court's ruling." "Whether the default should have been set aside was a matter within the sound, legal discretion of the court below, and with its determination we may not interfere, unless there was a manifest abuse of such discretion."

In *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693, this court reversed the district court, because it would not set aside a default; and in the course of the opinion we stated the purposes of section 774, Code of Civil Procedure 1895, now section 6589 above, and the principles which ought to control in disposing of applications for relief from defaults. Among other things, we said: "It will not do to say that if the defendant

was, or its attorneys were, guilty of negligence, whereby the default was occasioned, such default will not be set aside; for the very purpose of section 774 [6589, Rev. Codes] is to relieve a party who has defaulted, and that, too, through his own inadvertence or negligence, provided, however, that the inadvertence be not gross or the negligence inexcusable." And we quoted approvingly from *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181, the following: "The design and purpose of the statute is to further the administration of justice, so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to which he may properly be entitled." And referring to the same statute in force in California, we quoted from *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932, the following: "This is a remedial provision, and, under the terms of section 4 of the same Code [Code Civ. Proc.], which require it to be liberally construed with a view to effect its objects and promote justice, it is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve, rather than impede or defeat, the ends of justice, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights." And further approved the following from *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761: "The power thus conferred upon courts to relieve parties from judgments taken against them by reason of their mistake, inadvertence, surprise, or excusable neglect should be exercised by them in the same liberal spirit in which the section was designed, in furtherance of justice, and in order that cases may be tried and disposed of upon their merits. When, therefore, a party makes a showing of such mistake, inadvertence, surprise, or excusable neglect, applies promptly for relief after he has notice of the judgment, shows by his affidavit of merits that prima facie he has a defense, and that he makes the application in good faith, a court should not hesitate to set aside the default, and allow him to serve an answer upon such terms as may be just, under all the circumstances of the case."

In view of the declared purpose of section 6589 and the policy of the law as announced in *Greene v. Montana Brewing Co.*, above, I think the action of the district court in opening this default and permitting a trial of the cause upon the merits should be affirmed.

In my opinion, the affidavit of defendant, Willis, offers some reasonable excuse for his forgetfulness. I do not think it necessary

that he should be required to make full disclosure of the character of his private business, in order to make out a case of excusable neglect.

### RIDPATH v. HELLER et al.

(Supreme Court of Montana. Jan. 29, 1913.)

#### 1. PLEADING (§ 8\*)—LAWS OF OTHER STATES—TAXATION—INCUMBRANCES.

In an action for breach of warranty in a deed to real estate in another state, an allegation that it was subject to a tax, or assessment duly assessed and confirmed, which was "a lien and incumbrance by law," is a mere legal conclusion, it not showing any statute making a levy of such taxes or assessments liens or incumbrances, and since a lien or incumbrance is not averred by the mere naked allegation of its existence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

#### 2. STATUTES (§ 289\*)—EVIDENCE—WRITTEN LAW OF OTHER STATES.

The written law of another state is proven under Const. U. S. art. 4, § 1, Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677), and Rev. Codes, §§ 7906, 7907, relating to the manner of showing the records of other states by a printed copy thereof duly attested.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.\*]

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Action by William M. Ridpath against August Heller and another. Judgment for plaintiff, and defendants appeal. Reversed.

Sidney M. Logan, of Kallispell, and Henry C. Smith, of Helena, for appellants.

SANNER, J. Action to recover for the breach of a warranty against incumbrances. A demurrer to the complaint and an objection to the introduction of any evidence under it were overruled, and, at the close of the evidence for the respondent, a motion for nonsuit was denied. Respondent had judgment according to the prayer of the complaint, and from that judgment and from an order overruling their motion for a new trial defendants appeal. The principal questions presented are (1) the sufficiency of the complaint, and (2) the admissibility of oral testimony by an attorney to establish the law of a sister state.

[1] 1. The complaint alleges that on July 16, 1899, the appellants sold and granted to respondent "by deed duly acknowledged in fee simple" certain lots in the city of Spokane; that said deed contained a covenant that the premises were free from all incumbrances, except taxes for the year 1898; that at the time said deed was made and delivered the said premises were not free from all incumbrances except taxes for 1898, but "were subject to a tax, charge or assessment therefore duly assessed, charged and confirmed by the city of Spokane \* \* \* and by the proper officers thereof, in the sum of \$463.03," and which was "a lien and incumbrance by

law upon the said premises," that by reason thereof, and "to extinguish said tax or assessment and to protect said premises from the lien thereof and the enforcement of the same," plaintiff was obliged to and did pay \$722.33, for which amount judgment is prayed, with costs. It will be noted that the supposed incumbrance referred to is born of some kind of tax or assessment imposed by the city of Spokane. What the legal status of the city of Spokane is, what kind of tax, charge, or assessment it imposed upon the property, what power it had to impose such a tax or assessment, how such power must be exercised, how it was exercised, and how the tax or assessment came to be a lien or incumbrance, are matters concerning which the complaint is silent.

No extended discussion is needed to demonstrate the utter deficiency of such a complaint. A lien or incumbrance is not averred by the mere naked allegation of its existence. The facts should be fully stated. 25 Cyc. 684, par. 3; 13 Ency. Pl. & Pr. 124, par. 2; *McGlaflin v. Wormser*, 28 Mont. 177, 72 Pac. 428. To say, in the absence of other allegations, that the real property was "subject to a tax, charge or assessment duly assessed, charged and confirmed" which was "a lien and incumbrance by law," is to recite a series of mere legal conclusions, ineffective for any purpose as a pleading. Nor does it specially aid the matter, if we assume that the city of Spokane is a municipal corporation of the state of Washington. Nowhere outside of the law of Washington can there be anything which empowers the city of Spokane to levy any taxes or assessments of such character as to be liens or incumbrances upon real estate. If it has any such power, it must have it by virtue of some statutory provision of the state of Washington, because the circumstances under which a tax or special assessment lien attaches so as to render a grantor liable on his covenant against incumbrances are wholly matters of statute. 11 Cyc. 1114, pars. 1, 3. Now, the courts of this state do not take judicial notice of the statutes of a sister state. *Bank of Commerce v. Fuqua*, 11 Mont. 294, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461; *McKnight v. Oregon Short Line Ry. Co.*, 33 Mont. 40, 82 Pac. 661. They must be pleaded and proved as facts in the case, and to such effect that it may be readily seen that under them a cause of action exists. 11 Cyc. 1114; 5 Ency. of Evidence, 808; *Bank of Commerce v. Fuqua*, supra; *McKnight v. Oregon Short Line Ry. Co.*, supra. Of course these principles apply with especial force where, in addition to the statutes of a sister state, there is involved the existence and validity of the ordinances of cities within its boundaries.

[2] 2. Inasmuch as this case must be retried, we deem it advisable to refer briefly to the manner of proving the law of a sis-

ter state. The rule is settled that, where the unwritten law of a sister state is in question, resort may be had to the published reports of the decisions of the courts of such state, or to oral testimony of witnesses skilled in the subject (Rev. Codes, § 7908); but, where the written law of a sister state is to be proved, other methods must be pursued. United States Constitution, art. 4, § 1; United States Rev. St. § 905 (U. S. Comp. St. 1901, p. 677); Revised Codes, §§ 7906, 7907; Bank of Commerce v. Fuqua, *supra*; 36 Cyc. 1255.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

**MARRON v. GREAT NORTHERN RY. CO.**  
(Supreme Court of Montana. Feb. 1, 1913.)

**1. RAILROADS (§ 481\*)—FIRES—DAMAGES—EVIDENCE.**

While the injury to grass roots from a fire caused by the negligent operation of a locomotive is one to the freehold, and the measure of damages is the difference between the value of the land before and after the fire, yet in such case evidence of the damages to the roots, and the time it would take the meadow to regain its original thickness, is admissible, in an action for the destruction of the crop.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

**2. RAILROADS (§ 481\*)—FIRES—MEASURE OF DAMAGES.**

In an action against a railroad company for negligent fire, evidence of the value of a crop of grass lost by the fire is admissible, although the injury be one to the freehold; for if a thing destroyed, though a part of the realty, has a value which can be accurately ascertained without reference to the soil, the recovery must be for its value, not the difference in the value of the land before and after the fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

**3. APPEAL AND ERROR (§ 856\*)—REVIEW—SUSTAINING DECISION ON DIFFERENT GROUNDS.**

Where the ruling below is justified on any ground, the Supreme Court will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 856.\*]

**4. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

In an action by a landowner against a railroad company for damages from a fire caused by the company's negligence, where there was no contention that he was entitled to recover the value of the crop which might have been raised during a certain time, an instruction denying that recovery was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**5. WITNESSES (§ 258\*)—EXAMINATION—REFRESHING MEMORY.**

Under Rev. Codes, § 8020, providing that a witness may refresh his memory from anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, but the writing must be pro-

duced, or that the witness may testify from such writing, though he retain no recollection of the particular facts, a witness cannot testify from a writing until it has been qualified as required by the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 893, 895, 896; Dec. Dig. § 258.\*]

**6. WITNESSES (§ 257\*)—REFRESHING MEMORY—ADMISSIBILITY OF WRITING USED—STATUTES.**

Under Rev. Codes, §§ 8060, 8061, respectively, declaring that there is no common law where the law is declared by the Code, and that it establishes the law of the state respecting the subjects to which it relates, a book of entries, made in the ordinary course of business, cannot itself be introduced; section 8020 providing for the use of such entries for the refreshing of a witness' memory, or allowing the witness to testify directly from the book.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 892; Dec. Dig. § 257.\*]

**7. RAILROADS (§ 482\*)—FIRES—ACTIONS—EVIDENCE.**

In an action against a railroad company for fire caused by its negligent operation of a locomotive, evidence held sufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1734, 1736; Dec. Dig. § 482.\*]

Appeal from District Court, Valley County; Frank N. Utter, Judge.

Action by Peter Marron against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Veazey & Veazey and E. L. Bishop, all of Great Falls, for appellant. Hurd & Lewis, of Glasgow, and Paul Babcock, of Culbertson, for respondent.

**HOLLOWAY, J.** The complaint in this action states three causes of action for damages to property, occasioned by fires alleged to have been started by the defendant railway company along its Plentywood line of road, in Valley county. It is alleged that the first fire occurred on September 18, 1910, the second on April 11, 1911, and the third on April 21, 1911. It is charged that these fires were caused by the negligence of the defendant company, and that certain stacks of hay, and the grass, pasture, and vegetation on plaintiff's land, were destroyed. The answer admits the defendant's corporate existence and its operation of the Plentywood line of road, but denies all the other allegations of the complaint. The trial resulted in a verdict and judgment in favor of plaintiff, and it is from that judgment that this appeal is prosecuted.

[1] 1. Counsel for appellant insist that the trial court adopted an erroneous theory as to the measure of damages, and it is said that this is made apparent from the rulings admitting certain evidence, and the refusal to give certain instructions requested by the defendant.

(a) Specifications of errors 1, 3, and 6 re-

late to the admission of evidence to the effect "that by reason of the fire the land in question burned over produced no crop to speak of in 1911; that the fire running over bluejoint hay land, such as this, 'injures the grass below the ground,' and 'it takes two or three years to get it in the same condition as it was before;'" \* \* \* that 'it damages the roots to a great extent, and it takes the meadow from two or three years to get back to its original thickness; if there are any bunches of hay left in taking the hay off that field, it just absolutely burns out that piece of ground, so that it takes years to get back to its original thickness.'" It is insisted that injury to or destruction of the grass roots or sod of plaintiff's bluejoint meadow constituted injury to the realty itself, and that the measure of damages for such injury is the diminished value of the realty occasioned by the fire. In support of this view numerous authorities are cited, including 8 Sedgwick on Damages (9th Ed.) p. 1939; *Thompson v. Chicago, B. & Q. Ry. Co.*, 84 Neb. 482, 121 N. W. 447, 23 L. R. A. (N. S.) 310; *Wiggins v. Railway Co.*, 119 Mo. App. 492, 95 S. W. 811; *Terre Haute, etc., Ry. Co. v. Walsh*, 11 Ind. App. 13, 38 N. E. 534; *Ward v. Railway Co.*, 61 Minn. 449, 63 N. W. 1104; *Railway Co. v. Jagoe* (Tex. Civ. App.) 32 S. W. 717; *Railway Co. v. Malone* (Tex. Civ. App.) 126 S. W. 936.

No fault is found with the rule just stated, but counsel for respondent contend that the evidence was properly admitted under that rule, for the purpose of showing the extent and character of plaintiff's injury, and with this we agree. If the fire did not cause any injury whatever, then the plaintiff's case would fall of its own weight. This evidence tended to establish the fact that the inheritance itself sustained injury, and the character and extent of that injury. There is not any merit whatever in appellant's contention; indeed, the very authorities cited by its counsel fully warrant the trial court's action. *Railway Co. v. Jagoe*; *Terre Haute, etc., Ry. Co. v. Walsh*; *Ward v. Railway Co.*, above.

[2] (b) Specification of error 2 has to do with a question asked the respondent while a witness in his own behalf, as to the value of the crop of grass on his land in September, 1910, which was destroyed by the fire of September 18th of that year. There is evidence in the record which tends to establish the fact that there was a growth of grass on the land at the time of the fire, which had a separate and independent value of its own. In entire harmony with the rule stated above is the further rule that "if the thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, not the difference in the value of the land before and after such destruction."

*Railway Co. v. Brown*, 158 Ala. 607, 48 South. 73; 4 *Sutherland on Damages* (3d Ed.) 1023, 1049; *Railroad v. Noland*, 75 Kan. 691, 90 Pac. 273.

[3] (c) Specifications 4, 5, 7, and 8 relate to rulings of the trial court admitting opinion evidence as to the extent of plaintiff's damage. The questions objected to were all preliminary ones. Each question could have been answered "yes" or "no"; and upon that ground alone the district court was justified in overruling the objections made. This court sits as a court of review, and it is incumbent upon the appellant to show error prejudicial to its interests. If the trial court's ruling is justified upon any ground, this court will not interfere.

[4] (d) The court refused two instructions offered by the defendant, as follows:

"No. 3. You are instructed that the plaintiff is not entitled to recover in this action the value of any crop which he might have raised in 1911 upon any of the land burned over, referred to in the complaint.

"No. 4. You are instructed that the plaintiff is not entitled to recover in this action for damage to the grass roots of the land burned over, referred to in the complaint."

There was not any contention whatever that plaintiff was entitled to recover the value of the crops which might have been raised during 1911, and for that reason instruction No. 3 was properly refused.

It is somewhat difficult to comprehend just what was meant by instruction No. 4. The court should have advised the jury as to the proper measure of plaintiff's recovery and the elements which might be considered in arriving at the amount of his recovery; but there was not any request made for such an instruction.

[5] 2. Error is predicated upon the action of the trial court in excluding certain evidence. The defendant called Thomas Shea and A. H. Rollins, men employed by it in the shops at Williston, and whose duties required them to inspect the ash pans and spark arresters on locomotives used on the Plentywood line at the time of the fire in September, 1910. When called to the stand as witnesses at the trial of this cause, neither of these men retained any independent recollection of his work on the particular locomotive which caused the fire of September 18, 1910. These men kept a record book, in which they made entries of every inspection; but neither was able, by examining the record book to refresh his memory. It was sought to have the witness Shea testify directly from the record book, but upon an adverse ruling from the court counsel for defendant company then offered in evidence the book itself, and this offer was refused. In their endeavor to show that the trial court erred, counsel for appellant cite many cases from other states, but without reference to the statutes, if any, under which they

were decided. Happily we are not left in doubt upon the subject at all.

(a) Section 8020, Revised Codes, provides: "A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

This section comprehends two classes of witnesses. The first class includes the witness whose memory can be refreshed by reference to the memoranda. The second class includes the witness who does not retain any recollection of the particular facts recorded in the memoranda, even after he examines the entries which he made himself. The witness of the first class may refresh his memory, and, having done so, may then testify independently of the memoranda. The witness of the second class may testify directly from the memoranda. But before either one will be heard at all these preliminary facts must be made to appear: (a) The entries must have been written by the witness himself, or under his direction; (b) they must have been written at the time the facts occurred, or at a time when the facts were fresh in the witness' memory; and (c) the witness must have known at the time the entries were made that they correctly stated the facts. Counsel for defendant failed to qualify the witness Shea under the rules just stated. He was not asked whether he knew, at the time the entries were made in the record book, that the entries correctly stated the facts; and it is idle now to attempt to cure the oversight. The Code provision above is perfectly plain, and its meaning is not open to doubt. Even though the trial court may have given a wrong reason for its ruling, so long as the ruling itself was correct, it will not be disturbed.

[8] (b) In those jurisdictions where the book containing the entries is admissible, it is required as a preliminary that the correctness of the entries be made to appear, and if admissible here under preliminary proof of the facts required by section 8020, above, it is doubtful whether this offered proof would be admissible. But that, in adopting the extremely liberal rules announced in section 8020, above, our Legislature evinced an intention that the general rules of evidence under which such entries themselves are excluded should be observed here is obvious; otherwise the provisions of section 8020 are practically meaningless. The idea that the

entries themselves may be introduced in evidence is negated by the very liberal use to which they may be subjected in aid of witnesses. It will be noticed that, upon cross-examination of the witness who made the entries, the entries may be read to the jury by the cross-examiner. If the entries themselves are admissible, all these provisions are meaningless. With great particularity the Code has indicated the use which may be made of a private writing, such as the one considered in this case, and the courts are not authorized to enlarge these provisions. "In this state there is no common law in any case where the law is declared by the Code." Section 8060, Rev. Codes. "The Code establishes the law of this state respecting the subjects to which it relates." Section 8061. These provisions are conclusive upon the question now under consideration.

[7] 8. Finally, it is urged that the evidence is insufficient to sustain the allegations of the third cause of action, that the fire of April 21, 1911, was caused by the defendant's locomotive. There is evidence to the effect that the plaintiff owned the W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, township 35 N., range 55 E., through which the defendant's Plentywood line of road runs; that the same fire which burned over six acres of this ground on April 21st also burned a stack of hay 150 or 200 yards from the track. A witness Ator at Plentywood, a mile and a half from the plaintiff's land, saw defendant's train approaching Plentywood on April 21st while it was some distance away, and while it was about the neighborhood of plaintiff's land he saw smoke arising from the ground, indicating a fire. He was on the lookout, because other fires had been set by the defendant's train, and the witness owned a ranch in the same direction and near the line of defendant's road. Ator went down the track immediately and ascertained that the fire had burned over some of plaintiff's land, and was then burning his stack of hay. While the witness does not tell us how near the burned area was to the track, he does indicate that the fire was so near that the smoke from the fire and the smoke from the locomotive appeared to commingle, as he looked towards the fire and the on-coming train. On cross-examination this witness testified: "I saw this smoke rise up just after the train had passed, and then saw the fire right away. To the best of my knowledge, it was started by the Great Northern engine."

A witness Misfeldt testified that he was on defendant's train and saw it set the fire on plaintiff's land on April 11th, and two or three other fires between Medicine Lake and Plentywood. Plaintiff testified that he saw the defendant's train start three fires along the Plentywood line shortly before April 21st, probably during the week of that date. The witness Ator testified that during the month of April, 1911, he saw the defend-

ant's train start three fires near the Marron place. Clark, a witness for the defendant, testified: That he was the only locomotive engineer on the Plentywood branch during April, 1911. That he used only two locomotives during that month. That he used the same locomotive on the 11th and 21st. That the track runs upgrade along by the plaintiff's place and into Plentywood. That he was probably running 15 miles per hour as he passed through plaintiff's place on April 21st. That "I might have been working the engine hard if I was a little bit late. I do not remember if I was or not. \* \* \* I was going my best always when we are going in that direction." That in going upgrade more sparks are thrown out than at any other time. "In going upgrade with an engine of the kind that I was running, particularly, you have to be very careful in the way you handle your engine in order to keep from throwing out pretty good-sized chunks of fire; and with the engines used on the Great Northern, particularly in going upgrade and working them hard, you can't prevent them from throwing out a big bunch of cinders and fire. \* \* \* With the Great Northern engines in going upgrade, running the engine fast and working the engine hard, they do sometimes throw out pretty good-sized chunks of fire."

We confess that this showing is very weak, and it is all the more inexcusable because it is perfectly apparent that better evidence could have been produced. The men who were fighting the fire on plaintiff's place when Ator reached there were not called or their absence accounted for. Even the witness Ator, who saw the burned area, was not asked to state where that particular piece of land was situated with reference to the railway track or the direction in which the wind was blowing at the time. But with all these infirmities we cannot say that the evidence is insufficient to warrant the inference that the defendant's locomotive caused the fire. In each of the following cases a somewhat similar state of facts was presented, and it was held sufficient to go to the jury: *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Railroad Co. v. Noland*, above; *Dunning v. Maine C. R. Co.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; *Brown v. Benson*, 98 Ga. 372, 25 S. E. 455.

The judgment is affirmed.  
Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

#### STATE v. MURPHY.

(Supreme Court of Montana. Jan. 31, 1913.)  
CRIMINAL LAW (§ 1186\*)—APPEAL AND ERROR—HARMLESS ERROR.

In view of Rev. Codes, §§ 9415, 9548, requiring technical errors to be disregarded, im-

proper argument of counsel in a criminal prosecution is no ground for reversal, where not affecting accused's substantial rights.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

I. J. Murphy was convicted of grand larceny, and from the judgment and order denying his motion for new trial he appeals. Affirmed.

W. F. O'Leary and Geo. A. Judson, both of Great Falls, for appellant. Albert J. Galen, Atty. Gen., for the State.

HOLLOWAY, J. I. J. Murphy was convicted of grand larceny, and appeals from the judgment and from an order denying him a new trial. Only two questions are presented:

First. It is urged that the evidence is insufficient to sustain the judgment. A recital of the testimony would not serve any useful purpose. We have examined the record carefully, and are of the opinion that the trial court did not err in submitting the cause to the jury.

Second. Complaint is made that counsel for the state exceeded the limits of legitimate argument in addressing the jury. Whether or not this charge is well founded is not of consequence here; for it is impossible that defendant could have suffered in respect to any substantial right.

In view of the provisions of sections 9415 and 9548, Revised Codes, and the oft-repeated pronouncements by this court it is idle for counsel to hope to secure a reversal upon such a threadbare technicality as is presented here.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

#### HOLLENBACK v. STONE & WEBSTER ENGINEERING CORPORATION et al.

(Supreme Court of Montana. Jan. 28, 1913.)

1. MASTER AND SERVANT (§ 261\*)—ACTION FOR WRONGFUL DEATH—COMPLAINT—NEGATIVE CONTRIBUTORY NEGLIGENCE.

Where a complaint alleges that deceased, while in the employ of defendant, came in contact with a live wire negligently placed by defendant, by reason whereof he was electrocuted, it does not show the injury was caused by plaintiff's act, so as to require him to negative contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 849-854; Dec. Dig. § 261.\*]

2. APPEAL AND ERROR (§§ 204, 237\*)—GROUNDS OF REVIEW—NECESSITY OF OBJECTION.

A party, who did not object to the admission of evidence or request that it be withdrawn

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or limited by instruction, cannot complain of its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1253-1272, 1274-1278, 1280, 1569; Dec. Dig. §§ 204, 237.\*]

### 3. DEATH (§ 95\*)—MEASURE OF DAMAGES—WAGES AND PROSPECTIVE EARNINGS.

Plaintiff, the mother of deceased, who was altogether dependent on him for support, in an action for his wrongful death, was entitled to recover all his wages until he became of age, charged, however, with the burden of his support, and such proportion of his earnings after he became of age as she might reasonably have expected to receive from him during her lifetime.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

### 4. DEATH (§ 99\*)—DAMAGES—EXCESSIVE DAMAGES.

Rev. Codes, § 6486, provides that in an action for wrongful death such damages may be given as, under all the circumstances of the case, may be just. Deceased was an active, energetic young man of 19, holding a stationary engineer's license, and employed as fireman on a stationary engine at \$3 a day, and since he was 13 or 14 had earned good wages, and always turned them over to his mother, who had supported him, and to whom he was very devoted. *Held*, in the mother's action for his death, that on the evidence a verdict for \$18,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

### 5. MASTER AND SERVANT (§ 89\*)—MASTER'S LIABILITY—SCOPE OF EMPLOYMENT.

When a servant, of his own accord, and without the direction of his master, steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters, and is not liable for any injury received.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.\*]

### 6. MASTER AND SERVANT (§ 89\*)—MASTER'S LIABILITY—SCOPE OF EMPLOYMENT—RESCUING MASTER'S PROPERTY.

Deceased was fireman on a stationary engine in a shed situated immediately below a dam, and used in pumping water out of the river bed; the shed being lighted by wires strung from the power house. The power lines operating the pump became disabled, and the shed was surrounded by water so high that work with the engine was impossible, and deceased, after waiting a while on the bank, built a raft and poled toward the shed, in which were some tools and appliances, and, on taking hold of one of the wires to pass under it, was electrocuted. *Held*, that his employment as fireman contemplated that he should make every reasonable effort compatible with his own safety to rescue his master's property, particularly that in the engine shed, and that, as he was engaged in the rescue of such property, he was acting within the scope of his authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.\*]

### 7. EVIDENCE (§ 595\*)—WEIGHT AND SUFFICIENCY—INFERENCES ON EVIDENCE.

The jury are not confined in their determination to the precise language in which the evidence is given, but may find a verdict upon any fair inference deducible therefrom.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2444, 2445; Dec. Dig. § 595.\*]

### 8. MASTER AND SERVANT (§ 246\*)—CONTRIBUTORY NEGLIGENCE—SCOPE OF EMPLOYMENT—RESCUING MASTER'S PROPERTY.

While a servant engaged in rescuing his master's property may be acting within the scope of his employment, he does not thereby secure immunity from the charge of contributory negligence; the question in each case being whether his acts measure up to the standard of ordinary care and prudence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.\*]

### 9. APPEAL AND ERROR (§ 216\*)—INSTRUCTIONS—REQUEST FOR MORE SPECIFIC INSTRUCTION.

Though an instruction be of doubtful value in enlightening the jury, it cannot be complained of, in the absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. §§ 327-641, 660, 662-676.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by Matilde Hollenback against the Stone & Webster Engineering Corporation and another. Judgment for plaintiff against defendant Stone & Webster Engineering Corporation, and it appeals. Affirmed.

Day & Mapes and John G. Brown, all of Helena, for appellant. O. W. McConnell, of Helena, for respondent.

**HOLLOWAY, J.** This is an action for damages for death by wrongful act. The plaintiff, the mother of the deceased, alleges that she is the sole surviving heir at law of John Hollenback, and that at the time of his death she was altogether dependent upon him for her support. At the time of the accident John Hollenback, a minor about 19 years of age, was employed by the defendant Stone & Webster Engineering Corporation as fireman for a hoisting engine, at a time while the dam was being constructed across the Missouri river at Hauser Lake. A large force of men was employed, and the work prosecuted continuously. The works and grounds adjacent were lighted, and certain power machinery was driven, by electricity furnished from Canyon Ferry and carried to Hauser Lake over high-tension lines to a power house, where it was stepped down to the voltage required. The waters of the Missouri river had been turned from the natural channel through a flume, and on account of seepage and leakage from this flume the water would continuously rise in the river bed below the dam at the point where the engine upon which young Hollenback was employed was situated, necessitating the use of force pumps to keep the water out of the way. The pumps were located upon a scow, some 60 or 70 feet from Hollenback's engine, and were operated by electrical power. The engine about which Hollenback was employed was partially inclosed in a small frame shed situated immediately below the dam, and almost surrounded by the dam, the river bank, and a large pile of dirt.



These obstructions so far cut off the light from the engine shed that it required artificial light, not only during the nighttime, but late in the morning and early in the evening as well. To meet this demand, wires were strung from the power house, by way of the pump scow, to the engine shed, and light supplied by means of a cluster of four lamps. At the point where these wires left the pump scow, there was a switch, by which the current to the engine shed could be cut off. These light wires carried 440 volts, and led into the engine shed at the height of six or seven feet above the ground and a few inches from the engine shed doorway. On the night of April 28th the high-tension power lines from Canyon Ferry became disabled, resulting in the lights being extinguished and the pumps stopped. As soon as the pumps ceased working, the river bed about young Hollenback's engine began to fill with water. When Hollenback reported for work about 7 a. m. of April 29th, he found his engine surrounded by water, and the water so high in and about the engine shed that work with the engine was impossible; and the water continued to rise thereafter for some considerable time. Hollenbeck and Purcell, the day engineer, gathered up some of the tools about the engine and carried them to a place of safety. Purcell then suggested that they wait upon the river bank until they could see Gohrmley, the supervising engineer, and report to him. After waiting some 20 minutes or more, Hollenback started away, and, in answer to Purcell's inquiry, said that he was going down to the engine. Purcell suggested that it was not necessary, as he could not do anything down there; but Hollenback continued down to the water's edge, where he constructed a raft, got upon it, and made his way towards the engine shed. When six or seven feet from the shed door, he came to the light wires running from the pump scow to his engine shed. These wires were then only eighteen inches or two feet above the surface of the water. Hollenback took hold of one of the wires to pass under it, and was electrocuted. Gohrmley, the supervising engineer, was made a party defendant.

The plaintiff charges negligence on the part of defendants in failing to exercise reasonable care to provide young Hollenback with a reasonably safe place in which to perform his work, and the following particulars are specified: "(a) Stringing live wires of high voltage close to the ground, where employes would come in contact with the same. (b) Failure to run these wires out of range of employes, as the corporation could and should have done. (c) Using wires that were old and bare of insulation. (d) Failure to shut off the electricity in these bare wires of high voltage at the switch provided for that purpose."

The defendants admit the employment of

deceased and his death, but deny any negligence on their part, and plead contributory negligence on the part of the deceased. The affirmative allegations of the answer were put in issue by reply. The trial of the cause resulted in a verdict and judgment in favor of plaintiff and against the defendant Stone & Webster Engineering Corporation for \$18,000 and costs. From that judgment and an order denying it a new trial, the corporation defendant appealed.

[1] 1. It is urged that the complaint does not state facts sufficient to constitute a cause of action, because it does not negative the idea that Hollenback's death resulted from his own act, and the rule announced in *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, and reiterated in *Badovinac v. Northern Pacific Ry. Co.*, 39 Mont. 454, 104 Pac. 543, is invoked here. In each of those cases the injured party jumped from a moving vehicle, and the injury resulted directly from the act. This court, speaking of a complaint which showed these facts affirmatively, said, "Thus the plaintiff declares that the proximate cause of the injury he sustained was his own action." It is the general rule in this state that contributory negligence is a matter of defense, and that "the existence of contributory negligence need not be negated in the complaint, unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff." *Orient Insurance Co. v. Northern Pacific Ry. Co.*, 31 Mont. 502, 78 Pac. 1036. The complaint in the present instance charges: "That the said John Hollenback, on the said 29th day of April, 1910, while so working and in the employ of the defendants, came in contact with the said live wire so negligently and carelessly strung and placed by the defendants, by reason whereof the said John Hollenback was electrocuted." We do not think that it can be said to appear affirmatively from this allegation that the proximate cause of Hollenback's injury was his own act; and therefore the case is not within the exception declared in *Kennon v. Gilmer* and *Badovinac v. Northern Pacific Ry. Co.*, above.

[2] 2. Complaint is made that counsel for plaintiff discussed to the jury the effect of certain evidence, and argued that the defendants were guilty of negligence with respect to acts not charged in the complaint to be negligent acts. It is sufficient to say that the evidence went in without objection, and was before the jury. There was not any request made that it be withdrawn or its effect limited by instructions.

[3,4] 3. It is claimed that the verdict is excessive. Section 6486, Revised Codes, provides that in a case of this character "such damages may be given as under all the circumstances of the case may be just." If it is possible from the evidence in this record to account for the amount of the verdict, then

this court ought not to interfere. *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 102 Pac. 310, 18 Ann. Cas. 1201; *Helena & Livingston S. & R. Co. v. Lynch*, 25 Mont. 497, 65 Pac. 919. Under the statute the amount of the verdict must, of necessity, rest in the sound discretion of the jury. The parties are entitled to a verdict from the jury; and it is only in rare instances that the court is justified in interfering, unless the record discloses that the elements of passion and prejudice have influenced the minds of the jurors in arriving at the result.

There is not any complaint made of the instructions given, which advise the jury of the measure of plaintiff's recovery and the circumstances to be considered in arriving at the amount which, in the judgment of the jurors, would be just. Assuming, without deciding, that the rules announced in those instructions are correct, the plaintiff was entitled (1) to all the wages of the deceased until he became of age, charged, however, with the burden of his support, and (2) to such proportion of his earnings, after he arrived at 21, as she might reasonably have expected to receive from him during her lifetime. The record discloses that the deceased was a very active, energetic young man, particularly devoted to mechanics, in the pursuit of which he had shown considerable ability; that he already had a stationary engineer's license, and had been intrusted with the running of a stationary engine for a short time; that he was very ambitious, and devoted to his mother, this plaintiff; that since he was 13 or 14 years of age he had been earning good wages, and uniformly turning over his earnings to his mother, who had supported him. At the time of his death he was receiving \$3 per day as a fireman; and the jurors were fully justified in assuming from all the facts disclosed by the evidence that he would continue to progress in his work as he had done in the past. Based upon the wages he was then receiving, and the reasonable probability that he would be able to earn, and would earn, wages equally as good or better during the expectancy of his mother's life, the amount written in the verdict is not beyond the legitimate limits indicated by the evidence.

[5] 4. Was the deceased engaged in the discharge of duties within the scope of his employment at the time he was injured? It is admitted in the answer that he was employed by the defendants as a fireman on April 29, 1910; but it is alleged that at the precise time of his injury he had gone beyond the scope of his employment; that he was not acting under the orders of the defendants, and that in whatever he was doing when injured he was acting as a volunteer; and that it was his own negligence which was the proximate cause of his injury. The general rule of substantive law governing in a case of this character is tersely stated as follows: "When a servant, of his own accord, and

without the direction of his master, steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters, and is not liable for any injury received" (*Dresser's Employer's Liability*, § 104); while the rule of pleading and practice covering the same subject is aptly stated by the Supreme Court of Alabama, as follows: "To hold an employer liable, as such, for injury resulting from a breach of such duty, it must appear that the employé was, at the time of the injury, acting within the scope of his employment." *Southern Ry. Co. v. Guyton*, 122 Ala. 231, 25 South. 34.

To attempt to delimit the "scope of employment" by any definite rules of general application would be a hopeless task. The Supreme Court of Pennsylvania has said: "The scope of his [the servant's] duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position." *Rummell v. Dilworth, Porter & Co.*, 111 Pa. 343, 2 Atl. 355. Of necessity, every case must be determined by its own facts.

[6, 7] In the present instance the extreme difficulty which confronts us arises from the paucity of facts. That the circumstances were such on April 29, 1910, that young Hollenback could not perform the duties primarily attaching to his position as fireman, and that he was not attempting to do so when he was injured, may be conceded. There is some evidence which tends to show that Hollenback and Purcell did not remove all of the master's tools and appliances from the engine shed, but that certain oil cans and a tool box were floating on the water at the time Hollenback was injured. The water formed a sort of lake surrounding the engine shed, and on the surface of this water were floating large pieces of driftwood and other débris. It also appears that the engine shed was open, so that the driftwood or débris might settle on or about the engine; and, furthermore, that there were portions of the engine's machinery and appliances which might have been injured by these floating timbers, if they had drifted into the shed. That Hollenback was not merely idling away his time floating upon the water is reasonably certain. He told Purcell that he was going to the engine. He built a raft, and was apparently making his way directly to the engine shed when he was killed. Just what prompted him to go—what his purpose was—cannot be read from the printed record alone; but it is the rule that "in rendering a verdict the jury are not confined in their determination to the precise language in which the evidence is given, but may find a verdict upon any fair inference deducible from the evidence." *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.

After much serious reflection we are of

the opinion that it is a fair inference from the evidence, viewed in the light of the surrounding circumstances, that young Hollenback was engaged, at the time of his death, in attempting to rescue property belonging to his master—property to which his work was more or less directly related. That Hollenback's contract of employment as fireman contemplated that he should make every reasonable effort compatible with his own safety to rescue his master's property, if in jeopardy, and particularly property related directly to the business of operating the hoisting engine, we do not entertain any doubt. There is some conflict in the authorities upon this subject, but the better reasoned cases and the dictates of common sense support the view that a servant engaged in the rescue of his master's property in peril is acting within the scope of his employment.

In *Moyse v. Northern Pacific Ry. Co.*, 41 Mont. 272, 108 Pac. 1062, we held that the conductor of a freight train, while asleep in the caboose after the completion of his run, and while waiting to be called to take out a train on the following morning, was in the discharge of his duties and acting within the scope of his employment. In the note to section 625 of 2 Labatt on Master and Servant, and in chapter 9 of 2 Dresser on Employer's Liability, will be found many cases indicating the liberality of the courts in treating this subject. In *Rees v. Thomas*, 1 Q. B. Div. (1889) 1015, the English Court of Appeals had before it a case of a fireman employed in a coal mine. In the course of his duty he was required to take a report to the mine company's office. A horse drawing a truck upon which the fireman rode ran away, and in his efforts to stop the horse the fireman was killed. The court held that the accident arose out of, and in the course of, the fireman's employment.

In some of the following cases it is distinctly held to be the duty of an employé to make reasonable efforts to rescue his master's property in jeopardy; while in others it is held that in making such efforts he is not to be held guilty of contributory negligence. All of the cases in principle support the rule which we have announced above. *Martin v. North Jersey St. Ry. Co.*, 81 N. J. Law, 562, 80 Atl. 477, Ann. Cas. 1912D, 212, and note; *Terre Haute & I. R. Co. v. Fowler*, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531; *Prophet v. Kemper*, 95 Mo. App. 219, 68 S. W. 956; *Pegram v. Seaboard Air Line Ry.*, 139 N. C. 303, 51 S. E. 975, 4 Ann. Cas. 214, and note; *Winczewski v. Winona & W. Ry. Co.*, 80 Minn. 245, 83 N. W. 159; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Broderick v. Detroit U. R. S. & D. Co.*, 56

Mich. 261, 22 N. W. 802, 56 Am. Rep. 332; *Louisville & N. R. Co. v. Selbert's Adm'r* (Ky.) 55 S. W. 892; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104; 1 Thompson, Com. on the Law of Negligence, § 199. In *Maltbie v. Belden*, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52, the rule which we have announced is affirmed, but it was held in that particular case that the evidence disclosed such negligence on the part of the injured person as to preclude recovery.

[8] Of course, the rule just stated cannot be invoked to secure immunity from the charge of contributory negligence. The injured person's acts in attempting to rescue property are to be viewed in the same light as his acts in discharging the duties primarily devolving upon him by virtue of his employment. In other words, the question in every case where the defense of contributory negligence is raised must be: Did the injured employé, in attempting to rescue his master's property, measure up to the standard of ordinary care and prudence?

[9] While our conclusion is that the jury was justified in finding that Hollenback was engaged in the discharge of duties within the scope of his employment at the time he received his injury, we are not to be understood as approving instruction No. 5, given to the jury, to the effect: "If you believe from the evidence that there was no necessity for the deceased to be in the position in which he was when electrocuted, and that he was not at the time working in the employ of the defendant company, then and in that event the plaintiff cannot recover, and your verdict must be for the defendant." This instruction was submitted in lieu of one requested by the defendants, as follows: "If you believe from the evidence that the deceased voluntarily, and not at the instance or request of the defendants, or either of them, went upon the surface of the water on a raft, and while there came in contact with the said live wire, then he was not at that time working in the employ of the defendant company, and for injuries so received the plaintiff cannot recover, and your verdict must then be for the defendants." In our opinion, the requested instruction was clearly erroneous, while the one given could not have been of much value in enlightening the jury upon the principal question for determination. But a more specific instruction was not requested, and appellant cannot complain.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, O. J., and SANNER, J., concur.

**LOKOWICH et al. v. CITY OF HELENA.**  
(Supreme Court of Montana. Jan. 28, 1913.)

**1. WATERS AND WATER COURSES (§ 152\*)—ACTION TO ESTABLISH RIGHTS—BURDEN OF PROOF.**

Under Rev. Codes, § 4842, forbidding an appropriator of water to change the point of diversion to the prejudice of others, any such change will not be presumed prejudicial, but the burden is on the party claiming prejudice to show it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**2. JUDGMENT (§ 719\*)—MATTERS CONCLUDED—IDENTITY OF ISSUES.**

In an action by a water company involving rights to the use of the water of a creek against the city of H., having a prior placer mining right to the use of water therefrom, and in which other defendants claiming junior water rights therein filed a cross-complaint against the city, the pleadings showed that the city was proposing to take water from the creek and convey it beyond the watershed for municipal purposes, and it was adjudicated without limitation as to time, place, or manner that the city was entitled to the use of water beyond and without the watershed. *Held*, in an action brought by the individual defendants in the former action against the city to enjoin it from conveying water continuously and permanently out of the watershed for municipal purposes, that, as the matters in issue were raised and adjudicated in the former action, it was conclusive against plaintiffs' rights.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1249, 1250; Dec. Dig. § 718.\*]

**3. JUDGMENT (§ 725\*) — CONCLUSIVENESS — MATTERS INDIRECTLY INVOLVED.**

A decree stands an absolute finality, not merely as to the conclusions expressed, but as to everything directly or impliedly involved in reaching them.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1255-1257; Dec. Dig. § 725.\*]

Appeal from District Court, Broadwater County; W. R. O. Stewart, Judge.

Injunction by Frank Lokowich and others against the City of Helena. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hartman & Hartman, of Roseman, and J. A. Walsh, of Helena, for appellants. H. S. Hepner, Edw. Horsky, C. W. Wiley, and Walsh & Nolan, all of Helena, for respondent.

**SANNER, J.** Appeal from a judgment of dismissal and from an order overruling a motion for a new trial.

The appellants are owners in severalty of certain agricultural lands situate in the valley of Beaver creek, Broadwater county, Mont., and of certain rights in and to the waters of said creek; and they have brought this action to have the respondent city of Helena permanently enjoined from changing the place of diversion of said waters under its prior rights, and from conveying such waters continuously and permanently out of the watershed of the stream to the city for municipal purposes.

They allege that by a decree of the district

court of Broadwater county, in what is herein referred to as the Spokane Ranch Case, the respective rights of all the parties to this action in and to the waters of Beaver creek were determined as to volume and date, and that there was adjudged to respondent the first four rights upon the creek; that in said suit there was no issue presented in the pleadings with reference to taking any of said waters out of or beyond the watershed of Beaver creek, no issue as to the time that respondent or its predecessors in interest used any of said waters, and no determination as to what particular rights respondent had therein as to time or manner of use; that the respondent's several rights were in fact wont to be used only at certain intervals each year during the irrigation or mining season, leaving the waters to flow in said creek at other seasons for the use and benefit of appellants and other appropriators; that the city and its predecessors were wont to so divert its waters that seepage occurred, which supplied the appellants and other appropriators; that the city threatens to change its point of diversion, and convey said waters in pipes to the city of Helena out of and beyond the watershed of said stream, to be there used continuously for municipal purposes.

1. The flow in Beaver creek, except at flood times, is approximately 165 inches or 4.125 cubic feet per second. Of the four rights therein belonging to respondent the first three are agricultural rights, and aggregate 328 inches or 8.17 cubic feet per second, and the fourth is a placer mining right for 1,000 inches, or 25 cubic feet per second. The points of diversion of all these agricultural rights are below the French Bar ditch, by which the waters under the placer right are diverted, and the city proposes to establish a new point of diversion for its placer mining right above the French Bar ditch, and through it take such water as it may to Helena for municipal purposes. If for this branch of the discussion it be assumed that the respondent is authorized to take the waters held in virtue of its placer right out of the watershed of Beaver creek, it does not seem of much importance, in view of the normal flow of the creek, whether they are taken through the French Bar ditch or from a point above, as proposed.

[1] While, of course, one may not change the point of diversion any more than the place of use or the character of use to the prejudice of other appropriators (Rev. Codes, § 4842), it does not follow that any such change is to be taken in limine as prejudicial. On the contrary, the burden is on the party claiming to be prejudiced by such change to allege and prove the facts. *Hansen v. Larsen*, 44 Mont. 350, 120 Pac. 229. Now, as to whether the appellants would be prejudiced by the proposed change in the point of diversion, there was an issue in the pleadings; but, while there are many offers to prove

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prejudice to the appellants from the proposed change in the manner and place of use, the record is barren of any proof or offer to show prejudice from the proposed change in the point of diversion.

[2] 2. Counsel for appellants concede that the disposition of this case depends upon the answers to the following questions: (a) Can the respondent take these waters out of the watershed of the stream and use them continuously, to the manifest and irreparable damage of the appellants? (b) Was this question tried, determined, and disposed of in the case of *Spokane Ranch & Water Co. v. Beatty et al.*, 37 Mont. 342, 96 Pac. 727, 97 Pac. 838? It is claimed that the right of respondent to make a continuous diversion was not settled in the *Spokane Ranch Case*, because not involved, and appellants assign as error the refusal of the trial court in this case to receive evidence touching the time, place, and manner of the use of respondent's various rights by the respondent and its predecessors in interest, and how the proposed diversion from the watershed of Beaver creek would be a change in the time, place, and manner of use, to their detriment. The trial court thought all these matters foreclosed by the *Spokane Ranch decree*, and we think that this conclusion was correct. Turning to the record, we find that the parties to this action were parties to the *Spokane Ranch Case*; that in that case the present appellants filed an answer to the cross-complaint of the city of Helena, and the city filed a reply, and these pleadings distinctly presented the time, place, and manner of the use of these rights by the city and its predecessors and the right of the city to continuously divert the waters of Beaver creek from its watershed to the city for municipal purposes. What the issues were in that case was specifically indicated by this court in the *Spokane Ranch decision*, as follows: "The pleadings show that the city of Helena proposes to take the water which it has a right to use out of the basin or channel of Beaver creek, and convey it to the city of Helena for municipal purposes, and that, if the city carries out its intention, none of the said water will be available for agricultural purposes in the basin of Beaver creek. The defendants, other than the city of Helena, claim water rights in Beaver creek subsequent in time to those of the city, but they allege in their several answers that after the waters were used by the predecessors in interest of the city the same were allowed to return to the stream in such a manner as that the junior rights were supplied at some periods of the year, and that they, the junior claimants, did in fact acquire substantial rights in the water, which will be entirely lost to them if the city is allowed to take the water away from the basin of the creek." And again: "Let it be recalled that the pleadings and bill of exceptions show that the fundamental

question before the court was whether the city of Helena was authorized to continuously use its waters outside of the basin of Beaver creek." In view of this language and of its support in the record before us, we marvel that the appellants could make the allegations of the present complaint, or contend that the matters referred to in their offers of proof were not presented by the pleadings in that case.

Appellants next insist that they are not foreclosed by the decree, because it did not adjudge to the city the right to permanently and continuously take the water out of the watershed, and they say that this court held that that decree left the respective rights of the parties undetermined, save as to volume and date. Turning again to the record before us, we observe that the court found as a fact that on October 1, 1865, the city and its predecessors in interest diverted and appropriated 1,000 inches of the waters of Beaver creek through its French Bar ditch, extending beyond and without the Beaver creek watershed, and have ever since continued to use said water for useful and beneficial purposes beyond and without said watershed. And in the decree itself it is formally adjudged, without limitation as to time, place, or manner, that the city is entitled to use this right beyond and without the watershed of Beaver creek without interference from any one and subject only to the preceding rights, which were likewise decreed to it. Commenting on this decree, the opinion of this court, after discussing the terms of the decree relative to the placer rights of the city, proceeds: "When we come to examine the words used by the court with reference to the other water rights of the city, we observe that the findings are couched in the ordinary terms employed by courts in the northwestern country in defining water rights used for agricultural purposes. \* \* \* The phraseology employed with reference to these agricultural rights of the city simply amounts to a determination that the city has the same rights in the waters of Beaver creek that its predecessors had. What those rights were, save as to the volume of water and date of appropriation, is left undetermined. Therefore we are of opinion that this decree, so far as the agricultural rights are concerned, does not give to the city the authority to continuously take the water outside the watershed or basin of the main stream. \* \* \*" On motion for rehearing, it was sought to have clarified some language in this opinion, which counsel thought to be obscure; and this court then said: "The court, in the sentence quoted, referred solely to the city's so-called agricultural rights as being restricted, by the decree, to the watershed of Beaver creek. We do not feel that counsel for the city need apprehend that any different construction will be placed upon the language used." And still again, as if to make assurance more

assured, this court in the Carlson Case (Carlson v. City of Helena, 43 Mont. 1, 114 Pac. 110) said: "The decree in the Spokane Ranch & Water Company Case above is a solemn adjudication that the city may rightfully use its French Bar right beyond and without the watershed of Beaver creek." And now, in the hope of committing the subject to its final rest, we again express the opinion of this court that every substantial matter here raised was involved in the Spokane Ranch Case, and that by virtue of the decree there rendered the authority of the city under its placer mining right to continuously divert the waters of Beaver creek from its watershed and to use them for municipal purposes is settled.

Whether in the trial and determination of the Spokane Ranch Case the district court did or did not enter as fully as it might have into the question of time, place, and manner of the use of its rights by the city and its predecessors, or sufficiently restrict the rights of the city with respect to the time, place, and manner of use, cannot now be considered. These are matters which any dissatisfied party to that case could have had reviewed by this court on proper presentation.

[3] But the decree is no longer reviewable. It stands an absolute finality, not merely as to the conclusions expressed, but as to everything directly or implicitly involved in reaching them. 23 Cyc. 1288, par. "c"; 1295, par. "g"; *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205; *C. K. & W. R. Co. v. Black et al.*, 47 Kan. 766, 29 Pac. 96.

There is no error in the record, and the judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

JEFFREYS v. HUSTON, State Auditor.  
(Supreme Court of Idaho. Feb. 11, 1913.)

(Syllabus by the Court.)

1. STATES (§ 130\*)—STATE FUNDS—AUTHORITY OF AUDITOR—APPROPRIATION.

Section 13, art. 7, of the Constitution of the state, limits the power of any officer created under the Constitution and laws of the state in paying out of the state treasury money, except upon appropriation made by law.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. § 130.\*]

2. STATES (§ 132\*)—MILITIA—SALARIES OF OFFICERS—APPROPRIATION—STATUTES.

Section 11, c. 72, Laws of 1911, p. 202, provides there shall be appointed by the Governor on the recommendation of the adjutant general an assistant adjutant general, who shall have the rank of major. The adjutant general shall receive as a yearly compensation the sum of \$2,000 payable in equal monthly installments, and the assistant adjutant general shall receive as a yearly compensation the sum of \$1,500

payable in equal monthly installments, and section 101 of said act provides to carry out the provisions of this act a continuous appropriation of \$25,000 per annum is hereby made out of any money in the state treasury not otherwise appropriated, and the use or expenditure of the same sum hereby appropriated shall not be limited to any particular year.

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. § 132.\*]

3. STATES (§ 132\*)—MILITIA—SALARIES OF OFFICERS—APPROPRIATION—STATUTES.

Chapter 86, Laws of 1911, p. 319, is a general appropriation bill, and provides for the payment of the salaries and compensation of officers and employes of the state and the general expenses of state government, and in said chapter it is provided that the following sums of money, or so much thereof as may be necessary, are hereby appropriated for the payment of the salaries and compensation of state officers and employes of the state of Idaho and the general expenses of state government and the maintenance of the several state institutions for the period commencing on the first Monday of January, 1911, and ending on the first Monday of January, 1913; and provides "for all expenses relating to the National Guard of Idaho and the reserve militia, including the salaries of officers and subordinates as per House Bill No. 156, \$45,000."

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. § 132.\*]

4. STATES (§ 132\*)—CONSTRUCTION—APPROPRIATION BILLS—SUSPENSION.

Where an act of the Legislature provides for all expenses relating to the National Guard of Idaho and the Idaho reserve militia, including the salaries of officers and subordinates, and makes a continuing appropriation of \$25,000 per annum, and that such appropriation shall not be limited to any particular year, and a subsequent general appropriation act is passed by the same Legislature four days thereafter, and in said general appropriation bill it was provided for all expenses relating to the National Guard of Idaho and the Idaho reserve militia, including the salaries of officers and subordinates, as per House Bill No. 156, \$45,000 (House Bill No. 156 was the previous act appropriating \$25,000 per annum), the later act suspends the first act during the period of time such later appropriation covered.

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. § 132.\*]

5. STATUTES (§ 161\*)—APPROPRIATION LAWS—CONSTRUCTION—REPEAL BY IMPLICATION.

Where a general appropriation bill in no way specifically repeals a former act, which makes an appropriation for the same purpose for which the general appropriation bill applies, and is continuous from year to year, and applies to no particular year, and the provisions of the two statutes when considered together can be harmonized and applied, this court will follow the rule, and give effect to both acts, in order to carry out the intent of the Legislature, and will not invoke the rule of repeal by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230, 234; Dec. Dig. § 161.\*]

6. STATES (§ 132\*)—APPROPRIATION—EFFECT—APPROPRIATION BILL.

Held, in this case, that the provisions appropriating \$25,000 per annum, under the act of March 10, 1911 (Laws 1911, p. 202), was suspended during the years 1911 and 1912, but was in operation after the first Monday in January, 1913.

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. § 132.\*]

\* For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. MANDAMUS (§ 102\*) — EMPLOYÉS — ASSISTANT ADJUTANT GENERAL—SERVICES.**

*Held*, that section 101 appropriates \$25,000 per annum for use and expenditure under the provisions of chapter 72 of the Laws of 1911, p. 202, and was in operation January 6, 1913, and during said month, and that the plaintiff in this case having been appointed assistant adjutant general, and having performed such services, has a claim against the state for \$125, and that it is the duty of the state auditor, the defendant in this action, to draw a warrant for that sum.

[Ed. Note.—For other cases, see Mandamus, Cent.Dig. §§ 217-219, 221, 222; Dec.Dig. § 102.\*]

Petition by Woodson Jeffreys for writ of mandamus against Fred L. Huston, State Auditor. Writ granted.

F. A. McCall and E. G. Davis, both of Boise, for plaintiff. J. H. Peterson, Atty. Gen., and J. J. Guheen, Asst. Atty. Gen., of Pocatello, and T. C. Coffin, Asst. Atty. Gen., of Boise, for defendant.

**STEWART, J.** This is an application for a writ of mandate. The case is submitted upon the pleadings. The facts as disclosed by the complaint and answer are as follows: That the defendant, Fred L. Huston, is the state auditor; that the plaintiff during the month of January, 1913, was the duly appointed, qualified, and acting assistant adjutant general of the state of Idaho; that on the 1st day of February, 1913, the petitioner presented to the defendant, the state auditor, at his office, a duly verified claim against the state of Idaho for the sum of \$125; that such claim conforms in all respects to the requirements of law governing the presentation of such claims, and represents the amount due plaintiff from the state of Idaho for services rendered during the month of January, 1913; that he demanded that the defendant issue a warrant on the state treasury for the said sum of \$125, and the defendant refused to issue said warrant and has since said time refused to issue the same. In the answer of defendant it is claimed that the reason for refusing to issue the warrant to pay plaintiff's claim is based upon the fact that no appropriation has been made by the Legislature for the payment of the salary of the assistant adjutant general for the month of January, 1913, or for any period subsequent to the first Monday of January, 1913.

The contention made by the state auditor arises by reason of the conflict between two acts of the state Legislature. The plaintiff relies upon sections 11 and 101 of chapter 72 of an act providing for the organization, discipline, and regulation of the organized militia of this state, known as the National Guard of Idaho (Laws of 1911, p. 202). Section 11, among other things, provides: "There shall be appointed by the Governor, on the recommendation of the adjutant general, an assistant adjutant general who shall have

the rank of major. The adjutant general shall receive as a yearly compensation the sum of \$2,000, payable in equal monthly installments, and the assistant adjutant general shall receive as a yearly compensation the sum of \$1,500 payable in equal monthly installments." Section 101 provides: "To carry out the provisions of this act, a continuing appropriation of \$25,000 per annum is hereby made out of any money in the state treasury not otherwise appropriated, and the use or expenditure of the same sum hereby appropriated shall not be limited to any particular year." It will be seen from these two sections that the assistant adjutant general is to receive \$125 a month, payable in monthly installments, and under the provisions of section 101 an appropriation is made of money in the state treasury in the sum of \$25,000 per annum as provided for by the Legislature, and this appropriation is not to be limited to any particular year. The foregoing chapter providing for the organization of the National Guard of Idaho was approved March 10, 1911. The same Legislature enacted chapter 86, Laws of 1911, p. 819, entitled, "Making appropriation for the payment of salaries and compensation of officers and employes of the state of Idaho and the general expenses of state government and the supporting and maintaining of the state institutions for the period commencing on the first Monday of January, 1911, and ending on the first Monday of January, 1913." This is a general appropriation bill providing for an appropriation of the funds of the state for carrying on the state government for the time fixed by the act, and includes the compensation of officers and employes of the state. In that chapter is the following provision: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated for the payment of salaries and compensation of the state officers and employes of the state of Idaho and the general expenses of state government, and for the support and maintenance of the several state institutions for the period commencing on the first Monday of January, 1911, and ending on the first Monday of January, 1913."

\* \* \* Adjutant General. For all expenses relating to the National Guard of Idaho, and the Idaho reserve militia, including the salaries of officers and subordinates, as per House Bill No. 156, \$45,000." House Bill No. 156 is chapter 72, above referred to, in which is found the continuous appropriation of \$25,000 for the purposes of carrying out the act.

[1] The question thus presented is, Does section 1 of chapter 86 as above quoted, repeal the provisions of section 101, c. 72, Laws of 1911, quoted above? Section 13, art. 7, of the Constitution of this state, clearly limits the power of any officer created under the Constitution and laws of the state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

in paying out of the state treasury money, except upon appropriation made by law. This section provides: "No money shall be drawn from the treasury but in pursuance of appropriations made by law." This limitation of the power of the state auditor makes it necessary to determine whether the provisions relating to the continuous appropriation provided in the act approved March 10, 1911, were in force after the first Monday of January, 1911, for the years 1911 and 1912. This court in the case of *Gilbert v. Moody*, 8 Idaho (Hasb.) 3, 25 Pac. 1092, in discussing a similar statute, held: "The act in question makes the appropriation. It fixes the compensation, the time of payment, and authorizes the comptroller to draw his warrant to pay the same when due." The Supreme Court of Wyoming in the case of *State v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266, in discussing a similar statute, says: "The first state Legislature provided for the compensation of presidential electors in a special act regulating their duties and time and place of meeting. No specific appropriation was made otherwise than by this act, and none was necessary, as the appropriation in the act itself was sufficient, and is a perpetual one, so long as the law is in force. It is clear that the act creating the office of state examiner does, in section 27 thereof, make an appropriation at least for the salary of such officer, which is a continuing appropriation."

[2-4] There can be no question but that the act of March 10, 1911, made an appropriation of \$25,000 per annum for carrying out the provisions of the act providing for the organization of the national guard, and that such appropriation was made a continuing appropriation and was not limited to any particular year. In using this language the Legislature intended that the appropriation was not limited to any particular year, and that the Legislature waived the right to fix a different appropriation for any particular year. Exigencies might arise, or necessities might appear, which would necessitate either a suspension of the amount appropriated by this act, or the fixing of a higher or lower appropriation, as such necessities might justify. This intention of the Legislature is clearly demonstrated by the provisions of chapter 86, wherein the same Legislature passed a general appropriation act just four days later than chapter 72, and in said later act a special appropriation is made "for all expenses relating to the National Guard of Idaho and the Idaho reserve militia, including the salaries of officers and subordinates, as per House Bill No. 156, \$45,000." This appropriation was for a period commencing on the first Monday of January, 1911, and ending on the first Monday of January, 1913, and covered the entire years of 1911 and 1912, and suspended the continuous appropriation made of \$25,000 per an-

num as provided in chapter 72 of the act of March 10, 1911.

It will be observed from the provisions of the general appropriation bill (chapter 86, Laws of 1911) that it in no way specifically repeals the act of March 10, 1911, and the provisions of the two statutes being in conflict, and notwithstanding such conflict, when considered together being such that they can be harmonized and applied, the courts usually adopt the rule giving effect to both acts in order to carry out the intent of the Legislature, and will not invoke the rule of repeal by implication. The Legislature, no doubt, upon second thought, recognized the fact that by the act of March 10, 1911, the Legislature had enacted a general act which was intended as a permanent code for the military establishment of the state, and that such act provided for a continuous appropriation which was a permanent feature of the bill, and was intended to be permanent, the same as the bill itself; and desiring to reduce the total appropriation, and thereby reduce taxation, thought proper and necessary to reduce the expenditure provided in the act of March 10, 1911, and therefore reduced such appropriation and suspended the act of March 10, 1911, and fixed the appropriation at \$45,000 for two years, thus reducing the appropriation \$5,000 from that which had been provided for in the former act. It is clear from the provisions of the two bills that this was the intention of the Legislature. The Supreme Court of Colorado, in the case of *In re Continuing Appropriations*, 18 Colo. 192, 32 Pac. 272, in considering similar statutes held: "The fact that in several of the states of this Union it has been found necessary to inhibit the making of continuing appropriations furnishes an argument against the policy of such laws that will no doubt be given due weight by the Legislature, but with the policy or expediency the courts have nothing to do; the power of the Legislature to make the appropriation being conceded. We think the Legislature will be able to apply the general principles herein announced to the several acts mentioned, as occasion for so doing may arise."

Applying this rule to the present case, and recognizing that there is no constitutional inhibition against the Legislature making a continuous appropriation, the effect of a continuous appropriation may be and should be controlled by subsequent legislation, and, after a continuous appropriation has been made, subsequent Legislatures of the state have the power and authority to either repeal or amend the act making the continuous appropriation or suspend the provisions of the act making such appropriation as applied to any period of time as may be determined by the Legislature. This rule is approved in *Holcombe v. Burdick*, State Auditor, 4 Wyo. 290, 33 Pac. 131; *U. S. v. Fisher*, 109 U. S.



146, 3 Sup. Ct. 154, 27 L. Ed. 885; U. S. v. Mitchell, 109 U. S. 146, 3 Sup. Ct. 151, 27 L. Ed. 887. In the case of Mernaugh v. Orlando, 41 Fla. 433, 27 South. 34, the Supreme Court of Georgia, in considering this question, held: "A repeal removes the law entirely, but, when suspended, it still exists, and has operation in every respect except wherein it is suspended." The Supreme Court of the United States in *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638, in discussing this question, holds that, where two acts have been passed at the same session, they are to be construed so that both may have effect if possible, and, applying this rule, says: "The manifest intent of the suspending act was that the act repealed by the repealing act should continue in force until a day then future, the first of October, 1793. It could have had no other intent. And the intent of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." Many other cases might be cited, but the authorities as a rule hold, especially in cases where appropriations have been made to pay salaries and for other services, which are continuous, that a subsequent act making an appropriation to pay the salaries of such officers or services for a certain period of time suspends the continuous appropriation, and the appropriation made for the sum for which the salaries are fixed by subsequent act has effect during such suspension, and the general appropriation revives at the expiration of the termination of the period for which the special appropriation is made. In other words, the Legislature has the power to fix and determine, where there is no constitutional inhibition, the expenses and costs which shall be expended and paid for out of the funds of the state and the salaries of the various officers who are provided for to carry out the administration of the laws of the state; and this may be done by the passage of proper legislative acts, within the inhibition provided in the Constitution.

[5, 6] In the present case we are of the opinion that the appropriation made of \$25,000 under the act of March 10, 1911, was suspended during the years 1911 and 1912, but was in operation after the first Monday in January, 1913. We deem it proper in this opinion to call the attention of the Legislature to the two methods adopted in these two acts of appropriation; one a continuing appropriation of a specific amount to be used in the future, while the other policy is for the appropriation of a specific sum for a certain period, usually during the time existing between the times fixed for the Legislature to meet. Several of the states have found it necessary to prohibit the making of continuing appropriations. This court, however, expresses no opinion as to the policy or expediency of these two policies, as the court has nothing to do with such policy, as

the policy of making appropriations is purely a legislative authority conferred by the Constitution of the state. We are of the opinion, however, that where the Legislature does make an appropriation for a specific purpose to extend over a certain period of time, and the appropriation is not sufficient to meet the expenses of the administration in carrying out the purpose for which the appropriation has been made, such deficiency cannot be charged against or paid out of another appropriation made for a period subsequent to the appropriation during which such deficiency arose. This is clearly the requirement of the Legislature.

[7] It is therefore ordered that a writ of mandate issue directed to Fred L. Huston, state auditor, defendant, requiring said state auditor to forthwith issue a warrant on the treasury of the state of Idaho for the sum of \$125 in favor of the plaintiff in payment of the amount due him for services rendered as assistant adjutant general for one month beginning January 16, 1913.

AILSHIE, C. J. I concur in the conclusion that the writ should issue in this case directing the state auditor to draw his warrant in favor of the plaintiff for one month's salary, being the month commencing on the first Monday of January, 1913. I think the General Appropriation Act, approved March 14, 1911, had the effect of suspending the operation of section 101 of the Militia Act of that session (1911 Sess. Laws, 226), for the period covered by the General Appropriation Act. The comment made, however, as to the method of paying any deficiency created in that or any other department leads me to call attention to section 6 of the General Appropriation Act, approved March 14, 1911 (Sess. Laws 1911, p. 328). The portion of that section applicable here reads as follows: "No officer, employé, or state board of this state, or board of regents or board of trustees of any institution in this state shall have power to create any deficiency, nor shall they create any deficiency in excess of the appropriations made by the law for the specific purpose or purposes hereinbefore in this act provided. Any indebtedness attempted to be created against the state in violation of the provisions of this act, or any indebtedness attempted to be created against the state in excess of the appropriations provided for in any act shall be void." It will be seen at once that no board or officer of this state had any authority in law to create any deficiency, and that any deficiency created was in violation of law, and constitutes no legal claim or obligation whatever against the state. It also served as notice to any person dealing with any state officer, board or employé of the state that any service performed or material furnished to the state in excess of the appropriations made was wholly unauthorized and would create no claim whatever against the state.

The practice of the various boards, employes, and departments creating deficiencies in the hope that a succeeding Legislature will pay them is demoralizing, and wholly wrong, and can have no sanction whatever by the judicial department of the state government. This is especially true when confronted by the provisions of a statute so positive as section 6 of the foregoing act.

SULLIVAN, J., concurs.

CHAMBERLAIN et al. v. CITY OF LEWISTON et al.

(Supreme Court of Idaho. Dec. 20, 1912.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 3\*)—LABOR AND MATERIALS—MUNICIPAL CONSTRUCTION—WATERWORKS—STATUTES—REPEAL.

The act of March 13, 1909 (Sess. Laws 1909, p. 165), does not repeal section 5111 of the Rev. Codes, but affords an additional and cumulative remedy, and specially provides protection for the state, city, or other municipal corporation entering into such contract, and should be construed in harmony with the provisions of section 5111, Rev. Codes.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 4; Dec. Dig. § 3.\*]

2. MECHANICS' LIENS (§ 136\*)—CITY WATER PLANT—DESCRIPTION.

A description of the property as "the pumping plant and waterworks system of the city of Lewiston, said waterworks system being located on the south bank of the Clearwater river about 1½ miles above the point where the Clearwater river flows into the Snake river," is a sufficient description upon which to predicate a lien against the city's waterworks system, and is sufficient for identification thereof.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 213-224; Dec. Dig. § 136.\*]

3. MECHANICS' LIENS (§ 231\*)—LABOR AND MATERIALS—DESTRUCTION.

The fact that the labor performed and material furnished for the construction, alteration, and repair of any building, structure, or other works was carried away by floods and high water, without any fault of the man who performed the labor and furnished the material, does not deprive the laboring man or materialman from preferring his liens under the statute, and such lien attaching to the real estate on which the work was done or improvement made.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 413; Dec. Dig. § 231.\*]

4. MECHANICS' LIENS (§ 52\*)—PERSONS ENTITLED—REQUISITES.

Under the laws of this state, the test for a mechanic's lien is, Was the labor performed or material furnished in the construction, alteration, or repair of the building, structure, or other works? and the right to a lien is not dependent upon the actual enhanced value of the property on which the labor was performed, or for which the material was furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 54-56; Dec. Dig. § 52.\*]

5. MECHANICS' LIENS (§ 23\*)—NATURE AND PURPOSE OF RIGHT.

The purpose of the statute is to compensate the man who performs labor under, or furnishes material to be used in, the construction, alteration, or repair of a building or structure, irre-

spective of the value which such labor or material may add to the real estate.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 24; Dec. Dig. § 23.\*]

6. MECHANICS' LIENS (§ 33\*)—SCOPE OF LIEN—PROPERTY SUBJECT TO LIEN.

Where labor was performed and material furnished in the construction of an intake pipe and the placing of a steel cage around the pipe as an extension and addition to a waterworks system, a lien filed for labor performed and material furnished in connection with such work will attach to the waterworks system, notwithstanding the fact that the intake pipe, on which the work was done, was never completed or actually attached to the system.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.\*]

7. MECHANICS' LIENS (§ 33\*)—RIGHT TO LIEN—NATURE AND CHARACTER OF WORK.

Where a city entered into a contract to have an intake pipe added to the pipe of its waterworks system, extending the main out into the bed of the river, and the contractors found it necessary to build a cofferdam in the stream in order to carry on the work, or to employ some other means which would accomplish the same end, *held*, that laboring men and materialmen would be entitled to a lien for labor performed upon such cofferdam, and materials furnished in the construction thereof, as a necessary incident to the performance of the contract, although such dam, and material included therein, would not be a part of the completed work, and would not be of any use to the city when finally completed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.\*]

8. MECHANICS' LIENS (§ 47\*)—RIGHT TO LIEN—SCOPE.

In preferring a lien for labor and material under the mechanic's lien laws of this state, a lien will be allowed for material furnished and actually used and consumed in the construction of the building or other structure, irrespective of the fact that such use and consumption may not be in the main building or structure itself, but in such work as was necessarily incident to the carrying on of the principal work and discharging the contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. § 47.\*]

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Suit by John Chamberlain and others against the City of Lewiston and others for enforcement of a mechanic's lien on the city's water plant. Judgment for plaintiffs, and defendant city appeals. Affirmed.

Fred E. Butler, of Lewiston, for appellant. G. Orr McMinimy, of Ilo, and James E. Babb and McNamee & Harn, all of Lewiston, for respondents.

AILSHIE, J. This action was instituted for the foreclosure of a mechanic's lien against the property of the city of Lewiston for labor performed and material furnished to J. O. Maxon and C. Henry Payne, original contractors with the city of Lewiston. Maxon and Payne entered into a contract with the city of Lewiston on the 7th day of September, 1910, wherein and whereby they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

agreed to construct an extension to the intake pipe to the pumping plant of the water system of the city of Lewiston for a stipulated sum. It appears that the city was the owner of and maintained a waterworks system and a pumping plant in the city of Lewiston, the pumping plant being located on the Clearwater river about  $1\frac{1}{2}$  miles above the point where the Clearwater river flows into the Snake river, and that the city was desirous of extending its pipe line further out into the bed of the stream, and for that purpose of laying a new intake pipe and properly guarding and protecting the same. Maxon and Payne gave a bond to the city of Lewiston in the sum of \$5,000, executed by sureties, and thereafter entered upon the discharge of their work. In carrying out the contract, they found it necessary to build a cofferdam in the river; and, about the time this dam was completed, a freshet occurred in the Clearwater river, and the dam and all the work and material was carried away by the flood. The contractors thereupon abandoned the work, and nothing further was done thereafter; and the persons who had performed labor and furnished material in connection with this work, or for the completion of this work, filed their liens, and in due time actions were prosecuted in the district court, and judgment and decrees were entered in favor of the several parties for the amounts due, and appeals have been prosecuted. Four appeals are pending; but the cases were consolidated for the purposes of argument, and one opinion will serve to dispose of all the cases.

In this case the claim is for labor done and performed in the construction of the cofferdam. The other cases are for materials furnished. A number of questions are presented, and we will deal with them briefly in the order in which they arise.

[1] 1. This action was prosecuted under the provisions of section 5111 of the Rev. Codes, which provides as follows: "Every subcontractor, laborer or other person, who performs labor, or furnishes material, for any original contractor or subcontractor, to be used in the construction, alteration or repair of any building, machinery or other structure, for any county, city, town or school district, has a lien upon such building, machinery or structure, and all the provisions of this chapter respecting the securing and enforcing of mechanics' liens shall apply thereto, so far as applicable."

Section 5110 of the Rev. Codes defines the right to a lien, and names the persons and conditions under which liens may be had, while section 5111, as above set out, extends the right of lien to buildings, machinery, or structures owned by any "county, city, town or school district." Appellant contends however, that the foregoing section was repealed by implication by act of March 13, 1909 (1909 Sess. Laws, p. 165), which act provides that where any person enters into a contract

with the state, any county, city, town, school, or irrigation district, or any quasi public corporation in the state, for the construction, alteration, or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of \$200, he shall be required, before commencing such work, to execute the usual penal bond in a sum equaling 60 per cent. at least of the contract price, etc. Then follows the detail of procedure and order of preference and payment of any claim or judgment obtained on such bond.

It is contended by counsel for appellant that this latter act, providing another remedy, necessarily repeals the provisions of section 5111. The contention, however, does not appear sound. The statute of 1909 in no way conflicts with the former statute. It rather seems to be a mere additional and cumulative remedy, and was especially intended to protect the state, city, or other municipal corporation. We are bound to assume that, when the Legislature passed the act of March 13, 1909, they were aware of the provisions of section 5111 of the Rev. Codes. Notwithstanding this fact, they embodied no repealing clause in the act of 1909. There is no difficulty about construing the two provisions harmoniously and giving force and effect to both. In such case, the court is not justified in holding the former act invalid or repealed. The Supreme Court of California dealt with a somewhat kindred question in *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438, and *French v. Powell*, 135 Cal. 638, 68 Pac. 92, and held the acts thereunder considered to be merely additional and cumulative remedies.

[2] 2. It is next contended that the description contained in the liens, complaints, and decrees in these cases is insufficient. The general description used is as follows: "The pumping plant and waterworks system of the city of Lewiston, said waterworks system being located on the south bank of the Clearwater river about  $1\frac{1}{2}$  miles above the point where the Clearwater river flows into the Snake river." It seems to us that there will be no difficulty about locating the waterworks system of the city of Lewiston, and that the description herein would enable an officer to very readily locate and point out the property. This court is presumed to know the geography and political subdivisions of the state (section 5950, R. C.), and we are likewise at liberty to take notice of the size and location of the city of Lewiston. It is hardly to be presumed that the city itself owns more than one waterworks system, and so there can be no confusion or uncertainty about locating the system here described and intended.

In *Phillips v. Salmon River, etc., Co.*, 9 Idaho, 149, 72 Pac. 886, it was held that a description of the mining claim, contained in a notice of lien in the following language, was sufficient: "The mining claim, known as

the 'Salem Bar,' situated on the Idaho side of the main channel of the Snake river one-half mile north or down the river from the mouth of the Grande Ronde, in Nez Perce county, Idaho." The authorities abundantly sustain us in this view. *Hotaling v. Cronise*, 2 Cal. 60; *Tibbets v. Moore*, 23 Cal. 206; *Tredinnick v. Red Cloud Con. Min. Co.*, 72 Cal. 78, 18 Pac. 152; *Emerson v. Gainey*, 26 Fla. 183, 7 South. 526; *Durling v. Gould*, 83 Me. 134, 21 Atl. 833; *Phillips on Mechanics' Liens*, § 379; *Bloom on Mechanics' Liens*, § 404.

[3] 3. It is contended that since all the work that was done and all the material that was furnished were swept away by the flood or freshet in the Clearwater river, and there is nothing left either of the work or material, no lien claim can be sustained. In this connection, it is also contended that materials furnished and labor performed in preparatory work, such as false works and a cofferdam, as was done in this case, and which do not constitute a part of the real work or structure, as it is intended to stand in the completed form, are not lienable, and cannot furnish a basis for liens upon the real estate or the property which it was intended to improve, alter, or repair. The argument embodying these phases of the question rests upon the theory, which is maintained by many authorities, that the lien law only intends to allow a lien for such labor and material as have actually gone into and become a part of the property of the landowner, and enhanced its value. That position is maintained and fortified by a great many authorities. That doctrine, however, has been questioned and doubted in this state, and the great number of statutes which have been enacted in this state, providing for liens for materials furnished and labor performed, show clearly on their face that, in a great many instances, the question of enhanced or increased value to the property has not been taken into consideration by the Legislature and was not intended to be the test upon which a lien should be based.

[4] On the contrary, it is apparent, from a number of our statutes authorizing liens of various and sundry kinds, that the true test meant to be applied by the Legislature is the value of the labor or material furnished and used in or about the construction, alteration, or repair of the building, structure, or other works. As far back as the year 1903, the writer of this opinion in *Thompson v. Wise Boy Mining Co.*, 9 Idaho, 363, 74 Pac. 958, had occasion to express himself upon this principle involved in our lien laws, and said: "It seems to us, however, that, as these laws have come to be extended to mines and mining properties, this line of reasoning has to a great extent become faulty. To say that the laborer who goes into the placer mine and washes out all the gold it contains, or into a quartz mine and extracts

and removes the values it contains, has added to the value of the mines is not a course of reasoning that appeals to us very forcibly. The Legislature, in enacting these laws, did not have in mind the protection of the mineowners, but rather the protection of the laborers. They were not contemplating, when then enacted this law, the probability of the laborers enhancing or depreciating the value of the prospects, mining claims, or mines, as the case might be, but rather that the men who were employed and sent out to do work upon such properties should be entitled to a lien on them for their services. To say that the laborer is worthy of his hire is to tell him what he already knows; but what he wants to know, and what the Legislature evidently intended, is that this maxim will be carried a step further, and that he shall be assured that he is not only worthy of his hire, but that he will get his pay, and that the property upon or about which he worked shall be liable for such pay."

[5, 6] Counsel for respondents, after reviewing the general purpose and policy of these statutes, has aptly summed the whole matter up in the following sentence: "The law rests on the policy that one who initiates work, and may by slight precaution avert injury to innocent persons affected thereby, shall be charged with the duty of taking that precaution." This states the ultimate purpose intended. The person or corporation owning property, and desiring to make alterations or improvements or erect structures thereon, has it in his or its power to absolutely and unqualifiedly protect men who perform labor, or those who furnish material in or about such works; and it is the purpose and policy of the law to charge such owner with that duty to the extent of the value of the property on which such structure, repair, or improvement is placed. The lien statute operates in rem, and not in personam. It creates no personal charge against the owner of the property, but rather a charge against the property to the extent of its value. Now, the fact that the improvement or structure or the work done is carried away by the elements, or destroyed, cannot relieve the property owner, nor can it pay the man who has furnished his labor or material in carrying on the work, or destroy the lien given him by statute. So far as we have been able to examine the authorities cited by appellant, holding that there is no lien where the property has been lost or destroyed, they are dealing chiefly with an original contractor; and, under that principle of law, that one who contracts to erect and complete a building or structure, and deliver it in the completed condition, so as to satisfy the terms of his contract, must suffer the loss, if loss occurs, before the completion and acceptance of the contract. This principle, however, can have no appli-

cation to the laboring man and the material-man. The man who is laboring on the building has no control over it; neither does the man who furnishes the material for its construction have the control or custody of the building. The original contractor, however, may take out a builder's insurance and protect himself, as he progresses with the work.

[7] It is further argued, in this connection, that the building of a cofferdam was no part of the contract in this case, and that the city would have no use for that after the work was completed; that this was only an incident to the placing of the piping and cage that were to be constructed for the intake to the water pipe and system. It is insisted that the contractors might have employed some other method of doing this, rather than the construction of a cofferdam, and that this material and labor was not a part of the contract. This may be legally and technically correct; but the application of such a course of reasoning would go wide of giving substantial justice. When the city contracted for the laying of this pipe and the doing of this work, its agents and officers knew at the time that it would be necessary to construct a cofferdam or use some other means or method that would accomplish the same result in order to do the work and make the repair that the contract called for. If this be true, and it undoubtedly is, then we fail to see what difference it makes to the city whether this labor and material was employed and used in building the cofferdam, or in procuring some other means or contrivance through and by which the work should be carried on and completed. When a man contracts to have a building erected, he knows that the contractors and builders will be obliged to have scaffolding and other material that does not actually go into the building, but which may practically be used and consumed and destroyed in the course of the work. Such material and the labor incident thereto is as much a part of the contract as if it were specified and set forth in the contract itself.

These views have been very ably set forth and sustained by Mr. Chief Justice Winslow, in the Supreme Court of Wisconsin, in *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875, and this authority has been approved and the same view ably set forth in *Darlington Lumber Co. v. Westlake Con-*

*struction Co.*, 161 Mo. App. 723, 141 S. W. 931. See, also, *Valley Lumber Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24; *Weeter Lumber Co. v. Fales*, 20 Idaho, 255, 118 Pac. 289.

[8] 4. Considerable has been said both in the briefs and the oral argument as to the extent of lien to be allowed in this case should any lien be allowed at all. The extension pipe and intake were to be constructed out in the bed of the Clearwater river. The work was done there. No work was actually and literally done upon any of the pipe or machinery or any part of the present water system, and so it is insisted that whatever lien there is can only attach to the bed of the stream where the work was carried on. This contention overlooks the fact that the contract called for a repair or alteration to the water system and pumping plant, which would attach itself to and become a part of the system. The contract called for extending the pipe out into the stream, setting a steel cage there to inclose the intake to the pipe and certain works necessary and essential to the completion of this repair or alteration. This would have been a part of the system had it been carried out and completed as the contract called for. This could not be completed by the first load of material, or the first day's labor, or the second day's labor. The work may have been commenced in the middle of the stream, or it may have been commenced at the end of the water pipe. This, however, is immaterial for the purposes of the lien. The test is the contract which they were working on—the improvement or repair that was made. The liens of the laboring men and the materialmen were not dependent upon the ultimate completion of the contract in connecting up the repair with the original system; but the right to the lien attached as fast as the labor was performed and the material was furnished, and such lien might fail or be perfected upon complying, or failing to comply, with the statute. We think the district court correctly held that this was a repair or improvement to the water system, and that the lien attached to the system.

The judgment of the district court is therefore affirmed, with costs in favor of the respondents.

STEWART, O. J., and SULLIVAN, J., concur.

**NINNEMAN et al. v. CITY OF LEWISTON.**  
(Supreme Court of Idaho. Dec. 21, 1912.)

(*Syllabus by the Court.*)

1. **PRIOR DECISION—STARE DECISIS.**  
Chamberlain v. City of Lewiston et al., 129 Pac. 1069, followed.

2. **MECHANICS' LIENS (§ 45\*) — SUBJECT — TOOLS AND APPLIANCES.**

A lien cannot be had under the mechanics' lien laws of this state for tools and appliances which are the property of the contractors or laborers, and that are not necessarily consumed in the specific work, but which may be used, from time to time, in other works and upon other contracts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 48; Dec. Dig. § 45.\*]

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Suit by W. G. Ninneman and another, doing business as the Ninneman Hardware Company, against the City of Lewiston. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Fred E. Butler, of Lewiston, for appellant. Eugene A. Cox, James E. Babb, and McNamee & Harn, all of Lewiston, for respondents.

**AILSHIE, J.** This case is controlled in its principles of law by the decision just announced in Chamberlain et al. v. City of Lewiston, 129 Pac. 1069. It will be necessary, however, for the judgment to be modified in this case so as to eliminate therefrom the value of tools and appliances which did not go into or become a part of the work or improvement, and were not used or consumed in or about the work. A lien cannot be allowed for tools and appliances which are the property of the contractors, and may be used, from time to time, in other works and upon other contracts, and which are not consumed in the work, or which do not go as a part of the building or improvement and necessarily enter therein. Darlington Lumber Co. v. Westlake Construction Co., 161 Mo. App. 723, 141 S. W. 931; Boisot, Mechanics' Liens, § 123; Rockel, Mechanics' Liens, § 18. The district court will therefore be ordered and directed to enter a modified decree deducting from the original decree the amount included therein for such tools and appliances.

Judgment ordered modified, and affirmed accordingly. Costs awarded in favor of respondents.

**STEWART, C. J., and SULLIVAN, J.,** concur.

**POTLATCH LUMBER CO. v. CITY OF LEWISTON.**

(Supreme Court of Idaho. Dec. 21, 1912.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by the Potlatch Lumber Company against the City of Lewiston. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred E. Butler, of Lewiston, for appellant. George W. Tannahill, James E. Babb, and McNamee & Harn, all of Lewiston, for respondents.

**AILSHIE, J.** This is one of the actions for foreclosure of a mechanics' lien referred to in the opinion of Chamberlain v. City of Lewiston, 129 Pac. 1069, and upon the authority in that case the judgment must be affirmed.

Judgment affirmed, and costs awarded in favor of respondent.

**STEWART, C. J., and SULLIVAN, J.,** concur.

**HEWETT et al. v. CITY OF LEWISTON**  
et al.

(Supreme Court of Idaho. Dec. 21, 1912.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by William S. Hewett and Arthur L. Hewett against the City of Lewiston and others. Judgment for plaintiffs, and defendant city appeals. Affirmed.

Fred E. Butler, of Lewiston, for appellant. E. A. Cox, James E. Babb, and McNamee & Harn, all of Lewiston, for respondents.

**AILSHIE, J.** This is one of the actions for foreclosure of a mechanics' lien referred to in the opinion of Chamberlain v. City of Lewiston, 129 Pac. 1069, and upon the authority in that case the judgment must be affirmed.

Judgment affirmed, and costs awarded in favor of respondents.

**STEWART, C. J., and SULLIVAN, J.,** concur.

**HYSLOP v. BOARD OF REGENTS OF UNIVERSITY OF IDAHO et al.**

(Supreme Court of Idaho. Feb. 8, 1913.)

(*Syllabus by the Court.*)

1. **COLLEGES AND UNIVERSITIES (§ 8\*)—DISMISSAL OF PROFESSOR—POWER OF REGENTS.**

Under the provisions of section 490, Rev. Codes, the Board of Regents of the State University has power to remove the president or any professor, instructor, or officer of the University, when, in their judgment, the interests of the University require it.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 20-22; Dec. Dig. § 8.\*]

2. **DEMURRER TO COMPLAINT.**

Demurrer to complaint sustained, and action dismissed.

Action by R. E. Hyslop against the Board of Regents of the University of Idaho and the State of Idaho. Demurrer to complaint sustained.

R. M. McCracken, of Boise, for plaintiff. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., and J. H. Forney, of Moscow, for defendants.

**SULLIVAN, J.** This action was brought by the plaintiff against the Board of Regents

of the University of Idaho. After alleging the corporate existence of said University, and that the government thereof is vested in a Board of Regents, it is alleged that said Regents are the agents of the state of Idaho in the transaction of all matters which pertain to said University; that on or about the 27th of November, 1907, plaintiff entered into a contract with said Board of Regents to perform the duties of a professor of agronomy in said University, and of agronomist in the Idaho Experiment Station at Moscow; that he entered upon the duties of said position on the 1st day of January, 1908, and continued in such employment until about September 1, 1909, at a salary of \$1,500 per annum; that thereafter, on January 1, 1909, his compensation was fixed by said board at \$1,600 per annum; that on July 1, 1909, he entered into a contract with said board for a period of one year, from July 1, 1909, as such professor, and that his compensation was fixed by said board at \$1,700 per annum; that, in pursuance of such contract, plaintiff entered immediately upon the duties of such office and employment, and continued in such employment until the 1st day of September, 1909, when he was summarily dismissed by the president of the Board of Regents, and that said action of the president of said board, in dismissing plaintiff, was not considered by said board until the 29th of October, 1909, on which date said board ratified the action of its president in dismissing the plaintiff; that the interests of the University did not require the removal of the plaintiff from such employment, and that his dismissal was malicious and in violation of the legal rights of the plaintiff under his said contract; that, immediately after his dismissal, plaintiff sought similar employment elsewhere, but was unable to procure it, and was not engaged in his said vocation, or in any vocation, for a period of one year following his dismissal; that plaintiff was physically and mentally able, ready, and willing to continue his employment in accordance with the terms of his contract; that he is entitled to recover \$1,416.66; that he filed his claim for said sum with the Board of Regents, and that said claim was disallowed by said board; that he thereafter filed said claim with the Board of Examiners of the state of Idaho, and said claim was disallowed by said board; and prays for a recommenda-

tory judgment against the state for that amount.

To this complaint a demurrer was filed by the Board of Regents. The main ground of said demurrer is that the complaint does not state facts sufficient to constitute a cause of action against the defendants, the Board of Regents. It is contended, under said demurrer, that the power of removal by said board is absolute, and that they have the power to remove the president, any professor, instructor, or other officer of the University when in their judgment the interests of the University require it. Section 490, Rev. Codes, provides, among other things, as follows: "The Board of Regents shall have power to remove the president or any professor, instructor or officer of the University, when, in their judgment, the interests of the University require it." That provision of said section is a part of the contract of employment of any of the persons therein named, and the Board of Regents are thereby given plenary power to remove any of the employes therein named, whenever they may think best to do so. That being true, the complaint does not state a cause of action. As bearing upon the question here involved, see *Erwin v. Independent School Dist.*, 10 Idaho, 102, 77 Pac. 222.

Said demurrer must be sustained, and the action dismissed, and it is so ordered, with costs in favor of the defendants.

AILSHIE, C. J., and STEWART, J., concur.

#### SHINN v. BOARD OF REGENTS OF UNIVERSITY OF IDAHO et al.

(Supreme Court of Idaho. Feb. 8, 1913.)

Action by J. R. Shinn against the Board of Regents of the University of Idaho and the State of Idaho for a recommendatory judgment. Dismissed.

R. M. McCracken, of Boise, for plaintiff. J. H. Peterson, Atty. eGn., and J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., and J. H. Forney, of Moscow, for defendants.

SULLIVAN, J. This case involves substantially the same questions as that of *Hyslop v. Board of Regents*, 129 Pac. 1073, decided at this term of the court, and upon the authority of that case the demurrer to the complaint is sustained and the action dismissed, with costs in favor of the defendants.

AILSHIE, C. J., and STEWART, J., concur.

## Ex parte MILLER.

(Supreme Court of Idaho. Feb. 15, 1913.)

(Syllabus by the Court.)

## 1. SODOMY (§ 8\*)—SENTENCE—LENGTH OF PUNISHMENT.

Under the provisions of section 6810, Rev. St. 1887, the minimum punishment of one found guilty of the infamous crime against nature is imprisonment in the state penitentiary for not less than five years, and the length of imprisonment in excess of five years is left to the discretion of the court.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.\*]

## 2. SODOMY (§ 8\*)—SENTENCE—DURATION.

As section 6810 prescribes the punishment for said offense, section 6312, Rev. St. 1887, has no application and does not fix the maximum punishment for said crime.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.\*]

## 3. CRIMINAL LAW (§ 1206\*)—SENTENCE—VARIANCE.

Section 6312, Rev. St. 1887, only prescribes the punishment for felonies in cases where the punishment is not prescribed by other sections of the statutes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.\*]

## 4. PUNISHMENT FOR CRIMES.

The cases of *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, *In re Rowland*, 8 Idaho, 595, 70 Pac. 610, and *In re Burgess*, 12 Idaho, 143, 84 Pac. 1059, cited and distinguished.

## 5. CRIMINAL LAW (§ 1206\*)—PUNISHMENT FOR MISDEMEANORS.

The maximum punishment for misdemeanors is fixed by section 6313, Rev. St. 1887, where it is not otherwise fixed by other sections of the statutes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.\*]

Allshie, C. J., dissenting.

Application of Matt Miller for a writ of habeas corpus. Writ quashed, and prisoner remanded.

Chas. Clifton, of Boise, for petitioner. J. H. Peterson, Atty. Gen., and J. J. Guheen and T. O. Coffin, Asst. Attys. Gen., for the State.

SULLIVAN, J. The petitioner applied to this court for a writ of habeas corpus, and it is alleged in his petition that he is unlawfully imprisoned in the state penitentiary. The facts set up showing the alleged unlawful imprisonment are as follows: On the 26th of November, 1898, petitioner was found guilty in the district court of Lincoln county of the infamous crime against nature and sentenced to punishment therefor in the state penitentiary for a term of 25 years. Thereafter on or about November 30, 1898, he was delivered into the custody of the officers of the penitentiary pursuant to said sentence and ever since said date and still is confined in said penitentiary, and it is alleged that as a matter of law the trial court was without jurisdiction to sentence

him for a longer term than five years, and that he has long since completed the service of that term and should now be discharged from said imprisonment and that he is held as a prisoner for no other reason than because of said sentence of 25 years' imprisonment. Upon that application the writ was issued, commanding the warden of the state penitentiary to produce the body of petitioner and show cause why the prayer of said petition should not be granted. Upon the return day said matter was heard upon a general demurrer to the petition.

[1] The first question presented is: Had the trial court jurisdiction to sentence the defendant for more than five years upon his conviction for said crime? The defendant was convicted under the provisions of section 6810, Rev. Stats. of 1887, which section bears the same number in the Revised Codes, and is as follows: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the territorial prison not less than five years." It will be observed that the minimum sentence for that crime is fixed by that section, leaving it to the discretion of the court to fix the maximum sentence, which the court did in this case at 25 years.

[2, 3] It is contended by counsel for petitioner that the maximum punishment for said crime is fixed by section 6312, Rev. Stats. of 1887, which is the same as section 6312, Rev. Codes, which section is as follows: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony, is punishable by imprisonment in the territorial prison not exceeding five years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

Under the provisions of said section 6810, the term of imprisonment fixed is not less than five years and the maximum is left to the discretion of the court, hence that section prescribes the punishment for said offense, and since both the maximum and minimum sentences are in fact provided for by section 6810, the minimum being expressly fixed and the maximum left to the discretion of the court, it does not come within the provisions of section 6312, as it applies only to offenses where no punishment whatever is prescribed. Said section 6312 prescribes the punishment of acts declared to be felonious in cases where the statute did not provide the punishment and was intended to deal fully and completely, so far as the punishment was concerned, with all cases of felony where no other punishment had been provided. It was not intended to supplement other sections of the Penal Code that had already provided a penalty for the punishment of such crimes. Sodomy, the crime for which defendant was convicted, was at common law a felony punishable by death.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



36 Cyc. p. 502, and authorities there cited. Under our statutes the only crime punishable with death is that of murder in the first degree, and no one would contend that a court under the provisions of said section 6810 would have the authority to have a man executed who had been convicted of the crime mentioned in said section; but the Legislature no doubt considered it a grave crime and fixed the minimum punishment at five years' imprisonment and left it to the sound discretion of the court to fix the maximum according to the facts of each case.

Many of the penal statutes of this state, as well as of other states, prescribing the punishment by imprisonment for felonies either prescribe a minimum punishment, leaving the maximum to the court, or prescribe a maximum, leaving the minimum to the discretion of the court, or provide both a minimum and a maximum, leaving any sentence between the minimum and maximum to the discretion of the court. Said section 6810 provides that the punishment shall be "not less than five years"; that is the minimum. Section 6312 provides, "except in cases where a different punishment is prescribed," every offense declared to be a felony is punishable by imprisonment "not exceeding five years," so far as imprisonment is concerned. Five years is there fixed as the maximum; or, instead of such imprisonment, a fine not exceeding \$5,000, or by both such fine and imprisonment. Then we have this anomalous condition if these two sections are to be construed as affecting the same crime: The same term of imprisonment is prescribed in each section, one the maximum and the other the minimum, and the one providing that five years imprisonment shall be maximum has only the additional punishment of a fine not exceeding \$5,000. So if these two sections be construed together, the maximum prescribed by section 6312 is the minimum prescribed by section 6810. In construing them both together, the term of imprisonment is absolutely fixed at five years—no more, no less—minimum and maximum being the same. It does not seem probable that the Legislature should have contemplated such a condition of things as would exist if said sections are construed together, one as providing the maximum and the other a minimum punishment. Said section 6312 applies only to felonies where no other punishment is fixed and where no penalty whatever is prescribed by other provisions of the statute. And said section 6810 in order of number, at least, is subsequent to section 6312. Supposing section 6810 had prescribed the minimum punishment at not less than six years, would any one then contend that section 6312 had any application to the case? We think not.

[4, 5] It is next contended that the decisions of this court in *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, *In re Rowland*, 8 Idaho, 595, 70 Pac. 610, and *In re Burgess*,

12 Idaho, 143, 84 Pac. 1059, are in conflict with the views above expressed. In the three cases cited above, the contention was made that the anti-gambling law was unconstitutional and for the reason that it only fixed the minimum penalty for its violation and established no maximum penalty whatever, and that question was answered in *State v. Mulkey*, supra, as follows: "The act in question fixes the minimum punishment, but does not fix the maximum. Section 1 of said act makes the offense a misdemeanor. Section 6313 of the Revised Statutes is as follows: 'Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by fine not exceeding three hundred dollars, or by both.' Reading the act in question with said section 6313 of the Revised Statutes, both the maximum and minimum punishment are provided. There is no constitutional objection to the fixing of the minimum punishment only by the Legislature in a particular statute." And the court held in those decisions, which involved misdemeanors, that, as the gambling act fixed only the minimum punishment, the court would look to section 6313 to fix the maximum. We think those decisions were right. When we consider that the maximum punishment for a misdemeanor is only a few months' imprisonment, at most, and generally does not exceed a \$300 fine, or both such imprisonment and fine, it was clearly not the intention of the Legislature to leave the maximum punishment for misdemeanors in the discretion of the court. I know of no statute which fixes the death penalty or imprisonment for life as the maximum punishment for a misdemeanor; and the punishment prescribed by said section 6810 is limited to imprisonment, and the death penalty could not be imposed.

It was clearly the intention of the Legislature to fix the maximum punishment for all misdemeanors which were not otherwise fixed by section 6312 at not to exceed six months imprisonment or by a fine not exceeding \$300, or by both such fine and imprisonment. The crime which the Legislature has named in said section 6810 was under the common law punished by death. The Legislature fixed the minimum penalty by the provisions of said section 6810, and it is clear to me that they intended to and did leave the maximum punishment to the sound discretion of the court, and did not limit the maximum by the provisions of said section 6312. It was not intended that the maximum punishment for a misdemeanor should extend to life or be left to the discretion of the court, and it was intended that for the heinous crime of which defendant was convicted the minimum punishment should not be less than five years, and the maximum punishment was left to the dis-

cretion of the court. As touching upon this question, see *People v. Nop*, 124 Cal. 150, 56 Pac. 786; *People v. Steuter*, 142 Cal. 146, 75 Pac. 780.

The action is dismissed, the writ quashed, and the prisoner remanded to the custody of the warden of the state penitentiary.

STEWART, J., concurs.

AILSHIE, C. J. (dissenting). I cannot agree with my Associates in reading into the statute, section 6810, the provision which they construe it as containing providing for a maximum penalty to be left to the discretion of the court. That part of section 6810 which provides the only penalty therein named says that the offense described is punishable by imprisonment in the state penitentiary "not less than five years." It contains no intimation, however, as to what the maximum penalty is, nor does it contain any suggestion that the maximum is to be left to the discretion of the court. My Associates suggest that the maximum penalty is in the discretion of the court, but that such discretion cannot be exercised except in the way of sentencing the defendant to imprisonment, and that the court could not sentence him to be executed. The very fact that the court is forced to say that this statute would not permit the trial court to sentence the defendant to be executed is itself a sufficient answer to the contention made by the majority of the court that the statute leaves the maximum penalty to the discretion of the court. The statute clearly makes no attempt to provide a maximum penalty, and neither does it in terms leave the maximum penalty to the discretion of the court.

The history of this statute demonstrates to my mind the incorrectness of the views expressed in the majority opinion. Section 6810 was first enacted by the territorial Legislature on February 4, 1864, and then constituted section 45 of an act "concerning crimes and punishments." *Sess. Laws 1864*, p. 306. Section 45 of that act was in the identical language of section 6810 of our present revised statutes with the exception that it contained additional words immediately following the last word in the present sentence, "and which may extend to life." The section then provided that any person found guilty of the crime therein designated is "punishable by imprisonment in the state penitentiary not less than five years and which may extend to life." It will be seen at once that when this statute was first written and adopted in Idaho it authorized a penalty not less than five years and authorized it to be extended to life. When the code commission of 1887 compiled the 1887 statutes, the words "and which may extend to life" were omitted from this statute, and at the same time section 6312 was enacted by the Legislature and inserted in the Revised Statutes of 1887 for the first time that

this latter section appeared in the statutes of Idaho. Section 6312 reads as follows: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the territorial prison not exceeding five years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

This section has been carried over into the Revised Codes under the same section number, 6312, and is now a part of the Penal Code of the state. It is apparent to the writer that the code commission of 1887 in compiling the new statute and the Legislature in the adoption of the statutes of that year intended to change section 45 of the crimes and punishments act of 1864 by omitting therefrom the maximum penalty which might under the old statute be extended to life and thereafter have the maximum penalty limited by a general maximum penalty statute which the Legislature adopted as section 6312. In other words, it was the intent of the code commission and the Legislature as well to establish the maximum penalty in all felony cases, where a different maximum was not established, at five years' imprisonment and \$5,000 fine. In those cases where the minimum penalty is fixed by the specific statute greater than five years' imprisonment and \$5,000 fine, this general maximum penalty statute would not apply, for the reason that a higher maximum would already be fixed by special statute. Section 6312 makes no pretense at dealing with the minimum penalty, and so when it says that, "where a different punishment is not prescribed by this Code," the penalty shall "not exceed five years' imprisonment and \$5,000 fine," it certainly means that where a *different maximum penalty* is not fixed. In the very nature of the sentence, it could not have reference to a minimum penalty but only to a maximum penalty. Section 6312 makes no pretense at being anything but a maximum penalty statute. It is neither unusual nor inconsistent for one statute to fix the minimum penalty to be inflicted and another and general statute to fix the maximum penalty applicable to all felonies where a different, specific maximum penalty is not prescribed by statute. That is just the thing our statute has undertaken to do.

Section 6313 is in the identical language with reference to misdemeanors that section 6312 uses with reference to felonies and was intended as a maximum penalty statute for misdemeanors where a different maximum is not prescribed by the specific statute. This court has uniformly held that reference will be had to section 6313 in misdemeanors for a maximum penalty where a specific statute only defines the minimum penalty. *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17; *In re Rowland*, 8 Idaho, 596, 70 Pac. 610; *In re Burgess*, 12 Idaho, 143, 84

Pac. 1059. In *Re Burgess*, this court, speaking of a statute fixing a minimum penalty, said: "The court may let the prisoner off with either of the foregoing penalties, but nothing short of one of them will satisfy the statute. This statute, it will be observed, does not undertake to prohibit a heavier penalty than therein specified; its purpose is to prohibit a lighter penalty. For the maximum penalty this court has said we should look to section 6313 of the Revised Statutes. That is a general statute fixing the maximum penalty in misdemeanor cases where a maximum is not fixed by the act defining the offense, and under that statute the punishment may be 'imprisonment in a county jail not exceeding six months, or by a fine not exceeding three hundred dollars, or by both.' We are forced to the conclusion that, under the statute as it has been interpreted by this court in two unanimous decisions, the maximum punishment which may be imposed on one convicted of gambling would be a fine of \$300 and imprisonment for six months."

The opinion of the majority of the court seems to reverse the rule and reasoning adopted by this court in at least three cases with reference to misdemeanors and establishes a new and unusual rule with reference to the discretion of courts in pronouncing sentence in cases where the statute does not prescribe a maximum penalty. There is no occasion for prescribing a minimum penalty unless to prevent the courts from pronouncing a nominal or very small sentence. A statute would clearly not be void or objectionable because it failed to prescribe a minimum penalty. The difficulty about failure to specify the penalty arises where the failure is to specify the maximum penalty. Where a statute prescribes, as in this case, that the minimum penalty should be five years in the state penitentiary, the query at once arises as to what is the limit of the sentence that the judge might pronounce against a prisoner if he saw fit to do so.

There are three classes of penalties that are recognized by the laws of this state that may be pronounced for the commission of crimes: First, a fine; second, imprisonment; third, capital punishment. My Associates say that a statute which prescribes five years as the minimum penalty impliedly leaves the maximum to the discretion and sweet will of the judge who tries the case. If that is true, then why could not the judge order the prisoner executed, as that is a recognized penalty in this state and the highest penalty that can be pronounced. That is the maximum. If the statute leaves the maximum to the discretion of the judge, then why limit by the opinion of the court such penalty to life imprisonment? This merely illustrates the difficulty the court finds itself in when it departs from section 6312

which prescribes the general maximum penalty to be inflicted where a different maximum is not prescribed by the statute.

The writ should issue.

**STAAB et al. v. ROCKY MOUNTAIN BELL TELEPHONE CO. et al.**

(Supreme Court of Idaho. Feb. 1, 1913.)

(Syllabus by the Court.)

**1. ELECTRICITY (§ 14\*)—LIABILITY FOR INJURIES—CARE REQUIRED.**

A company engaged in generating, transmitting, and distributing a highly dangerous and unseen force, like electrical energy, is chargeable with a legal duty of handling it with such care and caution as to protect the public against its dangers, and especially to protect those who may be called upon to come near or in close contact with the transmission wires from dangers which they may not see or appreciate or may readily overlook.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.\*]

**2. ELECTRICITY (§ 16\*)—LIABILITY FOR INJURIES—CARE REQUIRED.**

Where an electric light and power company maintains its poles within a foot of the poles of a telephone company, and carries and maintains live wires charged with electrical current, it is chargeable with notice that laborers and linemen, working on the telephone company's poles and wires, may and will come in close contact with the electric light wires, and such company is chargeable with the duty of protecting such persons against receiving injury from the current carried on such wires, and this duty is commensurate with the danger apparent.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.\*]

**3. ELECTRICITY (§ 19\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.**

Where a telephone lineman, known as "trouble man," while seated on a messenger wire, was suddenly and without apparent cause precipitated onto a live wire maintained by an electric light company immediately under the telephone wires, and was suddenly electrocuted, and no cause is shown for the fall, and he is afterwards found to have had an electric burn on the foot which was nearest to the electric light wires, *held*, that the evidence is sufficient to justify the jury in returning a verdict that his death was primarily caused by an electric shock, and the court and jury may presume, in the absence of proof to the contrary, that the person who lost his life under such circumstances exercised reasonable care and precaution in an effort to preserve his life, and that he did not expose and subject himself to injuries and risks that he might reasonably have anticipated or expected would inflict mortal injuries.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

**4. ELECTRICITY (§ 15\*)—LIABILITY FOR INJURIES—TRESPASSERS.**

Where an employé of a telephone company, known as a "trouble man," was employed at a regular monthly salary, and his regular hours of employment were from 7:30 in the morning to 5:30 in the evening, and it is shown that it was his duty to respond to calls at all times when needed, and he was responding to such a call after regular hours, and received a fatal injury, *held*, that he was not a trespasser or mere volunteer on the company's property, but

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that he was engaged in the line of his duty, and received his injury while in the discharge of such duty.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.\*]

**5. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Contributory negligence is a matter of defense in this state; and where the question is presented, and there is a conflict of evidence, the jury are the exclusive judges of the weight and preponderance of the evidence, and may determine for themselves as to whether the defense of contributory negligence has been made out.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**6. DISMISSAL AND NONSUIT (§ 26\*)—VOLUNTARY DISMISSAL—CODEFENDANTS.**

Where a telephone company and an electric light company were both made defendants in an action for damage, it was not error for the plaintiff to elect as to which of the defendants it would proceed against, and dismiss as to the other defendant.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 46, 48-59; Dec. Dig. § 26.\*]

**7. INSTRUCTIONS AND RULINGS ON EVIDENCE EXAMINED—NO ERROR.**

Instructions of the court and rulings on the admission of evidence examined, and held no reversible error was committed.

**8. DEATH (§ 99\*)—ACTIONS FOR CAUSING DEATH—DAMAGES.**

Where a husband and father in good health, 32 years of age, earning a monthly salary of \$85, was electrocuted, through negligence of an electric light company, by coming in contact with a live wire, held that a verdict and judgment for \$15,000 in favor of the widow and two minor children is not excessive.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by Laura Staab and others against the Rocky Mountain Bell Telephone Company and another. From a judgment for plaintiff, defendant Idaho-Oregon Light & Power Company appeals. Affirmed.

Wyman & Wyman and Cavanah, Blake & McLane, all of Boise, for appellants. Frawley & Block and Hawley, Puckett & Hawley, all of Boise, for respondents.

**AILSHIE, O. J.** This action was prosecuted by the widow and minor children of Walter R. Grove, deceased, for the recovery of damages sustained on account of his death. Verdict was rendered, and judgment entered for the aggregate sum of \$15,000; \$3,000 in favor of the widow, \$5,500 in favor of Mary L. Grove, and \$6,500 in favor of Alice O. Grove. The defendants appealed.

The action was commenced against the Rocky Mountain Bell Telephone Company and the Idaho-Oregon Light & Power Company. A motion was subsequently made to require the plaintiffs to elect as to which company they would proceed against, and the plaintiffs elected to proceed against the Idaho-Oregon Light & Power Company, and dismissed as to the telephone company.

Walter R. Grove was an employé of the Rocky Mountain Bell Telephone Company at the time of his death, and was working at the monthly salary of \$85, and discharging the duties of "trouble man." His regular working hours were from 7:30 in the morning to 5:30 in the evening; but it appears that he was subject to duty whenever occasion required, whether in or out of regular working hours. On the evening the accident occurred, about suppertime and during twilight, he went with another employé of the company to make an inspection of a line between Thirteenth and Fourteenth streets in Boise City. The telephone poles and electric light poles both stood along the same alley, and on the same side of the alley, and the two poles were only about 11 inches apart. The wires on the telephone pole were several feet above the electric light wires. Grove climbed the telephone pole and sat on what is called the messenger wire or cable, and examined the "messenger can" on the pole, his feet hanging down toward the electric light wires. He finished his inspection, and was raising up to inspect the "arc" wires, and the next that was seen of him was a few seconds later, when his companion and assistant saw him lying across the primary or transmission electric light wire which was sizzling and burning his body, and this wire soon broke, and the deceased turned a somersault in the air and fell on the roof of a shed in an adjacent yard. The electric light wires consisted of a primary or transmission wire and an arc wire and a number of secondary or distributing wires. The primary or transmission wire carried a current of 2,300 volts; the arc wire a current of 2,000 volts; while the secondary or distributing wires carried a current ranging from 115 to 200 volts. The primary wires appear to have been insulated. The others seem not to have been insulated, or at least, if they had been insulated, the insulation had ceased to be of any protection or value.

[1, 2] 1. As to whether or not the proper care and precaution had been taken by the light company to insulate these wires to guard them against employés and innocent persons, who might be working about them, was one of the facts on which there was a conflict of evidence, and this was submitted to the jury, and has been passed upon by them. The appellant was engaged in the business of generating, transmitting, and distributing the most dangerous and least understood article known to the business or commercial world, namely, electrical energy—an unseen force—and it was chargeable with the legal duty of so handling it as to protect the public, and especially those who might be called upon to come near or in contact with its wires, from dangers they could not see, and which they might readily overlook. *Eaton v. City of Weiser*, 12 Idaho, 544, 86

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pac. 541, 118 Am. St. Rep. 225; Newark E. L. & P. Co. v. Garden, Adm'r, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725. It is extremely doubtful if the appellant company exercised the care, in protecting its wires, that it should have exercised in this instance. It allowed its wires to be in close proximity to the telephone wires; and it was chargeable with notice that linemen would be compelled to climb the telephone poles and work among the telephone wires.

[3] 2. It is contended that there is no evidence as to the manner in which deceased met his death. On this question, the evidence is not positive and direct. The circumstances, however, went to the jury, and were sufficient to justify them in concluding that it was caused by an electric shock. The deceased had an electric burn on one of his heels, and it is argued by counsel that he received such a shock from one of the company's wires as to cause his muscles to relax and precipitate him from the messenger wire onto the main wires, where he was electrocuted. It is clear that his death resulted from his contact with these live wires. No one can be positive, however, as to the cause of his falling. That might have been an accident on his part, or it may have been caused, as suggested by counsel, by a shock received from the secondary wires. The burn on his heel would tend to strengthen the latter presumption. Where death was almost instantaneous, as in this case, and no one could see or positively know the cause which precipitated deceased on this live wire, it is the duty of this court to presume that the person who lost his life under such circumstances exercised reasonable care and precaution in an effort to preserve his life, and that he did not expose or subject himself to injuries and risks that he might reasonably have anticipated or expected would inflict mortal injuries. *Adams v. Bunker Hill, etc., Mining Co.*, 12 Idaho, 648, 89 Pac. 624, 11 L. R. A. (N. S.) 844; *Fleenor v. O. S. L. R. Co.*, 16 Idaho, 803, 102 Pac. 897. The evidence was sufficient to justify the jury in concluding that the deceased came to his death from an electric shock received from the appellant company's electric wires.

[4] 3. It has been argued that the deceased was a mere licensee or volunteer on the telephone company's property at the time he received the fatal injury, and was not engaged in the line of his duty, and that therefore no recovery can be had. The evidence shows that the deceased was a "trouble man" in

the employ of the telephone company, and that such an employe "is supposed to be on duty at all times when needed. \* \* \* A trouble man works for so much per month, and is subject to duty whenever occasion requires. \* \* \* He is supposed to be the guardian of maintenance conditions; that is, he clears trouble, repairs irregular conditions, inspects for irregularities, and, if possible, cleans them up." The evidence adduced on the trial was sufficient to justify the jury in concluding that the deceased was engaged in the line of his duty when he met his death.

[5] 4. The question of contributory negligence was properly submitted to the jury, and their finding thereon has support in the evidence. The burden of proving contributory negligence was on the defendant. Section 4221, Rev. Codes; *Adams v. Bunker Hill, etc., Mining Co.*, 12 Idaho, 642, 89 Pac. 624, 11 L. R. A. (N. S.) 844; *Goure v. Storey*, 17 Idaho, 360, 105 Pac. 794; *Rippetoe v. Peeley*, 20 Idaho, 619, 119 Pac. 465.

[6] 5. There was no error in dismissing the case as to the telephone company. The dismissal can in no way work to the prejudice or injury of the light company in any claim that it might have against the telephone company on account of this judgment, or the accident which led to the judgment.

[7] 6. We find no error in the instructions of the court or in the rulings of the court on the admission of evidence.

[8] 7. We do not consider the verdict sufficiently large to justify this court in either reversing the judgment or reducing the amount. It should be remembered that this judgment represents the loss sustained both by the widow and the two minor children, a total of \$15,000 for three persons dependent upon his earnings and support, and the deceased was a man in good health and 32 years old at the time of his death. This verdict is not out of proportion or harmony with verdicts approved by this court in *Anderson v. Great Northern R. R. Co.*, 15 Idaho, 513, 99 Pac. 91; *Maloney v. Winston Bros.*, 18 Idaho, 740, 111 Pac. 1080; *Walsh v. Winston Bros.*, 18 Idaho, 768, 111 Pac. 1090; *Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

We conclude that the judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

## KING v. WEST COAST GROCERY CO.

(Supreme Court of Washington. Feb. 18, 1918.)

## 1. CORPORATIONS (§ 409\*)—CORPORATE LEASE—VALIDITY OF EXECUTION.

The president and secretary of a corporation testified that a lease, purporting to have been executed for the corporation, and its assignment, were authorized by the trustees. The resolution authorizing it was not recorded. A lease was executed by the president, as such, and as a trustee, and also by the secretary of the corporation and two other trustees, was attested by the corporate seal, and was acknowledged by the president and secretary in the statutory form of corporate acknowledgment; the certificate reciting that the officers stated under oath that they were authorized to execute the instrument, and that the seal was that of the corporation. The seal itself recited that the corporation caused its execution. *Held*, that such facts show prima facie a valid lease by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1620-1622; Dec. Dig. § 409.\*]

## 2. CORPORATIONS (§ 425\*)—CONTRACTS—ESTOPPEL BY CONDUCT.

Where the trustees of a corporation engaged in preserving fruit, etc., had full knowledge of a transaction purporting to lease the business, and knew that a contract made by it with defendant was being performed by the lessee, and several times thereafter held regular meetings, without questioning the rights or validity of the contract, but received rent under the lease, the corporation was estopped from denying either that the lease or assignment was unauthorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

## 3. ASSIGNMENTS (§ 137\*)—EVIDENCE.

If a contract was assignable, evidence of any assignment, sufficient to pass title as between the parties thereto, was sufficient to entitle the assignee to sue thereon.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 137.\*]

## 4. ASSIGNMENTS (§ 18\*)—CONTRACTS ASSIGNABLE.

As a rule, rights arising out of an executory contract are assignable, if they would survive to the assignor's personal representative.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. § 18.\*]

## 5. ASSIGNMENTS (§ 19\*)—CONTRACTS ASSIGNABLE—PERSONAL RELATIONS.

Rights which are coupled with liabilities or involve a relation of personal confidence or service are not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.\*]

## 6. ASSIGNMENTS (§ 19\*)—CONTRACTS ASSIGNABLE—CONTRACTS OF SALE.

To make a contract for the sale of personality for future delivery nonassignable, the liability and right must be dependent upon some future dealing with the property, as between the parties.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.\*]

## 7. ASSIGNMENTS (§ 18\*)—CONTRACTS ASSIGNABLE—CONTRACTS OF SALE.

A writing which recited that there was "sold" to the buyers for account, and subject to approval of the seller, the amount of jellies named, and stating the terms, and that the

seller guaranteed all goods sold under the contract to comply with the pure food law, was assignable; the buyer being required thereby to pay no money until goods were furnished of the kind and quality required by the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. § 18.\*]

## 8. ASSIGNMENTS (§ 68\*)—VALIDITY—ESTOPPEL BY CONDUCT.

Where the goods were accepted by the purchaser after an assignment to plaintiff of its contract to sell jellies to defendant, as meeting the terms of the contract, and retained with knowledge of the assignment, and invoices gave notice of the assignment, a finding that the purchaser was estopped to question the validity of the assignment was sustained.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 127; Dec. Dig. § 68.\*]

## 9. SET-OFF AND COUNTERCLAIM (§ 50\*)—PERSONS ENTITLED TO ASSEET.

Rem. & Bal. Code, § 191, authorizes the assignee of any chose in action to sue thereon in his own name, provided that any debtor may plead in defense a counterclaim or set-off held by him against the original owner against the debt assigned, except as against negotiable paper assigned before due; section 265, which defines counterclaims, does not specifically refer to assigned claims; and section 266 permits defendant, in an action on a contract, to set off any demand of like nature against plaintiff, which existed against the person to whom he was originally liable, or any assignee prior to the plaintiff of such contract, if such demand existed at the time of the assignment, and belonged to defendant before notice thereof, and could have been set off against such person to whom he was originally liable or against the assignee. *Held* that, where, at the time of the assignment to plaintiff of an executory contract to sell jelly to defendant, nothing was due under the contract assigned, defendant could not counterclaim against the assignee, when sued for the price of the jelly, for a claim against the assignor, which was matured at the time of the assignment.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 113; Dec. Dig. § 50.\*]

## 10. STATUTES (§ 225\*)—CONSTRUCTION—IN PARI MATERIA.

Where statutes in pari materia do not conflict, they must be construed together, so as to effectuate the legislative purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

## 11. STATUTES (§ 158\*)—REPEAL—IMPLICATION.

A repeal by implication will not be made, where no implied repeal is necessary from the language of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

Department 2. Appeal from Superior Court, Pierce County; E. M. Easterday, Judge.

Action by J. W. King against the West Coast Grocery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hayden & Langhorne, of Tacoma, for appellant. Jas. R. Chambers, of Seattle, for respondent.

ELLIS, J. This is an action to recover the purchase price of certain jellies and jams sold and delivered to the defendant, West Coast Grocery Company. The sale was by a

written contract between the defendant and Vashon Island Preserving Company, a corporation, dated May 17, 1910, which contract, it is claimed, was sold and assigned to the plaintiff, King, on June 11, 1910. It is admitted by both parties to this action that, at about that time, the officers and trustees of the Vashon Island Preserving Company leased its plant to the plaintiff, with the understanding that all of its existing contracts should be assigned to him, and that the lease and the assignment of the contract here in question were parts of one and the same transaction. The evidence shows, without contradiction, that thereafter the plaintiff personally, and at his own cost, manufactured the goods and shipped them to the defendant; that the cases and jars were marked, "Vashon Island Preserving Company, J. W. King, Lessee"; and that the invoices sent to the defendant were in the name of J. W. King, lessee. It is admitted that the defendant accepted and retained the goods; and there is no claim that they were not of the kind and quality contracted for, or that they were not of the full value agreed to be paid for them. The defendant admitted the execution of the contract, admitted the receipt and retention of the goods, but denied the assignment of the contract, and interposed, as a set-off or counterclaim, damages claimed against the Vashon Island Preserving Company on account of its breach of warranty in furnishing inferior goods to the defendant under a contract of the year before. The evidence shows that the goods sold under this last-mentioned contract had been received and paid for by the defendant some time prior to the making of the contract of May 17, 1910. The cause was tried to the court without a jury, and judgment was rendered in plaintiff's favor for \$818.59. The counterclaim was refused. The defendant prosecuted this appeal.

The court, in order to avoid a retrial in the event of this court holding that the counterclaim should have been allowed, took evidence on the defendant's claim and made a finding thereon that the goods furnished by the Vashon Island Preserving Company, under the contract of the year before, were defective and damaged to the value of \$162; that the plaintiff on and after June 7, 1910, knew that defendant claimed the goods furnished under this first contract were unsalable, but had no knowledge of the extent of such claim of damage; that the defendant, at the time of its reception of the goods delivered to it by the plaintiff under the assignment of the second contract, well knew that they belonged to the plaintiff, but prior thereto had no knowledge of the assignment of the contract.

1. The appellant first contends that neither the lease of the preserving plant nor the assignment of the contract of May 17, 1910, was validly executed by the Vashon Island

Preserving Company to the respondent. It is urged that both of these acts were void, because there was no formal resolution of the board of trustees of the corporation authorizing either of them. There was no direct evidence that any formal resolution was ever passed; but both the president and secretary testified that both the lease and the assignment were authorized by the trustees. There was, however, direct evidence that no record was ever made of any such resolution, if any was ever passed. The company had three trustees, of whom the respondent was one. He was also president of the company. The lease, which is in evidence, was executed in the name of Vashon Island Preserving Company, by the respondent as its president, and also as trustee, and by its secretary, and was attested by the corporate seal. It was also signed by the other two trustees. It was acknowledged by the president and secretary in the statutory form for corporate acknowledgments; the certificate reciting that both officers stated, under oath, "that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation." The lease itself recited that the corporation had caused its execution.

[1] In the absence of any evidence to the contrary, the evidence adduced must be held sufficient to establish prima facie the validity of the lease. *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402; *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32; 4 *Thompson, Corp.* (1st Ed.) § 5029. The assignment of the contract was made by the secretary, who testified that he was authorized to make it. It is admitted that the lease and the assignment were parts of one and the same transaction. The prima facie establishment of the authorization of the lease was therefore some evidence that the transfer of the contract was also authorized.

[2] Moreover, it was shown that the trustees had at all times full knowledge of the transaction, knew that the contract was being performed by the respondent, and on two or three occasions thereafter held regular meetings, and did not in any manner question or disaffirm the transaction, but knowingly received its benefits in the rental paid by the respondent. These things were ample to prevent the Vashon Island Preserving Company from ever in any way questioning the authorization of either assignment or lease. *Dexter, Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 28 Am. St. Rep. 867; *Carrigan v. Improvement Co.*, 6 Wash. 590, 34 Pac. 148; *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Roberts v. Wash. Nat. Bank*, 11 Wash. 550, 40 Pac. 225; *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *Rowland v. Carroll Loan & Inv. Co.*, 44 Wash. 413, 87 Pac. 482; *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495; *Russell v. Schade Brewing Co.*, 49 Wash. 362, 95

Pac. 327; *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125; *National Bank of Com. v. Puget Sound Biscuit Co.*, 61 Wash. 192, 112 Pac. 265; *Starwich v. Wash. Cut Glass Co.*, 64 Wash. 42, 116 Pac. 459; *Seanon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

[3] While these decisions, as pointed out by the appellant, rest largely upon the principle of estoppel, as between the immediate parties to the transaction, still, if the contract here in question was assignable at all, evidence of any assignment sufficient to pass the title as between the parties to the assignment is all that can be required. It is merely a matter of proving title. *Kull v. Thompson*, 38 Mich. 685.

[4] 2. But the appellant contends that the contract was not assignable without its consent. There can be no question as to the general rule that, in the absence of prohibition by statute or stipulation by contract, rights arising out of executory contracts are assignable whenever they would survive to the personal representative of the assignor. 2 Am. & Eng. Ency. Law (2d Ed.) 1017, 1035; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 81 Pac. 329, 31 Am. St. Rep. 948; *Onaway v. Co-Operative Home Builders*, 65 Wash. 39, 117 Pac. 716.

[5] The exceptions to this general rule are also well established. It is often broadly stated, in varying forms of expression, that if the rights are coupled with liabilities, or if they involve a relation of personal confidence or a personal service, they cannot be assigned. 4 Cyc. p. 22. The difficulty is not one of mere definition. It lies in the application of these general principles to the given case. Strictly speaking, almost every right arising under an executory contract has its corresponding liability. To give to the language of the first branch of the exception an absolute sense would be to declare every executory contract nonassignable.

[6] As applied to sales of personal property for future delivery, the liability, coupled with the right, must be dependent upon some future dealing with the property sold as between the parties, in order to render the contract of sale nonassignable. "When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract." *Devlin v. Mayor*, 63 N. Y. 8, 17; *In re Niagara Co.* (D. C.) 164 Fed. 102.

[7] The question in each case must turn upon the intention of the parties. In order to determine whether a given contract falls within either branch of the exception, it is necessary to consider the nature and purpose of the contract, and its terms and provisions. The contract here in question was as follows:

"Seattle, May 17, 1910.

"Sold to West Coast Grocery Company, Tacoma, Wash., for account and subject to

approval of Vashon Island Preserving Company: 350 Cases #3 Jelly, 4 doz. to case, per dozen, 90¢. 150 Cases #3 Jam, 4 doz. to case, per dozen, 90¢. Less 15% discount, pack of 1910, October delivery. Terms: F. o. b. Tacoma, less 2% cash discount 10 days from date of invoice. The sellers guarantee all goods sold under this contract to comply with the pure food law approved by Congress June 30th, 1906.

"Accepted. West Coast Grocery Co. Buyer, by S. A. Nourse, Treas. Bennington Burton, Broker. Vashon Island Preserving Co., Seller, by J. W. King."

This is simply a sale of personal property for future delivery. There is no undertaking that the goods shall be manufactured by any particular person or corporation. The contract involves nothing of a personal nature; nothing from which it can be implied that performance by the preserving company alone was the inducement or of the essence of the contract; nothing involving a personal confidence. No particular brand or label or trade-mark is specified; no particular process of manufacture imposed; no future dealings of any kind with the property sold, as between the parties contemplated. It is not a sale of fruits with an agreement to manufacture. It is a sale of a completed product for future delivery. The crucial point is that the appellant was required to pay no money until the goods were furnished of the kind and quality required by the contract. Such a contract, in the absence of stipulation to the contrary, is assignable by either party.

A contract in which one party agreed to sell, and the other to buy, all sound grapes containing a certain percentage of saccharine matter, to be grown from certain vines, for a period of 10 years, was held by the Supreme Court of California, after a careful analysis of the authorities, assignable by the seller, upon the same principles herein announced. *Larue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179.

A contract for the drilling of an oil well has also been held by the Supreme Court of Pennsylvania assignable by the contractor. The court said: "The personal performance of the work by the legal plaintiff could not have been contemplated by the parties at the time the contract was made. The work, of necessity, required the labor and attention of a number of men; and it does not appear that, because of his knowledge, experience, or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its personal performance by him was not the inducement nor of the essence of the contract. The contract was assigned to Smith Bros., the use plaintiffs, and the work under it was done by them, with the knowledge of the defendant, from the beginning." *Galey v. Mellon*, 172 Pa. 443, 33 Atl. 560. The same principles are exemplified in the



following decisions: *Janvey v. Loketz*, 122 App. Div. 411, 106 N. Y. Supp. 690; *Anse La Butte, etc., Co. v. Babb*, 122 La. 415, 47 South. 754; *Poling v. Condon Lane Boom & Lbr. Co.*, 55 W. Va. 529, 47 S. E. 279.

It is useless to review the vast number of authorities cited by the appellant in this connection, since the principles here involved are not questioned; and we conceive that a discriminating application of these principles to the contract before us demonstrates its assignability.

[8] Moreover, the goods were accepted by the appellant as meeting the contract. They were at least retained by it, with knowledge of the assignment. While the evidence was conflicting as to whether or not the respondent notified the appellant of the assignment shortly after it was made, it is not denied that the invoices gave such notice when the goods were delivered. The court would have been justified in finding that the appellant was estopped to question the assignment.

3. The third contention is that, even conceding that the contract was legally assignable and was validly assigned, still the appellant's claim against the preserving company was a valid set-off or counterclaim against the assignee King. The trial court held that the appellant could not set off its claim against the amount due respondent on the assigned contract, because that contract was, at the time of the assignment, an executory contract, upon which nothing was then due, and hence the appellant's claim was not such a demand as might have been set off against the respondent's assignor while the contract belonged to it. The appellant contends that this was error. It is urged that the case of *Boston Tow Boat Co. v. Seemon Co.*, 64 Wash. 375, 116 Pac. 1083, is decisive of this question. In that case the defendants, as ship lighters, had, prior to September, 1907, agreed with the charterers of a vessel to collect and turn over all freight charges, less compensation for lighterage. We held that the defendants might set off a prior indebtedness to them from the charterers for failure to deliver coal and grain shipped in their care, in an action for freights collected by the defendants, brought by the owners of the vessel upon abandonment of the vessel by the charterers in September, 1907; the charterers agreeing, as a part of the agreement of abandonment, to collect and hold in trust for the owners the proceeds of the voyage then about to begin. The lower court allowed the set-off on the express ground that the defendants had no notice of this agreement, and that, as between the defendants on the one hand and the plaintiff and the charterers on the other, the money collected by the defendants, and by them retained, was the interest of an undisclosed principal. Moreover, the actual assignment to the plaintiff of the claim for this freight was, as the lower court in effect found, made after the freight was collected.

This finding does not appear in the opinion; but that it was made is conceded in the briefs which we have examined, and our decision states that the facts found by the court were justified by the testimony. The actual question here involved, though raised in the briefs, was not discussed in the opinion.

[9] Whether a matured claim against the assignor of an immature claim may be set off in an action by the assignee, brought after the assigned claim has matured, has never been decided by this court. The question is one of statutory construction. Section 191, *Rem. & Bal. Code*, gives to the assignee of any judgment bond, specialty, book account, or other chose in action the right to sue thereon in his own name, with a proviso "that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner against the debt assigned," save as against negotiable paper assigned before due. This action does not attempt to define the time within which the right of set-off may be asserted, but was manifestly intended only to preserve the right of set-off. There is, however, force in the view that the words "against the debt assigned" mean against a claim matured at the time of the assignment. The time within which a set-off or counterclaim may be asserted is specifically defined by two subsequent sections. Section 265 defines a counterclaim generally, and does not specifically refer to assigned claims, and must be held to apply only to claims as between the original owners. This is shown by the next section (266), which expressly fixes the time when the set-off or demand may be allowed as against an assigned claim. It is as follows: "The defendant in a civil action upon a contract expressed or implied may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him." These sections are statutes in *pari materia*, and were all passed by the territorial Legislature of 1854, and were retained in the Code of 1881.

[10] They are not necessarily in conflict, and hence, under the rules of construction, they must be construed together so as to effectuate the purpose of all. Section 266 is

capable of no other construction than that a set-off can only be allowed as against an assigned demand, when it could have been asserted against such demand at the time of the assignment and as against the original owner. Obviously, there can be no set-off against an executory contract, while it remains in the executory stage. Performance only could ripen such a contract into a valid demand. There was, at the time of the assignment, no debt or demand against which the set-off could then be made. We are constrained to hold that the claim of the appellant was not a proper subject of set-off against the respondent's demand arising on the contract subsequent to the assignment, because it was not such as against the respondent's assignor, while it held the contract in the executory stage. There was never a time while the contract was held by the Vashon Island Preserving Company when the appellant's claim could have been set off against it. The assignment, therefore, defeated the right to set-off as against the assignee King. The construction which we place upon these three sections of the statute is the only one which harmonizes them, and yet gives a legitimate scope and accords a meaning and purpose to each.

[11] Any other construction would effect a repeal of section 266 by implication, when no such implication is necessary. This is never permissible. So construing the statute, the authorities are overwhelming to the effect that a claim against the assignor cannot be asserted against the assignee of an executory contract, who took it while in the executory stage, in the absence of some showing of insolvency of the assignor. In this case there was no such showing. "When two opposing debts exist in a perfect condition at the same time, either party may insist upon a set-off. If, therefore, the holder of such a claim, already due and payable, assign the same, and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect." Pomeroy, *Code Remedies* (3d Ed.) § 163; *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 57 N. W. 576, 23 L. R. A. 305, 39 Am. St. Rep. 565; *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74; *Henderson v. Michigan Trust Co.*, 123 Mich. 688, 82 N. W. 510; *Kull v. Thompson*, 38 Mich. 685; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Richards v. La Tourette*, 53 Hun. 623, 6 N. Y. Supp. 987. See, also, *Beckwith v. Union*

*Bank*, 9 N. Y. 211; *Patterson, Ex'r*, v. *Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Jordan, Adm'r*, v. *Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Greene v. Darling*, 10 Fed. Cas. No. 5,765; *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241; *Campbell v. Equitable Life Ass. Soc. (C. C.)* 130 Fed. 786. No fraud in the assignment was established. The respondent took an executory contract, performed it at his own expense, and is entitled to his pay from the appellant, who accepted the goods as meeting the contract.

The judgment is affirmed.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

# CITIZENS' NAT. BANK OF SEATTLE v. ABBOTT.

(Supreme Court of Washington. Feb. 8, 1913.)

## 1. MORTGAGES (§ 422\*)—FORECLOSURE—VENUE—SEPARATE MORTGAGES.

Where separate mortgages are given upon land in separate counties, each securing a part of the mortgagor's debt, the debt is separate for the purpose of security, so that each mortgage must be foreclosed in the county in which the land securing that part of the debt is situated.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1254-1261; Dec. Dig. § 422.\*]

## 2. MORTGAGES (§ 497\*)—FORECLOSURE—CONSTRUCTION OF DECREE—LAND FORECLOSED.

In an action to foreclose a mortgage upon land in K. county, which was executed with another mortgage upon land in A. county to secure a total indebtedness of \$10,800, the decree recited that the mortgage foreclosed was intended to, and did, secure \$5,400 of the principal indebtedness, and that the court found that there was now due \$10,846, and that the sum of \$5,248 was secured by the mortgage sought to be foreclosed on the property in K. county, and that the balance was secured by another mortgage on land in A. county, wherefore it was decreed that the mortgagee recover the sum of \$5,243, and that the property in K. county be sold to satisfy such indebtedness. Held, that the decree did not affect the part of the land in A. county secured by a mortgage, but left the mortgagee to look to the A. county mortgage for the remaining half of the debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. § 497.\*]

## 3. MORTGAGES (§ 411\*)—RES JUDICATA.

A personal judgment on mortgage notes is not res judicata precluding a subsequent action to foreclose the mortgage lien to recover that part of the debt not paid by the personal judgment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1181-1184; Dec. Dig. § 411.\*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Citizens' National Bank of Seattle against E. A. Abbott, trustee in bankruptcy. From a judgment for defendant, plaintiff appeals. Reversed and remanded for further proceedings.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

S. A. Keenan, of Seattle, and John Truax, of Ritzville, for appellant. Leopold M. Stern and Edgar C. Snyder, both of Seattle, and Adams & Naef, of Ritzville (J. W. Russell, of Seattle, of counsel), for respondent.

**PARKER, J.** This is an action to foreclose a mortgage upon land in Adams county, which, with another mortgage upon land in King county, was executed by Wigmore & Cummings, a corporation, to secure an indebtedness of \$10,800 evidenced by one promissory note given by it to the Citizens' National Bank of Seattle. Wigmore & Cummings having been adjudged bankrupt, the controversy here is between the bank and E. A. Abbott, the trustee in bankruptcy. Judgment was rendered in favor of the trustee denying the foreclosure prayed for, upon his motion therefor rested upon the facts disclosed by the pleadings alone. From this disposition of the cause the bank has appealed.

The facts appearing in the pleadings necessary for us to notice here, consisting of the complaint, answer, and reply, may be summarized as follows: The complaint alleges the indebtedness, the execution of the note as evidence thereof, and also "that at the same time and place and for the purpose of further securing said indebtedness said defendant Wigmore & Cummings duly executed to said H. O. Shuey & Co., in trust for plaintiff, a mortgage upon the following described real estate situate and being in the county of Adams and state of Washington, to wit: \* \* \* Among other things in said mortgage it was provided that, if the first party should pay or cause to be paid the sum of fifty-four hundred dollars (\$5,400) on said promissory note at the maturity thereof, then and in that event said mortgage or conveyance should be void, otherwise to remain in full force and effect; and also provided that in case of failure to keep any of the covenants in said mortgage or to pay the interest on said note or to pay the said amount of fifty-four hundred dollars (\$5,400) on or before April 23rd, 1911, then the whole debt, at the election of said mortgagee, might declare the whole debt due and payable, and proceed with the foreclosure of said mortgage as provided by statute. \* \* \* That there is now due and payable on said indebtedness the sum of ten thousand eight hundred (\$10,800) dollars, together with interest thereon from January 23rd, 1911, at the rate of eight (8%) per cent. per annum, and there is now due and payable of said debt and which is secured by said mortgage the sum of five thousand four hundred (\$5,400) dollars and interest at eight per cent. (8%) per annum payable annually since January 23rd, 1911." The prayer is for foreclosure only; there being no personal judgment asked for. The answer of the trustee, after denial of his knowledge or information as to

the principal allegations of the complaint, alleges as an affirmative defense facts showing a prior foreclosure by the bank of the mortgage upon land in King county, and the failure on the part of the bank to seek foreclosure of the mortgage upon the land in Adams county, in that action, alleging briefly the substance of the complaint and decree in that foreclosure without setting out any copy of either. Replying to this affirmative defense, the bank admits foreclosure by it of the mortgage upon the King county land, setting out in full a copy of both the complaint and decree in that foreclosure. The portions of that complaint with which we are here concerned are, in substance, the same as the complaint in this action, and the provisions of that mortgage are in substance the same as the one here sought to be foreclosed, except as to the property covered thereby. There was, however, in that complaint a prayer for personal judgment against Wigmore & Cummings for the whole indebtedness evidenced by the note, in addition to the prayer for foreclosure. The decree in that foreclosure contained, among other things, the following: " \* \* \* By the terms of which mortgage it was intended to and did secure five thousand four hundred dollars (\$5,400) of said principal indebtedness hereinbefore specified. \* \* \* The court finds from said instrument, from the testimony of A. J. C. Wigmore, president of said defendant corporation, and from other evidence that there is now due and payable on said principal indebtedness the sum of ten thousand four hundred eighty-six dollars (\$10,486); that the sum of five thousand two hundred forty-three dollars (\$5,243) thereof is secured by said mortgage on the property hereinbefore described. And the court further finds that the balance thereof or five thousand two hundred forty-three dollars (\$5,243) is secured by another mortgage executed by said defendant corporation at the same time to said H. O. Shuey & Co., as trustee for said bank on 480 acres of land in Adams county in said state. \* \* \* Wherefore, by virtue of the laws and the premises aforesaid, it is ordered, adjudged, and decreed that plaintiff bank have and recover of said defendant corporation by reason of the said indebtedness secured by said mortgage the sum of five thousand two hundred forty-three dollars (\$5,243). \* \* \* It is hereby adjudged and decreed that all and singular the mortgaged premises first above described and situate in the city of Seattle, together with the factory and other improvements thereon, or so much thereof as may be necessary to satisfy the said indebtedness of five thousand two hundred forty-three dollars (\$5,243); \* \* \* that out of the proceeds of said sale the sheriff satisfy the costs and expenses of this suit and apply the balance in payment of said indebtedness to this plaintiff, and the remainder, if

any, to be paid to the receiver [trustee] of said defendant heretofore duly appointed." There does not appear in this record any copy of either of the mortgages; so the question of their relation to each other and of the separateness of the debt or portions of debt they were given to secure must here be determined from the pleaded facts we have briefly narrated.

Counsel for respondent rest their contentions upon the theory that the mortgages were given to secure the same debt, and therefore constitute in law but one mortgage although covering land in different counties, and plaintiff, having the right to foreclose as to both pieces of property in the King county action, waived its lien upon the Adams county property by its failure to include it in the King county foreclosure. This apparently was also the theory upon which the trial court rested its disposition of the cause. Our attention is called to *Commercial National Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267, where it was held that two mortgages, one upon land in King county and the other upon land in Kittitas county, given to secure the same debt, should be regarded as one instrument, and that the superior court of either county had jurisdiction to foreclose both of them; and also to *Dooly v. Eastman*, 28 Wash. 564, 68 Pac. 1039, where it was held that the owner of a mortgage upon two distinct tracts of land, foreclosing against one of them only, waived his right to enforce the mortgage lien against the other tract. In both of those cases each tract of land involved was pledged as security for the whole of the same debt. This, it may be insisted, is not wholly true in the *Commercial National Bank Case*, but it is apparently true in so far as the debt involved in that case is concerned. The other debt which one of the mortgages was given to secure in addition to the debt involved seems not to have been involved in that case.

While it is conceded by counsel for respondent that under our law a suit to foreclose a mortgage upon land is local to the county wherein the land lies, they contend that the foreclosure of the mortgages here involved, by reason of their relation to each other, constitute an exception to this rule under the decisions above noticed. The solution of this problem will be found in the correct answer to the question, Were these mortgages given to secure the same debt? since it is manifest that they have no relation to each other except such as may be found in the debt or portions of debt each was given to secure. Looking only to the first part of the allegation of the complaint above quoted, which we have noticed was the same in the King county foreclosure, there appears to be ground for the contention that the mortgages were both given to secure all of the indebtedness evidenced by the one note. But, when we look to the

special conditions in the mortgages as stated in the complaints, we find that they were each given to secure separately the sum of \$5,400, or one-half of the whole debt evidenced by the one note. That the trial court upon the foreclosure of the mortgage on the King county land entertained this view, and in effect so adjudicated, is plainly evidenced by the recitals and adjudications in its decree rendered in that foreclosure.

[1] While it is true that, for the purpose of an action to recover a personal judgment only, the debt must be regarded as a whole and can be the subject of one action only, we do not think it follows that separate mortgages given upon land in separate counties, each securing a specific separate portion of a debt, can be said to be mortgages securing the same debt for the purpose of foreclosure. The separation of the debt for the purpose of security in this manner we think renders each portion thereof, so far as the security alone is concerned, a separate debt, and, the mortgages having no other relation to each other, their foreclosure would be local to the county wherein the land lies; hence the bank did not by foreclosing the King county mortgage waive its right to foreclose the Adams county mortgage.

[2] Some contention is made, rested upon the fact that in the foreclosure of the mortgage upon the King county land the bank prayed for a personal deficiency judgment. It is manifest, however, from the recitals and adjudications in that decree, that the personal character of the action and the relief there sought was abandoned by the bank with a view to looking to the security furnished by the Adams county mortgage for the other half of the debt. In that case the court did not adjudicate that there was then only \$5,243 of the debt owing by *Wigmore & Cummings*, but expressly found that the whole debt was due and unpaid. No judgment was there rendered upon the whole debt, but only a decree of foreclosure to the extent of the half thereof secured by the King county mortgage. It seems plain to us that that decree was not an adjudication against the bank as to the portion of the debt secured by the Adams county mortgage.

[3] But suppose there had been rendered in that case a personal judgment for the half of the debt not secured by the King county mortgage. We would then have a situation not unlike that occurring in *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271, where it was held that the fact that a personal judgment on notes secured by a mortgage had been rendered would not constitute such judgment *requi judicata* in a subsequent action for the foreclosure of the mortgage lien, for the purpose of recovering that portion of the debt which remained unpaid under such a personal judgment.

We are constrained to hold that the judgment of the trial court must be reversed,

and the cause remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

CROW, C. J., and GOSE, CHADWICK, and MOUNT, J.J., concur.

#### STATE v. COOLIDGE.

(Supreme Court of Washington. Feb. 8, 1913.)

##### 1. CRIMINAL LAW (§ 1026\*)—RIGHT OF APPEAL—WAIVER.

The giving of a bond conditioned for the performance of an order requiring accused to pay a certain amount for his child's support was not a waiver of his right to appeal from such order.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2615-2618; Dec. Dig. § 1026.\*]

##### 2. CRIMINAL LAW (§ 1097\*)—BILL OF EXCEPTIONS—STATEMENT OF FACTS—QUESTIONS PRESENTED.

A proper bill of exceptions, without a statement of facts, is sufficient to authorize a review of whether accused, a divorced husband, could be convicted for nonsupport of his minor child awarded to the mother, with directions in the decree to compel the husband to contribute to its support.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.\*]

##### 3. PARENT AND CHILD (§ 17\*)—NONSUPPORT OF CHILDREN—CRIMINAL LIABILITY—DIVORCE.

Where, though the custody of a minor child was awarded to the mother upon granting a divorce, no order for its support was made, it would be unjust to charge the father criminally under Rem. & Bal. Code, § 2444, for his failure to support the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.\*]

##### 4. DIVORCE (§ 311\*)—ENFORCEMENT OF ORDERS—JURISDICTION.

It is the policy of the law to intrust the enforcement of orders requiring support of minor children after divorce to the courts granting the divorce, so that, as a rule, such orders should not be enforced in criminal proceedings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 799, 805; Dec. Dig. § 311.\*]

##### 5. PARENT AND CHILD (§ 17\*)—SUPPORT OF CHILDREN—CRIMINAL PROCEEDINGS—DIVORCE.

Where a divorced husband was ordered by the court, granting the divorce, to pay a certain sum for the support of his minor child awarded to the wife, he could not be prosecuted for the child's nonsupport under Rem. & Bal. Code, § 2444, punishing every person who willfully neglects to provide for the support of his children under 16 years of age.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.\*]

##### 6. STATUTES (§ 241\*)—CONSTRUCTION—PENAL STATUTES.

Penal statutes should be strictly construed, so that no citizen shall be deprived of his liberty under statutes which are *malum prohibitum*.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Loren Z. Coolidge was convicted of willfully neglecting to support his minor child, and appeals. Reversed and remanded, with directions to enter judgment for accused.

O. M. Nelson, of Montesano, for appellant. W. E. Campbell, of Hoquiam, and A. Emerson Cross, of Aberdeen, for respondent.

PER CURIAM. Defendant was charged in the court below with willfully neglecting and refusing to provide for the support and maintenance of his minor child, Ione Coolidge; she being in necessitous circumstances. The charge was under section 2444, Rem. & Bal. Code. Defendant was tried by a jury and convicted. No judgment seems to have been entered; but the court made an order, fixing an amount to be paid each week, and staying proceedings pending the performance of a bond conditioned as follows: "Now, therefore, it is hereby ordered and adjudged that said defendant, Loren Z. Coolidge, do forthwith enter into a recognizance in the sum of \$500, without surety, conditioned that the said defendant, Loren Coolidge, will faithfully pay weekly the sum of \$2.50, commencing with the coming week, payable not later than Saturday of each week to Blanche Coolidge for the benefit of said child, said payments to be made in said sum for the benefit of said child, until the further order of the court; and it is further ordered by the court that so long as the said defendant, Loren Coolidge, shall faithfully comply with the conditions of such recognizance, conditioned as herein provided, all proceedings herein shall be stayed until the further order of this court; but if said defendant, Loren Z. Coolidge, shall fail to comply with the conditions of such recognizance, or shall fail to comply with any order for his appearance in said court, such recognizance shall be forfeited, and said proceedings in said cause shall be revived and continued, as if no stay had been had in said cause." A motion for new trial and a motion for judgment notwithstanding the verdict were overruled and severally excepted to.

[1] The bond was given, and the state has interposed a motion to dismiss, upon the ground that the judgment has been performed, and that the giving of the bond operates as a cessation of the controversy, and as a waiver of defendant's right to appeal. The motion will be overruled. It may be that a case might arise where the giving of a bond, conditioned for the performance of a judgment, would operate as a waiver of the right to appeal; but it cannot be so held in this case. The verdict still stands, and defendant is entitled to urge such legal defense as he may have thereto.

[2] It is also insisted that the court cannot consider the errors assigned, as there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is no statement of fact, "only a bill of exceptions." The bill is sufficient to raise the question presented.

On November 20, 1911, a decree of divorce was entered in the superior court for Chehalis county, dissolving the bonds of matrimony theretofore existing between defendant and Blanche Coolidge. The custody of their minor child was awarded to the mother, and defendant was directed and required to pay to his former spouse the sum of \$20 per month for the support and maintenance of the child. That he did not perform the obligation put upon him is evidenced by this proceeding and the verdict of the jury.

[3] It is the contention of the defendant that, the child being awarded to the mother, and he being subject to the further orders of the court in the divorce proceeding, no criminal charge will lie against him; that the statute (section 2444, Rem. & Bal. Code) was enacted to enforce the performance of a common-law duty, and that, where the civil side of the court had assumed jurisdiction and fixed the duty of a delinquent parent by a charge in money, no common-law duty remains; that his whole duty is merged in the decree of the court, with such modifications as may thereafter be made to meet new conditions. It is not denied that the court has ample power to enforce its decrees; but it is as earnestly urged that, notwithstanding the decree, an independent criminal proceeding can be maintained. An argument specious but not sound is made to sustain these contentions. It is unnecessary to follow it. It is met by the fact that the state introduced the divorce decree as the basis of its charge. Assuming that the custody of the child is given to a mother, but no order for support is made (and we may so assume, for the rule must be general), it would be manifestly unjust to charge a father under the criminal statute, when he might have no means of knowing of the necessities of his children, or be unable to provide for them. The fallacy of the state's argument is further shown by the order made by the court. The trial judge evidently treated this case as a proceeding in aid of the divorce decree, for he has made an order which, in effect, modifies that decree, but without reference thereto. This, it would seem, he should not do, for defendant is now subject to two orders of the same court; one calling for the payment of a certain sum, and the other calling for a different sum. He is subject to a citation for contempt on the civil side, and to a judgment on the verdict and sentence on the criminal side.

[4] Surely it was never intended that the criminal statute should be put to such unfair uses, for the court, rendering the divorce decree, has ample power, under the statute, to enforce its orders; and, if not directly declared, the policy of the law to keep the solution of such matters in the

court having jurisdiction of all parties to the divorce proceeding is recognized, if not directly declared, in many decisions of this court. In *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13, we said: "The practice of litigating questions of this kind by piecemeal cannot be too strongly condemned. Here the parties settled their property rights and, in all probability, the issues in the divorce action, and a decree was entered making no provision whatever for the support or maintenance of the minor child. Almost immediately the wife begins to assert claims against the husband, which should have been determined and adjusted in the divorce action. Such a practice is neither in the interest of the parties nor in the interest of society at large." Finally, counsel insist that the duty of the husband is not changed by the divorce, but that his obligation remains the same as before, citing *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 537; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817.

[5] These authorities hold that, after separation or divorce, the common-law obligation of the husband is not absolved, and the divorced wife can sue for contribution. But they do not hold, and we find no cases that do hold that, when the duty of the father has been measured in money by a court of competent jurisdiction, with power to enforce its decrees, an independent action can be maintained against him, or that appellant may be coerced by a criminal proceeding. The remedy lies in the court of first jurisdiction, to which defendant is answerable, for by its order he has become primarily liable to the court rather than to his former spouse.

[6] Penal statutes are to be strictly construed, to the end that no citizen shall be deprived of his liberty under statutes that are *malum prohibitum* only. The act declares that "every person who shall willfully and without lawful excuse desert, or willfully neglect or refuse to provide for the support and maintenance of his wife or child under the age of sixteen years," etc., shall be punished. It then provides a procedure and punishment, indicating that the Legislature had in mind only those cases where a husband deserts or refuses to provide for his wife or a child then in his custody and under his control; that it was not the intention of the Legislature to cover, by this law, any case where the custody and control of the child had been taken away from the parent by the due processes of the law, or where the obligation of the husband to the wife or child had been defined and fixed with penalty by a court of competent jurisdiction.

The judgment is reversed, and the case remanded, with instructions to enter a judgment in favor of the defendant notwithstanding the verdict.

**ZOLAWENSKI et ux. v. CITY OF ABERDEEN.**

(Supreme Court of Washington. Feb. 10, 1913.)

**1. BRIDGES (§ 37\*)—INJURIES FROM DEFECTS—DUTY TO REPAIR.**

It is the duty of a city to keep a bridge therein in a reasonably safe condition for public use; and it is liable for injuries resulting from it being permitted to become dangerous, when, in the exercise of reasonable care, it ought to have known of its defective condition.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-106, 109; Dec. Dig. § 37.\*]

**2. HUSBAND AND WIFE (§ 209\*)—INJURIES TO WIFE—ACTION BY HUSBAND—LOSS OF SERVICES.**

The loss of the wife's services is a proper element of damages in an action by a husband for personal injuries to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-772; Dec. Dig. § 209.\*]

**3. TRIAL (§ 256\*)—INSTRUCTIONS—REQUEST FOR MORE SPECIFIC CHARGE.**

In an action by a husband and wife for personal injuries to the wife from a defective bridge, the court instructed that in estimating plaintiff's damages the jury should, so far as shown by the evidence, consider the physical pain and mental suffering of plaintiff's wife and any temporary and permanent injury suffered, and should also consider what loss the husband sustained by reason of his wife's inability to perform her duties as a wife, so far as the evidence showed such loss. *Held*, that the instruction was correct, so far as it went, and defendant could not object thereto, in absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**4. DAMAGES (§ 33\*)—AGGRAVATION OF INJURY.**

If the jury was of the opinion that the person injured was, at the time of the injury, infirm, and such infirmity was aggravated by such injury, they should estimate from the evidence the amount to be allowed for such aggravation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 42; Dec. Dig. § 33.\*]

**5. TRIAL (§ 203\*)—INSTRUCTIONS.**

The court may frame its instructions, upon its own motion or at counsel's suggestion, to cover the issues as actually made at trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

**6. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS.**

Requested instructions were properly refused, where, so far as correct, they were embodied in the instructions given by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**7. TRIAL (§ 255\*)—REQUEST FOR INSTRUCTIONS—NECESSITY.**

Appellant should request instructions adapted to his view of the case, if he conceives a question to be raised by the evidence, and, not doing so, cannot complain of error because that phase of the case is not adequately presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

Department 1. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge.

Action by Thomas Zolawenski and wife against the City of Aberdeen. From a judg-

ment for plaintiffs, defendant appeals. Affirmed.

A. E. Graham, of Aberdeen, for appellant. Frank Beam, of Aberdeen, for respondents.

GOSE, J. This is an action to recover for personal injuries sustained by the plaintiff wife. The gravamen of the charge is, that a certain bridge in the defendant city formed a part of a public street; that it was used by pedestrians; that there was a hole in the bridge, which had existed for a period of five or six months before the date of the alleged injury; that the plaintiff wife stepped into the hole, fell, and "that she was thereby bruised about the legs and body, and that the skin was peeled and scraped from her leg; and that by being thrown to the floor of said bridge prolapsus uteri was caused and brought about—that is, her genital and urinary organs were displaced and dislodged." The answer joined issue upon the alleged defect in the bridge and the injury, and alleged affirmatively that, if the plaintiff wife received the injury, it was caused by her own negligence; and that if the defect in the bridge existed, "which defendant denies," she knew of its existence and assumed the risk. There was a verdict and judgment for the plaintiffs for \$500. The city prosecutes the appeal.

[1] The court instructed that it was the duty of the city to keep the bridge in a reasonably safe condition for the traveling public; that if it permitted it to become unsafe or dangerous, with knowledge of its condition, or when, in the exercise of reasonable care and diligence, it ought to have known its condition, and that by reason of its unsafe condition the respondent wife, without neglect on her part, was injured as alleged in the complaint, the respondents were entitled to recover reasonable compensation for the injury. Error is assigned to this instruction. The instruction correctly states the law. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Lorence v. Ellensburg*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42; *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183.

[2, 3] The court instructed: "In estimating the damage to plaintiffs, if you find for them, you should, in so far as is shown by the evidence, take into consideration the physical pain and mental suffering of the plaintiff Magdalena Zolawenski, the temporary and permanent injuries, if any, suffered by her; [and if you find plaintiffs are husband and wife you will also take into consideration what loss the husband has or will sustain by reason of the inability of the wife to perform the duties of a wife, in so far as the evidence shows such loss]." Error is assigned to that portion of the instruction in brackets. The loss of the wife's services is a proper element of damages. *Hawkins v. Front Street Cable*

Ry. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72. If the appellant desired a more specific instruction on the question of the loss of the wife's services, it should have requested it; and, having failed to do so, it is not in a position to assign error. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355.

[4, 5] The court instructed that, if the jury should find that the respondents were entitled to recover by reason of the negligence of the appellant, and should be of the "opinion" that the wife "was, at the time of the injury, infirm in body, and that such infirmity was aggravated by the injury," they should "estimate" from the evidence the amount that should be allowed "for such aggravation." The instruction is a correct statement of the law. *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743; *Short v. Spokane*, supra. The criticism is that the respondents contended that the wife was sound in body prior to the injury, and that they were not entitled to an instruction based upon the theory that an infirmity may have antedated the injury. The rule, however, is that the court may frame its instructions, upon its own motion or at the suggestion of counsel, to cover the issues as they are actually made upon the trial of the case.

[6] There was no error in denying the appellant's requested instructions. In so far as they correctly stated the law, they were, in substance, embodied in the instructions given by the court.

[7] Error is assigned in the failure of the court, of its own motion, to instruct on contributory negligence and assumed risk. This was not error for two reasons: (1) Although pleaded, there was no evidence to support either affirmative defense. The appellant's contention was that there was no hole in the bridge into which the respondent could have stepped. (2) If the appellant conceived that there was such evidence, it should have requested instructions adapted to its view of the case. Failing to do so, it cannot make a claim of error. *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

The last point pressed is that the evidence is insufficient to support the verdict. It suffices to say that the evidence tends to show that the respondent wife was apparently in sound health before she met the injury; that she was doing the ordinary work of a housewife and, in addition, milking two cows and caring for some swine; and that after the injury she was completely incapacitated for doing her ordinary household work. The physicians testified that at the time of the trial she had a "complete prolapsus of the uterus." It is true that they said that they found an ulcerated condition "at the neck of the cervix" that antedated the injury, but some of

them said that the prolapsus may have been produced or aggravated by a fall.

It is insisted that the case is a counter-part of *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367. In that case the late Chief Justice Dunbar pointed out that the family physician testified that the condition which was the subject of inquiry "could not have been caused" by the fall. The jury resolved the controverted facts against the appellant upon substantial evidence, and its conclusion is controlling.

The judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

#### ELANIUS v. ROTHSCHILD et al.

(Supreme Court of Washington. Feb. 18, 1913.)

#### MASTER AND SERVANT (§ 288\*)—INJURIES—JURY QUESTION—ASSUMED RISK.

Evidence in a longshoreman's action for injuries by a conveyor chute upsetting and striking him in the face because the particular chute had narrow ends, contrary to that usually used, held to make it a jury question whether the danger from such cause was so obvious as to make plaintiff assume the risk therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

Department 2. Appeal from Superior Court, Pierce County; Miles L. Clifford, Judge.

Action by Paul Elanius against Henry Rothschild and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Trumbull & Trumbull, of Seattle, for appellants. Johnston & McMenamin, of Tacoma, for respondent.

MORRIS, J. Respondent was injured while acting as one of a gang of longshoremen engaged in loading a steamship with flour. He recovered judgment, and upon this appeal we are asked to hold that the judgment should be reversed because respondent should be held in law to have assumed the risk of his injury.

The material facts are these: Upon the deck of the steamer, and opposite the hatchway through which the flour passed to the lower decks, was a consignment of lumber so placed that it prevented the use of the conveyor chute ordinarily used on account of the distance between the end of the conveyor and the lumber pile being too short. These conveyor chutes are provided with wide ends, extending beyond the framework of the conveyor, and gradually narrowing to the width of the chute, the purpose of these wide ends being to avoid the danger of contact with the endless belt and cleats running on the conveyor. Finding that, because of the situation of the lumber, the ordinary conveyor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



chute could not be used, respondent was directed by the foreman to substitute a conveyor chute not provided with widened ends, and to saw off one end of it so as to fit the required distance between the conveyor and the hatchway. One end of this substituted chute was then lashed to the conveyor with ropes so that it hung a few inches below the conveyor, and the other end brought to the chute leading to the lower deck, without fastening the two chutes together or connecting them in any way so as to prevent the substituted chute from moving when in use. Respondent stationed himself on one side of this substituted chute to assist the flour sacks in passing through it to the hatchway. It was quite dark, so that respondent could not observe any gradual movement of the substituted chute in slowing, working back until in about 45 minutes after its use the end lashed to the conveyor came in contact with the cleats on the conveyor belt, which would have been impossible had it been provided with the wide ends of the regular chute ordinarily used. When the chute came in contact with the cleats, it upset, striking respondent in the face, and causing the injury complained of. It is contended that the danger was an obvious one, that respondent was sufficiently experienced to understand it, and that, because he assisted in preparing the substituted chute for use, he cannot recover.

We cannot comprehend how we can say that under all these circumstances the questions here submitted were not of fact for the jury rather than of law for the court. The danger was not so open and apparent that respondent must be said in law to have assumed it. There was nothing to indicate the faulty construction of this substituted chute, or to apprise respondent that, because of the failure to fasten it at the lower end, it would gradually work back towards the conveyor and eventually come in contact therewith. It may be that this movement was due to the operation of a natural law, as contended by appellants, but it does not appear to us, if this be accepted as true, that it was so plain and obvious as to be within the knowledge of the ordinary longshoreman. If it was, then, why was it not within the knowledge of the foreman, and means taken to overcome it? The foreman did not appreciate any such danger, for he says he did not "think it was possible to push the chute the other way because the sacks go this way [indicating]. The elevation was enough to shove the chute down." Upon the whole case we can find nothing indicating to us that it is our duty to overturn the verdict by holding the danger was so open and apparent that the rule of assumption of risk must apply. There is no necessity of entering upon any discussion of this rule or the circumstances under which the application is made

by the courts. The facts in the case do not require it.

The judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and FULLERTON, JJ., concur.

#### D'AMBROSIO v. NARDONE et al.

(Supreme Court of Washington. Feb. 19, 1913.)

#### LANDLORD AND TENANT (§ 76\*)—SUBLETTING—RIGHTS AND LIABILITIES OF SUBLESSEE.

Where, in an action by a lessee on a note given by a sublessee in payment for the lease which contained a covenant against subletting, the lessor when on the stand did not repudiate the act of his agent in accepting rent from the sublessee, and stated that he was willing for the court to decide whether the lessee or sublessee was his tenant, he was estopped to deny the sublessee's right to attorn under the lease, and hence the sublease was not void for want of consideration.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Ciriaco D'Ambrosio against Francesco Nardone and another. Judgment for plaintiff, and defendants appeal. Affirmed.

H. M. Dalton, Jas. B. Metcalfe, and J. Vernon Metcalfe, all of Seattle, for appellants. Oscar G. Heaton and Douglas, Lane & Douglas, all of Seattle, for respondent.

CHADWICK, J. Plaintiff was the lessee of a certain five-acre tract which was devoted to truck farming. He had a lease for a term of four years. He sold his "business and lease" to defendants, who went into possession and have paid four half yearly rent payments, three to plaintiff and one to the original lessor. One of the covenants of the lease is that the lessee will not assign or sublet the property without the written consent of the lessor. Default being made in the payment of the note given in payment for the business and lease, this action was begun, and defendants have answered, pleading a failure of consideration, in that plaintiff has never procured an assignment of the lease. The court found that the original lessor, who was a witness at the trial, had ratified the assignment by accepting an attornment from the defendants. The testimony is ample to justify this conclusion. There is some suggestion that the rent paid the original lessor was paid to his son who acted as his agent, and that his act has not been ratified. The lessor did not repudiate the conduct of his son when he was upon the stand in this case as a witness. He said that he was willing that the court should decide as to whether the lessee or these defendants were his tenants. This would estop him to deny the

right of the defendants to attorn under the lease.

The judgment of the lower court is affirmed.

CROW, C. J., and PARKER, GOSE, and MOUNT, JJ., concur.

# McILWAINE et ux. v. TACOMA RY. & POWER CO.

(Supreme Court of Washington. Feb. 19, 1913.)

## 1. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

An instruction that if plaintiff, injured while alighting from a street car, was led to believe that she would not be carried on the car, as it was on its way to the barn, it was her duty to alight therefrom, and it was the duty of the defendant to keep the car standing still until plaintiff could alight, is not erroneous as assuming that the car was standing still when plaintiff attempted to alight, in view of other instructions as to contributory negligence of plaintiff in getting off a moving car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

## 2. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION.

Instructions must be read as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

## 3. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—MISLEADING INSTRUCTIONS.

An instruction that if plaintiff, injured while alighting from a street car, was led to believe that she would not be carried on the car, because it was going to the barn, it was her duty to immediately alight therefrom, is not erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1345; Dec. Dig. § 321.\*]

## 4. TRIAL (§ 296\*)—INSTRUCTIONS—PERSONAL INJURIES.

Where the court instructed the jury so as to limit them in their award to results reasonably probable, and to those established by a fair preponderance of the evidence, another instruction that the jury might include every expense which may happen in the future by reason of the injuries received is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

## 5. TRIAL (§ 260\*)—INSTRUCTIONS ALREADY GIVEN.

Requested instructions covered by those given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 6. CARRIERS (§ 238\*)—RELATION OF PASSENGER AND CARRIER.

Where plaintiff boarded a car, believing it to be one on which her husband was a conductor, at a regular stopping place, with the intention to pay her fare, she was a passenger entitled to the highest degree of care, though the car was in fact going to the barn, and made only a safety stop.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 973; Dec. Dig. § 238.\*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge. Action by Leslie McIlwaine and wife

against the Tacoma Railway & Power Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. A. Shackelford and F. D. Oakley, both of Tacoma, for appellant. Governor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, all of Tacoma, for respondents.

MORRIS, J. [1, 2] The errors here assigned are to instructions given the jury in a case where the issue was whether Mrs. McIlwaine boarded one of appellant's cars as it made a safety stop, and, when informed by the conductor that the car was going to the barn, started to get off, and while attempting to do so the car was suddenly started forward, throwing her to the ground, and inflicting the injuries complained of; or, as claimed by appellant, that she recklessly attempted to alight from the car in an improper manner while it was in motion.

The first instruction complained of is this: "The court instructs you that if you find from the testimony that the plaintiff was notified that the car in question was bound for the barns, and if the plaintiff was led to believe that passengers would not be carried upon the car at that particular time, then it was her duty to alight therefrom; and it was the duty of the defendant company, through its motorman and conductor, to keep the car standing still until the plaintiff would have a reasonable time to alight therefrom." It is contended that this instruction is erroneous for two reasons: (1) It assumes the only material fact in the case, and is therefore a comment with respect to a matter of fact; and (2) it is an erroneous statement of the law as applied to the facts.

It is undoubtedly error for a trial court, in its instructions to the jury, to infringe upon the constitutional mandate that "Judges shall not charge juries with respect to matters of fact, nor comment thereon." It is said this instruction comments upon the only issuable fact in the case, in that it assumes, in saying it was the duty of the defendant "to keep the car standing still," that the car was standing still when Mrs. McIlwaine attempted to get off. We hardly think the jury, in hearing this instruction, would take this view of it, or accept the court's meaning in any other sense than that it was the duty of the defendant to keep the car motionless while plaintiff was in the act of alighting. We have often said, in determining the meaning and effect of instructions, they must be read as a whole. Turning to another instruction, we find the court saying to the jury: "If you find from the evidence in this case that the plaintiff undertook to alight or jump from said car while the same was in motion, and before it had come to its regular stop," she would be guilty of contributory negligence and could not recover. It is, we think, plain that, in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hearing this instruction, the jury would understand that they might determine from the evidence that plaintiff did attempt to alight from the car while it was in motion, and that the questioned instruction was nothing more than an indication to them of the duty imposed on defendant not to move cars while passengers are in the act of alighting. The second complaint of this instruction is that it is erroneous in telling the jury that, if the plaintiff was notified that the car was bound for the barn, it was her duty to immediately alight therefrom. Counsel says "it was plaintiff's duty to remain on the car until it was stopped for the purpose of permitting her to alight," and it was not her duty to immediately alight therefrom, when notified it was going to the barn. We do not think the ordinary juror would follow this critical analysis of the language used, or take it to mean other than that, when Mrs. McIlwaine learned the car was going to the barn, she could not remain thereon as a passenger, but should get off, and while she was getting off defendant should keep the car standing still.

[3, 4] The second instruction complained of is one in which the court, in giving the jury the measure of damages, said to them they might include "further expenses which may happen in the future by reason of the injuries received." Standing alone, this would be error; but the court gave the jury three instructions embodying the rule to guide them in arriving at the amount in case of verdict for plaintiff, in which they are plainly told they are not to consider results which may or may not happen, nor allow anything for future pain or suffering, unless satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result. Again, they are told that, in assessing damages, they must confine themselves to such pain and suffering already endured, and such as "will in reasonable probability" be endured as a result of the injuries received, as well as for any liabilities incurred by reason of doctor, hospital, and medicine bills; all as shown by the evidence in the case, and not otherwise. We think the jury, from these instructions, would get the right idea that in making their award they were limited to results reasonably probable and to those established by a fair preponderance of the evidence.

[5] Complaint is next made of the court's refusal to give an instruction requested by appellant. The instruction offered, we think, is a correct statement of the law; but it seems to us the court covered the point in language differing somewhat from that chosen by counsel for appellant, but conveying the same meaning to the jury; and hence we cannot say the refusal was error.

[6] Finally, it is contended Mrs. McIlwaine was not a passenger, and therefore it was error to hold the appellant to the high-

est degree of care. Mrs. McIlwaine boarded the car believing it to be one on which her husband was conductor, intending to pay her fare. We think that, while on the car, she was a passenger, so far as imposing a duty upon the appellant; and that this duty continued until she had alighted in safety. The evidence is susceptible of a finding, which, in the light of the verdict, must be accepted, that the car stopped at a usual stopping point, and that Mrs. McIlwaine, in the exercise of due care, got on the platform for the purpose of taking passage. This would make her a passenger, and, having become such, she must be so considered until she had alighted from the car in safety.

Judgment affirmed.

CROW, ELLIS, MAIN, and FULLERTON, JJ., concur.

DONOFRIO et ux. v. CITY OF SEATTLE.  
(Supreme Court of Washington. Feb. 19, 1913.)

1. APPEAL AND ERROR (§ 927\*)—REVIEW—DISMISSAL.

On appeal from a judgment dismissing the complaint on a demurrer, all the allegations of the complaint must be accepted as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

2. EMINENT DOMAIN (§ 275\*) — GRADING STREET—NECESSITY OF PAYMENT OF COMPENSATION—"DAMAGE FOR PUBLIC USE."

Where a city in making an original grade makes a cut or fill of such depth or height as to necessitate the invasion of abutting property for the slope, it is a damaging, if not a taking, within Const. art. 1, § 16, providing that private property shall not be taken or damaged for public use without compensation having been first made or paid into court for the owner, and the abutting owner is entitled to an injunction to restrain the invasion until compensation has been determined and paid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 760-773; Dec. Dig. § 275.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1820-1822.]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by James Donofrio and wife against the City of Seattle. From a judgment dismissing the complaint on demurrer, plaintiffs appeal. Reversed and remanded, with directions to overrule the demurrer.

Blake & Williams, of Seattle, for appellants. James E. Bradford and William B. Allison, both of Seattle, for respondent.

MAIN, J. This as an action for injunctive relief. The plaintiffs' complaint, after alleging the status of the parties, the description of the property involved, and the ownership thereof, alleges:

"(3) That said city under and by virtue of ordinance No. 26830, approved on the 27th day of March, 1911, purported to provide

for an improvement of said Bayview avenue along and bordering upon plaintiff's said property by grading and curbing the same and have entered into a contract with the defendants Kalberg & Brandon for the doing of said grading and curbing.

"(4) That, under the plans provided by said ordinance and made a part of said contract, the defendants are threatening to and are about to make a fill along said Bayview avenue in front of said property between Twenty-Sixth Avenue South and Twenty-Eighth Avenue South of an average height of 11 feet. That said defendants are contemplating making fills extending upon plaintiffs' said property for an average distance from said street of 15 feet, and have actually staked out such fills upon plaintiffs' said property. That said defendants are threatening and about to make fills extending over and upon plaintiffs' said property for a distance of 15 feet or more in width and of about 500 feet in length.

"(5) That under the plans provided by said ordinance and made a part of said contract defendants are threatening and are about to make a cut along said Bayview avenue between Twenty-Eighth Avenue South and Thirtieth Avenue South for an average depth of 9 feet. That said defendants, in order to protect said cut, are contemplating taking earth from plaintiffs' said property to an average distance of said street of 15 feet, and have actually staked out the extent of such taking upon plaintiffs' said property, and that said defendants are threatening to and are about to take property extending over and upon plaintiffs' said property for a distance of 15 feet or more in width and 500 feet in length.

"(6) That, by reason of said fill and cut and the grading of said street as aforesaid, all access to the said premises from said Bayview avenue will be cut off, and said premises between Twenty-Sixth Avenue South and Twenty-Eighth Avenue South will be placed an average of 11 feet below the now level of said street, and the slope that said defendants are threatening to and about to actually place upon said property will extend over and onto the same a distance of 20 feet and over, and will materially damage and destroy the use of said property for residence or any purpose for which it is adapted. That between Twenty-Eighth Avenue South and Thirtieth Avenue South said premises will be placed an average of 9 feet above the now level of said street, and, in order to maintain said grade, the property of the plaintiffs will be taken for a distance of 15 feet and over, and said property will be materially damaged and destroyed for any purpose for which it is adapted.

"(7) That the damage that will be suffered by said plaintiffs by reason of said acts of said defendants as aforesaid will amount to at least the sum of three thousand dollars (\$3,000), and said premises or any part

thereof will not be benefited in any manner whatsoever by the filling in and grading of said street as aforesaid.

"(8) That the grade to which said street is being filled is an unreasonable and unnecessary one, and no condemnation proceedings of any kind have been had to ascertain the damages to plaintiffs' said property by reason of the filling in of said street and the making of slopes on plaintiffs' property, and for the taking away of earth from plaintiffs' said property, and no compensation of any kind has been paid to these plaintiffs on account of said damages, and these plaintiffs have not consented to said work.

"(9) That said plaintiffs have protested against the grading and filling in of said street, but, notwithstanding the same, said defendants are threatening to and are actually about to fill in said street and make the cuts as aforesaid, and make the slopes upon said property as hereinbefore set out, and, unless restrained by an order of this court, said defendants will proceed to fill in said street and run slopes onto plaintiffs' said property, and take away earth from plaintiffs' said property and damage plaintiffs' property as aforesaid, without first ascertaining and paying for such damages as required by law. That these plaintiffs have no plain, speedy, and adequate remedy at law for the injuries herein complained of.

"(10) That the defendants have actually dumped large quantities of earth on plaintiffs' property, and the plaintiffs have been damaged to the amount of seven hundred dollars (\$700) by the dumping of said earth on their property."

To this complaint the defendant interposed a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the trial court. The plaintiffs thereupon elected to stand upon their complaint and refused to plead further. The action was dismissed. From the judgment of dismissal the plaintiffs have appealed.

[1,2] Upon this appeal all the allegations of the complaint must be accepted as true. The legal question here presented is: Does the city in the original grading of a street have the right in making a fill to extend the foot of the slope upon the abutting private property, or in making a cut construct the slope upon abutting property, without first having acquired the right to do so by a condemnation proceeding or by some other legal means? This is not a question of liability on the part of the city for the reducing of the natural surface of the street in the course of its normal and ordinary improvement for street purposes to a grade line for the first time established; but it is a question which involves the right of a municipality, in the original grading of a street, to make an actual physical invasion of adjoining property. In the case of *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac.

1061, it is held that the city is not liable for damages resulting from the original grade of the street, and the opinion states: "In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication." But this decision does not reach the question here presented. It deals only with the question of the grading of the street, and not with the actual physical invasion of the adjoining property. In section 16, of article 1, of the Constitution of the state of Washington, it is provided: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." Under this constitutional provision, it has been held that the extending of slopes upon private property is not a taking within the inhibition of the constitutional provision, but is a damaging. *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757. In the course of the opinion in the *Compton* Case it is said: "The construction of slopes such as are in contemplation here is not necessarily a 'taking,' but is a 'damaging' merely." It requires no argument to show that, if the construction of slopes upon property abutting upon the street is a damaging thereof, the extending of the foot of the fill is likewise a damaging. Both involve the physical invasion of adjoining property.

The constitutional provision above quoted provides that property shall not be taken or damaged without compensation first being made or paid into court for the owner. If the allegations of the complaint above quoted are true, the respondent was extending slopes and fills upon the plaintiffs' property without first having acquired the legal right so to do. This being accepted as the fact, do the plaintiffs have the right to restrain such intrusion until compensation has been determined and paid? It has become the settled law of this state that under such circumstances plaintiffs are entitled to injunctive relief when the damages complained of are not merely nominal, but substantial. *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201. In the *Olson* Case it is said: "That injunction is a proper remedy in a case where the public authorities seek to take private property for a public use without first making compensation therefor was determined in this court in *Brown v. Seattle*, 5 Wash. 35 [31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161], and has been followed in practice ever since." We have been cited to no authority, and know of none, which justifies the city, without first

having acquired the legal right to do so, in making a physical invasion of the adjoining property when bringing the surface of a street to the grade line for the first time established. Such physical invasion of adjoining property comes within the inhibition of the section of the Constitution above cited.

The respondent in its brief makes numerous contentions to the effect that the complaint does not state a cause of action; but a detailed discussion of these is unnecessary. They are all met and answered by what has heretofore been said in this opinion. We think the complaint states a cause of action.

The cause will be reversed and remanded, with directions to the superior court to overrule the demurrer.

CROW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

#### DOWNIE v. SAVAGE et al.

(Supreme Court of Washington. Feb. 18, 1913.)

#### 1. PARTNERSHIP (§ 34\*)—RELATION—ESTOPPEL BY HOLDING OUT.

Persons holding themselves out as partners so as to induce others to deal with them, and give credit to them as such, are deemed partners as to such third persons, though not as between themselves.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.\*]

#### 2. PARTNERSHIP (§ 56\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—HOLDING OUT.

Evidence in an action against defendants as copartners held to sustain a finding that one of defendants did not hold himself out to creditors as a partner, or expressly or impliedly assume such relation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 80; Dec. Dig. § 56.\*]

#### 3. PARTNERSHIP (§ 35\*)—RELATION—ESTOPPEL—ACTS CONSTITUTING.

That letters and supplies came to the sawmill camp in which defendant S. and his brother worked, addressed to "S. Brothers" to S.' knowledge, did not constitute S. a partner by estoppel in the sawmill business, not showing anything more than a consent by him that his brother might do business under the style of "S. Brothers."

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 50; Dec. Dig. § 35.\*]

#### 4. PARTNERSHIP (§ 37\*)—ESTOPPEL.

To establish a partnership by estoppel with reference to third persons, the one sought to be bound must do something which induces such third persons to rely on the existence of the relation to their detriment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 37, 52; Dec. Dig. § 37.\*]

#### 5. PARTNERSHIP (§ 37\*)—ESTOPPEL BY HOLDING OUT—ACTS CONSTITUTING.

Facts and acts existing and occurring after plaintiff's employment by an alleged firm could not be relied on to hold any members of the alleged firm as partners by estoppel on the ground that such acts induced plaintiff to deal with the alleged partners as such.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 37, 52; Dec. Dig. § 37.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Pierce County; Miles L. Clifford, Judge.

Action by H. R. Downie against Charles G. Savage and another. From a judgment against one of defendants only, plaintiff appeals. Affirmed.

Bates, Peer & Peterson, of Tacoma, for appellant.

MORRIS, J. It is sought in this action to establish a liability against respondents as partners. The court below held that respondents were not partners, and that judgment should go against Howard P. Savage alone. There is no evidence from which it can be held that as between themselves the respondents, who were brothers, were partners. In fact, it clearly appears that they were not. The main contention of appellant is that Charles G. Savage held himself out as a partner, and is therefore liable as such.

[1] It is now too late to question the rule that, irrespective of what is the true relation as between themselves, persons can so hold themselves out as partners in a particular business, and thereby induce others to deal with them as such and give credit on the faith of such a relation, that as to such third persons the relation will be held to exist.

[2] The rule that fixes such a liability, when in reality the relation does not exist, is a familiar illustration of the general principle of estoppel when acted upon by another. While there is ample evidence in the record to establish the fact that many persons, including appellant and other creditors who have assigned their claims to him, regarded and generally understood the brothers were partners, we can find no instance in the record where any holding out of the existence of such a relation was done by Charles G. Savage, or with his assent express or implied. One witness not interested in any claim in suit testifies that on one occasion Howard P. Savage introduced Charles G. Savage to him as his partner. This is denied by each of the brothers, and, as the court finds against it, we accept its finding, as we cannot say that the evidence so preponderates in appellant's favor as to require a finding in his favor upon this point. It also appears that at one time Charles G. Savage and a third brother were in partnership as Savage Bros. The third brother died, and Howard P. Savage purchased the business and its assets from Charles G. and the administrator of the deceased brother. In doing so he acquired letterheads, envelopes, and blank checks upon which appeared the name "Savage Brothers," with the picture of two savages. Howard P. then engaged in a different business and adopted the business name or style of "Savage Brothers." In paying claims in the business in question, he used these checks, adding to the printed signature, "By Howard P. Savage." It may also be found that in

ordering supplies he directed them to be sent to "Savage Brothers." But it nowhere appears that Charles G. Savage at any time gave any such directions or had any knowledge of any inference upon the part of any person that he was regarded as a partner. The business out of which these debts grew was a small mill business at Mineral, in which Charles G. Savage worked as head sawyer. He does not appear to have had any charge or supervision of the business such as one would expect from a proprietor. All the orders and directions came from Howard P.

[3] It also appears that mail came to the camp addressed to "Savage Brothers," and that Charles G. Savage knew of such fact, and that he also knew that supplies came to the camp with a like direction. From this it is urged that it must be held there was an implied, if not an express, holding out. It does not appear to us, however, that this can be taken for anything more than a consent on the part of Charles G. that Howard P. might do business under the name and style of "Savage Brothers," which fact alone we do not think is sufficient to indicate that Charles G. was a partner, until he did something or said something that would indicate to others he was to be so regarded, especially in view of the undisputed fact that at the mill and in the camp where these creditors were employed Charles G. never assumed to act as a proprietor, gave orders, nor took charge as such. Nor did any of these creditors ever address him as a partner, make inquiries of him as such, nor when they failed to receive their wages, and thus knew of the failure of the business, did they make any demand of him for payment, nor in any way treat him as having any responsibility in the matter. To all intents and purposes, notwithstanding they now say they regarded him as a partner, they then did nothing nor said anything that would indicate such an understanding on their part; nor does their then conduct show other than that he was regarded as an employé.

[4] In order to work the estoppel upon which the rule of liability as a partner to third persons exists, it must appear that the one upon whom the liability is sought to be fixed does something which induces other persons to act and rely thereon to their detriment. It is not what Howard P. Savage might have done, nor what others might have thought, but what Charles G. Savage himself has done, what he himself has said, or the manner in which he has acted that has led others to act under the belief or impression created by him that he was a partner. Such facts do not here exist. The addressing of the mail or the direction of the supplies alone is not sufficient. Nor the fact that his name did not appear in the time book. The names of other employés likewise failed to appear therein. Nor the fact

that no charge was made against him for tobacco he obtained at the camp commissary maintained for the use and benefit of the men.

[8] All these facts were subsequent to the employment of appellant and his assignors, and they therefore cannot be said to have induced them to enter the employment upon the faith of anything Charles G. Savage may have done, nor to have given credit upon the belief induced by what he may have said or done that responsibility for the payment of their wages to any extent rested upon him. Certainly nothing occurring subsequent to the formation of a relation can be said to have been a controlling or inducing cause in the creation of that relation. And it is upon the misleading of appellant and his assignors to their prejudice, either positively or tactfully, by Charles G. himself when the relation of employer and employé began and credit was given, that alone must be determined the estoppel that fixes liability.

We are therefore of the opinion that there is no reason in fact or law which establishes error in the judgment, and the same is affirmed.

CROW, ELLIS, MAIN, and FULLERTON, JJ., concur.

#### OLDFIELD v. ANGELES BREWING & MALTING CO.

(Supreme Court of Washington. Feb. 18, 1918.)

##### 1. ACTION (§ 53\*)—SPLITTING CAUSE OF ACTION—BREACH OF CONTRACT.

Where plaintiffs erected a building under an agreement with defendant to lease it for a term of five years, and defendants refused to take possession, there is only one breach, which is final, going to the whole contract, and entitles plaintiffs to recover damages for the loss suffered, which is the difference between the entire rent reserved and the entire rental value for the term, and actions cannot be maintained for the several installments of rent.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.\*]

##### 2. LANDLORD AND TENANT (§ 22\*)—CONFORMITY TO PLEADING.

Under Rem. & Bal. Code, § 258, requiring the complaint to contain a plain and concise statement of the facts constituting the cause of action, and a demand for the relief which plaintiff claimed, a judgment for damages in favor of the owner of a building against defendant who refused to take possession under an agreement for a lease cannot be supported under a complaint claiming only installments of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

##### 3. APPEAL AND ERROR (§ 1212\*)—DETERMINATION—OPINIONS.

Where, in an action for installments of rent, it was determined on appeal that only one action, which was for breach of a contract of leasing, could be maintained, the opinion itself merely declares the law of the case, and cannot be treated as a pleading which will authorize

recovery of damages for the breach under the original complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.\*]

##### 4. APPEAL AND ERROR (§ 889\*)—AMENDMENTS REGARDED AS MADE—CONFORMITY TO PROOF.

Where plaintiff's sole cause of action was one for damages for breach of a contract of leasing and under a complaint, which merely sought a recovery of installments of rent, evidence of damages for breach was admitted, the complaint cannot be treated as amended to conform to the proof, all of the evidence having been admitted over defendant's objection, for to allow such course would ignore Rem. & Bal. Code, § 258, requiring the complaint to state the facts constituting the cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by James Oldfield against the Angeles Brewing & Malting Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Willet & Oleson, of Seattle, for appellant. Chas. F. Munday, Walter S. Fulton and R. L. Blewett, of Seattle, for respondent.

ELLIS, J. This action was before us on the same complaint in *Oldfield v. Angeles Brewing & Malting Co.*, reported in 62 Wash. 260, 113 Pac. 630, 35 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 1050, to which reference is now made for a complete statement of the material facts. We there held that the respondent having erected a building under an agreement to lease it to the appellant for a term of five years and the appellant having refused to take possession because of a statute subsequently passed prohibiting its use for saloon purposes, the breach of contract was actionable whether the technical relation of landlord and tenant was ever created or not, and that the measure of damages was not the fixed rental of \$350 a month, as awarded by the trial court, but the difference between the amount stipulated in the contract and the actual rental value for the specified term. For error in applying the incorrect measure of recovery, the cause was there reversed.

[1] A reading of the complaint and of the opinion on the former appeal makes it manifest that the respondent mistook the nature of his cause of action. He brought his action upon the lease for a recovery of the rent reserved from the time the building was tendered to the time of the commencement of the action amounting in all to \$3,850. The prayer was for the amount with interest from accrual upon the amount of each month's rent going to make up the aggregate. His evident theory, and that of the trial court on the first trial, was that there would be a right of action for each month's rent, and that the failure to pay the rent would constitute successive breaches. There was, how-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ever, but one breach, and that was complete and final going to the whole contract. It was made by the refusal to accept the building. In such a case the cause of action is entire and the measure of damages is the loss suffered, namely, the difference between the entire rent reserved and the entire rental value for the term. It is obvious that the complaint which did not tender as an issue that there was such a difference did not allege any loss or damage, and hence did not state a cause of action.

[2, 3] After the former reversal, the action was noted by the respondent for a retrial in the superior court. The complaint was not amended in any particular. The cause was tried to the court without a jury. When it was called for trial, it was upon the same complaint as before, seeking recovery for the installments of rent reserved and past due, and interest thereon. The appellant at the commencement of the trial objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action; that it was a complaint for the recovery of rent only, and pleaded no damages. The court overruled the objection, and the respondent then moved for a continuance in order to prepare to meet the issue of damages which was not presented by the complaint, but which the court had indicated would be tried. The continuance was denied. Throughout the trial, when evidence was offered tending to prove the rental value of the premises, the appellant strenuously objected to its introduction on the ground that it was not within the issues. The evidence was, however, admitted, and at the close of the trial the court found that the reasonable market rental value of the premises for the period covered by the contract of lease was \$150 a month, aggregating \$9,000 for the five years, that the aggregate rental provided for in the contract was \$21,000, and that the difference was \$12,000. Exceptions were reserved to the findings. Judgment was rendered against the appellant for \$12,000, being \$5,600 more than prayed for, and for costs, whereupon this appeal was taken.

The respondent contends that the issue tried was sufficiently defined by the opinion of this court on the former appeal. That opinion, however, did no more than declare as the law of the case that the action could not be maintained for rent, but for damages for breach of contract only, and defined the measure of damages in such an action. The complaint did not tender the issue tried, and we know of no rule of law permitting the opinion of the appellate court to be treated as a pleading. The statute (Rem. & Bal. Code, § 258) requires that the complaint contain a plain and concise statement of the facts constituting a cause of action and a demand for the relief which the plaintiff

claims. The complaint here did neither of these things. It tendered no issue as to the rental value of the premises, and made no demand for damages in any sum. It tendered an issue for the recovery of specific rental not for the recovery of unliquidated damages. Our former opinion having in effect pointed out that the issue tendered by the complaint was a false one upon which no recovery could be had, it would be most incongruous to hold that without change it now presented the very issue which we there in substance held it did not present. It is familiar law that, where a complaint sets forth facts entitling the plaintiff to some relief, such relief will not be denied merely because he has mistaken his remedial right, but such is not the case here. No facts showing damages in any sum or the right to any relief were pleaded. The only possible ground of relief was that the rent reserved exceeded the rental value. Neither this nor any fact tending to show this was alleged. There was no basis in the pleadings for the admission of any such proof.

[4] It is urged that the complaint should be treated as amended to conform to the proof. This rule, however, has no application where the evidence has been introduced over objection, and the issue tried was in no manner tendered in the complaint. The record is replete with objections pointing out the inadmissibility of the evidence under the issue tendered. No leave to amend was requested. No rule of construction, however liberal, can permit the trial of an issue not tendered in the complaint over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion. The trial court should have directed that the complaint be amended to conform to our former ruling on pain of dismissal.

We find no merit in the appellant's contention that the action cannot be maintained without first securing leave to sue the receiver of the respondent who was appointed subsequent to the commencement of the action. Nor do we find merit in the claim that the evidence was not sufficient to establish the execution of the contract of lease. That question was in effect passed upon adversely to the appellant's contention on the former appeal.

The cause of action being the same breach of contract declared upon in the original complaint, there can be no question as to the right to amend so as to present issuable facts showing damage.

The judgment is reversed and the cause is remanded, with leave to the respondent to amend so as to present the real issue involved, and for retrial upon that issue.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.



**STATE v. MILLER.**

(Supreme Court of Washington. Feb. 18, 1913.)

**1. CRIMINAL LAW (§ 576\*)—TIME FOR TRIAL—RIGHT TO SPEEDY TRIAL—STATUTORY PROVISIONS.**

Rem. & Bal. Code, § 2312, which provides that, where a defendant, whose trial has not been postponed upon his own application, is not tried within 60 days after information filed, the court shall order it dismissed, unless cause is shown, is mandatory, but is satisfied by a first trial within the 60 days, and the time for retrial is not a matter of absolute right, but is addressed to the discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**2. STATUTES (§ 190\*)—CONSTRUCTION—LANGUAGE OF STATUTE.**

In the interpretation of statutes, words in common use are to be considered in their plain and ordinary signification; and, so long as the language used is unambiguous, a departure from such plain meaning is not justified by any consideration of consequences or public policy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.\*]

**3. CRIMINAL LAW (§ 575\*)—RIGHT TO SPEEDY TRIAL—CONSTITUTIONAL PROVISIONS.**

Const. art. 1, § 22, guaranteeing accused the right to a speedy public trial, but prescribing no definite time, applies to all the time during which the accused is subject to trial; and, after a statutory provision therefor has been satisfied by a first trial, the time for retrial is necessarily in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1294-1296, 1377; Dec. Dig. § 575.\*]

**4. CRIMINAL LAW (§ 576\*)—RIGHT TO SPEEDY TRIAL—WAIVER OF STATUTORY RIGHT.**

A demand for trial, resistance of a postponement, or some other effort to obtain a speedy trial, must be shown to entitle accused to a discharge under a directory statute providing for a speedy trial; and even a mandatory provision is waived by a failure to ask for a dismissal until just before trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**5. CRIMINAL LAW (§ 575\*)—RIGHT TO SPEEDY TRIAL—WAIVER OF CONSTITUTIONAL PROVISIONS.**

The right to a speedy public trial under Const. art. 1, § 22, is waived by failure to ask for a trial or to claim the right until the cause has been definitely set for trial upon the request of the state, and then only by a motion to dismiss.

[Ed. Note.—For other cases, see Criminal Law, Cent. §§ 1294-1296, 1377; Dec. Dig. § 575.\*]

**6. CRIMINAL LAW (§ 576\*)—RIGHT TO SPEEDY TRIAL—SUFFICIENCY OF EXCUSE.**

Defendant's conviction for burglary was reversed, and a remittitur from this court was filed on February 15, 1911, in the office of the clerk of the trial court, and no effort was made by either side to have the cause set for retrial until September 30, 1912, when, on application of the state, trial was set for October 29th, and, in opposition to a motion to dismiss for delay in prosecution, the prosecuting attorney showed that the evidence on which the conviction was obtained was largely of confessions by defendant and an accomplice; that the Su-

preme Court held such confessions obtained by duress and inadmissible; that, at the time of the remittitur, defendant's appeal from a conviction in another case upon the same evidence was pending, and conviction was reversed April 13, 1912, with a holding that the testimony of the accomplice was admissible; that the Supreme Court held a petition for rehearing therein under advisement until September 29, 1912, when it was denied; that he at once caused the case to be set for retrial at the earliest date; that defendant meanwhile had been held under another charge, and had suffered no hardship from the delay. Held, on appeal from a judgment dismissing the action, that the showing made was a sufficient excuse for failure to bring defendant to an earlier trial, and that the cause would be remanded for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

From a judgment dismissing a criminal action against Peter Miller, the State of Washington appeals. Reversed, and cause remanded for trial.

John T. Murphy and Reah M. Whitehead, both of Seattle, for the State.

ELLIS, J. This is an appeal from a judgment dismissing a criminal action on the ground that the defendant, respondent here, had not been brought to trial within the time limited by law. An information charging the respondent with the crime of burglary in the first degree was filed in the superior court of King county on August 10, 1909. The cause was brought on for trial on October 29, 1909, and on November 2, 1909, respondent was found guilty of burglary in the second degree. He appealed, and secured a reversal. *State v. Miller*, 61 Wash. 125, 111 Pac. 1053, Ann. Cas. 1912B, 1053. In pursuance of that reversal, a remittitur from this court was, on February 15, 1911, filed in the clerk's office of the trial court. Prior to September 30, 1912, no effort was made by either side to have the cause set for retrial. On that date, upon application of the appellant in open court, the cause was set for trial on October 29, 1912. Counsel for respondent objected, and was granted, by the court, time until October 5, 1912, in which to present a motion for dismissal. Thereafter he moved for a dismissal upon the ground that he had not been brought to trial within the time limited by law. The motion was supported by an affidavit that no continuance had been asked for, and no postponement obtained by him, since the remittitur was transmitted from this court. The prosecuting attorney, in resistance to that motion, presented his affidavit, stating, in substance, that the evidence on which the former conviction was obtained consisted largely of defendant's own confession and that of his accomplice Taylor; that the Supreme Court, in revers-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing the judgment, held such evidence to have been obtained under duress, and hence inadmissible; that without such testimony, or especially that of Taylor, another conviction was improbable, and it was not advisable, in the absence of such testimony, to incur the expense of a retrial; that, prior to the date of the remittitur from this court, the defendant had been convicted in another case upon the same evidence and had appealed, which appeal was pending at the date of the remittitur in this case; that the state was hoping and endeavoring to induce the Supreme Court, in the pending appeal, to recede from its former ruling concerning the admissibility of one or both of the confessions; that the Supreme Court reversed the last conviction, and so far modified its former ruling as to hold that it was "not error to submit the testimony of the accomplice Taylor to the jury" (State v. Miller, 68 Wash. 239, 122 Pac. 1066)—this was on April 13, 1912—that thereafter a petition for rehearing of the last-mentioned appeal was submitted to the Supreme Court, in the hope and belief that the Supreme Court might be induced further to modify its ruling as to the admissibility of the confession of the defendant; that the Supreme Court held that petition under advisement till September 29, 1912, when it was denied, and the affiant at once caused this case to be set for retrial; that, during all the time since the conviction of the defendant in the last case appealed, he has been held under conviction and under a charge of being an habitual criminal, and upon other charges, as shown by the records and files of the court; that no hardship has been worked upon him by the state's refraining from setting this case for retrial pending a final determination by the Supreme Court of the matters involved in the last appeal; that this cause has already been set for trial on October 29, 1912, which date was the earliest date at which it could be tried under condition of the calendar in the criminal department at the time of the setting thereof; and that, until the final determination by the Supreme Court in the case last appealed, denying the petition for rehearing therein, the questions of law that have arisen, and will arise, in this case had not been finally decided by the Supreme Court, and the course which the state might or could pursue in accordance with law had not until that time been made plain.

[1, 2] The statute (Rem. & Bal. Code, § 2312) reads as follows: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown." While it appears from the record that the first trial of this cause was not had within 60 days after the

information was filed, it does not appear that the failure was due to any delay on the part of the prosecution. In this discussion, the question must be treated as if the respondent had actually been brought to trial originally within 60 days after the information was filed. The questions, therefore, actually presented on this appeal are: (1) Does the statutory provision above quoted, where a defendant has once been tried and convicted and the judgment reversed on appeal, entitle him to a dismissal because more than 60 days had elapsed without a retrial after the filing of the remittitur? (2) If not, was good cause shown for the delay? The first of these is a question of statutory construction; the second, a question of judicial discretion in the application of the constitutional provision for a speedy public trial.

The statute provides for a dismissal if the defendant be not brought to trial within 60 days after the indictment is found or the information filed. The statute is mandatory. A trial must be offered by the state within the statutory period, or good cause for delay shown. No initiative action is imposed upon the defendant. When, however, a trial has been had within that period, have the terms of the statute been satisfied? We must take the statute as we find it. Its mandate is to bring the defendant to trial within 60 days after the information is filed. If the Legislature had intended that the same limitation of time should apply to a second trial on reversal, the words "after information filed" would have been modified by the phrase, "or in case of reversal on appeal, within 60 days after the filing of the remittitur in the trial court," or by words of similar import. In the absence of such words, we are constrained to hold that the Legislature did not intend to convey the meaning which they would express, and which is not expressed by the words actually employed. The language of the statute is plain and unambiguous. The words used are simple and incapable of more than one meaning. Their natural meaning is that the specific limitation of time applies only to the first trial, since that trial, in the natural sequence of events, is the only one having an immediate relation to the time of filing the information. This is obvious, because in case of reversal on appeal, and usually in case of a new trial granted by the lower court, a retrial could not be had within 60 days after the filing of the information. "In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that, so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect." 38 Cyc.

p. 1114; Sutherland on Statutory Construction, 238; Sedgwick on Constr. Stats. & Const. Law (2d Ed.) p. 265; State ex rel. Chamberlin v. Daniel, 17 Wash. 111, 49 Pac. 243; Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994.

The purpose of the statute is to prevent continued incarceration without opportunity to the accused, within a reasonable time, to meet the proofs upon which the charge is based. A trial within 60 days after indictment found or information filed meets the purpose of the Legislature to accord an early opportunity for relief from an unfounded charge. Having had that opportunity, the one time prescribed by the statute, a specific limit of time for a retrial is not a matter of absolute right, but the time for such retrial is addressed to the judicial discretion of the trial court in view of the whole situation. This view is sustained by what seem to us the more persuasive authorities. In Commonwealth ex rel. McGurk v. Supt. County Prison, 97 Pa. 211, the statute involved declared that "if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment." The prisoner, having been convicted and obtained a new trial, was kept in custody for more than four terms after the new trial was awarded. The court held that he could not invoke the provisions of the statute to secure his discharge, using the following language: "Having thus procured a new trial, which must necessarily be more than six terms after his commitment, he now seeks to apply a statute which limits the time between commitment and the first trial to the interval of time after a new trial ordered and the second trial being had. We find no warrant for such application, either in the letter or in the spirit of the statute. It is further contended that, inasmuch as when a verdict is set aside or a judgment reversed and a new trial awarded, the case goes back upon all issues of fact as if it had never been tried, therefore this statute is made applicable. Conceding the correctness of the rule as to the manner and form to be observed in the second trial, yet the conclusion claimed by no means follows. The interval of time between the commitment and the close of the second term thereafter cannot be retraced, nor the statute, which might then have been invoked, be made applicable to a second period of time commencing long after the expiration of the time specified in the statute." In Glover's Case, 109 Mass. 340, construing a statute which required that the accused be tried "at the next term of the court after the expiration of six months from the time when he was imprisoned," the court, holding that this statute had no application to a second trial, said: "A trial before the expiration of six months

meets the purpose of the statute in securing to the prisoner an early opportunity of relief from an unfounded charge. Having had that, his application for another trial is not of absolute right, but is addressed to the judicial discretion of the court." In State v. Dilts, Sheriff, 76 N. J. Law, 410, 69 Atl. 255, the accused sought release on recognizance on the ground that, after a trial and disagreement in one term, he had not been brought to trial in the second term thereafter, under a statute providing for such release in case the defendant be not tried "at the term in which issue is joined or at the term after." The court, in denying the application, said: "While in strictness the word 'trial' implies a verdict, it was clearly not contemplated by the statute that a verdict must be had at the first or second term, or the prisoner be entitled to his discharge. The evil which the act was intended to remedy was the continued incarceration of citizens accused of crime because of delay of prosecutors in moving the indictments for trial. If it were otherwise, two disagreements at successive terms would require the defendant's discharge, or a postponement for good cause by the court. Under the view we take of the meaning and purpose of the statute, it was satisfied by the trial and disagreement of April term, 1907, and became inoperative thereafter."

While we are not favored with brief or argument on respondent's part, we have made a careful examination of the authorities cited by the trial court as sustaining his decision. In *Re Murphy*, 7 Wash. 257, 34 Pac. 834, the defendant was once tried, convicted, and a new trial granted before the expiration of 60 days from the trial had. This court said that the statutory provision "should not be held to apply to this kind of a case, at any rate until after the expiration of 60 days from the making of the order setting aside the trial which was had." Manifestly the question here presented was not before the court. In *re Begerow*, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, construing a statute similar to ours, holds that the 60-day requirement is applicable to the period commencing after a trial resulting in a disagreement of the jury. The court argues, in substance, that, if one trial be held to satisfy the statute, the same contention would apply to the constitutional guaranty of a speedy trial. We think not. The statute fixes a specific time, beginning with a specific event, within which trial must be had, unless good cause to the contrary be shown. That specific event (the filing of information) limits the operation of the statute to the first trial.

[3] The provision in the Constitution, art. 1, § 22, contains no such limitation. The provision for a speedy public trial therein contained, therefore, applies to all time during which the accused is subject to trial; and, inasmuch as it fixes no time as defining a

speedy trial, the time of retrial, after the statute has been satisfied by a first trial, is of necessity left to the judicial discretion of the trial court. What in such a case is a speedy trial must depend upon the circumstances of the case. "Again it is required that the trial be speedy, and here, also, the injunction is addressed to the sense of justice and sound judgment of the court." Cool-ey's Const. Lim. (7th Ed.) 440.

[4, 5] There is another distinction between the mandate of the statute and the provision of the Constitution. The one is a statutory mandate; the other a constitutional privilege. The statute imposes upon the state the duty to bring the accused to trial within the 60 days. The state must take the initial action. The Constitution accords a right to the accused to a speedy public trial. If he does not demand it, he should not complain. Such is the rule under statutes not mandatory. "A demand for a trial, a resistance to a postponement, or some other effort to secure a speedy trial must be shown to entitle the accused to a discharge under the statute by reason of the delay of the prosecution." 12 Cyc. 500. That a constitutional right may be waived by the accused has been repeatedly held by this court. *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818. This court has also held that even the mandatory statutory provision is waived by a failure to ask for a dismissal until just before trial. *State v. Alexander*, 65 Wash. 488, 118 Pac. 645. See, also, *State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

A fortiori it would seem that the constitutional right should be deemed waived by the failure to ask for a trial, the silent acquiescence in the delay, and the failure to claim the constitutional right until the cause had been definitely set for trial upon the request of the state, and then only by a motion to dismiss. "As to what constitutes a speedy trial, and what action must be taken by the accused to avail himself of the right to a dismissal because of delay, the authorities are conflicting. Except in so far as statutes may otherwise require, we think the rule should be that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial on the part of

the accused, should be shown to entitle him to a discharge on the ground of delay. 12 Cyc. 500. All our statute requires is a trial at the next term after the finding of the indictment, unless for good cause shown, or upon application of the accused it be postponed. It does not declare that, in case of a disagreement, a second trial must be had at the next succeeding term. Nevertheless, under the Constitution, another trial should follow a disagreement with reasonable speed, or the action should be dismissed. What is reasonable speed depends upon the circumstances surrounding each particular case. There is, therefore, nothing in our statutes or Constitution which precludes recognition of the rule that, where one trial has taken place in compliance with the statute, which has resulted in a disagreement, it is incumbent upon the accused to at least manifest a desire for another trial before he is entitled to a dismissal on the ground of delay." *State v. Lamphere*, 20 S. D. 93, 104 N. W. 1038, 1040.

There can be no question that, if at any time during the period after the remittitur from this court the respondent had demanded a speedy trial, it must have been accorded him or the information dismissed, in the absence of good cause shown for a continuance on the state's part. Nor do we hold that the showing now made by the state would have been sufficient, had a trial been demanded.

[6] We do hold, however, that the showing made should be held a sufficient excuse for failure to bring the respondent to an earlier trial, since he has never expressed a desire to be tried. The constitutional privilege of a speedy trial was intended to prevent an arbitrary, indefinite imprisonment, without any opportunity to the accused to face his accusers in a public trial. It was never intended as furnishing a technical means for escaping trial. It does no violence to this provision, either in letter or spirit, to hold that there has been no arbitrary denial of the right to a speedy trial under the circumstances set forth in the state's showing, where, as here, the accused has never demanded a trial.

The judgment is reversed, and the cause is remanded for trial.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

**ARIZONA EASTERN R. CO. v. GLOBE  
HARDWARE CO. et al. (SOLOMON-  
WICKERSHAM CO., Intervener).**

(Supreme Court of Arizona. Feb. 17, 1913.)

**1. MECHANICS' LIENS (§ 111\*)—TIME OF FILING STATEMENT—STATUTES.**

Under Civ. Code 1901, par. 2898, providing that persons furnishing services or material towards the alteration, repair, etc., "shall deliver to the owner, within 60 days from the completion of the improvement, his statement," etc., materialmen and those furnishing services may perfect their demands into a lien at any time after they have ceased to labor or furnish material, whether or not the original contractor has completed the structure, providing it is done not later than 60 days after its completion.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 144-146; Dec. Dig. § 111.\*]

**2. PLEADING (§§ 8, 433\*)—PLEA OF NONPAYMENT—GENERAL DEMURRER—CURED BY JUDGMENT.**

An allegation that a debt "was due and owing" was a legal conclusion and an unsatisfactory plea of nonpayment; but the defect, as against a merely general demurrer, was cured by a judgment, where it does not appear that it was directly called to the attention of the court.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-29½, 1451-1477; Dec. Dig. §§ 8, 433.\*]

**3. PLEADING (§ 433\*)—HARMLESS ERROR—SUBSTANTIAL JUSTICE.**

Under Const. art. 6, § 22, providing that no cause shall be reversed for technical error in pleading or proceedings, when upon the whole case it shall appear that substantial justice has been done, an allegation that a debt "was due and owing," though unsatisfactory as an allegation of nonpayment, will be held cured by judgment, where the issue of indebtedness was tried out as fully as though the pleadings were perfect, and it does not appear that the court's attention was directly called to it, though there was a general demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

**4. RAILROADS (§ 188\*)—COMPLAINT—SERVICES.**

In an action to enforce a mechanic's lien on a railroad, allegations that teams were furnished the contractor "for the purpose of constructing the line of railroad, and that such teams were employed for the purpose and did construct the said line," were sufficient to show that the teams were actually used in the work.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 618-621; Dec. Dig. § 188.\*]

**5. MECHANICS' LIENS (§ 207\*)—WAIVER OF RIGHT OF LIEN—WAIVER OF LIEN BY CONTRACTOR.**

While a materialman or laborer could personally waive his right to a lien on an improvement, the contractor cannot waive it for him in his contract with the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 381; Dec. Dig. § 207.\*]

**6. APPEAL AND ERROR (§ 864\*)—REVIEW—APPEAL FROM JUDGMENT—MOTION FOR NEW TRIAL.**

Under Civ. Code 1901, pars. 1212, 1213, 1214, and 1403, providing when the Supreme Court shall have jurisdiction of appeals and when appeals could be taken, an appeal from the judgment does not authorize a review of the whole record, but is confined to fundamental errors in the judgment roll and the court may not look into the evidence and alleged errors

in its admission or rejection; and one failing to appeal from an order overruling a motion for a new trial abandoned any error propounded by it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.\*]

**7. APPEAL AND ERROR (§ 1036\*)—HARMLESS ERROR—INTERVENTION.**

Where one who had furnished supplies to a contractor got judgment against him and garnished the owner, a denial of his application to intervene in a suit by others, who had perfected mechanics' liens on the property, where the amount necessary to pay such liens exceeded the amount due the contractor, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.\*]

Appeal and Error from District Court, Gila County; before Justice Ernest W. Lewis.

Action by the Globe Hardware Company and others against the Arizona Eastern Railroad Company, in which the Solomon-Wickersham Company intervened. Judgment for plaintiffs, and defendant appeals and the Solomon-Wickersham Company brings error. Affirmed.

The Crandall Contracting Company, on the 21st of August, 1909, entered into a contract with the Gila Valley, Globe & Northern Railway Company "to furnish all labor and equipment and to perform all work, consisting of clearing, grubbing, ditching, excavating material from cuts and borrow pits and depositing same in embankments in accordance with the specifications hereinafter named, in the construction of a branch line five and one-half miles long, more or less, said branch to leave the main line at the south end of the Globe yard and extending to the mines of the Arizona Commercial Company. The aforesaid work shall be commenced on or before the 1st day of September, 1909, at such points as the engineer may direct; and shall be completed on or before the 1st day of December, 1909. It shall be carried on at such points and with such rate of progress as the engineer may direct." Then follows the specifications of work to be done and the prices to be paid. The appellant, Arizona Eastern Railroad Company, an Arizona corporation, in January, 1910, became the owner of the lines of railroad theretofore belonging to Gila Valley, Globe & Northern Railway Company, and at the same time assumed all of the obligations of Crandall Contracting Company's contract. On or about April 3, 1910, the contracting company threw up its contract and abandoned the work, owing the several sums for which these suits are brought. The appellant then took up the work, and without cessation completed the work on May 28, 1910. The appellees filed liens against the line or piece of railroad described in contract, alleging work and labor performed or material furnished to the contracting company. The lower court ordered a consolidation of all of the above

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

cases, and they were tried as one case. Judgment was entered in favor of appellees against the Crandall Contracting Company, and also a decree foreclosing their liens against appellant's line of railroad. Appellant brings the case here on appeal from the judgments foreclosing the liens.

Nave & Campbell, of Tucson, for plaintiff in error. Rawlins & Little, of Globe, and E. S. Ives and S. L. Pattee, both of Tucson, for appellant. George R. Hill, of Globe, for appellees. George J. Stoneman, of Phoenix, for appellees Globe Hardware Co. and Old Dominion Commercial Co.

ROSS, J. (after stating the facts as above). The appellant railroad company interposed to all the complaints general and special demurrers, and now insists that the trial court erred in overruling the demurrers.

[1] One objection, and it applies to all the complaints, is that they fail to allege the appellant was served with a copy of the lien claims within 60 days after the completion of the line of railroad against which the lien is claimed, or to allege that same was completed at the time of making and serving of the statements of lien. The complaints show that the lien claims were served on defendant and filed with the county recorder within 60 days after rendering the services or furnishing the material, and alleges that the contracting company "stopped said work and abandoned said contract" on April 3, 1910.

Paragraph 2898, R. S. 1901, provides that persons who furnish material or render service towards the erection, alteration, repairs, construction, or completion of any building erected or improvement made, under a contract between the owner and original contractor, shall deliver to the owner, within 60 days from the completion of such building or improvement, his statement of account; and that thereupon the owner may, for his protection, retain out of the amount due, or to become due, the original contractor such account. The owner and the building or improvement, upon the service of such statement of account, become liable for the reasonable value of such labor done and material furnished.

The appellant insists upon a literal construction of this section, and argues that laborers and materialmen who render services or furnish material must await the completion of the structure before attempting to fix their liens; and that, inasmuch as the complaints in these cases fail to show a completed structure, the lien claims were filed prematurely, and must therefore fall.

The primary object of our lien law is to insure to the laborer and materialman the payment of their accounts, and incidentally to protect the owner against the filing of liens by such persons against his property for services and material rendered and furnished the original contractor. The statement of

lien provided for by paragraph 2898, supra, when served upon the owner, entitles him to withhold payment of the amounts claimed from the contractor, and thereby insures him against the delinquencies of the latter. This being so, it would seem that diligence on the part of those working for or dealing with the contractor should be encouraged; otherwise the owner might pay off the original contractor and later find his property plastered with liens of laborers and materialmen whose accounts had been left unpaid.

Our view of paragraph 2898 is that it limits the time after which no lien may be filed against the property of the owner to 60 days after the completion of the structure. In other words, we hold that the persons dealing with the original contractor may perfect their demands into a lien against the property of the owner at any time after they have ceased to labor or furnish material, whether the original contractor has completed the structure or not, providing it is done not later than 60 days after the completion of the structure. Such a construction is in harmony with paragraph 2889, Id., which provides generally for persons performing labor or furnishing material directly to the owner. Under this paragraph the persons performing labor or furnishing material may fix and secure the lien within 90 days after the completion of such labor or furnishing material. They are not required to await the completion of the structure before perfecting their lien. The limitation has reference to the completion of the performance of labor or the furnishing material, regardless of the completed or incomplete condition of the structure at the time.

The construction contended for by appellant would often inflict great hardship and loss to the owner of the structure or improvement, and defer to unreasonable lengths the time of payment of laborers and materialmen dealing with the contractor, or entirely defeat them in the collection of their claims. The contractor might complete the structure and collect the contract price, leaving unpaid many bills for labor and material. The laborers and materialmen could delay filing liens until the last day of 60 days after the completion of the structure and enforce their claims, notwithstanding the contractor had been fully paid the contract price. Or the laborer and materialman dealing with the contractor may have finished their contract in the performance of specified labor, or in furnishing definite and specified material, payments for which might be postponed for months or years because of suspension of work by contractor, or defeated entirely by abandonment on the part of the contractor.

In *Baldrige v. Morgan*, 15 N. M. 249, 106 Pac. 342, Ann. Cas. 1912C, 337, it was the contention of the appellant that the lien had been filed prematurely, because it was filed before the building was completed. The

New Mexico statute is that "every person save the original contractor, claiming the benefit of this act, must, within sixty days after the completion of any building, file for record," etc. That court said: "Here the question is squarely presented to us whether the Legislature fixed a period of time during which a lien of a subcontractor must be filed, or did it fix a point of time after which such a lien could not be filed? \* \* \* We therefore hold that the clause that requires a subcontractor to file his lien 'within sixty days after the completion of any building,' etc., fixes a time after which such lien is not to be filed, and does not fix a period of time during which it must be filed; or, in other words, that the time for filing does not commence to run from or await the completion of the building. *Hunter et al. v. Truckee Lodge*, 14 Nev. 24."

This construction of paragraph 2898 dispenses with the necessity of determining what effect the abandonment of the work by the original contractor had upon the rights of the appellees, holding as we do that their right to fix and secure their liens dated from the time they quit work or ceased to furnish material, and not from the completion of the structure or improvement, and that the limitation upon this right to fix and secure the lien is that it must be perfected not later than 60 days after the completion of the structure or improvement.

[2] The appellant insists that the various complaints (except in the *Globe Hardware Company* case) are vulnerable to the general demurrer, upon the ground that they fail to allege that the amounts claimed had not been paid at or prior to the times of filing complaints. Nonpayment is alleged in the *Old Dominion Commercial Company* case, in the *First National Bank* case, in the *John Bracco* case, in the *Maxon-Nowlin Company* case, and in the *F. E. Long* case, and it therefore follows that the objection to these complaints is unfounded.

In the *Augusti* and *Parker* cases the claims of lien, as filed in the county recorder's office, are set forth in the complaints in *hæc verba*, and in these notices of lien is the statement that "said sums are now due and owing over and above all offsets and counterclaims," and that such sums "are the net amounts now due and owing the said employes and lien claimants," less set-offs. In the *Augusti* case is the further allegation that, at the time of instituting the suit, there was due the amount claimed in the notice of lien; and in the *Parker* case that there was owing plaintiff the sum claimed in the notice of lien. Neither of these complaints, in so many words, alleges nonpayment. Appellant contends that these complaints are fatally defective for that reason. There are allegations of employment at stipulated wages, of the rendering of the service or full performance, of the amount due and owing over

and above offsets and counterclaims, both in the lien notices that are incorporated into the complaints and by affirmative allegations in the complaints.

The appellant's answer, in addition to the general demurrer, contained several special demurrers and pleas in bar of the action. The special demurrers did not attack the complaint for a failure to plead nonpayment; nor was there a plea of payment in the answer. The complaints stated good causes of action, except for the omission to allege nonpayment. We cannot tell from the record whether the defect now complained of was directly called to the attention of the trial court. The allegation that the debt "was due and owing" was a legal conclusion of the pleader and a very imperfect and unsatisfactory plea of nonpayment; but we think this defect in the complaints, as against a general demurrer, was cured by the judgment. *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1004.

In *Penrose v. Winter*, 135 Cal. 269, 67 Pac. 772, a default case, the court said: "It is true that the allegation [of nonpayment] was made in the form of a legal conclusion, in which the material fact was implied; but, in the absence of any demurrer, such faults of pleading are cured by the judgment." We are of the opinion that if a complaint contains sufficient facts to sustain a default judgment the same facts ought to be held sufficient to sustain a judgment after trial on the merits. It is not logical to say that a complaint is so defective as to be insufficient to support a judgment after trial on the merits (*Ryan v. Holliday*, 110 Cal. 335, 47 Pac. 891), but sufficient to support a judgment by default. *Penrose v. Winter*, *supra*; *Knox v. Buckman*, 139 Cal. 598, 73 Pac. 428.

We think the Supreme Court of Montana, in *Hershfield v. Aiken*, 3 Mont. 442-452, has adopted the correct, reasonable, and just rule. In that case it is said: "In this case the issues joined necessarily required on the trial proof of the facts defectively stated in the complaint, as to whether the amount of the notes was due and unpaid. In attempting to prove that they were due and payable as alleged, the plaintiffs must have proved that they were due and unpaid, and so the court found. The conclusion is irresistible that in attempting to prove the facts imperfectly stated they must have made such proof as would have supported the averment, had it been perfect and complete. Such proof, after verdict or decree, aids the averment and cures the defect. And it does not defeat the efficacy of such proof if, technically speaking, the defective averment was but a conclusion of law. Evidently it was an attempt to state facts; and proof of this character, necessarily given upon a trial of the defective issue, must, in like manner, cure this as well as any other defect. And so we think it may safely be

said that, where facts are entirely omitted, but are so connected with the facts alleged that the facts alleged could not be proved without proving those omitted, after verdict, the facts omitted will be presumed to have been proved upon the trial; and a defective complaint, aided by such proof, will support a judgment."

[3] In thus holding that the defective complaints in the Augusti and Parker cases are cured by judgment, we are giving meaning and effect to our Constitution, which provides that "no cause shall be reversed for technical error in pleading or proceedings when upon the whole case it shall appear that substantial justice has been done." Section 22, art. 6.

The issue of indebtedness was tried out in these cases as fully as it could have been tried out on perfect pleadings. The appellant is not shown to have suffered any injury by reason of the defective pleadings.

[4] It is also urged that the complaint in the Maxon-Nowlin Company Case fails to show that the teams, for the use of which a lien is claimed, were ever actually used in the construction of the appellant's line of railroad. The allegations of the complaint are that the teams were furnished the contracting company "for the purpose of constructing the line of railroad above described," and then follows an itemized statement of the number of animals furnished, the length of time furnished, and the price to be paid per day and month; "that the said teams were employed for the purpose and did construct the said above-described line of railway." We think these allegations, while inartistically worded, are sufficient to show that the teams were actually used in the work of constructing the appellant's line of railroad.

[5] Another point raised by demurrer grows out of the contract between appellant and the Crandall Contracting Company. This contract provided that neither the contractor, his assigns, subcontractors, employes, laborers, nor any person or corporation furnishing material or performing labor upon the work contracted to be done, should have, hold, or enforce any lien against appellant's property under the laws of the territory of Arizona now in force, or which may be hereafter enacted. This contract was pleaded by the appellant in bar of the actions herein. To this defense the appellees demurred, on the ground that it failed to constitute any defense. The trial court sustained the demurrer. The appellant's position is that the contractor, by this agreement, waived the right to a lien, not only for itself, but also for all persons or concerns furnishing material or performing labor under the contract. The right to claim the lien is a privilege, and the person to whom it is granted by the statute unquestionably may waive it. In this case the con-

tractor did, by this agreement, waive its right to claim the lien for any unpaid balance; but we do not think, under our statute, that the right of lien by laborers and materialmen is derivative or dependent upon the agreement of the contractor, but that their rights are independent of such agreement; that their right to a lien is unaffected by any contract between the owner and the contractor; and that, while they personally might waive their right to a lien on the property of the owner which has been made or improved by their labors or contributions, the contractor cannot, by his agreement, waive it for them.

The Arizona law giving liens against railroads is found in paragraph 2902, Revised Statutes 1901, as follows: "All contractors, subcontractors, laborers, operatives and other persons who may labor or furnish labor, teams, materials, machinery, fixtures or tools in the construction or repair of any railroad, locomotive, car or other equipment, or who may labor in the operating of a railroad, and to whom money or wages are due or owing for such labor, teams, tools, or materials, shall hereafter have a lien upon such railroad and its equipment for such sums as are unpaid."

The purpose and intent of the Legislature to give to all the enumerated parties in the above paragraph a direct lien could not be expressed in words more explicit. Each and all of them "to whom money or wages are due or owing for such labor, teams, tools, or material shall hereafter have a lien upon such railroad and its equipment for such sums as are unpaid."

The appellees base their right to a lien upon claims for wages of laborers who worked for, or for material furnished to, the original contractor. "Liens of this kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or materialman is entitled to the lien which the law affords, provided he gives the required notice within the specified time." McMurray v. Brown, 91 U. S. 257, 266 (23 L. Ed. 321); Van Stone v. Manufacturing Co., 142 U. S. 128, 136, 12 Sup. Ct. 181, 35 L. Ed. 961; Trust Co. v. Condon, 87 Fed. 84, 14 C. C. A. 314.

In Central Trust Co. of New York v. Richmond N., I. & B. R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, the court said: "It is not a lien originating in a contract for a lien, but arises out of the statute, independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered." Austin & N. W. Ry. Co. v. Daniels, 62 Tex. 70.

It is too evident to justify mention or com-



ment, especially in contracts for the construction of railroads, that it was in contemplation of the parties that many hundreds, if not thousands, of laborers would be employed to perform work, and that much material would be needed; and we think it violative of no fundamental right to hold that the owner contracted in view of the statute giving such laborers and materialmen independent liens. It would be an unreasonable exaction to require all of these laborers and materialmen to investigate and learn the terms of the contractor's agreement with the owner, or deal at their hazard, where the law provides no means of access to the contract, such as its recordation.

Judge Lurton, in *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 387, 30 C. O. A. 108, 125, reviews most thoroughly and learnedly the question herein involved, and we quote an excerpt from his opinion with approval: "In most instances it is well understood that the contractor will employ others to aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others, an independent lien was given to all who should, at the instance of the owner or his contractor, contribute towards the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice, which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract; for all thereafter made are entered into upon the basis of the law."

The highest courts of the states of Maine and Montana have upheld the right of independent liens by laborers and materialmen, notwithstanding the contract between the owner and the original contractor contained a provision against liens. *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393. And Colorado, while not deciding the question, intimates a leaning that way in *Jarvis v. State*

*Bank*, 22 Colo. 309, 45 Pac. 505, 508, 55 Am. St. Rep. 129.

At 27 Cyc. 95 it is said: "But the more generally accepted view is that the owner and contractor cannot, by contract between themselves, deprive the subcontractor, materialman, or workman of the right to a lien which the statute gives him." We think that the just rule, and are contented to adopt it.

[5] The appellant contends that the judgment of the trial court should be reversed for errors in the admission of evidence and for want of evidence to sustain it. The appeal is from the judgment only. A motion for a new trial was made and overruled, and the order overruling the motion is assigned as error. No appeal, however, was taken from the order overruling the motion for new trial. The appeal being from the judgment only, the question is: May we, under the law, review errors alleged to have been committed in the allowance or rejection of evidence, or look into the evidence to determine if it supports the judgment?

Paragraph 1212, R. S. 1901, provides that the Supreme Court shall have jurisdiction to review, upon appeal, the judgments of the district court (now superior courts) in the four cases enumerated. Paragraph 1213 provides that upon the appeal from the judgment any intermediate order involving the merits and necessarily affecting the judgment may be reviewed. Paragraph 1214 provides that the Supreme Court shall also have jurisdiction to review, upon appeal, the following orders of the district courts (now superior courts): "(1) An order refusing a new trial or granting a motion in arrest of judgment. \* \* \*" Paragraph 1493 provides that "an appeal \* \* \* may be taken to the Supreme Court from any final judgment, \* \* \* and from any orders mentioned in section 1214. \* \* \*"

Reading these paragraphs together, it seems to us that a party, feeling aggrieved by the order overruling his motion for a new trial to have the same reviewed, must appeal from such order. The appeal from the judgment does not include an appeal from the order overruling the motion for a new trial. An appeal may be taken from both, but an appeal from the judgment does not authorize a review by this court of the whole record, as would be the case if the appeal was from both the judgment and order overruling the motion for a new trial. In other words, if the appeal is from the judgment only, this court, in its examination of the case, is confined to the judgment roll, and may not look into the evidence and alleged errors in its admission or rejection.

The appellant failing to appeal from the order overruling the motion for a new trial, and the statute requiring such appeal to give this court jurisdiction to review the order, we are precluded from examining the record,

except for errors of a fundamental character appearing in the judgment roll. By failing to appeal from the order, the appellant abandoned the motion for a new trial and any error that was propounded by it, and is before this court as though no motion for a new trial had ever been made. If the appellant wanted this court to review the rulings of the trial court admitting and rejecting evidence, or if it wanted this court to pass on the sufficiency of the evidence to support the judgment, it should have not only made its motion for a new trial, but appealed from the order overruling the motion. *Grounds v. Ralph*, 1 Ariz. 227, 25 Pac. 648.

Solomon-Wickersham Company, Intervener.

[7] When the Crandall Contracting Company ceased operations and abandoned the construction work on appellant's line of railroad, it was indebted to Solomon-Wickersham Company in the sum of \$13,000 for supplies furnished it. Solomon-Wickersham Company brought suit against the contracting company and garnished the appellant. Appellant answered the garnishment, admitting an indebtedness to the contracting company in a sum much less than the Solomon-Wickersham Company's demand, and in its answer pleaded the lien claims involved in the above-consolidated cases as a defense to a judgment on the writ of garnishment. The Solomon-Wickersham Company obtained judgment against the contracting company for the amount of its demands, but, pending the lien suits, action on the garnishment proceeding was postponed. After obtaining judgment against the contracting company, the Solomon-Wickersham Company filed its application for leave to intervene in the consolidated cases, which application was denied. Since we have held that the claims of appellees are liens upon the appellant's railroad, and it appearing that the total of lien judgments equals or exceeds the amount owing by appellant to the contracting company, the plaintiff in error could not be benefited by intervention. Had the liens been disallowed, the right of the plaintiff in error to intervene would be of vital interest, as these same funds would be subject to its garnishment lien. If the application to intervene had been granted, the plaintiff in

error could have secured no judgment against the garnishee, for the reasons that all its indebtedness to the contracting company was already impressed with the lien claims. It is not necessary for us to indicate what our ruling would be had the garnishee been possessed of funds of the debtor not already appropriated. Under the circumstances, the plaintiff in error suffered no injury. The trial court was right in denying the application to intervene.

The judgment of the lower court in the consolidated cases is affirmed, as is also the order denying the application of plaintiff in error to intervene.

FRANKLIN, C. J., and DUFFY, Superior Judge, concur.

N. B.—Judge CUNNINGHAM being disqualified and announcing his disqualification in open court, the remaining judges, under sections 3 of article 6 of the Constitution, called in Hon. FRANK J. DUFFY, Judge of the superior court of the state of Arizona, in and for the county of Santa Cruz, to sit with them in the hearing of this cause.

#### FIRLGENZI v. STATE

(Supreme Court of Arizona. Feb. 13, 1913.)

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Alfonzo Firigenzi was convicted of murder, and he appeals. Affirmed.

G. P. Bullard, Atty. Gen., for the State.

ROSS, J. The appellant was indicted, tried, and convicted of murder at the May term of the Graham county superior court. A motion for a new trial was made and overruled. From the order overruling this motion, and from the judgment of conviction, this appeal is taken.

The record was filed in this court on September 12, 1912. The appellant has assigned no error, nor filed a brief. However, without any such assistance or aid, we have carefully examined the record for fundamental error, and have not been able to discover any. The motion for new trial raises many objections to instructions given and refused. We think the court's instructions were very favorable to the appellant, and that his complaint is unfounded. The judgment of the trial court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

**BRUNSON et al. v. STATE.**  
(Criminal Court of Appeals of Oklahoma.  
Feb. 19, 1913.)

(Syllabus by the Court.)

**INTOXICATING LIQUORS (§ 21\*) — LIQUOR  
NUISANCE—INJUNCTION—PUNISHMENT FOR  
VIOLATION.**

The provisions of the prohibition enforcement act (section 14, c. 70, Sess. Laws 1911), defining public nuisances and providing for the abatement of the same, and prescribing punishment as for contempt for a violation of the terms of any injunction granted in such proceeding, is a constitutional exercise of the legislative authority, under section 25 of the Bill of Rights, providing that "the Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 27; Dec. Dig. § 21.\*]

Appeal from Superior Court, Muskogee County; Tarras McCain, Judge.

E. H. Brunson and another were adjudged guilty of contempt, and appeal. Affirmed.

Kistler & Haskell, of Muskogee, E. G. McAdams, of Oklahoma City, and C. J. Nelson, of Wagoner, for plaintiffs in error. The Attorney General and W. E. Disney, Co. Atty., of Muskogee, for the State.

DOYLE, J. The judgment sought to be reviewed in this case was rendered in a proceeding instituted against the plaintiffs in error for an alleged contempt of court. It appears from the record that they were charged by affidavit with contempt of court in violating the terms of an injunction granted in proceedings had under the provisions of the prohibition enforcement act (section 14, c. 70, Sess. Laws 1911), wherein they were enjoined from maintaining a public nuisance. Upon a rule to show cause why they and each of them should not be punished for their misconduct in failing to obey said injunctive order, they presented themselves before said superior court, accompanied and represented by counsel, whereupon the court offered the defendants E. H. Brunson and George White a trial by jury, which offer the said defendants thereupon did refuse and waive. Thereupon a hearing was had, and, the court having heard the testimony and the argument of counsel, it was by the court adjudged that the said E. H. Brunson and George White, defendants as aforesaid, have been guilty of a contempt of this court in manner and form as charged in the affidavit, in that they and each of them did willfully violate said temporary injunctive order, whereupon the court sentenced the said defendants to severally pay a fine of \$100, and to be imprisoned in the county jail for the term of 5 months as punishment for said alleged contempt, and further confinement not exceeding 50 days in default in the payment of said fines. Whereupon the de-

fendants gave notice of appeal and moved the court that they be allowed to give bond pending said appeal, which motion was by the court refused. The judgment and sentence was entered on December 2, 1911. An appeal was taken by filing in this court a petition in error and transcript December 4th, and upon an application for bail pending appeal it was ordered by this court that super-seedeas be allowed in the sum of \$1,000.

The only error assigned, that the record presents, is that the court erred in holding that there is any law giving it power to punish for contempt of court. No briefs have been filed. The question presented has been passed upon in the case of *Nichols v. State*, 8 Okl. Cr. —, 129 Pac. 673, wherein it is held that the provisions of the prohibition enforcement act (section 14, c. 70, Sess. Laws 1911), providing that "any person violating the terms of any injunction granted in such proceeding, shall be punished, as for contempt, by a fine of not less than \$100 nor more than \$500, or by imprisonment in the county jail not less than 30 days nor more than 6 months, or by both such fine and imprisonment," is a constitutional exercise of legislative authority under section 25 of the Bill of Rights, providing: "The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt." It is our opinion that the appeal in this case is wholly destitute of merit.

The judgment of the superior court of Muskogee county is therefore affirmed, and the order allowing bail staying the execution is hereby revoked, and the cause remanded to the superior court of Muskogee county, with direction that said plaintiffs in error be remanded to the custody of the sheriff of Muskogee county in accordance with the judgment and order of the court.

ARMSTRONG, P. J., and FURMAN, J.,  
concur.

**BURNETT et al. v. STATE.**  
(Criminal Court of Appeals of Oklahoma. Feb.  
15, 1913.)

(Syllabus by the Court.)

**1. COURTS (§ 240½, New, vol. 8 Key-No. Se-  
ries)—JURISDICTION—PROCEEDINGS FOR CON-  
TEMPT.**

Under the Constitution (article 7, § 2 [section 187, Williams']) and the statute (sections 1916 and 1917, Snyder's Sta.), the Criminal Court of Appeals has exclusive appellate jurisdiction in criminal cases; and a proceeding and judgment for criminal contempt is reviewable on appeal to this court.

**2. CONTEMPT (§ 3\*)—NATURE AND ELEMENTS—  
"CRIMINAL CONTEMPTS."**

"Criminal contempts" are all those acts or conduct in disrespect of the court or its process.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or which obstruct the due administration of justice, or tend to bring the court into disrepute.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1747, 1748.]

### 3. CONTEMPT (§ 30\*)—PROCEEDINGS TO PUNISH—POWER OF COURT.

The power to punish contempts is inherent in all courts of justice, and is expressly conferred upon them by the Constitution. Section 25, Bill of Rights. The exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court, or its order; and, second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94; Dec. Dig. § 30.\*]

### 4. CONTEMPT (§ 58\*)—PROCEEDINGS TO PRESENT EVIDENCE—ANSWER OF DEFENDANT.

In proceedings for contempt for disobedience to an order of court, the sworn answer of the party charged with contempt is evidence to purge him thereof; but it is not conclusive. It may be contradicted and supported by other evidence, and the question whether or not the party charged has purged himself of the contempt is for the determination of the court, upon the consideration of all the evidence adduced for and against him; and if, upon such hearing, the court is satisfied that it is within the power of the contemner to comply with its order, the court should enforce the order by appropriate punishment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 169-175; Dec. Dig. § 58.\*]

### 5. CONTEMPT (§ 15\*)—ACTS CONSTITUTING—CONCEALMENT OF SUBJECT-MATTER OF ACTION—"CRIMINAL CONTEMPT."

A party to a suit, who willfully destroys, removes, conceals, or disposes of its subject-matter pending the proceeding, with intent to withdraw it from the jurisdiction of the court, and to render futile any order or decree concerning it, unavoidably defies the power and offends the dignity of the court, and thereby renders himself liable to punishment for "criminal contempt."

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 42-44; Dec. Dig. § 15.\*]

### 6. BANKS AND BANKING (§ 73\*)—DEPOSITORS' GUARANTY—INSOLVENCY OF BANK.

Under the act "creating a state banking board, establishing a depositors' guaranty fund to insure depositors against loss when the bank becomes insolvent," etc., all of the books, records, and papers of the failed or insolvent bank taken over by the Bank Commissioner are public records, and become the property of the state.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 154, 155; Dec. Dig. § 73.\*]

### 7. WITNESSES (§ 298\*) — PRIVILEGE — SELF-CRIMINATION.

The officers of an insolvent state bank cannot disobey, on the ground of the constitutional protection against self-crimination, the order to produce and deliver the books, records, and papers of such bank to the State Bank Commissioner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1038-1041; Dec. Dig. § 298.\*]

### 8. WITNESSES (§ 298\*) — PRIVILEGE — SELF-CRIMINATION.

The privilege against self-crimination afforded by section 21 of the Bill of Rights, "that no person shall be compelled to give evidence

which will tend to incriminate him, except as in this Constitution specifically provided," does not protect the officers of an insolvent state bank in resisting the compulsory production of its books, records, and papers because such documents may tend to incriminate them. And such officers may be compelled, in a judicial proceeding, to produce the books, records, and papers of such bank for inspection, even though to do so would tend to incriminate them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1038-1041; Dec. Dig. § 298.\*]

(Additional Syllabus by Editorial Staff.)

### 9. CONTEMPT (§ 4\*)—NATURE AND ELEMENTS—"CIVIL CONTEMPT."

"Civil contempts" are those quasi contempts which consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1194, 1195.]

Error from District Court, Creek County; A. H. Huston, Judge.

Bates B. Burnett and another were convicted of criminal contempt, and bring error. Affirmed, and order allowing bail as superseas revoked.

On the 7th day of October, 1912, there was filed in the district court of Creek county a case entitled "The State of Oklahoma, on relation of Chas. West, Attorney General, and J. D. Lankford, Bank Commissioner of the State of Oklahoma, Plaintiffs, v. Farmers' & Merchants' Bank of Sapulpa, a Banking Corporation, Bates B. Burnett, Birch C. Burnett, A. P. Crawford, S. C. Nigh, Thomas Wills, Charles W. Wills, the Big Pond Oil Company, the Bogy Oil Company, the Brown Real Estate Company, the Creek County Investment Company, Elbert Oil & Gas Company, the Sapulpa Interurban Railway Company, and Dannie Ross Burnett, Defendants."

The petition, among other things, alleges that the Farmers' & Merchants' Bank of Sapulpa, prior to September 9, 1912, was conducting a general banking business at Sapulpa as a state bank on which said date said bank was taken over by the State Bank Commissioner; that the defendants Bates B. Burnett and Birch C. Burnett are stockholders of said bank.

Listed among the assets of said bank, among bills and notes, as alleged in the petition, are the following items:

Big Pond Oil & Gas Co.....	\$ 10,000 00
Brown Real Estate Co.....	29,753 75
Creek County Investment Co.....	40,986 00
Elbert Oil & Gas Co.....	9,250 00
Sapulpa Interurban Ry.....	107,402 56
Wade S. Stanfield.....	3,815 82

Paragraph 3 of said petition is as follows:

"(3) That the defendants the Big Pond Oil Company, the Bogy Oil Company, the Brown Real Estate Company, the Creek County Investment Company, and the Elbert Oil & Gas Company are oil and gas and real estate corporations controlled and operated, in

whole or in part, by the officers, directors, and stockholders of said Farmers' & Merchants' Bank, and have been financed, in whole or in part, from the funds and assets of said Farmers' & Merchants' Bank; and at the close of business on September, 9, 1912, there was listed among the assets of said Farmers' & Merchants' Bank notes and bills aggregating \$90,989, given by said companies, which are now held by the Bank Commissioner of the state of Oklahoma as the property of the state of Oklahoma, for the use and benefit of the bank guaranty fund of said state. That said bills and notes represent funds of the said Farmers' & Merchants' Bank which were advanced to said companies in violation of law, and with the intent that the stockholders of said bank would profit personally, to the injury of the bank."

Paragraphs 6 and 7 are as follows:

"(6) That the property, assets, and business of the defendants the Big Pond Oil Company, the Boggy Oil Company, the Brown Real Estate Company, the Creek County Investment Company, the Sapulpa Interurban Railway Company, and the Elbert Oil & Gas Company, which are in fact the property and assets of the Farmers' & Merchants' Bank, are being mismanaged and mishandled by the persons in control of same, and are in imminent danger of being entirely lost, and will be dissipated, unless prevented by the appointment of a receiver for all of said defendant corporations by this court in this action, to take charge of all the property and assets of said defendants, and to hold and manage same under the orders and direction of this court.

"(7) That the books of said Farmers' & Merchants' Bank, including the daily statement of resources and liabilities from February, 1908, to September 3, 1912, all remittance records for the years 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the personal accounts in the individual ledger of B. C. Burnett, B. B. Burnett, and the companies in which they are interested, have all been taken from the building occupied by said bank, and, although demand has been made on the officers, directors, and stockholders of said bank that they return said books to the Bank Commissioner, they have failed and refused, and still fail and refuse, so to do. That it is believed by relator that said books are now in the custody and under the control of the persons acting as officers and directors of said Farmers' & Merchants' Bank when same was taken over by the Bank Commissioner on September 9, 1912, and are being secreted in order to hinder and embarrass the state in administering the affairs of said Farmers' & Merchants' Bank."

The prayer of the petition is that the court appoint the Bank Commissioner of the state of Oklahoma as receiver for said defendants the Farmers' & Merchants' Bank and the

corporations named, and then prays for judgment against certain stockholders for an amount equal to the par value of the shares of stock held by each, and that the court order and direct that the officers and directors of said Farmers' & Merchants' Bank turn over to the State Bank Commissioner all books, records, and papers pertaining to the business and affairs of said Farmers' & Merchants' Bank, and that the plaintiff have such other and further relief in the premises as may be deemed proper.

The record shows that on the 11th day of October, in said case, in open court, the following order was made:

"Order to Produce Books, etc.

"The above cause coming on to be heard upon the application of the plaintiff for the appointment of a receiver for the defendant the Farmers' & Merchants' Bank, and for an order directing that the officers, directors, and employees of the defendant the Farmers' & Merchants' Bank, at the time same was taken over by the Bank Commissioner, turn over and deliver to the Bank Commissioner of the state of Oklahoma all books, records, and papers belonging to said bank, and the plaintiff being represented by W. C. Reeves, Assistant Attorney General of the state of Oklahoma, and the defendants being represented by Messrs. Rutherford and Lawrence, their attorneys, and the court being fully advised in the premises:

"It is ordered and adjudged that the application for a receiver for said Farmers' & Merchants' Bank be denied, to which order and judgment the plaintiff excepts.

"It is further ordered and adjudged that the petition and application herein shall be treated by the court as in the nature of a bill of discovery, for the purpose of securing the books and property which should be delivered over to the Bank Commissioner by the officers, directors, and employees of said Farmers' & Merchants' Bank as the books and property of said bank at the time said bank was taken over by the Bank Commissioner of said state of Oklahoma.

"It is further ordered and adjudged that the officers, directors, and employees of the Farmers' & Merchants' Bank of Sapulpa produce and deliver to the Bank Commissioner of the state of Oklahoma all property, books, and papers of said Farmers' & Merchants' Bank, and pertaining to the business and affairs of said Farmers' & Merchants' Bank, prior to the time said bank was taken over by said Bank Commissioner, including the daily statement of resources and liabilities of said bank from February, 1908, to September 3, 1912, all remittance records for the years 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the individual ledger, showing the personal accounts of B. C. Burnett, the Big Pond Oil Company, Boggy Oil & Gas Company, the Brown Real Estate Company,

the Creek County Investment Company, the Elbert Oil & Gas Company, and the Sapulpa Interurban Railway Company, or show cause to the contrary on or before Monday, October 14, 1912, at 9 o'clock a. m.

"Wade S. Stanchfield, Judge."

The record further shows that on said day the sheriff of Creek county served said court order by delivering a true copy to Bates B. Burnett, as president; and Birch C. Burnett, as cashier, of the Farmers' & Merchants' Bank of Sapulpa.

October 12th there was filed a stipulation, signed by W. C. Reeves, Assistant Attorney General, for plaintiff, and Rutherford & Lawrence and Stuart, Cruce & Gilbert for the defendants, wherein it is stipulated and agreed that further hearing of said case shall be continued until a district judge is assigned to Creek county in place of Hon. Wade S. Stanchfield, who is disqualified to sit in said cause. October 16th the Chief Justice assigned Hon. Tom D. McKeown, of the Seventh judicial district, to hold court at Sapulpa, in the Twenty-Second judicial district, on October 18th and 19th.

October 18th the Attorney General filed an information, duly verified by L. H. Patton, Assistant Bank Commissioner, which, omitting the formal parts, is as follows:

"Information.

"Comes now Chas. West, Attorney General of the state of Oklahoma, and gives the court to know and be informed that in the course of certain interlocutory proceedings in this action an order was duly made by this court, requiring the officers, directors, and employees of the Farmers' & Merchants' Bank, one of the defendants in said cause, to turn over and deliver to the Bank Commissioner of the state of Oklahoma certain books pertaining to the business of said Farmers' & Merchants' Bank, or show cause to the contrary on or before October 14, 1912, at 9 o'clock a. m., which order was duly served on Bates B. Burnett, Birch C. Burnett, two of the officers of said Farmers' & Merchants' Bank, on the 11th day of October, 1912, and on Brooks G. Burnett, an employee of said bank, on the 12th day of October, 1912, a copy of which order is attached hereto as a part hereof and marked 'Exhibit A'; that said Bates B. Burnett, Birch C. Burnett, and Brooks G. Burnett, and each of them, wholly failed and refused, and still fail and refuse, to obey said order, and refuse to deliver to said Bank Commissioner of the state of Oklahoma any of the books described in said order. Wherefore plaintiff prays that said Bates B. Burnett, Birch C. Burnett, and Brooks G. Burnett be committed to the county jail of Creek county, Oklahoma, until they fully comply with said order, and that they be adjudged to pay the costs of this proceeding."

On said day the defendants, appearing specially, filed a motion to quash the writ issued on the information, because said writ was issued without authority of law, and because no sufficient showing had been made to authorize the issuance of the said writ. The motion was by the court overruled, and on the same day the defendants filed their special demurrer, on the ground "that there is a defect as to parties plaintiff in this, to wit: Because of the failure to make the Bank Commissioner of the state of Oklahoma a party plaintiff." The court sustained the demurrer, with permission to the plaintiff to amend by making the Bank Commissioner an additional party plaintiff. December 31st the Chief Justice assigned the Honorable A. H. Huston, of the Eleventh judicial district, to hold court at Sapulpa, Creek county, for a period beginning January 14, and continuing up to and including January 18, 1913.

On January 13th, in open court, Hon. A. H. Huston presiding judge, the defendants filed their answers, as follows:

"Answer to Rule.

"Now come the defendants, Bates B. Burnett and Birch C. Burnett, who on the 11th day of October, 1912, were cashier and president, respectively, of the defendant the Farmers' & Merchants' Bank, and without waiving any of the exceptions heretofore entered to the issuance of the order of the court heretofore made, or to the petition of the plaintiff heretofore filed in this case, but still insisting that said order directing these defendants to show cause was issued without any authority of law and was void, and still insisting that this court is without jurisdiction to compel them in this proceeding to answer said order of the court, and protest that the plaintiffs, if any right they have, have a plain, complete, and adequate remedy at law, they state that they are unable to comply with said order, and are unable to deliver to the plaintiff, the Bank Commissioner, the various books and records referred to in the order of the court heretofore made, to wit, the daily statement of resources and liabilities of said bank from February, 1908, to September 3, 1912, all remittance records for the years 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the individual ledger, showing the personal accounts by Birch C. Burnett, Bates B. Burnett, the Big Pond Oil Company, Boggy Oil & Gas Company, the Brown Real Estate Company, the Creek County Investment Company, the Elbert Oil & Gas Company, and the Sapulpa Interurban Railway Company, for the reasons that neither of these defendants now has, nor has he had since the said 9th day of September, 1912, nor for several days prior thereto, the possession, custody, or control of any of said records, nor has either

one of these defendants any knowledge of the whereabouts of said records, or knowledge of any facts that would enable either of them to produce said records to the Bank Commissioner. Wherefore these defendants ask to be discharged and relieved from the obligations imposed upon them by virtue of the issuance of said order out of this court. Second. These defendants state that the discovery and the possession of the books sought herein are not sought in good faith, for the purpose of enabling the Bank Commissioner to liquidate the Farmers' & Merchants' Bank, but that said books are sought for the purpose of instituting criminal prosecutions against these defendants, charging them with violations of the criminal laws of the state of Oklahoma in connection with the affairs of said bank; that it is the purpose of the Attorney General of the state to institute criminal prosecutions against these defendants for various acts charged against them in connection with their duties as officers of said bank, and the plaintiff herein hopes and expects to get information from said books to assist in said prosecution; that even if it were in the power of these defendants to produce said books they might contain information which would tend to incriminate these defendants and to render them liable to criminal prosecution, and they here plead that this court has no authority or power to compel them to produce said books, even if it were in their power so to do. They state that they do not know personally of all the entries in said records, for the reason that said records were not made by them, but that they do not object to producing said books if it were in their power, provided said books do not contain matters tending to incriminate them. Wherefore these defendants ask to be discharged and relieved from the obligations imposed upon them by virtue of the issuance of said order out of this court. Rutherford & Lawrence, Stuart, Cruce & Gilbert, Attorneys for Defendants.

"State of Oklahoma, Creek County—ss.:

"Bates B. Burnett and Birch C. Burnett, each being duly sworn according to law, states that he has read the above and foregoing answer and knows the contents thereof, and that the statements therein contained are true to the best of his knowledge and belief. Bates B. Burnett. B. C. Burnett. B. C. Burnett.

"Subscribed and sworn to before me this the 14th day of January, 1913. R. Herman Killebrew, Notary Public. [Seal.]

"My commission expires Mar. 18. 1916."

Thereupon the plaintiff filed a reply as follows:

"Reply.

"Comes now the plaintiff in the above-entitled cause, and for its reply to the answer filed herein by the defendants on the 14th

day of January, 1913, alleges and states that the matters, things, and facts alleged in defendants' purported answer to the rule of court, requiring them to produce certain books herein, does not state facts sufficient in law to relieve said defendants from the operation and effect of said rule; that at the last examination by the state bank examiner had of the condition of the Farmers' & Merchants' Bank of Sapulpa, prior to September 9, 1912, the books referred to in the court's order were in the possession and under the control of said Farmers' & Merchants' Bank and its officers, and that the Bank Commissioner of the state of Oklahoma took charge of said bank on the 9th day of September, 1912, and on that date and at that time said books were not found in said bank, and at the time that said Bank Commissioner took charge of said bank on, to wit, the 9th day of September, 1912, said books, nor any of them, were in said bank, and said books, nor any of them, have ever come into the possession or under the custody and control of your petitioner, or of said Bank Commissioner; that, in order that the condition of said bank as relates to its assets and liabilities, may be understood and ascertained, your petitioner states that it is absolutely necessary for your petitioner to have the custody and control of said books. Charles West, Attorney General, W. C. Reeves, McDougal & Lytle, Attorneys for Plaintiff.

"State of Oklahoma, County of Creek—ss.:

"Comes now L. H. Patton, who being first duly sworn, on his oath, deposes and says that he is Assistant Bank Commissioner for the state of Oklahoma; that he has heard read the above and foregoing reply on the part of the petitioner made, well acquainted with the facts therein contained, and that said facts are true. L. H. Patton.

"Subscribed and sworn to before me this 14th day of January, 1913. Ruth Snyder, Notary Public. [Seal.]

"My commission expires October 9, 1916."

The defendants thereupon filed their verified application for a continuance, which was overruled, and the court proceeded to hear the evidence.

The following named witnesses testified on behalf of the state: The defendant Chas. W. Wills, R. Herman Killebrew, bookkeeper in said bank, the defendant S. O. Nigh, L. H. Patton, Assistant Bank Commissioner of the state, and M. R. Garnett, state bank examiner; also Brooks Burnett. When the state rested, the defendants called W. C. Reeves, Assistant Attorney General, as a witness. No other testimony was offered on behalf of the defendants.

The findings of the court, as shown by the record, are as follows:

"By the Court: In this case, as I recall this petition, it alleges the insolvency of the bank (I think it alleges that), and alleges

the use of the funds of the bank in the financing of several corporations, and asks for a receiver for the bank and for the various corporations, and then asks for judgment against certain stockholders named; that is, to recover the double liability provided by statute. That, in substance, is the range of this petition as I get it, isn't it?

"By Mr. Reeves: I think so.

"By the Court: After that petition was filed, the presiding judge refused the application contained therein for the appointment of a receiver, either for the bank, or these other corporations.

"By Mr. Reeves: The order just relates to the application in regard to the bank.

"By the Court: And an opinion was expressed by the judge that he would deny that application for a receiver—whether he passed on the question as to whether the plaintiff was entitled to the judgment or not, perhaps not—and said something or other in the opinion that it should be retained or proceeded with in the nature of a bill of discovery. It is not like the opinion of any other court. This is the same court, as it is the rule here a court may be composed of several judges, one acting at a time at different times; it is all the same court. I would not be disposed, after other judges had held the court for a time and made any rulings, to go back of those. Whether they are right or wrong may be determined by the Supreme Court, but not by me. Even if I had an opinion that they were, I should not reverse them, because I would assume that if there was any error in them the party injured could save his exceptions and test the case on them in the Supreme Court. Whether it is in the nature of a bill in equity or a bill of discovery or not, it has not been a ruling. Of course, he suggested that in an opinion. I am not concerned much with what it is. I don't care what you call it. Here is a suit pending, and in this suit an order is made. Now, whether, in the opinion of one judge, the case itself is in the nature of a bill of discovery, or what it is, the fact that that might have been his opinion would not invalidate the order made, if he had a right to make it. Now, it is said that, pursuing it logically, which I think the counsel ingeniously did, that is a suit in equity, and that a suit in equity cannot be maintained as long as there is an adequate remedy at law; and the adequate remedy at law suggested is an action in replevin. I do not think that is an adequate remedy. What good would be a judgment of replevin for the recovery of the account books if the officers couldn't find them? And a judgment for the value of them, which has been suggested, would be practically nothing. They are of no value themselves, except to use as the Bank Commissioner requires; they wouldn't have any value as articles of commerce. They might be of inestimable value

to the Bank Commissioner to enable him to settle up the affairs of the bank; but, so far as being able to do anything with them, to dispose of them, nothing could be done at all, so a judgment for their value would be no adequate remedy.

"Perhaps a more serious point is that urged that a demurrer to the petition—the first pleading filed was this petition. On that petition this order was made. Later a demurrer to the petition was filed, and one of the judges sustained that demurrer; and it was therefore argued, logically too, that with the sustaining of that demurrer the petition itself fell, and when it went down everything else went down with it. It might not have been necessary to have demurred to procure all that was procured in this case. An application to have another party made or joined would have had the same effect. No demurrer was sustained because of the insufficiency of the petition upon its merits; it didn't fall in that way; it still stands, so far as the allegations therein are concerned, but another party was joined as a party plaintiff. Technically, taking the argument on the technicalities, the argument that has been made is reasonable. Can the court regard that? It has been said by some of the old English judges that when the technicalities of the law tend to justice, then the court should make much of it; and when they do not the court should not make very much of them. The bare fact that another party was asked to be joined, and he was joined, would not, in fact and in effect, interfere with the order of the judge made, ordering the production of these books. Now a special arm of the state government is brought in, and, because the court held it was necessary to bring him in, to hold that invalidated the order theretofore made, requiring the parties to produce these books, it seems to me, would be sacrificing the real for the shadow of things.

"The only thing left is the evidence produced upon this hearing. As a reason for not producing them, they file an answer, saying they haven't got them. Of course, that is a pretty good reason, perhaps, if they can't; but can the court act upon the bare statement of that kind, connected with the statement that they ought not to be required to produce them anyway, because it might incriminate them? The testimony is that these books were there in the bank; that they were officers of the bank; they exercised full control, under this evidence. The witness Wills, acting as assistant cashier, and Mr. Nigh were directors somewhat to their doubt. They didn't seem to know whether they were directors or not. Evidently they didn't have anything to do with the control. Even Brooks Burnett didn't know that he was a director. That is the five. The president and cashier ran this bank, and it is the testimony of Brooks Bur-



nett that he merely went there with the keys and handed them over to the bank examiner on the direction of either Bates or Birch. He was acting then for those who were actually in charge, for those who were running, operating and controlling that bank. I don't know anything about this, except what I have heard in the evidence. I didn't know what case I was coming over to try, so I could not be influenced by anything else. From this evidence I am convinced that these two gentlemen are the ones that were in full control of this bank. Being in full control of the bank, they were in control of its records, books, and papers. If they were not there when the bank examiner took charge, and unless there was some burglary, which isn't attempted to be alleged, why they must know where they are. They may have put them beyond their reach temporarily; they possibly may have destroyed them. There is nothing alleged though; there is nothing said. If they are destroyed so as to relieve them from producing them, they must show it. Perhaps the weakest part in the plaintiff's proposition is that the order itself runs to the bank officers, naming nobody. I think the individuals should have been named; but these individuals were served personally, and the evidence is they were bank officers, the president and cashier. These two are the highest bank officers, and they were the persons that were served. That was away back in October some time. Now, from that time to this they have had notice; it was their place to produce these books. They don't say they are destroyed; they say they haven't them in their control. They say nothing in their answer as to how they got away from their possession. If there was some sort of a reasonable explanation from the time they had them, that at some time the bank was robbed, or that some one else was in the bank, who had possession of these books, and went away, something to reasonably show to the court that these books got away from them without their connivance and without their consent, the court might consider it. Under this evidence the court can only find that they themselves knew what became of them. It still might be true, if they got rid of them, that they wouldn't know where they are now. They might have given them to somebody else, or somebody else removed them elsewhere; they might still swear they don't know where they were, and they were not under their control. The court must believe they can get them under their control again. The arm of the law ought not to be so weak that it can't deal with situations of this kind.

"The state has a system of bank examinations by a Bank Commissioner, whose duty it is to come and take charge of banks in failing circumstances and wind up their affairs. Is it possible to defeat and delay the banking officers by taking the books out of

the banking house that are necessary to do that, and then come up to the court and say: 'You can't do that; the court is not strong enough to handle me. Proceed in some more orderly, lengthy way.' I don't think that is the intention of the law at all.

"Come forward, Mr. Bates B. Burnett and Birch C. Burnett. You have been heretofore directed by this court to produce certain described books and papers of the Farmers' & Merchants' Bank of Sapula, or show cause why you did not produce them. You have filed an answer. You failed to produce them, but you filed an answer, saying you did not know where they were. Your answer has been held to be insufficient by the court. Have either of you anything further to say why you should not be punished for contempt of court in failing to obey the order, Mr. Bates B. Burnett?

"By Mr. Bates B. Burnett: No, sir.

"By the Court: Mr. Birch C. Burnett?

"By Mr. Birch C. Burnett: No, sir.

"By the Court: It is the judgment of the court that you have failed to obey the order of the court in not producing the books of the bank described in the order, and that you have failed to show sufficient cause why you have not done so; and it is the judgment of the court that you be imprisoned in the county jail of this county until such time as you shall produce these books and papers. I shall not grant a supersedeas of the order, but will stay the order for the period of 10 days upon the giving of the bond of \$3,000 each, and will stay the order after the giving of the bond for the period of 10 days, to enable you to lodge your petitions in error, or any proceeding you want, and there ask for the stay. I don't think in this character of a case the trial court should grant a supersedeas. I have had several of that kind of cases, and I want the Supreme Court to have a chance to grant the supersedeas themselves. The defendants will be placed in custody of the sheriff until these bonds are given."

The judgment and sentence was rendered and entered January 15, 1913, and contains the following recital: "It is therefore ordered, and adjudged that said defendants, Bates B. Burnett and Birch C. Burnett, be confined and imprisoned in the county jail of Creek county, Oklahoma, until they shall deliver and turn over, or cause to be delivered and turned over, to the Bank Commissioner of the state of Oklahoma the following books and property of the Farmers' & Merchants' Bank, now in process of liquidation by said Bank Commissioner, to wit, daily statement of resources and liabilities of said bank from February, 1908, to September 3, 1912, all remittance records for the year 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the individual ledger, showing the personal account of B. C. Burnett, B. B. Burnett, the

Big Pond Oil Company, Boggy Oil & Gas Company, the Brown Real Estate Company, the Creek County Investment Company, the Elbert Oil & Gas Company, and the Sapulpa Interurban Railway Company, to which judgment defendants and each of them except. It is further ordered and adjudged that said defendants, Bates B. Burnett and Birch C. Burnett, be held in the custody of the sheriff of said county of Creek until they each give bond in the sum of three thousand (\$3,000) dollars, with good and sufficient sureties, said bond to be approved by the clerk of the district court, conditioned that they file their petition in error in the proper appellate court of this state and obtain therein an order of supersedeas within ten (10) days from this date; and upon the giving and approval of such bond, then execution herein be stayed for a period of ten (10) days from this date; and should said defendants fail to obtain a supersedeas in said appellate court within said period of ten (10) days, then said sheriff of Creek county will proceed to carry out the judgment and commitment of this court—to all of which orders, ruling, and judgments defendants and each of them at the time duly excepted.”

An appeal to this court was duly perfected by filing, January 25th, a petition in error with case-made, at which time an application for supersedeas was allowed and an order made, fixing \$5,000 as the amount of the bond for each defendant; also an order that the cause be advanced and set for argument and final submission on February 7th, at which time it was argued and submitted.

J. B. Rutherford and J. F. Lawrence, both of Sapulpa, and Stuart, Cruce & Gilbert, of Oklahoma City, for plaintiffs in error. Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). The statement of facts has been made somewhat full in order that, by exhibiting the various proceedings in detail, the errors assigned and relied upon for a reversal of the judgment may be at once clearly understood and deprived of any seeming force.

[1, 2] We are confronted at the threshold of the cause with the contention of the Attorney General “that this is a civil proceeding, and that this court has no jurisdiction to review the judgment of the lower court,” citing the case of *Flathers v. State*, 7 Okl. Cr. 668, 125 Pac. 902, and cases therein cited.

While the Attorney General may have proceeded upon the theory that the proceeding was remedial and the contempt civil, it is evident from the record that the district court very properly considered the defendants’ contumacy as a “direct” or “public,” and therefore a criminal contempt; and, though the proceedings were had to compel a

compliance by the defendants to an order of the court, the punishment was primarily in the interest of public justice to vindicate the authority and the dignity of the court from the disrespect shown to it and to its order by the defendants.

We think this case is clearly distinguished from the *Flathers Case*, wherein this court held that a refusal and neglect to pay alimony constituted a civil contempt. In the opinion in that case the following language is used: “Contempts of court are of two kinds, civil and criminal. Much confusion exists in judicial decisions as to whether or not contempt proceedings are civil or criminal. As a general rule, these designations must be considered with reference to the specific question before the court. \* \* \* In the absence of a statutory classification, it is impracticable to state a general rule by which, in all cases, to distinguish these two classes, in the one or the other of which every act of contempt must be classified.”

When the State Bank Commissioner, in the name of the state of Oklahoma, through its Attorney General, asked that the books and records of the Farmers’ & Merchants’ Bank of Sapulpa be produced, it was for the purpose of protecting the interest of the state and the rights of the public, not the interest of an individual litigant.

One of the provisions of the Bank Guaranty Law (section 324, Snyder’s Sts.) is that “the Bank Commissioner shall take possession of the books, records and assets of every description of such bank or trust company, collect debts, dues and claims belonging to it, and upon order of the district court, or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the stockholders, officers and directors; provided, however, that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers and directors.”

[3] The power to punish contempts is inherent in all courts of justice, and is expressly conferred upon them by the Constitution. Article 2, § 25, Bill of Rights. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and decrees of the court, and consequently to the due administration of justice; and upon its proper and prudent exercise depend the respect and dignity and efficiency of our courts of justice. It has been well said that “the exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its orders; and, second, to compel

his performance of some act or duty required of him by the court, which he refuses to perform." *Texas v. White*, 22 Wall. 157, 22 L. Ed. 819.

A party to a suit, who willfully destroys, removes, conceals, or disposes of its subject-matter pending the proceedings, with intent to withdraw it from the jurisdiction of the court, and to render futile any order or decree concerning it, unavoidably defies the power and offends the dignity of the court, and thereby renders himself liable to punishment for contempt. *Cyc. par. E*, and cases cited, p. 8, note 22.

[8] As to the distinction between civil and criminal contempts, Mr. Rapalje, in his work on Contempts, at section 21, gives the best general definitions relating thereto we have found. He says: "'Civil contempts' are those quasi contempts which consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while 'criminal contempts' are all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute."

In the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it is said: "The distinction between civil and criminal contempts seems to be that, where the order of the court is made in a civil proceeding solely for the benefit of one of the parties litigant, and is disobeyed by the other party to the suit, an order committing such party for contempt until he yields obedience to the order is a civil proceeding. Such are orders requiring the payment of money or the performing of some act for the benefit of the opposing litigant, and are not matters in which the public is interested. Criminal contempts consist in such disobedience of the mandates or decrees of a court as constitute a defiance of the power and authority of the court."

In *Bessette v. Conkey Co.*, 194 U. S. 329, 24 Sup. Ct. 667, 48 L. Ed. 997, Mr. Justice Brewer said: "It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court, rather than a disregard of the rights of the adverse party." See, also, *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897, and cases collated in the note; also *Smythe v. Smythe*, 28 Okl. 266, 114 Pac. 257.

The contumacious conduct and acts of

these defendants, as officers of said bank, in refusing to produce the books, records, and papers of said bank were well calculated to embarrass and obstruct the court in the due administration of justice, and constitute a contempt of flagrant character in the face of the court. We think this was the view of the trial court, because the court, before pronouncing judgment, said to the defendants: "Your answer has been held to be insufficient by the court. Have either of you anything further to say why you should not be punished for contempt of court in failing to obey its order?"

It is our opinion that the proceedings and judgment committing the defendants to confinement in the county jail were criminal, and therefore reviewable on appeal by this court. The motion to dismiss the appeal is therefore denied.

The first contention of the learned counsel for the defendants is that no sufficient predicate was laid in the petition for the order to produce the books; and it is argued that the order was void, because it commanded the officers of said bank to produce the books, without naming any particular person, and that, inasmuch as the main body of the suit fell when the application for a receiver was denied, all other orders fell with it. There is no merit in this contention. It is enough that the district court had jurisdiction of the parties and subject-matter of the action, and was exercising its jurisdiction to hear and determine the issues in the case. If the court having jurisdiction should issue an improper order, it is obligatory until reversed by an appellate court; and parties may be punished for disobedience or resistance of such orders. *Rapalje on Contempt*, § 16. Thus, where the alleged contempt consists in the failure to comply with the terms of a court order or decree, inquiry into the merits of the order or decree will not be allowed. 9 *Cyc.* p. 47, and cases cited in note 58.

[4] It is next contended that the defendants' answer was sufficient to purge them of contempt, as it shows inability to comply with the order of the court; and for this reason they were entitled to their discharge, and the infliction of punishment by the court was the exercise of arbitrary and unconstitutional power.

The doctrine of the common law that in constructive criminal contempts, alleged to have been committed out of the presence of the court, if the defendant's sworn answer squarely met and denied the alleged contempt, such answer was conclusive, and no further evidence could be received, has no application in this case. Here the defendants' answer states as a mere conclusion their inability to comply with the order of the court. The testimony of the other officers of the bank shows that these defendants were in possession of the bank's books and

records, and no explanation is made or offered by them as to how or in what manner these books and records passed from their control. However, as hereinbefore stated, this was a direct contempt in the face of the court, and the hearing was given to conform with the constitutional guaranty of section 25 of the Bill of Rights, which provides: "In no case shall a penalty or punishment be imposed for contempt until an opportunity to be heard is given."

Inability to comply with an order of the court may, under certain circumstances, avail as a defense for failure to obey the same; but it stands as an inflexible rule of common sense and common justice that, where the contemner creates the inability to comply, in anticipation of an order of court, commanding him to produce and deliver, he rather aggravates than extenuates his offense.

The defendants cannot avoid obedience to the order of the court by simply adding perjury to fraudulent concealment or misappropriation of the books, records, and papers of the bank of which they were officers.

We think the true rule in proceedings for contempt for disobedience of an order of court is that the sworn answer of the party charged with contempt is evidence to purge him thereof; but it is not conclusive evidence. It may be contradicted and supported by other evidence; and the question whether or not the party charged has purged himself of the contempt is for the determination of the court, upon the consideration of all the evidence adduced for and against him; and if, upon the hearing so had, the court is satisfied that it is within the power of the party charged with contempt to comply with the order of the court, the court should enforce the order by a fine or confinement as for contempt. *Wartman v. Wartman*, Taney, 362, Fed. Cas. No. 17,210; *Clay v. Waters*, supra; *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1030.

[5-8] The only legal justification sought to be established by the defendants is the claim of privilege against self-crimination, in the second paragraph of their answer, as follows: "That even if it were in the power of these defendants to produce said books, they might contain information which would tend to incriminate these defendants, and to render them liable to criminal prosecution." There is no merit in this contention. It ignores the fact that the order calls for the books, records, and papers of said Farmers' & Merchants' Bank, and commanding that the defendants, as officers of said state bank, produce the same. They are not asked to produce their private books and papers.

One of the best-considered cases on the question here presented is *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558. The opinion by Mr. Justice Hughes is clear and logical, and

shows great research, and it is here quoted:

"We come, then, to the broader contention of the appellant, thus stated in the argument of his counsel: 'An officer of a corporation, who actually holds the physical possession, custody, and control of books or papers of the corporation, which he is required by a subpoena duces tecum to produce, is entitled to the same protection against exposing the contents thereof which would tend to incriminate him as if the books and papers were absolutely his own.' That is, the power of the courts to require their production depends, not upon their character as corporate books, and the duty of the corporation to submit them to examination, but upon the particular custody in which they may be found. If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable; and, maintaining the absolute control which alone will insure protection from their being used against him in a criminal proceeding, he may defy the authority of the corporation whose officer or fiduciary he is and assert against the visitatorial power of the state, and the authority of the government in enforcing its laws, an impassable barrier.

"But the physical custody of incriminating documents does not, of itself, protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded, and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case*, where the fact that the papers involved were the private papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself, and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies, not only to public documents in public offices, but also to records required by law to be kept, in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

"There are abundant illustrations in the decisions. Thus, in *Bradshaw v. Murphy*, 7 C. & P. 612, 32 E. C. L. 654, it was held that a vestry clerk, who was called as a witness, could not, on the ground that it might incriminate himself, object to the production of the vestry books kept under the statute. 58 George III, c. 69, par. 2. In *State v. Farnum*, 73 S. C. 165, 53 S. E. 83, it appeared that a legislative committee had been appointed to investigate the affairs of the state dispensary; and it was provided that it should have access to all books of the institution, or of any officer or employé thereof. In anticipation the state dispenser removed certain books from the files, defending his action on the plea that they contained private matter which the committee had no right to inspect. The court ruled that it was the 'obvious duty of any officer to keep books, letters, and other documents relating to the business of his office, and to the manner in which he has discharged, or failed to discharge, its duties, in the place where the public business with which he is charged is conducted, subject to examination by any of the committees appointed by the General Assembly; and upon an application for mandamus to compel him to perform this obvious public duty, it is essential for the court to ascertain the facts and inform itself whether there has been an actual removal of public documents or other public property and a refusal to restore them for examination.' In *State v. Donovan*, 10 N. D. 203, 86 N. W. 709, the defendant was a druggist, who was required by statute to keep a record of all sales of intoxicating liquors made by him, which should be subject to public inspection at reasonable times. It was held that the privilege against self-crimination was not available to him with respect to the books kept under the law; for they were 'public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.' On similar grounds, in *State v. Davis*, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640, the court sustained a statute requiring druggists to preserve the prescriptions they compounded, and to produce them in court when required. See, also, *State v. Davis*, 68 W. Va. 142, 69 S. E. 639, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996; *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527; *Louisville, etc., R. Co. v. Commonwealth (Ky.)* 51 S. W. 167; *State v. Smith*, 74 Iowa, 580, 38 N. W. 492; *State v. Cummins*, 76 Iowa, 133, 40 N. W. 124; *People v. Henwood*, 123 Mich. 317, 82 N. W. 70; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874.

"The fundamental ground of decision in this class of cases is that, where, by virtue of their character and the rules of law applicable to them, the books and papers are

held subject to examination by the demanding authority, the custodian has no privilege to refuse production, although their contents tend to criminate him. In assuming their custody, he has accepted the incident obligation to permit inspection.

"What, then, is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. The demands, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority, when demand is suitably made. This is involved in the reservation of the visitatorial power of the state and in the authority of the national government, where the corporate activities are in the domain subject to the powers of Congress.

"This view, and the reasons which support it, have so recently been stated by this court in the case of *Hale v. Henkel*, supra [201 U. S. 43, 28 Sup. Ct. 370, 50 L. Ed. 652], that it is unnecessary to do more than to refer to what was there said (201 U. S. at pages 74, 75, 28 Sup. Ct. at page 379 [50 L. Ed. 652]): 'Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He

owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure, except under a warrant of the law. He owes nothing to the public, so long as he does not trespass upon their rights. Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions, unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privilege. \* \* \* Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular, in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.' See, also, *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 348, 349, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645.

"The appellant held the corporate books subject to the corporate duty. If the cor-

poration were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation, of necessity, reaches the corporate books, without regard to the conduct of the custodian."

All of the records and papers of the Farmers' & Merchants' Bank of Sapulpa are public records, and became, when it was taken over by the Bank Commissioner, the property of the state.

In the case of *Noble State Bank v. Haskell*, 22 Okl. 88, 97 Pac. 607, it is said: "Banks are chartered by the state, not with the paramount view of enabling the stockholders to make investments and derive profits therefrom, but to meet a public necessity. The stockholders, having made investments therein, should be protected; but private interest must always be subordinated by the state, in the reasonable exercise of its police power, to the public welfare or good. With the view that the depositor, as well as the stockholder, and the general public with an incidental interest therein, may be protected, banking is regulated, and limitations, restraints, and requirements are imposed. The imposition of double liability upon the stockholders, the requirement of reserve funds, stipulations as to what capital stock cannot be invested in, prescribed qualifications of the directors—all these having been tried, in the judgment of the Legislature the further restriction that active officers should not borrow from the bank without incurring pains and penalties was deemed salutary. In addition, to further and more completely protect the depositors, the depositors' guaranty fund is created; the Legislature acting pursuant to the mandatory declaration of the Constitution. Section 1, art. 14."

And in the case of *State ex rel. v. Cockrell*, 27 Okl. 630, 112 Pac. 1000, it is said: "That the depositors' guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund is also true. The depositors' guar-

any fund act was sustained by this court on the theory of the reserved power of the state to alter and amend charters of state banking corporations for the public welfare. [Citing cases.] This power, exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state \* \* \* equal to five per centum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks (section 3, art. 2, c. 5, pp. 121-123, Sess. Laws 1909), is the same as that which levies, or causes to be levied, a tax upon the people and property within the state for the maintenance and support of the common schools and educational institutions. The title of such depositors' guaranty fund vests in the state just as much so as the common school lands, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the state."

The officers of an insolvent state bank cannot disobey, on the ground of the constitutional protection against self-crimination, the order to produce and deliver the books, records, and papers of such bank to the State Bank Commissioner. The privilege against self-crimination afforded by section 21 of the Bill of Rights, "that no person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided," does not protect the officers of an insolvent state bank in resisting the compulsory production of its books, records, and papers because such documents may tend to incriminate them. And such officers may be compelled, in a judicial proceeding, to produce the books, records, and papers of such bank for inspection, even though to do so would tend to incriminate them.

In conclusion we will say that these delinquent defendants must realize that the law is not so lame, helpless, and impotent that craft, intrigue, and subterfuge, or bold defiance, can defeat the due administration of justice. It is truly said that "courts might as well break and cast away the scepter of justice if derelicts may thus trifle with their authority." The public have a profound interest in preserving the power and authority of their courts of justice. Everything that affects the well-being of organized society, the life and liberty of the citizen, and the rights of property is submitted to their decision. Without the power to punish for contempt, the courts would become objects of public derision, and the citizen would be without protection or security in his person and property.

The judgment is affirmed, and the order heretofore allowing bail as supersedeas is hereby revoked.

The clerk of the district court of Creek county is directed to issue to the sheriff of said county, commitments in accordance with the judgment of the court. Mandate to issue forthwith.

ARMSTRONG, P. J., and FURMAN, J., concur.

#### Ex parte REMILLARD.

(Criminal Court of Appeals of Oklahoma.  
Feb. 22, 1913.)

Application of Lewis Remillard for writ of habeas corpus. Dismissed.

C. B. Leedy, of Arnett, for petitioner. Chas. West, Atty. Gen., opposed.

PER CURIAM. The petitioner, Lewis Remillard, filed a petition for the writ of habeas corpus in this court on the 15th day of February, 1913, on the ground that he was unlawfully restrained of his liberty by the sheriff of Ellis county. On the 17th day of February, 1913, the petitioner filed a motion asking this court to dismiss his petition for the writ of habeas corpus.

The motion is sustained, and the petition dismissed.

## STATE v. GILLMORE.

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

## 1. HUSBAND AND WIFE (§ 306\*)—CRIMINAL LAW (§ 1213\*)—OFFENSES—DESERTION—NONSUPPORT—STATUTES—CONSTITUTIONALITY—UNUSUAL PUNISHMENT.

Chapter 163, Laws 1911, relating to desertion and nonsupport of wife by husband, or of children by either parent, is not unconstitutional by reason of the provisions of section 4 relating to orders for periodical payments, nor because of the requirement of section 7 relating to wages of one confined at hard labor, nor because the punishment is unusual.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1101; Dec. Dig. § 303; \* Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

## 2. HUSBAND AND WIFE (§ 304\*)—NONSUPPORT—OFFENSES—DUTY TO SUPPORT—PLACE.

The chief object of the act is to compel the husband, when able, to support his family; and wherever he deserts his wife, leaving her in destitute or necessitous circumstances, it is his duty to provide for her there, unless some reason be shown why she should follow him elsewhere.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.\*]

## 3. HUSBAND AND WIFE (§ 304\*)—OFFENSES—DESERTION—STATUTES—OPERATION.

The offense is committed either by deserting and leaving her in destitute or necessitous circumstances, or by neglect or refusal to provide for her whenever, after such desertion, she becomes destitute or necessitous. And a husband who deserted his wife in such circumstances and left the state before the act took effect, and after it became operative voluntarily returned to be a witness in a civil action between other parties, and while here neglected or refused to provide for her, she then being in destitute and necessitous circumstances, thereby rendered himself liable to prosecution.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.\*]

## 4. CRIMINAL LAW (§ 276\*)—PLEAS—JURISDICTION—DEFENSES.

In a criminal case, a plea to the jurisdiction, which goes only to matters of defense, may properly be denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 636, 637; Dec. Dig. § 276.\*]

## 5. CRIMINAL LAW (§ 276\*)—PLEA TO JURISDICTION—PROOF AND VERIFICATION.

A plea to the jurisdiction is not receivable unless proved or positively verified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 636, 637; Dec. Dig. § 276.\*]

Appeal from District Court, Stafford County.

Robert E. Gillmore, having been arrested, charged with neglecting and refusing to support and maintain his wife, pleaded to the court's jurisdiction; and, from an order overruling a demurrer to the plea and discharging him, the State appeals. Reversed.

J. S. Dawson, Atty. Gen., and Ray H. Beals and Paul R. Nagle, both of St. John, for the State. F. L. Martin and Van M. Martin, both of Hutchinson, for appellee.

WEST, J. Section 1 of chapter 163 of Laws of 1911 provides: "That any husband who shall, without just cause, desert or neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, \* \* \* shall be guilty of a crime, and, on conviction thereof, shall be punished by imprisonment in the reformatory or penitentiary, at hard labor, not exceeding two years."

On May 11, 1912, a complaint was sworn to before a justice of the peace of Stafford county, charging: "That on the — day of April, 1911, and from then continuously to the filing of this complaint, at the county of Stafford, state of Kansas, the said defendant, Robert E. Gillmore, being then and there the husband of one Rosamond Gillmore, did then and there unlawfully, willfully, feloniously, and without just cause desert and neglect and refuse to provide for the support and maintenance of his said wife, she (the said Rosamond Gillmore) being then and there in destitute and necessitous circumstances." The defendant was arrested, and filed a motion to quash, which was overruled; and, after a preliminary hearing, the defendant was bound over to the district court for trial. On the 13th day of May, an information was filed containing substantially the same charge as indicated, in response to which the defendant filed a paper unnamed, setting out that he denied the jurisdiction of the court over his person, and over the subject-matter of the action, and that he entered his special appearance for the sole purpose of this plea; that he was arrested on the 11th day of May; that he left the state of Kansas in 1908, and had been a resident of Texas continuously for the past three years, and had not been in Kansas since 1909 until he came on May 6, 1912, to act as a witness in a case between his wife and other parties; that he intended to return to Texas, where he resided, and, when about to take the train on the 10th of May, he was arrested on a warrant issued by Justice Mace, from which arrest he was discharged on May 11th; that, when attempting to take the train on the date last mentioned, he was again arrested on a warrant of Justice Swartz, before whom he entered his special appearance and moved to quash, which motion was overruled; that the justice proceeded with the preliminary examination, and although there was no testimony showing, or tending to show, that the defendant had ever been in Kansas from April 1, 1911, until and including May 6, 1912, and although it was shown to the justice that the defendant was a resident of Texas, and had been during the times named in the warrant, and no evidence showing that he had been in Kansas subsequent to March 29, 1911 when the act under which he was arrested took effect, he was nevertheless bound over; that he came to Stafford county as a witness in



the cause mentioned, and for no other purpose, and was endeavoring to return at the earliest possible moment at the close of the case in which he came to testify; that he believed he was illegally restrained of his liberty by the sheriff of Stafford county, and that the laws of Kansas can have no extraterritorial effect, and that he could not be guilty of violating the act in question, and that he believed, if it were the intention of the Legislature to apply the provisions of such act to nonresidents who were living apart from their wives prior to its passage, that such act is unconstitutional and *ex post facto*, and defendant believed he was exempt from arrest, because he had come merely to be a witness. This was sworn to on belief only. To this paper the state demurred; and after argument the court not only overruled the demurrer, but discharged the defendant; and the state, reserving the question for review, appeals and assigns error in the ruling of the trial court.

[1] The defendant contends that the act is unconstitutional because section 4 provides that before trial, with the consent of defendant, or at the trial on entry of a plea of guilty, or after conviction, instead of sending the defendant to the penitentiary or reformatory, or in addition thereto, the court, in its discretion, may make an order, subject to change from time to time, directing the payment of a certain sum periodically, for a term not exceeding two years, to the wife, guardian, curator, or custodian of the minor child or children, or to an organization or individual approved by the court as trustee, and shall have power to release the defendant from custody on probation for a period so fixed, upon his giving a recognizance with or without surety in such sum as the court or judge may order and approve. Also that it is unconstitutional because section 7 authorizes the warden or official, in charge of the penitentiary or reformatory, to pay over to the wife, or to some one for the minor children, at the end of each week for their support, a sum equal to such amount as may be allowed by law to such convict for each day's hard labor performed by him. It is also contended that as the statutes of Kansas can have no extraterritorial effect, and as it is the wife's duty to reside at the husband's domicile, which was here shown to be in Texas, he could not default in her support until demand was made at that place; that, if he owed a duty to support his wife, it was a duty to support her in Texas, and not in Kansas. The provision requiring the warden to pay a sum equal to the daily wage of the convict can hardly render the act unconstitutional, as there is no law in existence by which the convict receives wages for his labor.

The fact that the court is authorized, instead of putting the sentence into execution at once, to parole and recognize the defend-

ant on condition that he provide periodical support for his wife does not render the act void for diversion of a fine from the direction required by section 6, art. 6, of the Constitution, which requires the proceeds of fines, for the breach of any penal laws, to be applied exclusively to the support of common schools. The payment required under this sort of order is the payment of a sum found by the court to be reasonable for the support of a wife, by virtue of which payment the defendant escapes the penalty of the law, and it can by no process of reasoning be rightfully considered a fine.

As to the paper filed by the defendant, we think it should be considered as an attempted plea to the jurisdiction of the court. It appears to have been so treated by both parties and by the trial court; and we know of no other designation which could with propriety be applied to it.

[4] The general rule is not only that a plea to the jurisdiction must be certain, but that, if it contain matters of defense merely, it may with propriety be overruled. "Where an indictment is taken before a court that has no cognizance of the offense, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. \* \* \* Such pleas are not common; the easier and simpler course being writ of error or arrest of judgment. The want of jurisdiction may also be taken advantage of under the general issue." Wharton's *Crim. Plead. & Prac.* (9th Ed.) § 422.

"By this plea, the defendant totally denies the authority of the court to try him. \* \* \* But it seems that the defendant cannot plead, to an indictment before justices, that the offense was committed at some place beyond their jurisdiction, for this would amount to no more than the general issue." Bishop's *Crim. Proceed.* (3d Ed.) § 736.

"This plea is seldom used, as the objection may be taken in other ways. This plea will be proper when the court before which the indictment is preferred has no cognizance of the particular crime, either because of the nature of the crime or because it was not committed within the territorial jurisdiction of the court, or when the court has no jurisdiction of the defendant's person. Objection to the jurisdiction may generally be taken advantage of under the plea of not guilty, or the general issue, and need not be specially pleaded; or it may be successfully raised by motion in arrest of judgment, or an appeal or writ of error, or by demurrer, when the want of jurisdiction appears on the face of the indictment or in the caption. A plea to the jurisdiction is therefore seldom resorted to. The plea, being dilatory, must be certain to every intent. The highest degree of certainty is required." Clark's *Crim. Proceed.* § 130.

While the question of jurisdiction may be

raised at any time (*Rice v. State*, 3 Kan. 141, par. 5 Syl., 161), still "it is proper for the district court to overrule a plea to the jurisdiction of the court, which substantially raises the question of the guilt or innocence of the accused." *City of Salina v. Cooper*, 45 Kan. 12, 25 Pac. 233, Syl. par. 2; *State v. Bailey*, 57 Neb. 204, 77 N. W. 654.

[5] Section 162 of the Criminal Code (Gen. St. 1909, § 6738) provides that: "No plea in abatement or other dilatory plea to an indictment or information shall be received by any court unless the party offering such plea shall prove the truth thereof by affidavit or some other evidence." The oath of the defendant that he merely believed the contents of the paper filed to be true did not amount to an affidavit. *State v. Gleason*, 32 Kan. 245, 4 Pac. 363. The demurrer challenged the sufficiency of the plea. Whatever of substance the paper contained was, if anything, matter of defense; and the demurrer was erroneously overruled.

[2, 3] Assuming, however, that the paper should have been considered as a properly drawn and verified plea to the jurisdiction, it was insufficient, although this sort of pleading and practice is novel in our criminal law. The statute is disjunctive, and the crime is committed either by desertion and leaving the wife destitute or by neglect or refusal to provide for her support and maintenance when in destitute or necessitous circumstances. In *State v. Dvoracek*, 140 Iowa, 266, at page 268, 118 N. W. 399, at page 400, it was held that the venue may be laid in the county where the duty to support should be discharged. It was also said in the opinion, concerning an act quite similar in terms: "Analyzing this, it becomes apparent that any one of three acts, stated disjunctively, may subject a person to the penalty denounced. The act of abandoning his children had been consummated prior to the taking effect of the act; and this doubtless accounts for the omission to charge him therewith."

In *State v. Witham*, 70 Wis. 473, at page 475, 35 N. W. 934, at page 935, the statute made it a misdemeanor to abandon the wife, leaving her in a destitute condition, or, being of sufficient ability, to refuse or neglect to provide for her; and it was held that such abandonment, before the act took place, but continued down to the time of the trial, subjected the defendant to the penalty. It was said: "By the act of abandonment, leaving his wife in a destitute condition, the husband incurs the penalty. He also incurs the penalty when, being of sufficient ability, he refuses or neglects to provide for her support. In the present case, while the abandonment occurred before the law took effect, still the willful refusal to provide for his wife continued to the time of trial. This rendered the defendant liable, under the

statute, for the penalty incurred or imposed for such neglect."

The wife was alleged to be in destitute circumstances in Stafford county, and the defendant was charged with there deserting and there neglecting and refusing to provide for her support and maintenance. The fact that, when the act was passed, he was in Texas could be no defense. That he had come voluntarily into Stafford county to appear as a witness in a case between other parties was no bar to his arrest for a violation of the criminal laws of Kansas. His plea that he believed that his domicile had been in Texas since 1908, or even such fact, if it were a fact, of itself, furnished no reason why his wife should be left or permitted to remain in Kansas in destitute circumstances. Had it been shown that she had wrongfully refused to follow him to his domicile in Texas, and thus in law abandoned or deserted him, this might be a defense.

In *Commonwealth v. Bailey*, 1 Leg. Gaz. R. (Pa.) 87, both parties had their domicile in Delaware, and the desertion was in Massachusetts, for which the husband was arrested in Pennsylvania, where it was held that the court had no jurisdiction. But in *State v. McCullough*, 1 Pennewill (Del.) 274, 40 Atl. 237, it was ruled that it was sufficient that the husband be in the state, and that he neglect without cause to support his wife, regardless of where he abandoned her. *People v. Pettit et al.*, 74 N. Y. 320, was a case wherein it was shown that, when the parties were living apart, the husband gave a recognizance for her support. He then offered to take her to his father's house, where they had formerly lived, and to support her there, but not elsewhere. She refused to go, for the reason that she would not live in the house with his parents, and that it was unfit because of his father's drunkenness and abusiveness. It was held that the husband was not guilty of failing to support her, on the theory that he had a right to choose the domicile. A violation of the statute, as it was worded, made the delinquent a disorderly person, and the court found no evidence of disorder in the offer to support the wife at the domicile chosen by the husband. *People v. Vitan* (Gen. Sess.) 10 N. Y. Supp. 909 is cited. There the parties were domiciled in Pennsylvania, where the wife left her husband and went to reside in New York. He afterwards came to live in another county in New York. While calling on her, he refused to live with or support her. The court held that this did not render him subject to punishment as a disorderly person, on the ground that he had abandoned his wife in the county where he was living, and that, knowing after she had left him without legal cause that he was residing in another county, she should have made her demand there. Had he first abandoned her without cause and left her destitute, a different question would have arisen.

It was held in *Burton v. Commonwealth*, 109 Va. 800, at page 804, 63 S. E. 464, at page 466, that, under a statute making it a misdemeanor to desert or willfully neglect to provide, the violation may be charged as having occurred at the time of desertion or at any time during its continuance. The court said: "In order to establish the offense, \* \* \* it must be made to appear that, without just cause, he deserted or willfully neglected to provide for the support of his wife or minor children, leaving them in destitute or necessitous circumstances. They may be in destitute circumstances at the time the desertion takes place, or they may become destitute as a consequence of the desertion on the part of the husband and his willful neglect to provide for their support. The object of the statute was to compel the husband, if he were able to do so, to support his wife and children. It is a continuing duty, and the breach of it may be stated as having occurred at the moment of the desertion, or at any time during the continuance of the willful neglect to make provision for his wife or minor children, whom he has left at the moment of desertion, or who have since been rendered destitute or in necessitous circumstances."

*State v. Sanner*, 81 Ohio St. 393, 90 N. E. 1007, 26 L. R. A. (N. S.) 1093, involved a statute making it an offense to neglect or refuse to provide, when able, for the wife or children living within the state, and it was held that a parent might be guilty, although residing in another state, as the venue is in the county where the child is when the complaint is made. The Supreme Court of Wisconsin decided in *Spencer v. State*, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969, that a husband, having the means, was punishable for failure to support his wife, who became destitute to his knowledge, although they were living separate by consent. The theory of a continuing offense is fully recognized in *State v. Stout*, 139 Iowa, 557, 117 N. W. 958.

The defendant's statement that he verily believed it was not the intention of the Legislature to apply the provisions of the act to "nonresidents who were living apart from their wives prior to the passage of said act" indicates the notion that mere living apart from a wife relieves the husband from the duty to support, which is neither good law nor good morals. In his brief, his counsel ask: "When he came into Kansas for a

temporary and lawful purpose, was he violating the law and committing a crime by failing and refusing to support his wife while here? If, during the few days he was in Kansas, he had supported his wife, would he be innocent of the crime charged?" As to the first question, we reply that, according to the information, he was violating the law, and there was nothing shown in his plea to the contrary. As to the second query, we feel confident that, had he provided for his wife's support during the few days he was here, he would at least be in much better relation to the law than he now is. It is insisted that, before he can be in default, the wife must demand of him in Texas that he provide for her. This presupposes that the circumstances were and are such as to make it her duty to follow him to the other state; and, as already suggested, he alleged nothing showing such duty on her part. Counsel say: "He may admit that he deserted his wife in Kansas in 1908; the law not then being in effect. He cannot be tried for desertion under this law, even if he deserted her in Texas in 1909." But he can be tried for failure to support her in the place where he deserted her, unless he can show some legal excuse, which he has not done thus far.

It is suggested that the act is void because the punishment provided is unusual. Hard labor in the penitentiary or reformatory not exceeding two years, with the incidental provision for the enforcement of orders for support, which, if obeyed, work a stay of execution, is certainly not more unusual than the Wisconsin penalty of six months in jail on bread and water. Of that Chief Justice Winslow said in the *Spencer Case*, 132 Wis. 509, at page 520, 112 N. W. 462, at page 466 (122 Am. St. Rep. 989, 13 Ann. Cas. 969): "We are of opinion, however, that the clause in question may well be justified as providing an appropriate punishment for an aggravated case of abandonment or failure to support." The penalty is severe; but evidently the Legislature believed that this very feature would act as a deterrent to faithless husbands and pitiless fathers, who might be tempted to leave wife and child without support or care. Its severity need trouble no one who possesses sufficient manhood and decency to entitle him to remain outside prison walls.

The ruling of the trial court is reversed, with directions to proceed in accordance herewith. All the Justices concurring.

HETZER v. BURBERY et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. STIPULATIONS (§ 14\*) — ADMISSIONS — EJECT.

An admission, made upon the trial of an action in ejectment, that a decree in a suit to quiet the title to the same land had been regularly rendered in favor of the plaintiff in that suit, "quieting his title to the land in controversy against all parties then claiming an interest therein," is insufficient to bar the grantee in a tax deed issued upon the land nine months after the decree was rendered. The language of the admission is interpreted as referring to persons claiming an interest in the litigation and parties to the action, and not to the holder of an outstanding tax sale certificate, upon which the tax deed was afterwards issued.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

2. TAXATION (§ 796\*)—TAX SALES—TAX DEED—RIGHTS OF HOLDERS—LATER DEED.

A tax deed, void upon its face, under which possession had never been taken, does not give to the holder a sufficient standing to successfully assail in ejectment the later tax deed of a party in possession, which is valid upon its face, but voidable because of antecedent irregularities.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.\*]

Appeal from District Court, Kearny County.

Action by A. R. Hetzer against Thomas Burbery and another. Plaintiff having dismissed his action, the case proceeded as an action by defendants to recover possession from plaintiff. From a judgment in their favor, plaintiff appeals. Reversed and remanded.

H. O. Trinkle, of Garden City, for appellant. Emery & Emery, of Seneca, for appellees.

**BENSON, J.** The appellant, Hetzer, in possession of the land in controversy, and claiming title thereto under a tax deed valid upon its face, but based upon irregular proceedings, commenced an action to quiet title against the appellees, Burbery and Raper, who claimed the premises under a tax deed of an earlier date, void upon its face. The appellees, in their answer, interposed a counterclaim in ejectment for possession of the land. The reply of the appellant admitted his possession, and denied the appellees' title. The appellant then dismissed his action, and the case proceeded as an action by appellees (defendants) to recover possession from appellant (plaintiff).

[1] It was admitted on the trial that neither the appellees nor any of their grantors had ever been in possession of the land, but that judgment quieting title had been rendered in favor of each of two of the grantors, under whom the appellees held by a conveyance made after the decrees had been entered, and which was taken in reliance up-

on them. The last of the judgments quieting title was entered on January 24, 1906, and it was admitted that it was regularly rendered, quieting title to the land in controversy against all parties then claiming any interest therein. The appellant's tax deed is dated October 31, 1906, recorded March 19, 1907, and is based upon the delinquent taxes of the year 1901. The appellees' tax deed was issued September 15, 1902, based upon sales for taxes due prior to the year 1901.

The judgment in this action contains findings that the defendants, by reason of being the owners of a prior tax deed, upon which title had been quieted, were in the position of the original owners, and entitled to five years in which to bring suit to set aside plaintiff's tax deed; that the defendants were the owners of the land in fee; and the plaintiff's tax deed was voidable for irregularities. Thereupon judgment was rendered for the appellees for possession, and a tax lien allowed to the appellant.

It appears from these findings that judgment was given upon the theory that the decrees quieting title operated to put the appellees in the position of the original owners, who could, of course, have maintained an action to set aside a voidable tax deed if brought within the period of limitation. It was held, however, in *Lockwood v. Meade*, 71 Kan. 739, 81 Pac. 496, that an ordinary judgment quieting title did not have the effect of transferring to the plaintiff, in such an action, the title theretofore held by the defendant owners. That decision is cited in *Bancher v. Proctor*, 88 Kan. 510, 129 Pac. 526, where it was said that a judgment quieting title did not transfer the title of the heirs (original owners), but did render the tax title quieted unassailable by them. It must be held, then, that the decrees quieting title did not transfer the original patent title to the plaintiffs therein, but protected their title against attack by the original owners, who were barred by the decrees.

The appellees contend, however, that the decree of January 24, 1906, bars the appellant from any interest in the land, although his tax deed was issued afterward, because of the fact that the deed is based upon a tax sale certificate outstanding when the decree was entered, which certificate created an interest in the land. *Douglass v. Dickson*, 31 Kan. 810, 1 Pac. 541. Whether the holder of a tax sale certificate, who has a mere lien for unpaid taxes and charges, has an adverse estate or interest in the land that may be barred by an action to quiet title, under the provisions of section 6213 of the General Statutes of 1909, it is not necessary now to decide. Ordinarily such an action would fail, for, if the land be taxable and the taxes delinquent, the certificate would not be set aside, except upon payment of the taxes and charges due, and this could be accomplished by redemption at the treasurer's office. If

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexer

the lands are not taxable, or the taxes have been paid, the ordinary proceeding in equity would be an action to set aside the certificate, or for an injunction against the public officers.

Without deciding the question just referred to, it is sufficient to say that in this instance the admission is too broadly interpreted by the appellees. The admission was that the proceedings in the suits to quiet title were regular upon the face of the record, and that the decree of January 24, 1906, was rendered in favor of the plaintiff in that action, "quieting his title to the land in controversy against all persons then claiming any interest therein." Interpreting this language in the light of the circumstances, and giving effect to the natural meaning of the words used, this is held to apply to persons claiming an interest in the litigation and parties in the action. To bar the holder, for the time being, of an outstanding tax sale certificate, it should appear that such holder was a party to the suit.

[2] If the certificate upon which the appellant's tax deed was issued was not barred by the decrees quieting title, the situation is simple. He is in possession under a tax deed valid upon its face, but voidable if exposed to the attack of a party having the right to assail it. The appellees, however, are claiming under a tax deed of an earlier issue, void upon its face, under which possession had never been taken, and have no standing to make the attack. "It is fundamental that a person attacking a tax deed must show title in himself." *Smith v. Newman*, 62 Kan. 318, 321, 62 Pac. 1011, 1012, 53 L. R. A. 934. In *Cone v. Usher*, 86 Kan. 880, 122 Pac. 1049, and *Bancher v. Proctor*, 88 Kan. 510, 129 Pac. 526, the rights of successive tax title holders, with respect to each other, are considered, but there is nothing in either decision out of harmony with these views.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion. All the Justices concurring.

**RICHARDSON v. SIMPSON et al., State Board of Dental Examiners.†**

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

**1. PHYSICIANS AND SURGEONS (§ 11\*)—DENTISTS—REVOCATION OF LICENSE—CONCLUSIVENESS OF DECISION.**

Where the State Board of Dental Examiners, acting within its jurisdiction, revokes the license of a dentist for alleged misconduct, and an action is brought to enjoin the enforcement of the order on the ground that it was fraudulently made, a finding by the court that the members of the board acted honestly and impartially, and not arbitrarily, compels a judgment sustaining their decision, notwithstanding

a further finding that their action was oppressive.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

**2. PHYSICIANS AND SURGEONS (§ 11\*)—DENTISTS—LICENSE—GROUND FOR REVOCATION—"FALSE STATEMENT."**

The making of a promise without an intention to perform it may amount to a false statement as to an existing condition within the meaning of a statute authorizing a dentist's license to be revoked, where he has obtained money by false representations.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2670.]

**3. PHYSICIANS AND SURGEONS (§ 11\*)—DENTISTS—REVOCATION OF LICENSE—STATUTORY PROVISIONS.**

In a statute authorizing the revocation of a dentist's license for specific offenses, the additional phrase, "or for any other dishonorable conduct," is not void for indefiniteness.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

**4. PHYSICIANS AND SURGEONS (§ 11\*)—DENTISTS—REVOCATION OF LICENSE—PROCEEDINGS.**

The enforcement of the order of the Board of Dental Examiners, revoking the license of a dentist, will not be enjoined for any informalities in the complaint made, or in the manner of conducting the investigation based thereon, where he is advised of the nature of the accusation against him, and given a fair opportunity to prepare and present his defense.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

Appeal from District Court, Franklin County.

Action by W. S. Richardson against O. H. Simpson and others, as the Kansas State Board of Dental Examiners. From a judgment for plaintiff, defendants appeal. Reversed, with directions.

John S. Dawson, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and W. S. Jenks, of Ottawa, for appellants. W. R. Hazen and H. Ward Page, both of Topeka, for appellee.

MASON, J. W. S. Richardson is engaged in the practice of dentistry. A complaint was made to the State Board of Dental Examiners, charging, in general terms, that he had been guilty of obtaining money by false pretenses, and of dishonorable conduct, and specifying that, having performed services for a customer (a Mrs. Brack) under a promise that any needed repairs would be made without additional charge, he had refused, after having been paid in full, to make repairs that became necessary by reason of defective work. The board investigated the matter, took evidence, found against Richardson, and revoked his license. He brought an action to enjoin the board from enforcing its order, and obtained a permanent injunction. The board appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.

[1] The trial court made a finding, among others, reading as follows: "In view of the fact that no question is raised either at this trial or upon the hearing before the board, touching the moral character of the plaintiff, or his capability or workmanship touching any case except the one of Mrs. Brack, and in view of the further fact that each member of the board testified that no other act of the plaintiff was taken into consideration, except the one named in the charge against him, I believe that his license ought not to have been revoked, and that its revocation was a great injustice. There was, in the hearing before the board, evidence proper for its consideration which, if believed in its entirety, would sustain its finding; yet the finding of the board was against the clear and decided weight of the evidence. In the hearing and decision of the case, the board acted honestly and impartially, and not arbitrarily, but I find that its act was oppressive." We think this finding required a judgment against the plaintiff.

The statute provides that the board may revoke the license of dentists "who have, by false or fraudulent representations, obtained, or sought to obtain, money or any other thing of value, or have practiced under names other than their own, or for any other dishonorable conduct." Gen. Stat. 1909, § 7991. The investigation and determination whether a license should be revoked is committed to the board. Its decision upon a question of fact is final, if made in good faith, or, as the same idea is sometimes expressed, "in the absence of fraud, corruption, or oppression." *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; *School District v. Davies*, 69 Kan. 162, 76 Pac. 409; *Allen v. Burrow*, 69 Kan. 812, 77 Pac. 555, 2 Ann. Cas. 539; *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439.

The board's decision is rendered unassailable, so far as relates to its conduct, by the finding that it acted honestly and impartially, and not arbitrarily. True, the court added: "But I find that its act was oppressive." In the original finding, upon which the judgment was rendered, these words followed, which were afterwards stricken out on the motion of the plaintiff: "That is, it was unduly severe, and an excessive use of the authority vested in the board, and that the penalty imposed upon the plaintiff was grossly out of proportion to the offense." We do not think the dropping of the explanatory phrase materially changed the effect of the finding. The court believed the penalty to be too severe for the offense, and regarded this as sufficient to characterize the action of the board as oppressive. The striking out of the specific statement to this effect does not indicate a change of opinion. The term "oppressive" is essentially a conclusion. The

finding that the board acted honestly and impartially, and not arbitrarily, is the controlling one, because the more specific. *State v. Kirmeyer*, 88 Kan. 592, 128 Pac. 1114. As the board acted honestly and impartially, and not arbitrarily, its conduct could not have been oppressive in such sense as to authorize a court to set aside its order, unless because of a want of legal authority. An order of revocation, lawfully made, cannot be set aside as oppressive on the ground that it seems to a court unduly severe. If the version of the transaction given by Mrs. Brack is correct (and the board is the tribunal to which the law commits the decision of this question), the plaintiff was guilty, in a sense at least, of obtaining money by false representations, and at all events of dishonorable conduct. The statute purports to authorize the revocation of a dentist's license for a single act of that character. Doubtless the Legislature and the board proceeded upon the theory that a solitary instance of misconduct on the part of a dentist, in connection with his profession, might exhibit such a want of character as to amount to a disqualification to practice. The revocation of a license, by reason of such misconduct, is not regarded as a punishment for a past wrong, but as a protection to the public for the future. *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811. It is the withdrawal of the permission, without which the dentist may not practice.

[4] It remains to consider whether the board lacked authority to make the order of revocation for any of a number of reasons that are suggested. The statute requires the filing of written charges, supported by affidavit, as a basis for action by the board. The plaintiff contends that here the complaint was insufficient to give the board jurisdiction to act. It was informal, and lacked much of the precision and definiteness of a well-drawn pleading; but we think it advised the plaintiff of the substance of the charge against him, and gave him all the information necessary to the preparation of his defense, and in a proceeding of this character nothing more is required.

[2] The specific contention is made that the conduct complained of did not constitute the obtaining of money by false pretenses because, even accepting Mrs. Brack's story as true, Richardson made no false statement of an existing fact, but at the most only failed to keep his promise as to what he would do in the future. The authorities are agreed that a false pretense, to be within the criminal statute, must relate to an existing condition; but there is a line of cases holding that a promise made with a deliberate purpose not to perform it, amounts to such a misrepresentation, because it falsely asserts an intention, the existence of which is a question of fact. 19 Cyc. 397; *National Bank v. Mackey*, 5 Kan. App. 437, 49 Pac.

324; note, 10 L. R. A. (N. S.) 640, 646. In 14 A. & E. Encycl. of L. 51, it is said: "Though there is a conflict of opinion on the question, the better opinion is that the rule that an unperformed promise does not amount to fraud does not apply if the promise was made for the purpose of deceit, and with the intention at the time not to perform the same, but that there is fraud in such a case. The reason, it has been said, is that the promisor impliedly represents that he intends to perform his promise, and therefore falsely represents the condition of his mind, which is a representation of fact."

Whatever should be the rule in a criminal prosecution, the making of a promise, without any intention of performing it, should be regarded as a false pretense, within the meaning of the statute here involved. Of course, the mere failure of Richardson to keep a business agreement would not be a ground for revoking his license; but the evidence warranted the belief, upon which the board obviously proceeded, that he knew the work was defective when he collected pay for it, and that he had no intention of making the repairs.

[3] The plaintiff contends that the portion of the statute warranting the revocation of a dentist's license for "dishonorable conduct" is unconstitutional and void, because the phrase quoted is too indefinite to be made the basis for such action. Several courts have held in accordance with that contention, the argument being that a course, regarded by one person as dishonorable, may not seem so to another; and there is no fixed standard by which the disagreement can be settled. *Hewitt v. State Board of Medical Examiners*, 148 Cal. 500, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; *Czarra v. Board of Medical Supervisors*, 25 App. D. C. 443; *Matthews v. Murphy*, 63 S. W. 785, 23 Ky. Law Rep. 750, 54 L. R. A. 415. Of the case last cited it is said in a note in 1 L. R. A. (N. S.) 813: "The court, on the other hand, admits the validity of the statute as to the refusal to grant licenses, though such refusal may be based upon the same grounds. This seems inconsistent with its holding as to revocation, as there is no distinction between the two phases of the question. On the whole, the decision seems to be against the spirit of the decisions above noted, and of the many cases upholding the validity of such a provision in connection with the granting of licenses."

Cases in which similar statutory provisions have been enforced (although in none of

them does this precise question appear to have been directly raised) are collected in notes in 7 Ann. Cas. 753, and 8 L. R. A. (N. S.) 586. See also, *Morse v. Board of Medical Examiners*, 57 Tex. Civ. App. 93, 122 S. W. 447. We think it is going entirely too far to say that such a provision is a nullity. Before a license to practice dentistry is issued, the applicant is required to furnish proof that he is "of good moral character." Gen. Stat. 1909, § 7985. The phrase is general; but no great practical difficulty attends its application. The courts which make a distinction between general language used in defining the conditions upon which one may be originally permitted to practice, and similar language used in stating the grounds upon which the permission may be withdrawn, proceed upon the theory, not accepted by this court, that the revocation of the license is essentially a punishment. The evil results, the fear of which has occasioned the decisions against the validity of provisions authorizing the revocation of a practitioner's license upon general grounds, can be avoided by reasonable interpretation. Doubtless no conduct should be deemed "dishonorable" in such sense as to warrant a forfeiture of a dentist's right to practice, unless it occurs in connection with the exercise of his profession and involves moral turpitude. The expression "other dishonorable conduct" may be interpreted to mean conduct of the same general character as that already specified. *State ex rel. v. Purl*, 228 Mo. 1, 128 S. W. 196. Whether or not the conduct of Richardson, as narrated by Mrs. Brack, constitutes what might be technically described as obtaining money by false pretenses, it was dishonorable conduct of a similar kind.

An argument is made in support of the view that the evidence shows the decision of the board to have been arbitrary, fraudulent, and the result of a violent prejudice. We find nothing to impugn the good faith of any of the members of the board. There was a direct conflict of testimony in the hearing before them. The quality of the work done by Richardson had a bearing upon the controversy. This was a matter concerning which they were peculiarly qualified to reach a correct conclusion. The procedure followed was not that of the courts; but we cannot say that it was not adapted to the ascertainment of the truth, or that the plaintiff was denied any substantial right.

The judgment is reversed, with directions to render judgment for the defendants. All the justices concurring.

**STOCK EXCHANGE BANK v. WYKES.**  
(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

**LIMITATION OF ACTIONS (§ 84\*)—ACTION AGAINST NONRESIDENT.**

A resident of Oklahoma bought goods of a firm in Kansas, the last item of which became due January 1, 1907. He continued to reside and remain in Oklahoma until the action was there barred. The account was assigned to the plaintiff, a Kansas bank, which sued in Kansas in June, 1911. *Held*, that as the cause of action did not arise between nonresidents of this state, and the defendant was at no time a resident of this state, the action was not barred by section 20 or 21 of the Civil Code (Gen. St. 1909, §§ 5613, 5614).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439-448; Dec. Dig. § 84.\*]

Appeal from District Court, Sumner County.

Action by the Stock Exchange Bank against Lawrie T. Wykes. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Dinsmoor, of Caldwell, for appellant. C. C. Ridings, of Caldwell, and W. W. Schwinn, of Wellington, for appellee.

WEST, J. The defendant, Wykes, lived in Grant county, Okl., and bought meat of his butchers in Caldwell, Kan., from September, 1902, to December 20, 1906, when there was a balance of \$93.23. That last item became due January 1, 1907, and no payment has been made since December 20, 1906. The creditors sold and assigned the account to the plaintiff bank January 3, 1908. This action by the holder was begun in June, 1911. On October 13th a judgment was rendered in favor of plaintiff for the face of the account and 6 per cent. interest. It was agreed that the defendant had been absent from the state of Kansas most of the time since September 1, 1902, and had not been present in the state as much as one year since that date, and for more than three years since December 20, 1906, had been personally present in Grant county, Okl. The defendant appeals, and insists that the action was barred by the statute of limitations, and relies on sections 20 and 21 of the Civil Code (Gen. St. 1909, §§ 5613, 5614).

Section 20 has been construed to apply only to "cases where the defendant resides in the state when the cause of action accrues, but is either out of the state or has absconded or concealed himself." *Bruner v. Martin*, 76 Kan. 862, 869, 93 Pac. 165, 167 (14 L. R. A. [N. S.] 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39). The defendant did not reside in this state when the cause of action accrued, and hence this section does not apply. *Conlon v. Lanphear*, 37 Kan. 431, 15 Pac. 600; *Williams v. Railway Co.*, 68 Kan. 17, 74 Pac. 600, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6. Section 21 provides that: "Where the cause of action

has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action maintained thereon in this state." It was agreed that the action was barred by the statutes of Oklahoma. Certainly the cause of action did not arise anywhere between nonresidents of this state, and therefore it was not barred by section 21. *Land Co. v. Bassett*, 85 Kan. 48, 116 Pac. 475.

The judgment is affirmed. All the Justices concurring.

**EWING et al. v. NESBITT.**

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

**1. ESTATES TAIL (§ 1\*)—NATURE AND CHARACTER—EXISTENCE.**

Estates tail resulting from the judicial interpretation of the statute *de donis conditionalibus* (13 Ed. I, c. 1, June 28, 1285), as modified by subsequent statutes and judicial decisions, were introduced into this country at the time of its colonization, with other parts of English jurisprudence, and still exist in this state.

[Ed. Note.—For other cases, see Estates Tail, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**2. ESTATES TAIL (§ 1\*)—NATURE AND CHARACTER—BARRING ESTATE—FINE AND RECOVERY—CONVEYANCE OF RECORD.**

One of the characteristics of these estates, as we received them, was that they were capable of being barred by fine and by common recovery, which were looked upon as legal modes of transfer having the effect of conveyances of record.

[Ed. Note.—For other cases, see Estates Tail, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**3. ESTATES TAIL (§ 7\*)—BARRING ESTATE—DEED.**

Fines and common recoveries are inconsistent with our modes of procedure. But the fiction and the form only are obsolete. The substantive result of the proceeding, a conveyance of record, may still be accomplished by an ordinary deed.

[Ed. Note.—For other cases, see Estates Tail, Cent. Dig. § 8; Dec. Dig. § 7.\*]

(Additional Syllabus by Editorial Staff.)

**4. WILLS (§ 605\*)—ESTATES TAIL—REVERSION—DESCENT.**

Testator devised specified tracts of land to each of four children and to the heirs of the body of the particular devisee, and by the residuary clause bequeathed all other property, goods, chattels, moneys, stocks, credits, and effects to his surviving children, share and share alike. *Held*, that the children took an estate tail by the devise, and one of them having died after the death of testator, but without children, acquired an undivided interest in the reversion in fee expectant on her death without issue, which interest, on her death, passed to her husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1360-1365; Dec. Dig. § 605.\*]

Appeal from District Court, Johnson County.

Action by Thomas J. Ewing and others

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.



against William J. Nesbitt. Judgment for defendant, and plaintiffs appeal. Affirmed.

F. R. Ogg, of Olathe, for appellants. J. W. Parker, of Olathe, for appellee.

BURCH, J. In the year 1893 John Ewing made his will. The fourth paragraph reads as follows: "Fourth. I will and bequeath to my daughter, Mary A. Nesbitt, née Ewing, and to the heirs of her body, the south half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) of section No. twenty-one (21), township thirteen (13), of range twenty-four (24), in Johnson county, Kansas."

Devises using the same language were made to the testator's other children, four in number. Besides these, the will contained four other devises, which were expressly stated to be "free and clear of all entailment," thus clearly indicating the intention of the testator to create estates tail by the phraseology employed in paragraph 4 and those like it. In 1895 John Ewing died, leaving as his heirs the five children, who were the beneficiaries of his will. The will was duly probated, the estate was administered and closed, and Mary A. Nesbitt entered into possession of the tract of land devised to her. In the year 1909 she died without having borne children, and was survived by her husband, William J. Nesbitt, who continued in possession of the land. Soon after Mary A. Nesbitt's death her brothers and sisters commenced an action of ejectment, and for rents and profits, against William J. Nesbitt, claiming to be owners in fee simple. He answered, claiming a one-fifth interest in the land, and praying for partition. Judgment was rendered for the defendant, and the plaintiffs appeal.

[1] The will contained a residuary clause, in which the testator gave to his children surviving him, share and share alike, "all other property, goods, chattels, moneys, stocks, credits, and effects" of which he might die seised. The defendant claims that his wife was the donee of an estate tail; that the donor retained a reversionary interest in fee simple expectant upon the estate tail; that if, by virtue of the residuary clause of the will, this reversion was not disposed of it descended, upon the death of the donor, to his heirs, one of whom was his daughter, Mary A. Nesbitt; and that upon her death the defendant, as her surviving husband, took her share of the fee, which was one-fifth. If, however, the residuary clause of the will was effectual to devise the reversion to the testator's children, Mary A. Nesbitt took a one-fifth interest, which, upon her death, descended to the defendant. Under either theory the defendant's claim to a one-fifth interest in the land is valid, if the law of this state recognizes estates tail as they existed under the common law of England at the time of the colonization of this country.

Under the early common law a grant to

a man and the heirs of his body was a grant of a fee, on condition that he had heirs of his body. The fee so granted was designated a conditional fee. If the donee had no heirs of his body, the condition was not performed, and the land reverted to the donor. If heirs of the donee's body were born, the condition was regarded as performed, and the donee was at liberty to make a conveyance which would bar him, his issue, and the donor's reversion. He could likewise charge the land with rents and incumbrances which would bind his issue, and the estate was forfeitable for his treason. If the condition were performed, but the donee made no conveyance, the land descended, upon his death, to the specified issue, who were at liberty to convey. If they made no conveyance, the land reverted to the donor. If the condition were performed, but the issue died, and the donee then died without having made a conveyance, the land reverted to the donor. In order to bar the possibility of reverter to the donor and to restore the descent to its ordinary course under the common law, donees of conditional fees were in the habit of making conveyances as soon as issue was born and taking back warranty deeds. To stop this practice, which evaded the condition and defeated the intention of the donor, the nobility of the realm, who were desirous of perpetuating family possessions, procured the passage of the statute of Westminster II, known as the statute "de donis conditionalibus." 13 Ed. I, c. 1, June 28, 1285. This statute took away the power of alienation, and declared that the will of the donor, plainly expressed, should be observed, and that tenements given to a man and the heirs of his body should go to his issue if there were any, and, if not, should revert to the donor. The judges interpreted this statute to mean that the donee no longer took a conditional fee capable of being disposed of as soon as issue was born, but that he took a particular estate, denominated an estate tail, and that, instead of a possibility of reverter only remaining in the donor, he had a reversion in fee simple expectant upon the failure of issue. Some of the social consequences of this statute are thus described by Blackstone: "Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought, of suits in consequence of which our ancient books are full; and treasons were encouraged, as estates tail were not liable to forfeiture longer than

for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm." 2 Commentaries, \*116. Notwithstanding these mischiefs, the statute forms one of the fundamental institutes of the land law of England, which three and a quarter centuries later was transplanted in the New World.

[2] Before the settlement at Jamestown in the fourth year of James I (1607), a number of statutes had been passed whereby the privileges attending estates tail were much abridged. They were made forfeitable for treason. 26 Henry VIII, c. 39. Certain leases by the tenant in tail, not prejudicial to the issue, were allowed to be good in law. 32 Henry VIII, c. 28. The statute of fines (4 Henry VII, c. 24) was construed to permit the tenant in tail and his heirs to be barred by levying a fine. 32 Henry VIII, c. 36. Such estates were chargeable with the payment of certain debts due the king (33 Henry VIII, c. 39), and by construction of the statute 43 Eliz. c. 4, an appointment to charitable uses by a tenant in tail was held to be good. 2 Bl. Com. 117 et seq. The most serious blow, however, to the evils fostered by estates tail under the statute *de donis* was struck by a bold piece of judicial legislation. In *Taltarum's Case*, reported in Year Book, 12 Edw. IV, 19 (1472), the judges, upon consultation, held that a common recovery suffered by a tenant in tail accomplished the complete destruction of the estate tail. This mode of barring estates tail is thus described in 1 Washburn On Real Property (6th Ed.) § 186: "This was a fictitious suit, brought in the name of the person who was to purchase the estate, against the tenant in tail, who was willing to convey. The tenant, instead of resisting this claim himself, under the pretense that he had acquired his title of some third person who had warranted it, vouched in, or, by a process from the court, called his third person, technically the vouchee, to come in and defend the title. The vouchee came in as one of the *dramatis personæ* of this judicial farce, and then, without saying a word, disappeared and was defaulted. It was a principle of the feudal law, adopted thence by the common law, that if a man conveyed lands with a warranty, and the grantee lost his estate by eviction by one having a better title, he should give his warrantee lands of equal value by way of recompense. And as it would be too barefaced to cut off the rights of reversion, as well as of the issue in tail, by a judgment between the tenant and a stranger, it was gravely adjudged, first, that the claimant should have the land as having the better title to it; and second, that the tenant should have judgment against his vouchee to recover lands of equal value, on the ground that he was warrantor, and thus, theoretical-

ly, nobody was harmed. If the issue in tail or the reverser or remainderman lost that specific estate, he was to have one of equal value through this judgment in favor of the tenant in tail; whereas, in fact, the vouchee was an irresponsible man, and it was never expected that he was anything more than a dummy in the game. The result of this, which Blackstone calls 'a kind of *pla fraud* to elude the statute *de donis*,' was that the lands passed from the tenant in tail to the claimant in fee simple, free from the claims of reverser, remainderman, or issue in tail, and he either paid the tenant for it as a purchaser, or conveyed it back to him again in fee simple."

The precedent of fictitious suits as means of acquiring or conveying property was found in the Roman law, and the practice of resorting to them was supposedly introduced in England by the clergy to evade the statute of mortmain. Spence's *Equitable Jurisdiction of the Court of Chancery*, 114, note. The solemn piece of jugglery already described later became more involved. "Complex, however, as the proceedings above related may appear, the ordinary forms of a common recovery in later times were more complicated still; for it was found expedient not to bring the collusive action against the tenant in tail himself, but that he should come in as one vouched to warranty. The lands were therefore, in the first place, conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the *præcipe* or writ. The proceedings then took place in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the *præcipe* by another person, called the demandant; and the tenant in tail was then vouched to warranty by the tenant to the *præcipe*. The tenant in tail, on being vouched, then vouched to warranty in the same way the *crier* of the court, who was called the common vouchee. The demandant then craved leave to imparl or confer with the last vouchee in private, which was granted by the court; and the vouchee, having thus got out of court, did not return, in consequence of which judgment was given in the manner before mentioned, on which a regular writ was directed to the sheriff to put the demandant into possession." Williams on Real Property (17th Ed.) 108.

In all cases there was an agreement or understanding that the person who acquired an estate tail by means of a common recovery should pay for it, or convey it to the original tenant in tail in fee simple, or dispose of it as such tenant might direct. The result was that estates tail and all remainders over and the reversion were effectually barred. As Blackstone said, by long acquiescence and use these recoveries came to be

looked upon as a legal mode of conveyance, by which a tenant in tail might dispose of his land. 2 Com. 117. This right of conveyance became, in contemplation of the law, an inherent and inseparable incident of an estate tail, and covenants and conditions attempting to restrain the exercise of the right were held to be void. 2 Washburn on Real Property, 188. The same purpose was accomplished by the equally fictitious proceeding of fine.

In the fourth volume of his Commentaries (14th Ed.) \*14, Chancellor Kent said: "Estates tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery." These estates are now very generally changed by legislation into fee simples, or reversionary estates in fee simple, or may be converted into fee simples by ordinary conveyance. 2 Bl. Com. 119, Cooley's note. In the pages following the above quotation from Kent, much of this legislation is referred to.

The territorial Legislature of 1855 passed an elaborate act relating to conveyances. Stat. of Kan. Terr. 1855, c. 26. Section 5 of this act reads as follows: "That from and after the passage of this act, where any conveyance or devise shall be made whereby the grantee or devisee shall become seised in law or equity of such estate, in any lands or tenements, as under the statute of the thirteenth of Edward the First (called the statute of entails), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over and right in such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee; and if there be only one child, then to that one, in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue; and if there be no issue, then to his or her heirs."

This, of course, constituted a deliberate legislative modification of the common law relating to estates tail. In 1859 the territorial Legislature completely revised the act of 1855, relating to conveyances, making radical changes in its substance and content. Laws 1859, c. 30. The subject-matter of the section quoted was entirely omitted, and nothing whatever was substituted for it, either in the revision or in any other statute. The result was that section 5 was repealed by implication; and, since the Legislature had its attention specially directed to estates tail by that section the purpose evi-

dently was to restore the common law on the subject. This intention is made more apparent by the passage of the following act at the same session: "The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding." Laws 1859, c. 121, § 1.

The Constitution, adopted in July, 1859, under which the state was admitted to the Union on January 31, 1861, contains nothing which bears upon the subject, either directly or remotely; and the Legislature has not since dealt with it. Nothing is to be found in the acts relating to conveyances, descents, and distributions, or wills, incompatible with the existence of such estates; and in their unfettered form such estates are not out of harmony with the conditions and wants of the people of Kansas. On the other hand, they exactly meet the requirements of testators in the situation of John Ewing. He desired to give his daughter an estate for life, in order to secure to her a home and some measure of comfort and welfare while she lived. After that he desired that the remainder should go to her children in fee. But he did not desire that his son-in-law should take the whole gift should she die childless, to be enjoyed by him and, perhaps, a strange second wife and their children. The court knows of no reason in law, morals, or public policy why these sentiments should not be respected, and they were clearly and fully expressed by the language of the will, interpreted by the common law. The overweening propensity to perpetuate family name and family property which made estates tail so obnoxious in the middle ages is fairly curbed by the right of a tenant in tail to convert his tenancy into a fee simple, and is not a menace to the general welfare of the people of this state; and it will be remembered that this right became one of the characteristics of the estate.

[3] Fines and recoveries, however, are not adapted to any of our needs, are inconsistent with the Code of Civil Procedure, and consequently cannot be resorted to, as portions of the common law, in aid of the general statutes of this state. Gen. Stat. 1909, § 9850. The effect of these indirect, fictitious, and operose proceedings was merely that of a deed of record, and the same end may now be accomplished by an ordinary conveyance. The fiction and the form alone are obsolete.

The substance of the proceeding (a conveyance) and the essential character of the estate tail (the right to convert the estate into a fee simple by a conveyance) are preserved. If, therefore, Mary A. Nesbitt had chosen, in her lifetime, to make a conveyance of the land devised to her, she would thereby have barred herself, her issue, born and unborn, and her father's reversion.

[4] While the mere possibility of a reversion such as attended conditional gifts under the ancient common law is not a subject of disposal by will, reversions in fee under the statute de donis may be devised. The result is that Mary A. Nesbitt was given by the will an estate tail in the land in controversy. She also took, by virtue of the residuary clause of the will, one-fifth of the reversion in fee expectant upon her death without issue. Upon her death this interest passed to her husband, the defendant.

The judgment of the district court is affirmed. All the Justices concurring.

#### BUSEY et al. v. STACKHOFF et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

Appeal from District Court, Wyandotte County.

Action by Ella Busey and others against William Stackhoff and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. N. Baird, of Kansas City, for appellants. H. L. Alden and Junius W. Jenkins, both of Kansas City, for appellees.

PER CURIAM. Action in ejectment. The defendants had judgment for costs. Plaintiffs appeal.

The case is controlled by the decision just handed down in *Ewing v. Nesbitt*, 129 Pac. 1131, in which it is held that the statute de donis and the rule of the common law expressed therein are in full force and effect in this state, and that an estate tail is capable of being barred by a conveyance of record, made by the tenant in tail. It follows, therefore, that the conveyance made to the defendants by Robert O'Donnell, the sole surviving tenant in tail, and his wife, Hulda O'Donnell, barred the issue, born and unborn, of the tenants in tail, as well as the donors' reversion.

The judgment will be affirmed.

#### KAILL v. BELL†

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. GUARANTY (§ 24\*)—OPERATION AND EFFECT—ABROGATION.

A written contract for the sale of land stipulated that the vendee should pay the price in school orders for school supplies. The validity of the orders was expressly guaranteed. When the contract was consummated by delivery of the deed to the land and delivery of the orders, an assignment to the vendor of the land was indorsed on each order, which specified that the assignment was without recourse. Held, the written guaranty of the validity of the orders was not abrogated.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 26, 27; Dec. Dig. § 24.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 95\*)—SCHOOL ORDERS—EVIDENCE OF VALIDITY.

The evidence examined, and held to be sufficient to establish the invalidity of the order sued on for want of power in the school board to purchase the article ordered.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 218-222, 277, 278; Dec. Dig. § 95.\*]

#### 3. APPEAL AND ERROR (§ 587\*)—RECORDS—ABSTRACT.

The practice of filing abstracts agreed to by counsel for both sides commended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2606; Dec. Dig. § 587.\*]

Appeal from District Court, Allen County.

Action by Henry G. Kaill against Wilber L. Bell. From a judgment for plaintiff, defendant appeals. Affirmed.

E. G. Wilson and F. W. Casner, both of Kansas City, Mo., for appellant. Cook & Gossett, of Kansas City, for appellee.

BURCH, J. The plaintiff, Kaill, sold a tract of land to the defendant, Bell, and received in part payment of the price an order for the purchase of a book described as "Bell's Louisiana Portfolio," signed by the board of school directors of a parish in Louisiana. The order proved to be uncollectible, and Kaill sued Bell to recover the sum of money represented by it. The plaintiff recovered, and the defendant appeals.

[1] The order was one of a number, aggregating \$7,500, delivered to the plaintiff pursuant to a written contract of sale wherein the defendant guaranteed that the orders were valid, and were taken in the regular course of business. The contract provided that the plaintiff should have 10 days time in which to furnish an abstract of title to the land, and that the defendant should have 10 days time in which to examine the abstract. In due time the contract was consummated by delivery of a deed to the land and delivery of the orders referred to. The contract did not specify the particular orders to be supplied, and the first time the plaintiff saw those which he accepted was when they were turned over to him in exchange for his deed. At that time the defendant, in the plaintiff's presence, placed the following indorsement upon each order, which he signed, and then handed to the plaintiff, who blotted the signature: "For value received, this account is assigned to Henry G. Kaill, without recourse." The plaintiff examined the orders, observed the indorsement, and knew the meaning of the words, "without recourse," but nothing was said by either party respecting any change in the terms of the previous contract. The defendant contends that, by virtue of the indorsement and its acceptance by the plaintiff, a novation was accomplished, and that the defendant is relieved from his guaranty of validity. There is nothing in the situation or conduct of the parties to indicate that an abrogation of the express contract of guaranty was mutually in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.

tended, and the insertion of the words, "without recourse," in the instrument passing title does not have that effect. Those words have no precise legal signification outside the law of commercial paper, and, unless it is manifest that they were intended to express a different meaning, they must be given their ordinary effect, which is that the indorser assumes no contractual liability by virtue of the indorsement itself. Even in the case of commercial paper indorsed without recourse, the vendor impliedly warrants that the instrument is a valid obligation of the kind it purports to be. The following authorities are sufficient to furnish a key to the law on the subject: *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152; *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199; *Gompertz v. Bartlett*, 2 Ell. & Bl. 849; *Gurney v. Womersley*, 4 Ell. & Bl. 132; 7 Cyc. 831; 2 Randolph on Commercial Paper, §§ 720, 756. In the case of *Hannum v. Richardson* a note given for intoxicating liquor sold contrary to law, and consequently void at its inception, was transferred by indorsement without recourse. The court said: "By indorsing the note 'without recourse,' the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled that, where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time. \* \* \* In this case the note in question was given for intoxicating liquor sold in this state in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it imported to be, or what it was sold and purchased for. It is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his \$50. In this view of the case, we think the defendant is liable upon a warranty that the thing sold was a valid note of hand." 48 Vt. pages 510, 511 (21 Am. Rep. 152). In this case the defendant contracted to deliver to the plaintiff school orders for school supplies, and, if the instruments were not legal orders, they failed to answer the description contained in the contract precisely as the instrument in *Hannum v. Richardson* failed to possess the character imported by its face. Such being the law, the greatest effect the restrictive words of the assignment could have would be to substitute an implied for an express warranty of validity, which, of course, was not a matter in the mind of either party. The defendant

argues that the law implies knowledge on the part of the plaintiff of any legal restrictions on the power of the school board to issue the orders, and consequently that the plaintiff took them for what they were worth. The contract shows, however, that the parties did not act with reference to such knowledge or deal upon the basis of a delivery of school orders, good or bad, in payment for the plaintiff's land.

[2] There remains to be considered the question whether or not the order is invalid for want of power on the part of the board of school directors to purchase the portfolio. The plaintiff brought suit on the particular order in question in the proper court of the state of Louisiana, and was defeated. Under the law of this state, the judgment is *prima facie* evidence only in favor of the plaintiff, and the guarantor had the right to contest the claim that the order is invalid when sued in this state for the amount of money which it represents. In a suit in the Circuit Court of the United States for the District of Louisiana upon another order given by a different school board the plaintiff recovered. This judgment is not, of course, *res judicata*, and neither judgment is conclusive upon the courts of this state as an interpretation of the law of the state of Louisiana. The statutory law of Louisiana governing the subject was agreed to. It provides for a state board of education which is given power to prepare rules, by-laws, and regulations for the government of the public schools of the state, prescribe the studies which shall be taught therein, enforce strict uniformity of text-books, and adopt a list thereof. Parish boards have power to procure school sites, erect school buildings, contract for outbuildings and inclosures, make repairs, and provide the necessary furniture, equipment, and apparatus. No other provision of the laws of Louisiana either gives or denies power respecting the matter in controversy. It is agreed that the article for which the order was given consisted of a large number of sheets, bound in book form, containing maps, historic data, descriptive, scientific, and other educational matter, printed in words and figures, with indices and directions, and covered with a heavy, flexible binding. Included in the price for the article and sold with it was a wooden frame or rack for its support, mounted on an iron or steel tripod with legs and feet. The article is used for educational purposes, and in book form, but, without the wooden frame and tripod, was exhibited in evidence in the district court. The secretary of the state board of education of the state of Louisiana testified that he is custodian of the records of the board, and that there is no record of the adoption of the portfolio. The Attorney General of Louisiana testified that in his opinion the portfolio is embraced within the section of the act relating to the adoption of a list of text-books by the state board.

The defendant argues that the portfolio falls within the provision of the law relating to necessary furniture, equipment, and apparatus. The plaintiff contends that it is an educational book supplementary to the usual text-books, and that the school board had no more authority to purchase it than they would have to establish a reference library upon geographical, historical, scientific, and other subjects to supplement the instruction afforded by the text-books adopted by the state board. It is agreed by the parties that the signatures upon the order were genuine, that the officers signing it were duly elected and qualified, that the order was filled by a tender of the thing attempted to be purchased, and that the order and its assignment to the plaintiff were received in evidence in the Louisiana suit together with proof of tender of the thing ordered. This evidence was sufficient to warrant a recovery in the Louisiana court, unless the law rendered the order invalid and the judgment of the Louisiana court is some evidence that such is the case. The opinion of the Attorney General of Louisiana was properly received upon the subject, and is to the same effect. The district court had the book before it and consequently was able to determine by actual examination whether or not it was fairly classifiable as school furniture, equipment, or apparatus. The frame and tripod were mere incidental facilities to use, and did not characterize the article itself. The question of what the law of Louisiana is and of what the nature of the book is were questions of fact, and the conclusion reached by the trial court is abundantly sustained. This court is all the more ready to approve the finding of the trial court because the defendant, who was duly notified of the suit in Louisiana and called upon to defend the legality of the order according to his guaranty, could easily have procured an adjudication from the highest court of that state, which would have ended the controversy.

The plaintiff pleaded false representations respecting the character of the order, but the proof comprehended nothing affording a basis of liability beyond the terms of the written guaranty. It is claimed that part of the proof respecting false representations ran counter to the rule forbidding the impeachment of written instruments embodying the result of oral negotiations. If so it is immaterial, because the contract alone is ample to sustain the judgment. Both parties introduced some irrelevant oral evidence, but the trial was before the court without a jury, and the presumption is that it was disregarded. There is nothing in the record to indicate the contrary, and, in any event, the agreed facts and the competent evidence recited above authorize the judgment which was rendered.

The court desires to express its appreciation of the agreed abstract submitted jointly

by counsel for the respective parties, which very succinctly, but very clearly and with perfect fairness, sets forth those portions of the proceedings which are necessary to a full understanding of the questions presented for review. The practice is greatly to be commended.

The judgment of the district court is affirmed. All the Justices concurring.

KERSHAW v. SCHAFER et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 21\*)—LIABILITY TO PRINCIPAL—TERMINATION OF RELATION.

Generally an agent employed to find a buyer for land who has received an offer from a prospective buyer therefor, has communicated such offer to his absent principal, and has received an acceptance from the principal may, if he has no knowledge of a better offer, communicate such acceptance to the prospective buyer, and close the deal so far as his duties are concerned. Thereafter he may engage as agent for the purchaser and re-sell the land at an advanced price. If, however, the agent has information at any time before communicating the acceptance to the prospective buyer that a greater price can be had for the land than he communicated to his principal, then it is his duty, in the exercise of good faith, not to communicate the acceptance to the buyer, but to secure the higher offer for his principal, and advise him thereof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 17; Dec. Dig. § 21.\*]

2. NEW TRIAL (§ 41\*)—GROUNDS—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.

An instruction which might be misleading, but which has become immaterial by reason of the findings of the jury, is not a ground for granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.\*]

(Additional Syllabus by Editorial Staff.)

3. BROKERS (§ 38\*)—LIABILITY TO PRINCIPAL—WAIVER.

Where an agent to find a buyer for land, after receiving his principal's acceptance of an offer, received a better offer, but completed the transaction with the maker of the first offer, and then immediately resold the land for the purchaser to the maker of the new offer, the fact that the first vendor extended the time of payment of a part of the consideration by the first purchaser did not affect his right to recover damages from the agent, in the absence of proof that the first purchaser conspired to defraud his vendor.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.\*]

Appeal from District Court, Pawnee County.

Action by William Kershaw against W. L. Schafer and others. From an order granting a new trial after verdict for plaintiff, he appeals. Reversed and remanded, with instructions.

G. P. Cline and G. W. Finney, both of Larned, for appellant. Vernon & Vernon, of Larned, and Sam Jones, of Lyons, for appellees.

.SMITH, J. This action was brought by the appellant against W. L. Schafer, A. D. Smith, J. A. Franz, and A. C. Franz to recover the difference between \$37 per acre and \$42.50 per acre for a section of land (fractional) in Pawnee county.

The undisputed facts are that appellant owned the land, and employed Schafer and Smith as his agents to find a buyer therefor, and set the price at \$40 per acre. Appellant lived in Sterling, Neb., and Schafer and Smith lived in Pawnee county, Kan. Soon after receiving the agency, Schafer and Smith wrote Kershaw that they had an offer from Franz of \$37 per acre for the land, and made some statements, indicating that they thought he should take it, remarking that the wheat was not looking good, etc. The appellant promptly accepted the offer by letter, expressing some reluctance. About the time of receiving Kershaw's answer to the proposition, Schafer and Smith negotiated a sale of the land for Franz for \$42.50 per acre. The appellant contends that this offer was made, and it was known to appellees that Wynn would give this price for the land, before the appellees closed the deal with Franz for Kershaw at \$37 per acre; that Franz conspired with Schafer and Smith to defraud appellant. A trial was had, and the jury returned a verdict in favor of A. C. Franz, and failed to agree as to the other defendants. The case was continued as to these defendants and again tried. Parties waived any oral testimony, and submitted the case on the transcript of the evidence taken on the former trial, which was read to the jury. The jury returned a general verdict in favor of J. A. Franz, and in favor of Kershaw and against Schafer and Smith for \$1,846.80, and made special findings of fact. Defendants Schafer and Smith filed a motion for a new trial and motion for judgment on the special findings, Plaintiff Kershaw also filed a motion for judgment in his favor on the verdict and findings. The case was continued. At the next term the motion for judgment for plaintiff on the verdict and findings was overruled; also the motion for judgment on the findings in favor of the defendants was overruled. Defendants' motion for new trial was sustained. The reason for sustaining the motion is stated as follows: "Now, to wit, on this 29th day of September, 1911, being an adjourned day of the regular June, 1911, term of this court, this matter came on for hearing, upon the motion of the defendants W. L. Schafer and A. D. Smith for a new trial of this cause, which motion had been by the court held under advisement until this date. And the court, having heard argument of counsel, and being fully advised in the premises, grants a new trial, for the reason that the court misdirected the jury in a material matter of law by instruction No. 4, in this: That the court instructed the jury that the defendants' liability to plain-

tiff continued until the purchaser had signed a contract for purchase, whereas as a matter of law, in the judgment of the court, the liability of a selling agent of real estate to his principal is ended when he has in good faith submitted an offer to the principal which the principal had accepted." The appeal is from the order granting a new trial, and appellant asks to have the case remanded, with instructions to render judgment in his favor and against Schafer and Smith in accordance with the verdict.

The appellees contend that the case depends upon the question of law whether or not an agent employed to find a purchaser for real estate who secures an offer from a proposed purchaser which is accepted by the principal is held as such agent until the transaction is consummated, or can he, upon the acceptance of the offer, engage as agent for the proposed purchaser to resell the land. On the other hand, appellant contends that the case depends upon the question of fact whether or not the appellees knew by having an offer or otherwise that Wynn would pay more than \$37 per acre before they negotiated the sale for appellant, and withheld this knowledge from appellant for the purpose of taking advantage thereof for themselves. The court instructed the jury upon the law as applied to the diverse claims in instructions Nos. 3 and 4, which read:

"(3) In this connection I instruct you that if you believe the transaction with J. A. Franz and A. C. Franz was in good faith, and that A. C. Franz, with the assistance of his father, was in good faith a purchaser of the land, and that at the time the contract was executed by A. C. Franz and the payment of \$1,000 made Smith and Schafer were acting in good faith, and had received no better offer for the land, then plaintiff cannot recover from them, and they had a legal right immediately upon the execution of the contract of purchase by Franz to become his agents for the purpose of selling the land again, and their obligation to plaintiff had been fully discharged.

"(4) If, on the contrary, you believe from a preponderance of the evidence that, before the contract with Franz was signed by Franz, defendants Schafer and Smith, or either of them, had a bona fide offer of more than \$37 per acre for the land, and for the purpose of taking advantage thereof themselves withheld the knowledge of such offer from their principal, the plaintiff, and closed the deal at a lower figure, then plaintiff is entitled to recover from them the difference between \$37 per acre and the amount of such offer, unless the plaintiff shall have ratified their action as hereinafter explained."

The jury returned a verdict in favor of appellee for \$1,846.80 damages, and returned the following, with other, special findings of fact:

"Q. 8. When was the letter of date Feb-

ruary 21st written by plaintiff received by Smith and Schafer? Answer. About February 26, 1910.

"Q. 4. When did Smith and Schafer communicate to J. A. Franz the fact that his offer had been accepted? Answer. March 2, 1910. \* \* \*

"Q. 6. When was the contract of sale between plaintiff and A. C. Franz for section 19 signed by A. C. Franz? Answer. March 2, 1910.

"Q. 7. When was the contract for sale between plaintiff and A. C. Franz mailed by Smith and Schafer to plaintiff? Answer. March 3, 1910. \* \* \*

"Q. 12. Did not plaintiff about April 29, 1910, in writing extend the contract with A. C. Franz for nine days? Answer. Yes."

Additional questions submitted by plaintiff, with the answers of the jury thereto, are as follows:

"Q. 1. Is it not a fact that W. R. Wynn made an offer of \$40 per acre for the land on February 28, 1910, when he was viewing the land? A. Yes.

"Q. 2. Is it not a fact that A. D. Smith offered the land to W. R. Wynn on the train going to Hutchinson on February 28, 1910, at \$42.50 per acre? A. Yes.

"Q. 3. Is it not a fact that A. D. Smith gave W. R. Wynn an option until March 4 (Friday), 1910, to take the land at \$42.50 per acre? A. Yes.

"Q. 4. Is it not a fact that W. R. Wynn did on March 3, 1910, agree to buy the land at \$42.50 per acre with Purdy, and made payment thereon of \$500, and that the following day, March 4th, Wynn made formal written contract through Smith and Schafer for the land at \$26,000? A. Yes.

"Q. 5. Is it not a fact that Kershaw had no notice of a trade or deal with Franz, and that no trade with A. C. or J. A. Franz was or had been consummated until after they had got an offer from W. R. Wynn? A. Had no notice.

"Q. 6. Is it not a fact that Kershaw did not close any deal with either of the Franzes until March 11, 1910? A. March 11, 1910.

"Q. 7. Is it not a fact that Smith and Schafer, as agents of Kershaw, acted in bad faith with their principal and concealed from Kershaw the Wynn offer? A. Yes."

[1] As we have seen, the court granted a new trial on the ground of error in the fourth instruction given, in that it fixed the time at which the appellees were absolved from duty to their employer at the signing of the contract of sale and purchase between appellant and Franz. In overruling the motion for judgment the court held that appellees were absolved from such duty when they had informed the employer of the offer, and he had accepted it. The latter proposition cannot be sustained. The employer was in another state, and it certainly devolved upon his agents to inform the purchaser of their employer's acceptance and to do what-

ever the circumstances rendered necessary to close the deal, assuming that nothing had occurred affecting the interests of the principal after the transmission of the offer. But a very important change in the situation had occurred. They had been offered \$5.50 per acre more for the land some days before they communicated the offer to the purchaser. The jury found, and we think correctly, that they concealed this fact from their employer and were guilty of bad faith in so doing; also that in so doing they reaped a great advantage to themselves and their employer suffered a corresponding loss. By representing to their principal that the wheat on the land was in bad condition they had induced him to accept \$3 per acre less for the land than the price he had authorized them to sell it for, and, with knowledge that they could not only get the price he had fixed but \$2.50 per acre additional, they took advantage of his acceptance so procured, closed the contract at the accepted price, and immediately resold the land for the purchaser to another and gained to themselves \$2,222.80 thereby. The following appears to be the general rule in these circumstances: An agent employed to find a buyer for land who has received an offer from a prospective buyer therefor has communicated such offer to his absent principal and has received an acceptance from the principal may, if he has no knowledge of a better offer, communicate such acceptance to the prospective buyer, and close the deal so far as his duties are concerned. Thereafter he may engage as agent for the purchaser and resell the land for an advanced price. If, however, the agent has information at any time before communicating the acceptance to the prospective buyer that a greater price can be had for the land than he communicated to his principal, then it is his duty, in the exercise of good faith, not to communicate the acceptance to the buyer, but to secure the higher offer for his principal and advise him thereof. *Moore v. Stone*, 40 Iowa, 259; *Short v. Millard*, 68 Ill. 292; *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068; *Finnerty et al. v. Fritz*, 5 Colo. 174.

[2] Instruction 4, given, is not in full accord with this rule. In the slight variance therefrom the instruction is too favorable to the appellees. It might have misled the jury, but it conclusively appears from the special findings of the jury that the verdict was not influenced or controlled thereby so far as it was erroneous. The error therefore becomes wholly immaterial. This court has recognized this principle in *O. K. & W. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083, and in *Aultman v. Miller*, 52 Kan. 60, 34 Pac. 404, and in many other cases.

[3] But it is said that, after the appellees as agents of the appellant had executed a written contract with Franz for the sale and purchase of the land and Franz had paid a part of the consideration, appellant extend-



ed the time of payment for a part of the consideration, and that in so doing with knowledge of the facts he ratified the transaction and cannot be heard to complain thereof. In the absence of proof that Franz conspired to defraud the appellant, it is not clear that appellant could at that time and after the resale of the land, so far as appears, to an innocent purchaser have avoided the sale to Franz. Neither is the purpose of this action to avoid the sale to Franz, but to recover damages from the alleged unfaithful agents in the transaction. The error in the instruction was not to the prejudice of appellees and became immaterial. The evidence seems ample to support the findings and the findings to support the verdict. Hence the order setting aside the verdict was erroneous and materially prejudicial.

The order granting a new trial is vacated and the case is remanded, with instructions to enter judgment for appellant upon the verdict. All the Justices concurring.

#### McLAIN v. PARKER.

(Supreme Court of Kansas. Feb. 8, 1913.)

#### (Syllabus by the Court.)

#### 1. PROCESS (§ 65\*)—SERVICE—FRAUD—EVIDENCE.

An allegation that a defendant was inveigled into another state for the purpose of obtaining service upon him is not sustained by proof that he would not have gone to that state except for the fact that the plaintiff had told him the action was to be brought in Kansas.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 51; Dec. Dig. § 65.\*]

#### 2. JUDGMENT (§ 818\*)—ACTION ON FOREIGN JUDGMENT—JURISDICTION—SUBJECT-MATTER.

A contention that a judgment rendered in another state is void for want of jurisdiction of the subject-matter, which turns upon the construction of the statute of that state, is not maintainable where upon appeal the judgment has been affirmed by the court of last resort.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458-1481; Dec. Dig. § 818.\*]

#### 3. JUDGMENT (§ 929\*)—FOREIGN EQUITY DECREE—ACTION.

An action may be brought upon the decree of a court of equity of another state adjudging the unconditional payment of money, notwithstanding that as a preliminary thereto the party in whose favor such judgment was rendered was required to deposit certain deeds with the clerk to be delivered to the debtor upon the payment of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1758; Dec. Dig. § 929.\*]

#### 4. ABATEMENT AND REVIVAL (§ 72\*)—ACTION ON FOREIGN JUDGMENT.

Upon the death of the plaintiff in an action upon a judgment rendered in another state, both parties being residents of Kansas, a revivor is properly had in the name of the executor appointed in this state, notwithstanding an administrator has been appointed in the state where the judgment was rendered.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 377-402, 412-416; Dec. Dig. § 72.\*]

#### 5. ABATEMENT AND REVIVAL (§ 72\*)—CONSENT TO REVIVAL—EFFECT.

A defendant who, upon the death of the plaintiff, expressly consents to an order reviving the action, cannot be heard to maintain that the revivor was void because not made in the name of the proper representative.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 377-402, 412-416; Dec. Dig. § 72.\*]

#### 6. JUDGMENT (§ 823\*)—ACTION ON FOREIGN JUDGMENT—FAILURE TO REVIVE—DEATH OF PLAINTIFF.

Where, upon the death of the plaintiff, an action upon a judgment rendered in another state is properly revived in the name of the personal representative, a recovery will not be prevented by a failure to revive the foreign judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1501-1503; Dec. Dig. § 823.\*]

#### 7. JUDGMENT (§ 944\*)—FOREIGN JUDGMENT—ACTION—EVIDENCE—RECORD.

To recover upon a judgment rendered in another state by a court of general jurisdiction, it is not ordinarily necessary to introduce copies of any part of the record except that showing the rendition of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. § 944.\*]

#### (Additional Syllabus by Editorial Staff.)

#### 8. ABATEMENT AND REVIVAL (§ 77\*)—PETITION—AMENDMENT.

Where plaintiff dies, and the action is revived in the name of his successor, the petition should be amended so as to allege the interest of the new party in issuable form.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 488-494; Dec. Dig. § 77.\*]

#### 9. LIMITATION OF ACTIONS (§ 125\*)—BAR OF STATUTE—ORDER OF REVIVOR.

A mere order of revivor is sufficient to prevent the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 542; Dec. Dig. § 125.\*]

Appeal from District Court, Johnson County.

Action by Julia A. McLain, as executrix of the estate of Carey McLain, deceased, against M. V. B. Parker. Judgment for defendant, and plaintiff appeals. Reversed.

W. R. Thurmond, of Kansas City, Mo., C. W. Gorsuch, of Olathe, and H. A. Poorman and Flavel Robertson, both of Kansas City, Mo., for appellant. L. O. Pickering of Olathe, for appellee.

MASON, J. Carey McLain obtained a judgment in a circuit court of Missouri against M. V. B. Parker; both being residents of Kansas. He then sued upon the judgment in this state. While the action was pending he died, and it was revived in the name of his executrix. The defendant contended: (1) That the Missouri judgment was void because the court rendering it had no jurisdiction of his person or of the subject-matter; (2) that it was but a part of a decree which required the performance of other acts than the mere payment of money, and therefore would not support an action in

this state; and (3) that the executor had no authority to maintain the action, that, an administrator having been appointed in Missouri, the Kansas action could be revived only in his name, and that the Missouri judgment was extinguished by the failure to revive it within a year from McLain's death. The trial court ruled against the first two contentions, but sustained the third and rendered judgment for the defendant accordingly. The executrix appeals.

[1] The contention that the Missouri court had no jurisdiction of the defendant's person is based upon testimony to this effect: Before the action was begun McLain's attorney told Parker that it would be brought in Johnson county, Kan., where both parties resided; if it had not been for this statement Parker would not have gone to Missouri; a short time afterwards he was served with summons in Kansas City, Mo. There was no evidence that his trip to Kansas City was in any way induced by the plaintiff. We do not think the mere statement that the action was to be brought in Kansas can be regarded as an agreement that it should not be brought elsewhere, or as a sufficient foundation for the claim that the defendant was inveigled into another jurisdiction.

[2] The contention that the Missouri court was without jurisdiction of the subject-matter is based upon the fact that, as a preliminary to the recovery of a judgment against the defendant, the plaintiff was required to execute to him deeds to property not situated in the county where the action was brought, while a Missouri statute requires "suits for the possession of real estate or *whereby title thereto may be affected*" to be brought in the county in which at least some part of it is situated. The question presented concerns the construction of the Missouri statute. Upon appeal to the Supreme Court of that state the judgment was affirmed, and this must be regarded as an authoritative interpretation in favor of the jurisdiction exercised.

[3] The Missouri judgment was based upon a petition declaring upon several distinct transactions, each pleaded as constituting a separate cause of action. In each instance the plaintiff asked to have the court annul on account of fraud a contract which he had made with the defendant for the purchase of real estate; two tracts being situated in Missouri (but not in the county where the action was brought), and the rest in Arkansas or New Mexico. As a condition to recovery upon each transaction the court required the plaintiff to execute and deposit with the clerk a deed to the property involved, naming the defendant as the grantee. The plaintiff complied with this condition before the judgment was rendered. He was given an absolute and unconditional judgment for the recovery of a specific sum of money upon each count; but the decree included a provision that upon

the satisfaction of each item of such judgment the corresponding deed should be delivered to the defendant.

It is said that an action cannot be brought upon the decree of a foreign court ordering a payment of money, if it also requires the performance of some other act. 23 Cyc. 1504, 1505, 1560; 13 A. & E. Encycl. of L. 1008; 2 Black on Judgments (2d Ed.) §§ 869, 962; 2 Freeman on Judgments (4th Ed.) § 434. The application of this rule is illustrated, and the limit upon its operation is shown, in *Du Bois v. Seymour*, 81 C. C. A. 590, 593, 152 Fed. 600, 603 (11 Ann. Cas. 656), where it was said: "Final decrees of courts of equity have the same conclusive effect as to questions of fact determined by them as judgments at law. If a final decree adjudges a fixed and certain sum to be due and owing from the defendant to the complainant, and nothing more, an action at law may be maintained on it for the recovery of the sum so adjudged to be due and owing; but the decree must be an unconditional one. The specific sum of money adjudged to be due must be payable, in all events. If there be a condition annexed to the decree which renders it uncertain whether payment shall ever be obligatory, the decree is not a record on which the common-law action of debt, or any other action at law instituted for the purpose of recovering a debt can be founded."

Here the court rendered an ordinary money judgment, collectible upon execution. Its enforcement was not made to depend upon any act to be subsequently performed. When it was paid or satisfied the defendant was entitled to receive the deeds from the clerk, but the plaintiff had nothing more to do with them. There may be difficulty in stating the theoretical condition of the title to the real estate resulting from this arrangement. It is not necessary to formulate an accurate definition. Practical problems are suggested as likely to result from the fact that the record title remains in the plaintiff, but their solution need not be undertaken until they arise. The existence of security for the judgment does not prevent an action upon it. If the defendant owned real estate in the county where it was rendered, the result would be a lien which would be released upon its payment; but this would not preclude its collection by proceedings elsewhere. It is by its terms payable at all events; it is collectible upon execution; and it is capable of supporting a new action in another state.

[4] We think that upon the death of the plaintiff in the action brought in Kansas a revivor was properly had in the name of the executrix. The original decree, like other personal judgments for the payment of money, is to be regarded in two aspects: As a conclusive determination of the fact of the indebtedness, and as a basis for its collection by execution. In the latter aspect, the

ancillary administrator appointed in Missouri may have been its legal owner, and the person entitled to its control. But the action brought upon it in McLain's lifetime was essentially one to recover upon the original claim; the judgment being invoked as a conclusive determination of its validity. The right to the maintenance of the action already brought passed to the executrix. She was entitled to receive the proceeds of the judgment even if it should be collected by the Missouri administrator, subject to the claims of any creditors in that state. 18 Cyc. 1235. The defendant is not exposed to any greater risk of unnecessary annoyance than if the judgment in Kansas and that in Missouri stood in the name of the same individual. He will, of course, in either case be protected against liability for a double satisfaction. No possible unfairness or injustice can result to him from this feature of the proceedings.

[5] Moreover, the defendant explicitly consented to the revivor in the name of the executrix, and in view of that fact cannot be heard to question her capacity to maintain the action.

[6] The defendant maintains that the judgment in the Missouri circuit court, not having been revived within a year after the death of the plaintiff, has become a nullity for all purposes. In Kansas a revivor is necessary to preserve the vitality of a judgment upon the death of the plaintiff, and can only be made within a year. *Mawhinney v. Doane*, 40 Kan. 681, 20 Pac. 488. The law of Missouri appears to be otherwise (23 Cyc. 1439; *Simmons v. Heman*, 17 Mo. App. 444), although evidence to that effect was not introduced. But even assuming that the Missouri judgment has lost its vitality by reason of the failure to revive it within a year from the appointment of an administrator in that state, it is still evidence of the validity of the claim on which it is based. *Douglass v. Loftus*, Adm'r, 85 Kan. 720, 119 Pac. 74.

The judgment was in full force when the action was begun in Kansas upon it; this action was revived in due time after the death of the plaintiff, and the right of recovery was preserved, even although during its pendency the right to issue execution upon the original judgment was permanently lost. The principle is similar to that applied in the case last cited and in *Kothman v. Skaggs*, 29 Kan. 5, and *Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725.

[7] The defendant maintains that the existence of the judgment against him was not sufficiently proved because the transcript introduced in evidence included only a copy of the judgment itself, and not of the pleadings or other proceedings. The purpose being only to establish the fact of the judgment, this was sufficient. 23 Cyc. 1574; 13 A. & E. Encycl. of L. 1045, 1046. The decree, however, contained recitals showing in considerable detail the character of the action in which it was rendered.

[8, 9] It appears that while the action upon the Missouri judgment was revived in the name of the executrix on May 6, 1907, the petition was not amended so as to set out her appointment and qualification until January 4, 1911. The defendant urges that the statute of limitations was not interrupted by the order of revivor, that no action was pending in behalf of the executrix until the amendment of the petition, and that in the meantime the statute of limitations had run. Where a plaintiff dies and the action is revived in the name of a successor, the petition should be amended so as to allege the interest of the new party in issuable form (*C. B. U. P. R. Co. v. Andrews*, Adm'r, 34 Kan. 563, 9 Pac. 213), but the mere order of revivor is sufficient to prevent the running of the statute (*Railroad Co. v. Menager*, 59 Kan. 687, 54 Pac. 1043).

The judgment is reversed, and the cause remanded, with directions to render judgment for the plaintiff. All the Justices concurring.

STATE v. GUTHRIDGE.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 189\*)—INCLUDED OFFENSES—RAPE—ATTEMPT—OVERT ACTS.

Under an information charging the defendant with the offense of rape, as defined in section 31 of the crimes act (Gen. St. 1909, § 2519), there may be, if the testimony warrants it, a conviction of an attempt to commit that offense, although the overt acts done towards the commission of the offense are not specifically set forth in the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

2. RAPE (§ 59\*)—INCLUDED OFFENSES—INSTRUCTIONS.

Upon such a charge the court is not required to instruct the jury as to the offense defined in section 41 of the crimes act (Gen. St. 1909, § 2529), which, among other things, includes the offense of assault with intent to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

3. CRIMINAL LAW (§ 1172\*)—RAPE (§ 15\*)—INSTRUCTIONS—DEGREES OF OFFENSE—PREJUDICE.

While an attempt to commit rape is, strictly speaking, not a degree of the principal offense, no prejudice resulted from a statement, in an instruction of the court in regard to degrees of crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\* Rape, Cent. Dig. § 14; Dec. Dig. § 15.\*]

4. CRIMINAL LAW (§§ 53, 774\*)—DEFENSES—DRUNKENNESS—INTENT—INSTRUCTIONS.

It is a principle of law applicable in ordinary cases that voluntary drunkenness does not, of itself, either excuse or justify crime. When a specific intent is of the essence or a necessary ingredient of the offense, drunkenness may be shown and considered; but, under the testimony in this case affecting defendant's condition and responsibility for his act, it is held that the omission of an instruction stating the exceptions to the ordinary rule is not material error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 761, 1829-1832; Dec. Dig. §§ 53, 774.\*]

Appeal from District Court, Franklin County.

A. E. Guthridge was convicted of an attempt to commit rape, and he appeals. Affirmed.

F. A. Waddle and H. M. Funston, both of Ottawa, for appellant. Jno. S. Dawson, Atty. Gen., and Ralph E. Page, of Ottawa, for the State.

JOHNSTON, C. J. [1] A. E. Guthridge was charged with having committed rape upon the person of Rosie Plummer, a girl seven years of age, and was found guilty of an attempt to commit that offense. On this appeal it is contended that the information was defective, because the physical acts done towards the commission of the offense were

not specifically alleged. The principal offense was set forth in the language of the statute, and under such a charge the accused may be convicted of an attempt to commit the offense. Crim. Code, § 121; State v. Decker, 36 Kan. 717, 14 Pac. 283; State v. Frazier, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274. Manifestly, the prosecutor was seeking to secure a conviction for rape; but the jury found, as it had a right to do, that the wrongdoing of the defendant proceeded no further than an attempt to commit that offense. If the specific charge of attempt to commit a rape had been made and relied upon by the prosecutor, it would have been necessary for him to have set out the acts done towards the commission of the offense (State v. Frazier, supra), but here the substance of the offense was sufficiently charged under section 31 of the crimes act (Gen. St. 1909, § 2519); and it is provided in the Criminal Code, as we have seen, that if the effort to consummate the crime was unsuccessful the jury may find the defendant guilty of an attempt.

[2] Complaint is made because the court instructed the jury that if they found that the defendant had not committed the crime of rape they might consider whether he was guilty of an attempt, telling the jury that one who attempts to commit that offense, and does some act towards the consummation of it, but fails in the perpetration of the offense, or is intercepted or prevented in executing the same, may be convicted and punished. Appellant insists that the jury should have been instructed under section 41 of the crimes act (Gen. St. 1909, § 2529), which relates to assaults with intent to commit particular offenses, including rape. The offense defined in section 41 is somewhat similar to that defined in section 283 of the crimes act (Gen. St. 1909, § 2783), but, as has already been decided, they involve different elements, and are distinct offenses. State v. Custer, 85 Kan. 445, 116 Pac. 507. As the prosecution was not under section 41, it was not necessary, nor proper, to call the attention of the jury to the offense defined in that section. As we have seen, the court instructed as to the offense of rape, and also as to an attempt to commit rape, and there was testimony supporting each grade of the offense.

[3] Another objection is that the court spoke of the offenses included in the charge as degrees of crime. While an attempt is not strictly a degree of the principal offense, it approaches it closely. It is an unsuccessful effort to commit an offense, and is, of itself, made an offense. If the overt acts constituting the attempt fall short of the completed crime, it is regarded as the lesser offense, rather than as a degree of the principal offense; but in no event can the reference to degrees in the instructions have operated to prejudice the appellant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[4] It is also contended that the court erred in telling the jury that voluntary intoxication is no defense to the crime charged. It is a principle of law applicable in ordinary cases that voluntary intoxication does not, of itself, either excuse or justify crime. *State v. White*, 14 Kan. 538; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. Yarrow*, 39 Kan. 581, 18 Pac. 474; *State v. O'Neill*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005. In cases where a specific intent is of the essence or a necessary ingredient of the offense, drunkenness may be shown and considered, in order to determine whether the defendant's mind was in a condition to form the essential felonious intent. *State v. Rumble*, 81 Kan. 16, 105 Pac. 1, 25 L. R. A. (N. S.) 376. While there is testimony that defendant drank intoxicating liquor, there is nothing tending to show that there was an approach to a state of mind that would relieve him from responsibility for his act. Under the testimony the court was not required to state specifically any of the exceptions to the rule that drunkenness excuses or extenuates crime; and, besides, no request was made for fuller instructions on the subject.

The judgment will be affirmed. All the Justices concurring.

Ex parte MURRAY et al.

(Supreme Court of Kansas. Feb. 8, 1918.)

(Syllabus by the Court.)

STATUTES (§ 165\*)—PUNISHMENT—STATUTORY PROVISIONS.

The enactment of chapter 375, Sess. Laws 1903 (section 6837, Gen. St. 1909), known as the indeterminate sentence law, did not repeal by implication the penalty for the crime of robbery on a railway train, provided by section 1, c. 174, Sess. Laws 1901.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 240; Dec. Dig. § 165.\*]

Application by Frank Murray and another for a writ of habeas corpus. Denied.

A. L. Clotfelter and L. N. Wylder, both of Kansas City, for applicant. Jno. S. Dawson, Atty. Gen., and S. M. Brewster, Asst. Atty. Gen., opposed.

PORTER, J. On December 12, 1908, the petitioners, having been tried and convicted of the crime of robbery on a railway train, were each sentenced to confinement and hard labor in the state penitentiary for a period of not less than 10 years. Section 1, c. 375, Laws 1903 (section 6837, Gen. Stat. 1909), known as the indeterminate sentence law, provides that the court, in imposing such sentence, shall not fix the limit of duration of the sentence. The failure of the district court to follow the provisions of the statute, however, is not relied upon by the petition-

ers. Obviously, if that were the only ground, it could not avail them, because the court would simply direct that the petitioners be returned to the district court to be resentenced. In re Howard, 72 Kan. 273, 83 Pac. 1032.

The point relied upon for their release is that by the enactment of the indeterminate sentence law (chapter 375, Laws 1903; Gen. Stat. 1909, § 6837) the Legislature repealed the penalty for the crime of robbery on a railway train provided by section 1, c. 174, Laws of 1901 (Gen. Stat. 1909, § 2888). In the last-mentioned statute the penalty for the crime is "confinement in the penitentiary for a term of not less than ten years or for life." It was passed in 1901. Two years later came the indeterminate sentence law, which provides that every person convicted of a felony or other crime punishable by imprisonment in the penitentiary, except murder or treason, shall be sentenced to the penitentiary, but that the term shall not exceed the maximum nor be less than the minimum term provided by law for such offense, the release of such person to be afterwards determined under other provisions of the act. It is not claimed that the penalty clause of the act of 1901 is expressly repealed, but that it was repealed by implication, and that, since the former law provided a determinate sentence for the offense, the term cannot become indeterminate under the act of 1903.

Repeals by implication are not favored, especially where they result in overturning the manifest intent of the Legislature or produce absurd consequences. Courts are required to construe statutes and to uphold their plain and obvious provisions; and, when necessary, it is their duty to reconcile apparent inconsistencies and ambiguous provisions. Courts were not created to defeat the legislative will, nor to seize upon the technical meaning of phrases in order to declare a statute void, or in conflict with some previous enactment. In *State v. Knoll*, 69 Kan. 767, 77 Pac. 580, this same statute was held to have repealed by implication a section of a former statute. The title to the act showed an express intention to repeal section 5685 of the General Statutes of 1901, but the body of the act expressly repealed another section, and made no reference to the section mentioned in the title. A consideration of the entire scope and purpose of the statute satisfied the court as to the real intention, and that was allowed to prevail. Courts always proceed with great caution before deciding that a statute has been repealed by implication. *Stephens v. Bailou*, 27 Kan. 594, 601; *Randall v. Butler County*, 65 Kan. 20, 68 Pac. 1083.

We find no difficulty in reconciling both statutes, and giving force to both. It would be absurd to conceive of the Legislature intending by the adoption of the indeterminate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

sentence law thereby to repeal all penalties for the crime of robbery on a railway train. It does not follow by any means that the sentence imposed by the terms of commitment deprives the petitioners of the benefit of the indeterminate sentence law. The termination of their imprisonment is left with the prison board under the provisions of the act of 1903.

The writ will be denied. All the Justices concurring.

### DALRYMPLE v. GREEN.†

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. BREACH OF MARRIAGE PROMISE (§ 28\*)—DAMAGES—AGGRAVATION.

In an action for damages for the breach of a contract of marriage, seduction may be proven and considered in aggravation of the damages.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 40-43; Dec. Dig. § 28.\*]

#### 2. BREACH OF MARRIAGE PROMISE (§ 28\*)—DAMAGES—AGGRAVATION—SEDUCTION—INSTRUCTIONS.

Where, in such case, evidence is produced of seduction, accomplished by reason of the promise, and that pregnancy resulted from the seduction, miscarriage from the pregnancy, and sickness from the miscarriage, and an instruction is requested which, in effect, would take from the jury the consideration of the evidence of pregnancy and of the successive results thereof, it is error to refuse it.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 40-43; Dec. Dig. § 28.\*]

#### 3. BREACH OF MARRIAGE PROMISE (§ 28\*)—DAMAGES—AGGRAVATION—SEDUCTION—INSTRUCTIONS.

Where, in such case, there is evidence that some weeks after the alleged seduction sexual intercourse was repeated, from which resulted pregnancy, from which miscarriage, from which sickness, it is error to refuse an instruction to the jury, designed to eliminate the evidence of pregnancy and the successive results thereof from the consideration of the jury in determining the amount of damages, if any, to be allowed. Neither the promise of marriage, nor the breach of it, could be the proximate cause of the pregnancy, the miscarriage, or the resulting sickness.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 40-43; Dec. Dig. § 28.\*]

Burch, Mason, and Benson, JJ., dissenting.

(Additional Syllabus by Editorial Staff.)

#### 4. TRIAL (§ 256\*)—INSTRUCTIONS—NECESSITY FOR REQUEST.

In an instruction, in an action for breach of marriage promise, that the jury may take into account the plaintiff's seduction, the omission to define seduction is not error, in the absence of a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

#### 5. BREACH OF MARRIAGE PROMISE (§ 35\*)—INSTRUCTIONS.

In an action for breach of marriage promise, where plaintiff testifies that in entering her

room at night for sexual intercourse with her on different occasions he made considerable noise in opening the door, and that other members of the household were sleeping on the same floor of the dwelling house, the court should instruct that the jury may take into consideration the time, the place, and the surrounding circumstances under which plaintiff claims defendant promised to marry her and had sexual intercourse with her.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 51; Dec. Dig. § 35.\*]

Appeal from District Court, Shawnee County.

Action by Selina Dalrymple against William Green. From a judgment for plaintiff; defendant appeals. Reversed and remanded for new trial.

Waters & Waters and Hazen & Gaw, all of Topeka, and Walter D. Jones, of Chicago, Ill., for appellant. Edwin D. McKeever, of Topeka, for appellee.

SMITH, J. This action was brought in the district court of Shawnee county for breach of contract of marriage, alleged to have been entered into between appellant and appellee on the 8th day of November, 1909. Trial was had to a jury, and verdict was returned and judgment rendered in favor of appellee for \$5,500. Motion for new trial was overruled and appeal taken to this court.

Very numerous assignments of error are made in the case, of which it is necessary to refer to only a few.

The appellee, in her petition, alleges that appellant's deceased wife was the sister of her father; that in the fall of 1909, and long prior thereto, she had been engaged in the occupation of teaching school; that she was 36 years of age; that during the fall of 1909 appellant wrote her several letters, urging her to resign her school and come to Topeka and take a position in his store and live in his house with his son and daughter-in-law; that she accepted the proposition and arrived in Topeka on the 7th day of November; that she was met at the railway station by the appellant and taken to the home of himself and son and daughter-in-law; that on the second night after her arrival the appellant, without her consent, entered the room where she was sleeping, got into bed with her, and "by force and threats of exposure of their situation to the other members of the household and promises of a speedy marriage accomplished the seduction of plaintiff, who had up to said time, as aforesaid, been a chaste and pure woman." Also that the said defendant, by persuasions and promises to marry the plaintiff, at various other times, to wit, about November 30th, December 12th, January 4th, January 21st, again sustained improper relations with the plaintiff, from which relations the plaintiff became pregnant, and remained in such condition for 60

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.

days, when she suffered a miscarriage. The answer was a general denial. On the trial the appellee testified to the facts substantially as alleged in her petition.

Without reciting in full or following in exact order as given, the appellee testified, in part, as follows: "I left for Topeka the first week in November. It was between the last week in October and the first week in November that I received some letters in regard to my coming to Topeka to go to work. I did not tell you on yesterday that I came down here to go to work in the grocery store as cashier. I came down here for the purpose and expectation of eventually becoming the wife of William Green. I came down here with the intention of being in his home and becoming his wife. I had no marriage contract with him at that time. I had no written contract with him. There are two kinds of contracts. I came down here with the expectation of being at William Green's home. The contract I have sued upon was made after I came to Topeka."

Later appellee testified as follows: "Q. Where was your room located? A. Beside Mr. Green's room, a small room. There were heavy rolling doors between our rooms. I had been asleep and was awakened; was awakened by the rumbling noise of the door in opening. The doors were very heavy and made such a racket; made considerable noise. The next I saw was Mr. Green. He was right by my bed, and as I fully awakened I saw Mr. Green, as he entered the room, as he came up to me. At first he did not say anything. He rolled back the bedclothes; just pushed back the bedclothes. Didn't say a word at first; reached out and pushed back the bedclothes; did not remove them fully from my person. I rose up in bed, and he began to say something to me. He says, 'Siney, just never mind.' I asked him what this all meant. I said, 'Uncle Will, what do you mean?' Of course, I was close to him, in a way. He sat down on the bed then, and I rose up in bed and was fully awakened. I began to say something to him about his action in coming in the room, and he said: 'Never mind, Siney; we will just have a little private talk. \* \* \*'"

She also testified that she was 36 years of age, had taught school 20 years, and had never had intercourse before; that the appellant's son and son's wife, two children, and a maid, during this and other times specified, were sleeping on the same floor of the dwelling house, viz., the second floor; that appellant came to her room three or four times thereafter. With reference to this she said: "I was unwell on the 9th; had my courses regularly up to the 9th of January; no interference of any kind or character; I am sure of that. I became pregnant the month after he was with me on the 15th or 16th. It was because of his having been with me on the 15th or 16th."

The appellant, on the other hand, testified,

and denied that he had ever, at any of the times stated, had sexual intercourse with her, or had promised to marry her. Also that he had never been in her room when she was in bed.

No other witness testified to any fact or circumstance bearing upon the question of promise of marriage or of seduction, except that a Mrs. Norris testified as to conduct between the appellant and appellee, said to have occurred in Chicago some time before the appellee came to Kansas, which is not claimed to have indicated any improper relation between the parties, but that each had a kindly regard, if not affection, for the other.

Numerous assignments of error are made by the appellant, very few of which refer to the rulings upon the introduction of testimony, and none of which, we think, are well taken.

[4] Appellant complains that the jury were instructed that they might take into account the plaintiff's seduction, without any definition of that term being given them. It is argued that the jury may have assumed that any procuring of sexual intercourse with the plaintiff amounts to seduction. However, no instruction on the subject was requested by appellant, so that the omission to give one does not constitute error. Upon another trial a proper instruction should be given, if requested.

[5] There are also numerous objections to the instructions given and refused by the court. The first of these which we care to discuss is instruction No. 11, which was requested by appellant and refused by the court. It seems that no instruction similar to this was given. It reads: "In weighing the evidence which has been introduced before you in this case, you have a right to take into consideration and call to your assistance the knowledge and experience common to mankind, for the purpose of throwing light upon the question submitted for your determination. You may take into consideration the age of both plaintiff and defendant, the disparity or difference in their years, the amount of the defendant's wealth, if the evidence shows him to be a man of wealth, the time, the place, the surrounding circumstances under which the plaintiff claims the defendant promised to marry her and had sexual intercourse with her."

In any trial before a jury, in which there is conflicting evidence, an instruction of this nature is proper; but only under unusual circumstances is the failure or refusal to give such an instruction regarded as sufficiently erroneous to justify a reversal of a judgment. We think it is not too much to say in this case that the evidence of the appellee herein is extraordinary and of such a character, especially in view of the great noise she says appellant repeatedly made in entering her room, near midnight, and almost in the presence of the members of his own household, that it should have been carefully

scrutinized, and that the giving of the instruction requested would have tended to lead the jury to such scrutiny. The instruction ought to have been given, but we are not disposed to place the reversal of the case alone upon the refusal to give it.

[1] A more serious question, we think, is involved in the refusal of the court to give instruction No. 13, requested by the appellant. It reads: "If you should find that there was a contract of marriage made between the plaintiff and the defendant on the night of the 8th day of November, 1909, and that the plaintiff is entitled to recover on account of the breach thereof, and should further believe that the defendant had sexual intercourse with the plaintiff at any time or times other than the night of the 8th of November, 1909, then I instruct you that you would not be authorized to take into consideration any sexual intercourse that occurred at such other time or times in determining what amount of damages you will award to the plaintiff."

The courts of last resort in several states have held that seduction cannot be proven in aggravation of damages in an action for the breach of a promise of marriage. This is on the ground that the recognized common-law rule is that a woman cannot recover for her own seduction, the parties being in pari delicto, or that she should not be allowed to do indirectly that which the law forbids her to do directly; that an action for seduction is given to the parent, or to him who stands in loco parentis to the person seduced, and to permit the person seduced, herself, also to recover would subject the seducer to double damages. *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912.

In a footnote to the case in 4 L. R. A. 615, supra, the authorities upon this question are collated; and it appears therefrom that by far the greater weight of authority sanctions proof of seduction by means of a promise of marriage in aggravation of damages in an action for a breach of the contract. Indeed, this is admitted by Chief Justice Douglas in the *Wrynn* Case, supra; but the decision is justified on the ground that from a long course of decisions it has become the settled law of that state, which, if changed at all, should be changed by the Legislature, and not by the courts. In *Sramek v. Sklenar*, 73 Kan. 450, 85 Pac. 566, the rule has been recognized in accordance with the law prevailing in most of the American states and against the rule in the *Wrynn* Case.

[2, 3] By instruction No. 13 appellant evidently sought to eliminate any claim for damages, other than for the breach of the contract made on the night of November 8, 1909, and the seduction accomplished on the same date, if the jury should find such a contract and a breach thereof.

Summing up the claims of the appellee, the

contract of marriage and the breach thereof constituted the appellee's cause of action. The seduction was not a cause of action, but, as we have seen, was proper for the consideration of the jury in determining the amount of damages to be allowed. Subsequent acts of intercourse constitute neither seduction nor ground for compensation or aggravation of damages, unless, as in *Sramek v. Sklenar*, supra, the long continuance of the unlawful relations for years, under repeated promises of marriage, or other circumstances, justify the inference that the promises were not made with any intention of redeeming them, but were intentionally fraudulent. In such case exemplary damages may and should be allowed. In the *Sramek* Case no portion of the damages was designated as exemplary, yet it is apparent that the verdict and judgment were sustained by reason of the long-continued fraudulent acts of the seducer.

In this case fraud is not pleaded, and if the appellant made the promises there is hardly a suggestion that they were not made in good faith. According to appellee's testimony, the relations continued less than three months.

As we have seen, seduction may be proved in aggravation of damages, but we have been cited to no decision that goes further and holds that pregnancy, or any of the hardships that follow therefrom, can also be considered to increase the damages; neither have we found such a decision. On the other hand, in *Giese v. Schultz*, 65 Wis. 487, 27 N. W. 353, it is said: "In an action for breach of a promise of marriage, where it is alleged that, by virtue of such promise, the defendant seduced the plaintiff and got her with child, the jury, in estimating the damages, may consider the loss of virtue and reputation and the mental suffering and sense of disgrace caused by the seduction, but cannot allow any additional damages because the plaintiff was gotten with child, or suffered a miscarriage."

There was evidence of pregnancy, miscarriage, and sickness resulting therefrom. In view of the large amount of damages allowed, we cannot say that the verdict and judgment were not materially influenced by such evidence. The refusal of the instruction permitted the consideration of that evidence, and refusal thereof was error.

The judgment is reversed, and the case is remanded for a new trial.

JOHNSTON, C. J., and PORTER and WEST, JJ., concurring.

MASON, J. (dissenting). I dissent from the second and third paragraphs of the syllabus, and from the corresponding part of the opinion. In an action for the breach of promise of marriage, all circumstances should be considered which might bear upon



the extent of the plaintiff's injury. Anything in the relations of the parties that adds to the humiliation which results to the plaintiff from the defendant's refusal to keep his word should be considered in determining the amount of recovery. A woman who, as a result of seduction accomplished by means of a promise of marriage, has become pregnant naturally and almost inevitably suffers greater humiliation from the failure of the seducer to perform his promise than if that consequence had not followed. The increased publicity given her misfortune by means of her condition is alone sufficient to make it a basis for the aggravation of damages. This seems clear on principle. It accords with the concluding part of the opinion in *Sramek v. Sklenar*, 73 Kan. 450, 85 Pac. 566. It is supported by what is decided, said, or intimated in the following cases, several of which are cited to that effect in 5 Cyc. 1014, note 34, and 8 Cent. Dig. c. 953, § 43: *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Hotchkins v. Hodge*, 38 Barb. (N. Y.) 117; *Jarvis v. Johnson*, 2 Ohio Dec. 312; *Churan v. Sebesta*, 181 Ill. App. 330, 333; *Johnson v. Levy*, 122 La. 118, 47 South. 422, 16 Ann. Cas. 978; *Tubbs v. Van Kleek*, 12 Ill. 446, 449; *Wilds v. Bogan*, 57 Ind. 453. *Musselman v. Barker*, 26 Neb. 737, 42 N. W. 759, has a contrary tendency.

Evidence of the plaintiff's pregnancy was admitted without objection, and no reference to it is made in the instructions. The point on which the case is reversed was raised only by asking an instruction, which was refused, to the effect that the jury should not consider any act of sexual intercourse subsequent to that in which the plaintiff's seduction culminated. I see no ground for distinguishing between the various acts of intercourse. The later instances were as much a consequence of the seduction as the first one. 35 Cyc. 1318; *Thompson v. Clendenning*, 1 Head [38 Tenn.] 287, 295; *Davis v. Young*, 90 Tenn. 303, 304, 16 S. W. 473; *Haymond v. Saucer*, 84 Ind. 3, 6; *Breiner v. Nugent*, 136 Iowa, 322, 111 N. W. 446.

I am authorized to say that BURCH and BENSON, JJ., concur in this dissent.

#### WILLIAMS v. WITHINGTON.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. NEGLIGENCE (§ 93\*)—IMPUTED NEGLIGENCE—GUEST IN VEHICLE.

A woman who, with a child in her lap, goes riding about 9 o'clock at night in a single-seated buggy, drawn by a gentle horse driven by her husband, and who does not exercise or attempt to exercise any control over the vehicle or the driver, is not chargeable with the negligence of the husband in failing to see and avoid an automobile approaching from the side on which the husband is sitting.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

#### 2. TRIAL (§ 350\*)—SUBMISSION OF SPECIAL QUESTIONS.

Special questions are not for the purpose of subjecting the jury to a process of technical and microscopic cross-examination, or of requiring them to distinguish between elements of injury beyond the ken of the anatomist and the metaphysician, but to show the chief ultimate facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

(Additional Syllabus by Editorial Staff.)

#### 3. APPEAL AND ERROR (§ 301\*)—RULINGS ON EVIDENCE—QUESTIONS NOT RAISED AT TRIAL—MOTION FOR NEW TRIAL.

Objections to the rejection of evidence not brought to the attention of the trial court on motion for a new trial, as required by Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

#### 4. TRIAL (§ 340\*)—VERDICT—CORRECTION—AMOUNT OF DAMAGES.

Where the evidence did not show that plaintiff had received any permanent injuries, the amount of damages awarded by the verdict for permanent injuries should be deducted therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.\*]

Appeal from District Court, Montgomery County.

Action by Mollie J. Williams against W. H. Withington. Judgment for plaintiff, and defendant appeals. Affirmed.

Chester Stevens, of Independence, for appellant. Thos. E. Wagstaff, of Independence, and Edward H. Chandler, of Tulsa, Okl., for appellee.

WEST, J. Main street, in Cherryvale, runs east and west, and is intersected by Liberty street, running north and south. At the intersection and thence some distance east and west Main street is paved with brick, the pavement being 40 feet in width with a cement curb on each side 6 inches above the surface of the pavement. Liberty street is paved with brick for one block north; the pavement being 30 feet wide with a curb similar to the one on Main street. At about 9 o'clock on the evening of June 26, 1910, the plaintiff was riding in a single-seated one-horse buggy, driven by her husband, who sat on the right side. Plaintiff held one child in her lap, and another sat between her and her husband. As the buggy was coming west on the north side of Main street approaching the intersection, the horse was driven diagonally across towards the south side as it approached Liberty street, and, when within about 15 feet therefrom, the defendant, coming in his automobile down the east side of Liberty street, turned into Main, and, when the buggy was four or five feet from the south curb line of Main street, the automobile struck the right hind wheel of the same, injuring the buggy, throwing the plaintiff forward into

the wheel, and injuring her. Plaintiff sued the defendant for damages, alleging, among other things, that there was an electric arc light about 20 feet above the center of the intersection of the two streets which cast sufficient rays on and around the vicinity to enable the defendant to see for 150 feet what objects, vehicles, or persons there were upon the streets; that he recklessly and carelessly drove his machine south at a very high rate of speed, to wit, about 20 miles an hour, and along the east side of Liberty street at a reckless rate, to wit, about 18 miles an hour, crossing the northwest corner of the intersection, and then in a southeast direction crossing Main street, having his face turned toward the opposite side of the street and away from the direction in which he was running; that, had he looked ahead, he could have seen the buggy; that he gave no warning or signal of his approach at any time, but while crossing Main street in a southeast direction was engaged in conversation with two ladies in the back seat of his car. The jury returned a verdict for \$600. A demurrer to the evidence, a motion for judgment on the special findings, and a motion for new trial were overruled. The defendant appeals, and plaintiff files a cross-appeal, alleging error in the reduction of the verdict.

The jury found, among other things, that there was room to have driven the horse along the north side of Main street where the accident occurred, the condition of the street being such as to afford an easy and safe passageway for the horse and buggy; that the horse was driven across the center and over to the south side of Main street just prior to the collision, to which the plaintiff made no objection; that the automobile crossed the center of the intersection toward the south side of Main, coming down Liberty street at from 10 to 12 miles an hour, which rate was not decreased when it crossed the intersection, or when the collision occurred; that there were four lamps on the front of the automobile lighted at the time and one on the rear; that plaintiff, had she looked, could not have seen the light before it reached the intersection and prior to the accident, and that she did not see it and could not have seen it until on the south side of Main street; that, when she could have first seen the light, the horse and buggy were 30 or 40 feet southeast of the intersection; that plaintiff could not have seen the automobile when it approached and crossed the intersection just prior to the collision; that the automobile was in the usual route of travel generally pursued in passing east on Main street, and that the defendant did not see the horse and buggy before the light from his machine fell upon it; that there was not room between the horse and the south curb of Main street for the defendant to safely drive his automo-

bile; that he did not just before the accident turn to the left to avoid collision; that after the plaintiff and her husband saw the automobile just before the collision they continued to drive toward the south curb of the intersection, and were 4 or 5 feet from the curb and 15 feet from the intersection when the collision occurred; that the plaintiff could not have seen the automobile before it reached the intersection had she been looking. They further found that she was in possession of all her faculties of sight and hearing, and did nothing to avoid the collision after she saw, or should have seen, the automobile and just prior to the collision. The plaintiff's husband testified that the defendant said it was all his fault, and he would pay the damages. Another witness testified that afterwards he had a talk with the defendant, in which the latter said he guessed it was his fault, and that he offered to pay what was right, and would have sent for a doctor if they had wanted it. There was no error in overruling the demurrer to the evidence.

[3] Complaint is made of the rejection of certain evidence, but this does not appear to have been brought to the attention of the trial court on the motion for new trial, as required by section 307 of the Civil Code of Procedure (Gen. St. 1909, § 5901). Neither do we find any error in the refusal to render judgment on the special findings. It remains to be considered whether the motion for new trial was wrongfully denied. Complaint is made that the instructions were not sufficient on the question of contributory negligence, although none were offered by the defendant. We have examined those given, and find that they were as strongly in the defendant's favor as he was entitled to.

[1] It is now argued, however, that the jury should have been told that plaintiff's failure to observe the law of the road by turning to the right, if without excuse, was a bar to her recovering; that, if she neglected to look when she should or could have seen the automobile approaching, this would prevent recovering. It is also argued that she was either guilty of contributory negligence in these respects or else her husband's negligence is to be imputed to her, although the jury found that she had no control over the buggy, the horse, or the driver. The seventh instruction was to the effect that it was her duty to exercise ordinary care on her part, and, as far as she could control the vehicle and direct and control the driver, to observe the law of the road and keep to the right, and to use her senses and exercise the care of any ordinarily prudent person to avoid injury to herself. Her testimony was, in substance, that she was holding her child in her lap and paying no attention to the situation or circumstances; that she saw the lights of the automobile, but it "was right into us before I saw it." Common sense would dic-

tate that, when a wife goes riding with her children in a rig driven by her husband, she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her under the circumstances shown here to impugn her husband's ability to drive and assume the prerogative to dictate to him the manner of driving. With one child on her lap, and another sitting next to look after, she might with human and legal fairness and propriety leave the driving in the exclusive care of the husband and father, at least until she actually saw some danger calling for warning or advice from her, which was not the case in this instance. She frankly testified that she was "scrooched down," holding her baby, and "gawking around at things," but not paying attention to the situation or circumstances surrounding the place at the time. So far as imputed negligence is concerned, she had a right to trust her husband to so conduct the ride that she could "scrooch down" and "gawk around" and rest, for very likely she was taken on the drive for real rest and relaxation. Although in *Bush v. Railroad Co.*, 62 Kan. 709, 64 Pac. 624, it was held that when one is riding with another for their mutual pleasure, with equal opportunity to see and ability to appreciate the danger, and is in fact looking out for herself, she is then chargeable with want of care if she makes no effort to avoid the danger, that was a case involving the crossing of a railroad track by a young couple out driving. One train had just passed, and they could have seen the other 1,300 feet away had they looked. A similar ruling was made in *Railway Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261. But in *City of Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309, it was held that a young woman riding in a carriage by invitation of the owner, she having no control over the carriage, the horse, or the driver, was not barred from recovering for an injury caused by an obstruction in the street, even if the driver was negligent. It was there said: "We think the law well settled that where the person injured has no right to control the movements of the driver, and does not in fact exercise any control, the negligence of the driver cannot be imputed to him." 57 Kan. 61, 45 Pac. 66, 57 Am. St. Rep. 309. Reading *Township v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355, was a case of a wife injured while riding with her husband in a vehicle over a defective highway. It was sought to impute to her the negligence of her husband, the driver, and, although it was shown that the ride was taken at her solicitation, it was decided that she was not to blame for his carelessness. After discussing the headship of the husband in spite of the equality of the sexes, it was said that "all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and pro-

tect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control." 57 Kan. 802, 48 Pac. 136, 57 Am. St. Rep. 355. Interesting discussions of the question will be found in *Thompson on Negligence*, §§ 502-504; also *Shultz v. Old Colony Street Railway Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597 and note, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; note to *Lerner v. Philadelphia*, 21 L. R. A. (N. S.) 672; 29 Cyc. 542, 543; *Southern R. Co. v. King*, 128 Ga. 383, 57 S. E. 687, 11 L. R. A. (N. S.) 829, 119 Am. St. Rep. 390; *Louisville R. Co. v. McCarthy*, 129 Ky. 814, 112 S. W. 925, 19 L. R. A. (N. S.) 230, 130 Am. St. Rep. 494. In the note to the *Shultz Case*, 8 L. R. A. (N. S.) 656, the cases are collated, and abundant support is found for the doctrine announced by Mr. Justice Field in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652: "But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury." 116 U. S. 379, 6 Sup. Ct. 397, 29 L. Ed. 652. This was said with reference to a hack case, but upon principle, the same principle, the wife cannot be held responsible for her husband's negligence, unless he was in some degree acting under her authority or direction. True, she would still be liable for her own failure to exercise due care, but the jury found in her favor in this respect, and we do not think her own evidence destroys such finding.

Some of the answers to special questions are apparently inconsistent, but no point seems to be made on that ground, and, if it were, they can be reconciled with one another and with the general verdict without doing real violence to their verbiage. In this case, free from unusual difficulty, to recover \$2,000, 85 special questions were submitted to the jury, and their very profusion necessarily tended to befog. The purpose of the statute providing for the submission of special questions was not to put the jury through a process of technical and microscopic cross-examination, and the trial court might well have refused three-fourths or more of the queries which cumber this record. *Evans v. Moseley*, 84 Kan. 322, 332, 114 Pac. 374; *Railway Co. v. Lyan*, 57 Kan. 635, 646, 47 Pac. 526; *Mo. Pac. Rly. Co. v. Reynolds*, 31 Kan. 132, 136, 1 Pac. 150; *Mo. Pac. Rly. Co. v. Holley*, 30 Kan. 465, 474, 1 Pac. 130, 554.

[2] The method so often indulged in of requiring the jury to separate the damages so as to distinguish between elements of injury which would puzzle the anatomist and the metaphysician is also vanity and vexation of spirit. Of course, under the present statute, it is the duty of the court to submit prop-

er and material questions to show the chief ultimate facts, but, if the number and character were properly limited, much waste of time, confusion, and prolixity would be avoided. We find no material error of which the defendant can justly complain.

[4] The plaintiff by cross-appeal seeks to reverse the action of the trial court in deducting \$250 awarded for permanent injuries. The jury allowed \$125 for injuries to the hip, \$100 for injuries to the ankle, and \$125 for injuries to the back. We do not think the testimony indicates that the plaintiff received any permanent injuries, and therefore we find no error in deducting the sum awarded therefor.

The judgment is affirmed. All the Justices concurring.

**BARKER v. KANSAS CITY, M. & O. RY. CO.**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

**1. EVIDENCE (§ 186\*)—BEST AND SECONDARY EVIDENCE—LOST WAYBILLS—LETTER PRESS COPIES.**

The defendant, having shown the loss of certain waybills indicating the destination of two of the cars in question, offered in evidence letter press copies, which were refused. *Held* error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.\*]

**2. EVIDENCE (§ 601\*)—WEIGHT AND SUFFICIENCY.**

Evidence that upon one freight car of the train in question, at some time by some one unknown, there had been written with chalk the name of a certain station, and that destinations were sometimes thus indicated, is not sufficiently probative to warrant a finding that such car was then being moved to such station.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.\*]

**3. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMED FACTS.**

Instructions should not by their language appear to assume as proven a matter sharply disputed by the parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**4. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT.**

Before an employé can recover for an injury under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), it must appear that at the time of the injury the defendant railroad was engaged in the work of interstate commerce, and that such employé was by the carrier employed in such commerce. To constitute him a person so employed his work at the time of the injury must have had a real and substantial connection with the interstate commerce in which such carrier was then engaged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**5. COMMERCE (§ 27\*)—INJURIES TO SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT—"INTERSTATE COMMERCE."**

An interstate railroad when engaged in moving cars of water or coal over its line from one state into another for use in its own engines is engaged in "interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

**6. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—DEFENSES—ASSUMED RISK.**

Assumption of risk is a good defense to an action under this act, except when the violation by the carrier of some statute enacted for the safety of employes has contributed to the injury or death of the employé. And, when such defense is pleaded and supported by the evidence, it is the duty of the court to instruct thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

**7. TRIAL (§ 340\*)—VERDICT—CORRECTION—AMOUNT OF DAMAGES—DEDUCTION FROM VERDICT.**

An item of damage allowed for an injury neither proved nor found should be deducted from the amount of the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.\*]

**8. TRIAL (§ 296\*)—INSTRUCTIONS—ERROR CURED BY GIVING OTHER INSTRUCTIONS—PREJUDICE.**

When the court charges that the plaintiff was guilty of contributory negligence, no error prejudicial to the defendant is committed by another instruction that the burden is upon the defendant to show such negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**9. TRIAL (§ 350\*)—SUBMISSION OF SPECIAL QUESTIONS.**

The purpose of the statute (Code Civ. Proc. § 204 [Gen. St. 1909, § 5888]) providing for the submission of special questions is to "direct the jury to find upon particular questions of fact," not to invade the domain of medical or metaphysical science in an attempt to separate and distinguish between constituent elements of physical injuries.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

*(Additional Syllabus by Editorial Staff.)*

**10. MASTER AND SERVANT (§§ 203, 227\*)—"CONTRIBUTORY NEGLIGENCE"—"ASSUMPTION OF RISK."**

"Contributory negligence" of a servant is the omission to use those precautions for his own safety which ordinary prudence requires, and is distinguishable from "assumption of risk" which arises, in the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, when the risk of the ordinary dangers of the occupation into which he is about to enter are known, or are so plainly observable that he may be assumed to know them, and he continues in the employ without objection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543, 668, 669; Dec. Dig. §§ 203, 227.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617; vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Sedgwick County.

Action by J. W. Barker against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Jno. A. Eaton and D. W. Eaton, both of Kansas City, Mo., and Chester I. Long and Holmes & Yankey, all of Wichita, for appellant. Dale & Amidon, Jean Madalene, and B. F. Hegler, all of Wichita, for appellee.

WEST, J. J. W. Barker, a fireman on a switch engine of the defendant, sued to recover damages for injuries received by him upon the turning over of such engine while on a trip on the main track between Clinton and Altus, Okl. He alleged that on or about December 17, 1909, he was ordered to go to Clinton, Okl., where he was ordered to return to Altus on the 18th; that his engineer was ordered to take back nine car loads of coal and a water car from Clinton to Altus, and while the switch engine was drawing this load it turned over and injured him; that wooden blocks had been placed under the engine to relieve the strain and friction on certain bearings and springs in lieu of proper appliances, and that it was also defective, in that it had no pony trucks or pilot, and was constructed for switching in yards, and not for use on the main line; that the track where the injury occurred was rough and uneven and unballasted, except by dirt lying on the track which was insufficient. The defendant, after a general denial, pleaded contributory negligence and assumption of risk. The jury returned a verdict in favor of the plaintiff. Error is assigned on overruling a demurrer to the evidence, refusing certain testimony, admitting certain testimony, refusing certain instructions, giving certain other instructions, and overruling a motion for judgment upon the special findings and a motion for a new trial.

The right of recovery is based upon the violation of the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). It is claimed by the plaintiff that the cars in the train at the time of the injury were transporting interstate commerce. The court expressly limited this question to the facts concerning one car which the plaintiff asserts was destined for Sweetwater, Tex. The court charged the jury that the plaintiff was guilty of contributory negligence, but failed to charge as to assumption of risk. The defendant insists that the train in question was engaged exclusively in intrastate work; that the court erred in refusing to charge as to assumption of risk; that the testimony showed that the plaintiff in fact assumed the risk; and that the verdict was excessive.

[1] Two of the cars had been diverted from their original destinations and rebilled. The

two waybills from the point of diversion appear to have been in the possession of the engineer who was killed, and the defendant offered proof of their loss, and sought to introduce letter press copies thereof in order to show the destination of the car already referred to. This evidence was competent, and it was error to reject it. *Bourquin v. Railway Co.*, 88 Kan. 183, 127 Pac. 770; *Railroad Co. v. Thirlwell*, 88 Kan. 275, 128 Pac. 199; Civil Code, § 384 (Gen. St. 1909, § 5979); *Darling v. Railway Co.*, 76 Kan. 893, 93 Pac. 612, 94 Pac. 202; *Richolson v. Ferguson*, 87 Kan. 411, 124 Pac. 360; *Glass Co. v. Pierce*, 87 Kan. 548, 125 Pac. 108. The evidence tended to show that the plaintiff was familiar with the engine in question, with the fact that it was not proper for service on the main track, and the fact that the track was bad where the injury occurred, and there was nothing showing, or tending to show, that he made any complaint or hesitated to carry out the orders to bring the train from Clinton to Altus. Testimony was introduced showing that the defendant had a rule of which the plaintiff had knowledge requiring conductors and engineers to show their train orders to the brakeman and fireman who must read and return them, and should there be cause to do so they are to remind the conductor or engineers of their contents; that in going to Clinton the conductor had a slow order which he showed to the plaintiff, but the plaintiff did not call his attention thereto at any time. Whatever of utility or futility a reminder would have had, he failed to follow the rule, but, as the jury were instructed that he was guilty of contributory negligence, the defendant cannot complain.

[2] There was testimony showing that it was customary for trainmen to mark on cars the number or name of the station to which they were destined. The plaintiff testified that there were marks on cars of this train; that some of them were marked Altus and some Sweetwater; that as nearly as he could remember one car was marked Sweetwater; that Sweetwater is in Texas, and a division point. He further testified that he did not know which one had this marking on, but he thought one of them did; that it was made with chalk, but he did not know when. On being recalled, he testified that switchmen put chalk marks on the cars practically all the time at Clinton; that he noticed a chalk mark on one of these cars. "It looked as though it hadn't been on many days; could not say exactly. That the name of the point on that car was Sweetwater, Tex." He should judge the chalk mark was a foot or 18 inches in size. "Very often put the number of the trains on the cars or write it—something like that. \* \* \* That when at work weighing coal cars the yardmasters would call how much the car weighed. Q. What would you put on the car then? A. I

would put Altus, sometimes Clinton, sometimes Sweetwater. Q. What would that mean? A. It would mean that it was going to that place. Q. Do you know who put that mark on the car? A. I don't, not that coal car. Q. Do you know when it was put on? A. No; I say I don't know exactly what date. Q. Answer the question yes or no. A. I say no, sir."

[3] Another witness said that he had seen the names of points at which cars had been left marked on the cars being the same town at which they were left. Complaint is made that the court nine different times in the instructions used the expression "the car on which was marked in chalk the words Sweetwater, Texas," as it assumed a matter not proved, and it was left to the jury to find whether one of the cars was thus marked, and to determine from this and all the other facts whether it was engaged in interstate commerce. An examination of the plaintiff's testimony in chief and upon cross-examination when first upon the stand, and when recalled, taken together, was not clear and satisfactory, and in view of the fact that the court had refused to permit the introduction of the letter press copies of waybills, one of which was supposed to have given the destination of the car in question, it was hardly proper for the court in instructing the jury repeatedly to refer to the car as the one on which the words "Sweetwater, Texas," were marked, because they might naturally believe that this amounted to an expression of opinion by the court that it was thus marked, although in two instructions it was left for them to say whether or not such was the fact. But, assuming that at some time not shown and by some person unknown these words were upon the car in question, it can hardly be said that the natural, fair, and reasonable inference to be drawn therefrom is that at the time in question this car was actually in process of transportation to a point in another state, and especially so when this was made the vital and determining question in the case.

[4] The act (35 St. at L. 65) provides: "That every common carrier by railroad while engaged in commerce between any of the several states or territories \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." In *Colasurdo v. Central R. R. of New Jersey* (C. C.) 180 Fed. 832, a track walker was injured while assisting in repairing a switch in a railroad yard. The track was used both for state and interstate commerce, and it was held that this brought the case within the act. *Lamphere v. Oregon R. & Nav. Co. et al.*, 196 Fed. 336, 118 C. C. A. 156, involved the question whether a fireman in the employ of a road engaged in interstate commerce, who was ordered to report at a station to be transported with others to another station to relieve the crew

of an interstate train, was within the act, and it was held that he was. It was held in *Pedersen v. Delaware, L. & W. R. R.* (C. C.) 184 Fed. 737, that at the time of the injury both the carrier and the employé must be engaged in interstate commerce. The plaintiff was engaged in bridge construction, and was injured while carrying material from one part of the work to another by a local train running between two points in New Jersey, and, as this business was held to be wholly intrastate, the plaintiff was not permitted to recover. This ruling was affirmed by the Court of Appeals. 197 Fed. 537. *Behrens v. Illinois Cent. R. Co.* (D. C.) 192 Fed. 581, was a case in which it appeared that a fireman on a switch engine was ordinarily employed in interstate commerce, though mingled with employment in commerce wholly within the state. He usually reported for duty at Chalmette, a terminal below New Orleans, not on defendant's road, to make up a train of empties and other cars for various destinations and going over its road, and also of empty cars to be returned to other roads. The crew would take such train to Harahan, a terminal above New Orleans on defendant's road, and then take another train back. When the accident occurred, the train being moved was composed of cars all originating in Louisiana and destined for Chalmette, also in Louisiana. It was held that the fireman was engaged in interstate commerce within the meaning of the statute, and could recover. In *Darr v. Baltimore & O. R. Co.* (D. C.) 197 Fed. 665, it was held that one employed in making running repairs, who was sent to replace a bolt which had been lost from the brake shoe of a tender was within the act; the engine and tender used by the company in moving interstate trains between two points having reached the end of their run, and had been placed on a fire track to await the time for starting on a return trip.

It was decided in *Northern Pac. Ry. Co. v. Maerkl* (C. C. A.) 198 Fed. 1, that an employé working in repair shops connected with an interstate track, engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce, was employed by the defendant in interstate commerce within the meaning of the act. The Supreme Court held in *Interstate Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, that the equipment of an interstate railroad, including cars for transporting its own fuel, are instruments of interstate commerce. That coal received from the tipple of a coal mine into cars by a railway company intended for its own use and transportation by it is a matter within the control of the Interstate Commerce Commission. In *Second Employer's Liability Cases*, 223 U. S. 1, at page 47, 32 Sup. Ct. 169, at page 174 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), the validity of the act

was settled, but the question now under consideration was not involved. However, in speaking of the power to regulate commerce among the several states, it was said: "Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes." The court quoted with approval from the brief of the Solicitor General: "The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of interstate commerce." 223 U. S. 48, 32 Sup. Ct. 174 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44). The Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. Stat. 1901, p. 3174]), as construed in *Southern Ry. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined to vehicles actually engaged in such commerce. In the opinion just quoted from it was further said: "The present act, unlike the one condemned in *Employer's Liability Cases*, 207 U. S. 463 [28 Sup. Ct. 141, 56 L. Ed. 297], deals with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. And, this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein." 223 U. S. 51, 52, 32 Sup. Ct. 176 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44).

The Court of Appeals of the Third Circuit quoted part of this expression in *Pedersen v. Delaware, L. & W. R. Co.*, 197 Fed. 537, at page 539, and said that the object of this act was "to broaden the right to relief for damage suffered by railroad employes in interstate transportation, for the power of Congress to create such liability to such employes rests on the fact and acts of interstate transportation work which are being done both by the company and by the injured employé at the time of the injury." It was pointed out that, like the Safety Appliance Act, the statute in question has for one object the lessening of dangers to employes during interstate transportation, and in pari materia to broaden the relief for damages so sustained; also, that by the wording of the present act it is plain that liability was imposed, not for every injury done an employé of an interstate road, but for one done to him while he is employed by such carrier

in such commerce." 197 Fed. 540. It was further suggested that in border line cases the difficulties can be met by bearing in mind not only that the carrier must be engaged in interstate commerce, but the employé must at the time of the injury "have a real and substantial connection with the interstate commerce in which the carriers and their employes are engaged;" the relation of the employé's particular work to interstate transportation at the time the injury is sustained being the test. That the same kind of act may at one time be a part of interstate transportation and at another time have nothing to do with it; that one helping to move interstate trains is within the act, but not when helping to move one purely local. This appears to be the latest, as well as the clearest, statement of the rule found in the federal decisions, and we adopt it as correct.

[5] Whether the plaintiff comes within this rule depends on the facts shown. If the engine at the time was engaged in moving an interstate load, then the company and the plaintiff were doing interstate commerce work. The plaintiff testified that in 1909 the Orient was operating in Kansas, Oklahoma, and a part of Old Mexico; that Altus is about 260 or 265 miles from Wichita; that he had been up and down the line in Kansas, Oklahoma, and Texas; that he had seen this water car before, and that he knew it was up and down the line; that, "wherever they wanted it, that is where they got it"; that it was used on the main line; that once when he went to Chillicothe, Tex., with a train load of water, this same car as nearly as he could remember was taken. Another witness testified that he had noticed a car of water being hauled up and down the line—all over the line. The plaintiff swore that at Clinton the defendant road connected with the Rock Island and Frisco, both of which roads were engaged in interstate traffic; that at Clinton cars were taken from and left for these roads; that the water car in question was got at Clinton. Another witness stated that he had been over the road from Wichita to Sweetwater, Tex., which was the division point, south of Altus, Fairview being the next division point south of Altus, and Wichita the division point next north of Fairview; that the road is engaged in interstate traffic; that the water car in the train at the time of the injury was used for hauling water up and down the line for supplying the engines. There was considerable testimony showing that the nine other cars were loaded with San Bois smokeless coal, a semianthracite used along the line of the road; that, while there is a slight change in the name of the company running from Altus into Texas, it is one continuous line. Seven of the cars of coal, from McCurtain, Okl., were consigned to the vice president of the Kansas City, Mexico & Orient of Texas, whose office was

at Sweetwater, Tex., and were being taken to Altus for delivery to that road; that the two other cars were billed to Aline, but by instructions they were being taken to Altus, the water car was being moved without way-bill. These facts with all the others should have been submitted to the jury for such inference and findings as they felt convinced were warranted. The principle announced in the Interstate Commerce Commission Case already referred to (215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280) seems directly applicable in case the jury should reasonably believe that the coal and water were being transported for use "up and down the line" in more than one state. Section 4 of the act (35 Stat. 65) provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injury to, or the death of, any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." The natural meaning of this language is that assumption of risk would be a defense when there was no violation by the common carrier of such statute. If contributory negligence and assumption of risk are not different, it is passing strange that Congress in its second enactment should expressly declare in section 3 that "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." Section 4: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act \* \* \* such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the death or injury of such employe." Such expressions are meaningless unless a clear distinction between contributory negligence and assumption of risk were recognized and intended. We should suppose that Congress meant that contributory negligence should never be a matter of defense, but should be provable in mitigation of damages in all cases save those in which the carrier had also contributed to the injury by violating some safety statute, and that assumption of risk should be a complete defense, except in case of such disregard of a safety requirement by the carrier. There is nothing to indicate an

intention to hold the carrier liable ordinarily for an injury arising out of a risk assumed by the employe. In *Northern Pac. Ry. Co. v. Maerkl*, 198 Fed. 1, at page 6, decided by the Court of Appeals of the Ninth Circuit, the question of assumed risk was thus lightly touched: "In respect to the defense set up of assumption of risk by him, it is sufficient to say that a risk arising out of the carrier's neglect, and of which the employe had no knowledge, was not one which can be held to have been assumed by him."

[6] In *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, at page 12, 27 Sup. Ct. 407, at page 409 (56 L. Ed. 681), a case under the Safety Appliance Act, the clause under consideration was that in section 8 any employe injured by any car in use contrary to the provisions of the act shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. It was said that the phrase as used in this clause extended to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them; that in this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law; that "probably the modification of this general principle by some judicial decisions and by statutes like section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist." Assumption of risk in this broad sense was said to shade into negligence as commonly understood, and the difference between the two to be more of degree than of kind, and that "when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to be master, \* \* \* then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name." This was said to be especially true in Pennsylvania (where the actions arose), where some cases at least seemed to have treated assumption of risk and negligence as controvertible terms. Justices Brewer, Peckham, McKenna, and Day dissented, and said that there is a vital difference between assumption of risk and contributory negligence, and quoted from Judge Taft in *Narramore v. Cleveland, etc., Railway Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, that: "Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of as-



suming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences."

The Court of Civil Appeals of Texas held in *Freeman v. Powell*, 144 S. W. 1023, that assumption of risk is available to the defendant, and, after quoting the provision of section 4, said: "It thus appears that under the federal statute a complaining employé to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation of some statute enacted for the safety of an employé which has contributed to his injury or death, and of this there is no contention in this suit." In *Railway Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990, it was decided that, if an employé with knowledge of the facts and appreciation of the danger voluntarily accepts the situation without complaint or promise of change, he assumes the risk of a dangerous work. After reviewing many decisions, it was said. "If the master fail to make the employment reasonably safe, and the danger takes on the aspect of a continuing condition which the servant knows about and understands, or which is so patent that ordinary care would bring it to his attention and appreciation, he may accept the situation, and continue to work without complaint. If he does so, he assumes the risk." Assumption of risk as distinguished from contributory negligence was recognized in *Manufacturing Co. v. Bloom*, 76 Kan. 127, 90 Pac. 821, 11 L. R. A. (N. S.) 225, 123 Am. St. Rep. 123; *Railway Co. v. Quinlan*, 77 Kan. 126, 93 Pac. 632; *Railway Co. v. Glick*, 78 Kan. 419, 96 Pac. 796; *Iron Works Co. v. Green*, 79 Kan. 588, 100 Pac. 482; *Smith v. Railway Co.*, 82 Kan. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255; *Lewis v. Barton Salt Co.*, 82 Kan. 163, 107 Pac. 783; *Cloud v. Railway Co.*, 82 Kan. 851, 109 Pac. 400; *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657; *Murphy v. Edgar Zinc Co.*, 83 Kan. 627, 112 Pac. 109; *Lupher v. Railway Co.*, 86 Kan. 712, 122 Pac. 106; *Karns v. Railway Co.*, 87 Kan. 154, 123 Pac. 758. Moreover, since the decision in the *Schlemmer Case*, 205 U. S. 1, 27 Sup. Ct. 407, 56 L. Ed. 681, the United States Supreme Court has put the question beyond doubt. In *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, it was held that the common-law rule of assumption of risk has never been modified by statute in the District of Columbia and must be enforced. And in the *Schlemmer Case*, 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596, when again before the court, it was unanimously decided that, "there is a practical and clear distinction between assumption of risk and contributory negligence."

[10] The latter was stated to be the omission of the employé to use those precautions for his own safety which ordinary prudence requires, and the former was said to arise, in the absence of statute taking away the defense of such obvious dangers that no ordinarily prudent person would incur them, when the risk of the ordinary dangers of the occupation into which he is about to enter are known, or are so plainly observable that the employé may be assumed to know them, and he continues in the employ without objection. See *Miller v. White Bronze Monument Co.*, 141 Iowa, 701, 118 N. W. 518, 18 Ann. Cas. 957, and note page 960, and note to *Scheurer v. Banner Rubber Co.*, 28 L. R. A. (N. S.) 1215. It must be held, therefore, that assumption of risk was a good defense, and, there being evidence to support it, the trial court erred in refusing to instruct thereon.

[7] As the case must go back, it may be well to notice the defendant's complaint that the verdict was excessive. The plaintiff alleged that he suffered permanent injury to his back, spine, hips, and limbs, that he received a great nervous shock which caused great mental and physical pain and suffering, and that he believed such injuries were permanent. Practically all the medical testimony was confined to a burn on the shoulder, and an alleged injury to the back. The only testimony touching any injury to the hip was that of W. C. Irwin, who said that plaintiff complained of injuries in his back and hips after the occurrence. To the question, "What injuries, if any, do you find that plaintiff sustained by reason of the derailment?" the answer was, "Scalded shoulder and bruised back." The jury allowed \$1,000 for mental pain and suffering, for injuries to his back and spine \$2,000, for injuries to his hip \$500, and for permanent injuries \$4,520. After finding these sums amounting to \$3,500 for mental suffering and injuries to the hip, back, and spine, they were asked: "Do you allow plaintiff anything for any other injuries. If so, for what injuries, and for what amount?" and answered "Yes." See question 151. "Yes; for permanent injuries \$4,520. Q. Do you allow plaintiff anything for permanent injuries? If so, what amount? A. \$4,520. Q. Do you allow plaintiff anything on account of loss of earnings in the future? If so, what amount? A. No." We find nothing in the evidence sustaining the allowance of damages for injuries to plaintiff's hip, and the allowance therefor should have been set aside. The answers as to the other items are somewhat confusing, but, giving them the interpretation evidently intended by the jury, we take it that they deemed the plaintiff damaged by his suffering and permanent injuries in the sum of \$8,020, including the \$500 which should have been deducted, and we are unable to say from all the evidence that laying aside any mitigation for contribu-

tory negligence, and the alleged assumption of risk, the remainder—\$7,520—would be excessive.

[8, 9] This method of attempting to separate the injury into constituent parts, when carried to the extent shown in this and in many other cases, is not in accord with the spirit and purpose of the statute requiring the jury when requested to "find upon particular questions of fact." Civil Code, § 204 (Gen. St. 1909, § 5888). See *Williams v. Withington*, 88 Kan. —, 129 Pac. 1148.

Complaint is made that the jury were instructed that the burden was upon the defendant to show contributory negligence, and also that the plaintiff was guilty of such negligence, because of the conflict and incongruity of such instructions. Ordinarily such burden is upon the defendant, and, if removed by admission or by determination of the court, so that the defendant has the benefit of such admission or removal, an instruction of the ordinary kind cannot be materially prejudicial.

The judgment is reversed and the cause remanded, with directions to grant a new trial. All the Justices concurring.

#### MADISON v. KANSAS CITY, M. & O. RY. CO.†

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

##### 1. NEW TRIAL (§ 56\*)—MISCONDUCT OF JURORS—HARMLESS ERROR.

A prejudicial statement by a juror to his fellow jurors, made as a positive fact and within his personal knowledge, will ordinarily be deemed sufficient ground for setting aside a verdict, but a statement by a juror to other members that he had heard a rumor to the effect that one of the parties to the action had made an offer of compromise, which was not accepted, and which statement was treated as a mere rumor by the jury, and not as a fact within the personal knowledge of the juror who mentioned the rumor, is not sufficient to overthrow the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 116-119; Dec. Dig. § 56.\*]

##### 2. TRIAL (§ 350\*)—SPECIAL FINDINGS.

A litigant has a right to special findings on the ultimate facts in the case, but the court is not warranted in submitting questions which require the itemizing of such facts, or which call for mere evidentiary matters upon which such facts were based.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

##### 3. DAMAGES (§ 132\*)—PERSONAL INJURIES.

Under the testimony, it is held that the award of damages herein is not so great as to indicate that the verdict was the result of prejudice or passion.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from District Court, Sedgwick County.

Action by F. H. Madison against the Kansas City, Mexico & Orient Railway Company.

Judgment for plaintiff, and defendant appeals. Affirmed.

H. J. Eaton, Jno. A. Eaton, and D. W. Eaton, all of Kansas City, Mo., Holmes & Yankey and C. I. Long, all of Wichita, for appellant. Houston & Brooks, of Wichita, and F. W. Madison, of Fairview, Okl., for appellee.

JOHNSTON, C. J. F. H. Madison recovered a judgment against the Kansas City, Mexico & Orient Railway Company, which has been brought here for review. He was a railway mail clerk, and his run was from Wichita, Kan., to Altus, Okl., over appellant's railway. While performing his duty upon a train of appellant, it was derailed, and he sustained injuries to his knee, abdomen, and kidneys. The derailment resulted from the defective condition of the track and the excessive speed of the train over such a track. The negligence of appellant is not denied, nor is liability for actual injuries contested, but it is contended that there was misconduct of the jury while considering the evidence, and that the award of the jury was so excessive as to indicate passion and prejudice. Some time after the case was submitted to the jury, one of the jurors is said to have remarked that the railway company had offered by way of compromise to give Madison \$5,000 as damages. It appears that mention was made of an offer of compromise, but there is a dispute in the testimony as to whether any one stated as a positive fact that an offer had been made, or only that he had heard a rumor to that effect.

[1] It has been held that, to warrant a reversal because of the introduction of extraneous statements, "It must be shown that such prejudicial statements so made were of positive facts within the knowledge, or asserted to be within the knowledge, of the juror making them, and such as the jury might receive as evidence of the fact asserted, and not as the mere expression of opinion of the juror." *Hulett v. Hancock*, 66 Kan. 519, syl., 72 Pac. 224. See, also, *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. Burton*, 65 Kan. 704, 70 Pac. 640; *Karner v. Railroad Company*, 82 Kan. 842, 109 Pac. 676. Whether the statement was made as a fact and within the personal knowledge of the juror making it was a question of fact for the trial court to determine, and upon the testimony of the jurors it expressly found that neither the juror, Steenrod, nor any other juror, stated that an offer of compromise had been made in fact, but only that they had heard a rumor to that effect, and that the jurors treated it merely as an idle rumor, and, further, that none of them claimed to have any personal knowledge that an offer of compromise had been made. The question in dispute is concluded by this finding of the trial court. *Perry v. Bailey*, 12 Kan. 539; *State v. Storm*,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied March 15, 1913.

74 Kan. 859, 86 Pac. 145; Taylor v. Abbott, 85 Kan. 198, 115 Pac. 979. The fact that the matter of compromise was mentioned in the jury room may have been due to the fact that one of the counsel for appellant referred to it in his opening statement to the jury, saying, in substance, that the appellant and the appellee had been unable to agree upon the amount he should receive for the injuries sustained.

[3] In support of the claim that the award of \$9,000 to appellee was excessive and out of proportion to the injuries actually sustained, it is urged that the injuries did not render him unconscious at the time they were inflicted; that shortly afterward he was able to travel with the aid of a crutch and later with only a cane; that the postal authorities permitted him to draw full pay from the time of his injury until shortly before the trial; and that he was then given a leave of absence, with the privilege of re-entering the postal service at the salary he formerly received, to wit, \$1,300 per annum; and that afterward he did resume work on the train, and is receiving the same compensation as he did before the injury. It appears that at the time of the injury he was 25 years of age, having been in the postal service about five years, beginning on a salary of \$800, and that he was advanced from grade to grade until he received a salary of \$1,300; that his general health was then good; that promotions were open to him in which he would receive much larger compensation, and his eligibility extended to and included that of general superintendent of the service. The testimony was that the injury loosened a piece of the cartilage which serves as a pad between the two ends of the kneejoint, which operated to lock the joint, and that to unlock it it became necessary to open the joint and remove a part of the cartilage. There is evidence that the injury permanently mars the function of the joint, and, notwithstanding the operation, he will never be able to straighten the leg, and will necessarily be a cripple for life. The testimony tended to show, too, that his kidneys were seriously impaired by the injury. He did return to the postal service, and upon a later motion for a new trial on the ground of newly discovered evidence, testimony was offered that he had resumed work, had walked without a crutch, and with little, if any, limp. This was met, however, by testimony that, while he had recently undertaken to perform his work as mail clerk, it was only done with great pain and difficulty, and by the aid of a coemployee who did the work that required him to be upon his feet, and that he had, in fact, given up hope of performing the duties of that place, and had applied for lighter work at less compensation. Some of the physicians who re-examined appellee about four months after the trial, and whose testimony was given upon the last motion for a new trial, stated that the ap-

pellee had grown worse, that his leg had shrunk in size, and would grow worse as he grew older. They testified, too, that the re-examination showed the injury to the kidneys to be permanent in character. There was testimony, it is true, that the injuries to the appellee were not serious nor permanent, but there is abundant testimony which seems to have satisfied the trial court that the injuries sustained are serious and permanent, and, although a liberal award was made, we cannot say on the testimony accepted by the trial court that it was the result of passion and prejudice, nor hold that the verdict was so excessive as to require a reversal.

Error is assigned on the refusal of the court to require the jury to give more definite answers to special questions. To question 5, "What sum do you allow plaintiff on account of the injuries to his knee?" the jury answered, "\$7,000," and finding No. 6 was that \$2,000 was allowed for injuries to his abdomen and kidneys. As will be observed, these two items constituted the full amount of damages awarded by the jury. In response to other questions, the jury found that nothing was allowed for mental pain and suffering, nothing for loss of time or earnings up to the time of trial, nor for loss of time or earnings in the future. By question 13 the jury were asked if anything was allowed on account of permanent injuries, and the answer was, "Included in answers to Nos. 5 and 6." And question 14 was, "If you allow plaintiff anything on account of permanent injuries, please state for what injuries and in what amounts;" and the answer was, "As stated in answers Nos. 5 and 6." It is insisted that the jury should have been required to have answered questions 13 and 14 definitely, and to have subdivided the elements entering into the award. These findings, in effect, declared that the injuries sustained were permanent in character, and that for permanent injuries to the knee \$7,000 was allowed and \$2,000 for permanent injuries to his abdomen and kidneys. Having eliminated, by other findings, mental pain and suffering, loss of time and earnings before the trial, as well as in the future, there is little reason for a more detailed finding of the elements which constitute the permanent injuries to the knee and to the abdomen and kidneys. Something might very well have been allowed for loss of earnings in the future, but the jury probably concluded that, having awarded damages for permanent injuries, the loss of earnings in the future was covered by that award. Under the law regulating special findings, a party is not warranted in asking the itemizing of the various things that enter into each element of the damages awarded.

[2] As has been decided, "a party is entitled to special findings as to ultimate facts, but has no right to ask for mere evidentiary matters nor to require the jury to file a bill

of particulars on each fact." Matheney v. El Dorado, 82 Kan. 720, 725, 109 Pac. 166, 168 (28 L. R. A. [N. S.] 980); Railway Co. v. Bricker, 65 Kan. 321, 69 Pac. 328; Williams v. Withington, 129 Pac. 1148; Barker v. Railway Co., 129 Pac. 1151. What is termed the newly discovered evidence did not warrant the court in granting a new trial, nor do we find any prejudicial error in the record.

The judgment of the district court will be affirmed. All the Justices concurring.

ARRINGTON v. HORNER.†

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 177\*)—USE—OPERATION OF AUTOMOBILE—STATUTES.

The driver of an automobile on a rural highway shall not operate his automobile at a greater speed than is reasonable or proper, having due regard for the traffic and use of the highway, or so as to endanger the life or limb of any person, or in excess of 20 miles per hour. Gen. Stat. 1909, §§ 450, 451.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 466; Dec. Dig. § 177.\*]

2. HIGHWAYS (§ 181\*)—AUTOMOBILES—OPERATION—FRIGHTENING ANIMALS.

When approaching persons driving or riding domestic animals, an automobile driver shall, if such animals appear restive and frightened, reduce speed, if practicable turn to the right and give the road, and upon signal from the rider or driver proceed no further toward such animal or animals, but remain stationary long enough for them to pass. Gen. Stat. 1909, § 452.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

3. HIGHWAYS (§ 181\*)—AUTOMOBILES—OPERATION—MEETING DOMESTIC ANIMALS.

In other respects the driver of an automobile shall, when meeting or passing persons driving or riding domestic animals, exercise the care and caution to prevent injury and insure safety which a reasonably prudent person would exercise, taking into consideration all the elements of the situation, including the appearance and attributes of his peculiar kind of vehicle. Gen. Stat. 1909, § 452.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

4. HIGHWAYS (§ 181\*)—AUTOMOBILES—OPERATION—MEETING DOMESTIC ANIMALS—DUTY OF DRIVER.

A corresponding duty rests upon a person riding or driving domestic animals when approached by an automobile to take cognizance of the conditions, and to exercise the care and caution which a reasonably prudent person would display in their presence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

5. HIGHWAYS (§ 172\*)—USE—DUTY TO LOOK.

It is the duty of a driver on the public highway, whether of an automobile or of domestic animals, to look ahead and see whatever there may be in the line of his vision which should affect his driving, and, if the driver of a team knows that an automobile is approaching from the rear, to act with reasonable prudence in the light of such knowledge.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. § 172.\*]

(Additional Syllabus by Editorial Staff.)

6. HIGHWAYS (§ 181\*)—AUTOMOBILES—OPERATION—"EVERY REASONABLE PRECAUTION."

Gen. Stat. 1909, § 452, providing that an automobilist when approaching a vehicle drawn by horses must exercise "every reasonable precaution" to prevent frightening such horses, does not make the automobilist an insurer; "every reasonable precaution" meaning merely the precaution which a reasonably prudent man would take in view of the danger to be apprehended.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

For other definitions, see Words and Phrases, vol. 7, p. 5975.]

Appeal from District Court, Kingman County.

Action by John Arrington against A. M. Horner. Judgment for defendant, and plaintiff appeals. Affirmed.

A. L. Noble, of Winfield, and John McKenna, of Kingman, for appellant. Chas. C. Calkin and S. S. Alexander, both of Kingman, for appellee.

BURCH, J. The action in the district court was commenced by Arrington to recover the value of a horse which he owned, and which was injured in a collision with an automobile driven by Horner. The jury returned special findings and a general verdict favorable to the defendant. Judgment was rendered accordingly, and the plaintiff appeals.

James Harper was driving a team of mules hitched to a loaded wagon, eastward on a public highway. The horse which was injured was a saddle horse, and was tied with 2 or 2½ feet of rein to the backband of the right-hand mule of Harper's team. Behind Harper, Edgar Benson was driving a team of four mules hitched abreast to a loaded wagon. The defendant approached the two teams from the west. He turned to the right, and, when passing the led horse, it suddenly swung out in front of the automobile, which struck the horse's right hind leg, and inflicted an incurable injury. Details of the incident are disclosed in the following special findings of fact:

"(3) When did the horse that was being led at the side of the team of mules first show signs of fright? A. When automobile was opposite the wagon. \* \* \*

"(5) Would the horse have been injured in the manner in which it was injured if said horse had not turned crosswise in the road? A. No.

"(6) Could the said A. M. Horner in charge of said automobile have done anything to have prevented the injury after said horse first showed fright and turned across the road? A. No. \* \* \*

"(8) What was the distance in feet between the north wheel of the automobile and the south wheel of the wagon at the point

where the injury occurred? A. Eight or nine feet.

"(9) Did the driver of the front wagon drawn by the team of mules as the automobile approached begin to turn to the north? A. No.

"(10) Could the said driver of the front team of mules have turned said team farther to the north and driven said team and wagon farther to the left at the point where said automobile was passing? A. Yes.

"(11) What was the condition of the highway on the north side of the road at the point where said automobile was about to pass said team and wagon? A. Smooth.

"(12) Did the said Harper see and know that said automobile was approaching? A. Yes.

"(13) How far behind said wagon in which said Harper was riding was the said automobile when the said Harper first saw the same and knew it was approaching? A. Forty or 50 yards.

"(14) Was there a bank or rise on the south side of the beaten track up which the automobile had to go in turning to the right and at the point where the automobile was opposite the said horse that was injured? A. Yes.

"(15) State the distance from the said bank or rise on the south side of the road to the north wheel of the automobile at the point where the automobile was opposite said horse. A. About two feet.

"(16) What was the condition of the highway, as to being smooth or rough on the south of the highway and where said automobile was traveling? A. It was rough.

"(17) Was there anything to prevent the said Harper from turning to the north, and thus placing more distance between the said team and saddle horse and the said automobile at the point of passing? A. No.

"(19) For what distance could the said Harper see and know that said automobile was approaching the said team and wagon controlled by him? A. About 80 rods.

"(20) As Horner approached in the automobile, did the rear four-horse team incline or turn to the north? A. He did."

These findings cover all the material facts in the case, except the rate of speed at which the defendant was driving. They show affirmatively that the defendant was not guilty of any negligence, leaving out of account the rate of speed. The testimony was that he was driving at a rate variously estimated at from 6 or 8 to 15 miles per hour.

[1] The statute provides that the driver of an automobile shall not operate it on a rural highway at a speed greater than is reasonable and proper, having due regard for the traffic and use of the highway, or so as to endanger the life or limb of any person, or in excess of 20 miles per hour. Laws 1903, c. 67, §§ 4, 5. Whether or not the speed maintained by the defendant was unreason-

able or improper under the circumstances, and was the proximate cause of the injury, were, of course, questions for the jury, and presumably were determined in the defendant's favor. The principal errors assigned relate to instructions given.

[2] Section 6 of the act referred to reads as follows: "Every person having control or charge of a motor vehicle or automobile shall, whenever upon any public street or highway and approaching any vehicle drawn by a horse or horses, or any horse upon which any person is riding or driving domestic animals, operate, manage and control such motor vehicle or automobile in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses or domestic animals and to insure the safety and protection of any person riding or driving the same; and if such horse or horses or domestic animals appear restive and frightened, the person in control of such motor vehicle shall reduce the speed thereof, and if practicable turn to the right and give the road, and, if requested by signal or otherwise by the driver of such horse or horses or domestic animals, shall proceed no further towards such animal or animals, but remain stationary so long as may be necessary to allow such horses or domestic animals to pass. This provision shall apply to automobiles or motor vehicles going either in the same or in the opposite direction." Gen. Stats. 1909, § 452.

[3] The effect of the court's instructions to the jury was that, under this statute, the driver of an automobile must exercise the care and caution of a reasonably prudent person, taking into consideration all the elements of the situation, to prevent fright and to insure safety. This is a correct interpretation of the statute.

[4] The jury was also instructed that a like duty rests upon the driver of a horse or team approached, and that a failure to act accordingly constitutes contributory negligence. This too is a correct statement of the law.

[5] The statute did not make the automobile driver an insurer. "Every reasonable precaution" is merely the precaution which a reasonably prudent man would take in view of the danger to be apprehended. The end to be attained is the end in view in all cases where reasonable precaution is called for, the avoidance of peril and the insurance of safety. Because of the appearance and attributes of a motor driven vehicle there is manifest difference in the situation presented when one meets or passes a team and when two teams meet or pass. The prudence demanded of the automobile driver is by no means the same as if he too were driving a team. He must order his conduct in the light of the conditions created by the presence and operation of his peculiar kind of conveyance, and in doing so must observe every precaution which would occur to a

reasonably prudent man occupying his place. When he has done this, he has discharged his full duty under the statute up to the point of obeying the specific injunctions to reduce speed, turn to the right, give the road, and remain stationary under certain designated conditions. On the other hand, the driver of the team which is met or passed is likewise confronted with a different situation from the one he would occupy if the automobile were a horse-drawn vehicle. He too must take cognizance of the conditions and act with reference to them. The court instructed the jury upon the duty to turn to the right when practicable, and stated that the driver of a horse or team approached by an automobile who negligently or carelessly fails to turn to the right, when practicable, is guilty of contributory negligence. It is claimed that the instruction could not be applied to one in Harper's situation, since his turning to the right would only have accentuated the danger. This is true, and for that reason the jury could not by any possibility have been misled by the instruction. The purpose of the court was doubtless merely to complete an exposition of the correlative duties of drivers of the two kinds of vehicles. It may be observed that the statute makes it imperative for the driver of an automobile to turn to the right only when the team approached shows signs of restiveness and fright, and when practicable. In such cases, if reasonable prudence would suggest that the driver of the team should turn aside, his course would clearly be to the right, if practicable. The jury was instructed that negligence in hitching the horse in such a way that he could not be handled or controlled would bar recovery. The proof was uncontradicted that the horse was led in the usual and customary manner, and, since the proof coincided with the common knowledge of the jury on the subject, the instruction affords no basis on which to predicate error. The jury was instructed that negligence on the part of the defendant must have been the proximate cause of the injury, and that the injury was such as could have been anticipated as a result of such negligence. It is claimed that the instruction is open to the interpretation that the defendant would not be negligent, unless he should have fore-

seen the particular injury which occurred. The interpretation proposed is a forced one, since the language of the instruction clearly goes no further than to require that the injury belong to the class of foreseeable occurrences.

[5] The court instructed generally with reference to the duty of a driver on the public highway to look ahead, and see whatever there may be in the line of his vision which should affect his driving. The instruction was then applied specifically to the defendant, and, in the same connection, it was said that Harper, as the agent of the plaintiff, was bound to take due notice, and act accordingly, if he knew the defendant was approaching from the rear. It is argued that the instruction required Harper to have eyes in the back of his head. It is clearly susceptible of no such meaning, and, in view of special findings numbered 12 and 13, based on Harper's own testimony, was properly given. The court gave the following instruction: "In the ordinary walks of life injury and damage often occur to persons and property that cannot be traced to the fault and neglect of any one, and so constitute only a mere accident for which no one is responsible, and for which no one can be held liable, and the person or persons suffering loss or damage by a mere accident are without remedy, and must bear the loss. So in this case, if you find that in the accident in question Mr. Horner was guilty of no fault or wrong, and that the injury and damage sustained by Mr. Arrington was a mere accident, then he is without remedy, and cannot recover in this action, and you should find so." It is argued that the judgment should be reversed because the court inadvertently designated the occurrence in question as an "accident," instead of an "incident." It is not likely that the verdict turned upon this distinction.

The instructions are subjected to some further criticism, and the evidence favorable to the plaintiff is marshaled to show that the verdict is not supported by the evidence. The court is satisfied that substantial justice has been done, and the judgment of the district court is therefore affirmed. All the Justices concurring.

**SUPER v. MODELL TP. IN NORTON  
COUNTY.**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

**1. BRIDGES (§ 46\*)—BARRIERS—INSTRUCTIONS.**

An automobile was driven over a highway at night into a river at a public crossing, from which the bridge had been recently carried away by a flood. There was no barrier or sign of warning, but the driver knew that he was approaching a crossing at which he supposed a bridge was standing. It is held (1) that it was not error to refuse to give an instruction to the effect that the approach to a stream is itself a warning of danger to a person unacquainted with the road driving an automobile in the night, which requires him to see and know that a bridge is reasonably safe.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108, 170, 122; Dec. Dig. § 46.\*]

**2. BRIDGES (§ 46\*)—DEFECTS—INJURIES—INSTRUCTION.**

That an instruction to the effect that the crossing of a stream is an indication that caution is required of the driver in the circumstances stated above is sufficient, when given in connection with other instructions stated in the opinion.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108, 170, 122; Dec. Dig. § 46.\*]

**3. BRIDGES (§ 46\*)—SPEED OF AUTOMOBILES—NEGLIGENCE—QUESTION FOR JURY.**

The question whether the driver was exercising proper care and prudence taking into consideration all the circumstances and conditions was one of fact for the jury. It cannot be held as matter of law that the speed of 12 to 15 miles an hour was negligent.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108, 170, 122; Dec. Dig. § 46.\*]

Appeal from District Court, Norton County.

Action by Cyrus Super against Modell Township, in Norton County, Kan. Judgment for plaintiff, and defendant appeals. Affirmed.

L. H. Thompson and R. W. Hemphill, both of Norton, for appellant. H. R. Tillotson, of Lenora, and W. L. Sayers, of Hill City, for appellee.

**BENSON, J.** A judgment was obtained by the appellee against the appellant for \$800 for damages suffered to person and property caused by a defective highway.

The appellee was driving his automobile west upon a public road which crosses the Solomon river. A month before the accident, the bridge at this crossing had been washed away by a flood. The appellant was not aware of this fact, and approaching the crossing at 10 o'clock in the evening, was unable to stop the automobile after he saw the bridge was gone, and it went over the bank, causing injuries for which he seeks to recover. The automobile was properly equipped and lighted. He approached the crossing from the east traveling westwardly. For some distance from the river the road was practically straight and level with timber on each side. The township had built a temporary bridge a little distance to the

north of the crossing reached by turning from the road two or three rods east of the crossing. The roadway bore the indications of travel usual upon a way frequently traveled. There were also marks of use in the temporary way from the road at the new bridge. The appellee was an experienced driver, and had been traveling in that vicinity during the day, in the course of which he had crossed the river several times at other points. He was watching the road ahead, and did not notice the turn to the north. He was traveling at a speed of 12 or 15 miles an hour. There was a 3 per cent. grade in the approach to the bridge commencing 45 feet from the bank. The width of the stream at the top of the banks is 45 feet. The appellant testified that, supposing he was nearing the river, he slackened speed, but in passing up the grade the lights were thrown upward, casting a shadow so that he could not see that the bridge was out until the car was at the bank. He found no barrier or obstruction. Evidence on the part of the appellant tended to show that a car such as the one he was driving could be stopped in 15 feet when running at 10 miles an hour, and that there would not be much difference if the speed were 15 miles an hour.

Error is alleged in refusing requests for instructions. The court was asked to instruct the jury that an approach to a stream is itself a warning of danger to a person unacquainted with the road over which he is driving an automobile at night, and, if in such circumstances he attempts to cross, he must see and know that the bridge if there be one is reasonably safe. Other requests included the same proposition. We are not advised of any authority declaring such a rule. Bridges as well as other parts of public traveled roads are ordinarily safe, and no reason is perceived why a traveler in the absence of barrier, warning, indication, or notice of danger should not proceed upon the belief that they are safe for ordinary use by one observing due caution on his part. The jury were instructed that such a crossing was an indication that caution on the part of the driver was required. Another instruction was that: "One in charge of an automobile driving upon a dark night over a straight stretch of strange country road at such speed that he is unable to stop within such distance as he may clearly see, under any circumstances and conditions, an obstacle in the highway, is negligent, and if the excessive speed contributed to his running into, or being injured by such obstacle, there can be no recovery." These instructions, given in connection with others to the effect that the driver was bound to exercise the care that a reasonably prudent person would use in the same or a similar situation, sufficiently stated the principles of law for the guidance of the jury. The appellant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contends "that the failure of the appellee to look and acquaint himself with the safety of the crossing is per se negligence" on his part. The evidence, however, was that he did look—was, in fact, looking ahead all the time, and that nothing was seen to indicate danger. He was not required as matter of law to acquaint himself with the safety of the bridge, unless there was some indication or he had some notice that would prompt a person of ordinary prudence in his situation to take such action, provided he was exercising proper care with respect to the speed and management of his car.

The jury in answer to questions submitted found as follows:

"(1) At what rate of speed was plaintiff running his automobile immediately before the alleged accident occurred? Ans. Twelve or 15 miles per hour.

"(2) Was the plaintiff exercising the care and caution of a man of ordinary prudence by running his automobile at such speed at such time, taking into consideration all the circumstances and conditions shown to exist by the evidence in this case? Ans. Yes."

These findings are supported by the testimony, and conclude the controversy, unless it should be held that the rate of speed constituted negligence as matter of law. The Legislature has, however, sanctioned greater speed in highways situated as this one was, with the further provision that the speed shall not be greater at any time than is reasonable and proper, having due regard to the traffic and use of the highway. These provisions give sufficient authority for the submission of the question to a jury under proper instructions such as were given in this case. Gen. Stat. 1909, §§ 450-453. The rules applicable to the drivers of automobiles with reference to the rights of other travelers on the highway are considered in *McDonald v. Yoder*, 80 Kan. 25, 101 Pac. 468, and *Arington v. Horner*, 129 Pac. 1159 (just decided).

The judgment is affirmed. All the Justices concurring.

#### ADAMS v. CITY OF WICHITA.

(Supreme Court of Kansas. Feb. 8, 1918.)

(Syllabus by the Court.)

**WATERS AND WATER COURSES (§ 179\*)—OVERFLOWING LANDS—EVIDENCE.**

Special findings of fact considered, and held to be consistent with each other, to be supported by the evidence, and to be conclusive against the appellant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 250-259, 263, 264; Dec. Dig. § 179.\*]

Appeal from District Court, Sedgwick County.

Action by Joe Adams against the City of Wichita. Judgment for defendant, and plaintiff appeals. Affirmed.

Adams & Adams, of Wichita, for appellant. A. S. Buzzi, Dale & Amidon, and Earl Blake, all of Wichita, for appellee.

BURCH, J. A meandering stream, called Chisholm creek, formerly flowed in a southerly direction through the eastern portion of the city of Wichita and emptied into the Arkansas river some miles south of the city limits. In the year 1907 the city constructed a canal, for the purpose of straightening the creek and more effectually draining the territory tributary to it. The canal was, in fact, substituted for the creek between Twenty-First street and Zimmerly street, a distance of  $3\frac{3}{4}$  miles. The canal has the same fall as the creek between the streets named, but has only half the length of the creek, and has some  $5\frac{1}{2}$  times the carrying capacity. At Zimmerly street the canal empties into the creek, which again pursues a meandering course to its outlet.

The plaintiff owns land near the point at which the water of the canal returns to the creek, which he devotes to market gardening. On May 31 and June 1, 1908, following a rainstorm, this land was flooded, to the plaintiff's injury. He sued the city for damages, on the theory that the canal brought down quantities of water from the vicinity of its source with such rapidity that the crooked creek below could not take care of it. The action was tried before a jury, which returned special findings and a general verdict adverse to the plaintiff. Judgment was rendered accordingly, and the plaintiff appeals.

Among the special findings returned by the jury are the following:

"Q. 1. Were the plaintiff's crops inundated with water on or about the 31st of May or the 1st of June, 1908? A. Yes."

"Q. 5. Were plaintiff's crops wholly or partially destroyed by water on May 31 or June 1, 1908, for which damages are claimed in this action? A. Partially.

"Q. 6. If you answer the foregoing question affirmatively, state whether the water that destroyed or partially destroyed the plaintiff's crops was overflow water from the mouth of the drainage canal? A. Partially.

"Q. 7. Did the waters from the drainage canal directly contribute to or cause the damage to the plaintiff's crops by overflow on May 31 or June 1, 1908? A. No.

"Q. 8. Were the plaintiff's crops wholly or partially destroyed by water coming from the mouth of the drainage canal on May 31 or June 1, 1908? A. Partially."

"Q. 12. On May 31 or June 1, 1908, were the premises and country at or near the mouth of the drainage canal inundated by water flowing out of the drainage canal? A. Partially.

"Q. 13. On May 31, 1908, was the district

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



in the northeast part of the city of Wichita, and at or near Twenty-First street, overflowed with surface water? A. Yes.

"Q. 14. Was there an unprecedented flow of water in the vicinity of the drainage canal and on plaintiff's property on May 31 and June 1, 1908? A. Yes.

"Q. 15. Did Dry creek empty into Chisholm creek south of the drainage canal and north of where the Santa Fé railway crossed Chisholm creek on May 31, 1908? A. Yes.

"Q. 16. Did Gypsum creek empty into Chisholm creek south of the drainage canal and north of where the Santa Fé Railway Company crossed said Chisholm creek on May 31, 1908? A. Yes.

"Q. 17. Was Gypsum creek high and out of its banks on May 31, 1908? A. Yes.

"Q. 18. If you answer the foregoing question in the affirmative, state the cause of Gypsum creek being high and out of its banks on said date. A. By excessive rainfall.

"Q. 19. Was Dry creek high and out of its banks on May 31, 1908? A. Yes.

"Q. 20. If you answer the foregoing question in the affirmative, state the cause of Dry creek being high and out of its banks on May 31, 1908? A. By excessive rainfall."

"Q. 36. Was the plaintiff's property destroyed in part by the removing and distributing of surface water flowing in the city of Wichita through said drainage canal? A. No."

"Q. 39. On May 31 and June 1, 1908, did

any water empty into said canal except surface water? A. No."

Findings numbered 7 and 36 are obviously conclusive against the plaintiff. It is claimed that these findings are not in accord with the evidence, but there is ample evidence to sustain them. It is further claimed that these findings are incompatible with those numbered 6, 8, and 12, wherein it is stated that part of the water which covered the plaintiff's premises and destroyed his crops came from the mouth of the canal. The meaning of the jury, however, is plain and consistent. The rainfall was so excessive that the various water courses of the territory affected were unable to take care of it. The district in the northeast part of the city, in the vicinity of the origin of the canal, and the country about its mouth were alike flooded, causing an unprecedented flow of water. Commingled with the waters on the plaintiff's premises were some which the canal brought down, but the inundation took place notwithstanding the action of the canal. If Chisholm creek had not been straightened, it would have been out of its banks, like Gypsum creek and Dry creek, and the plaintiff's crops would have been injured just the same.

Since the special findings of fact preclude recovery by the plaintiff, it is not necessary to consider the errors assigned respecting instructions given and refused.

The judgment of the district court is affirmed. All the Justices concurring.

**ATCHISON, T. & S. F. RY. CO. v. BOARD  
OF COM'RS OF HARPER  
COUNTY et al.**

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

**TAXATION (§ 301\*) — LEVY — EXCESSIVE  
AMOUNT.**

Chapter 78, Laws 1908, Special Session, made it unlawful for the local taxing officers in any county to make any tax levy that would produce a sum of money in excess of 2 per cent. more than a sum that would have been produced by the levy of the maximum rate authorized for the year 1907. *Held*, that the fact that the taxing officers of Harper county in the year 1907 used as a basis for the levy the valuation of taxable property before the same was raised by the state board of equalization did not prevent them in 1908 from making a levy for general purposes, which would produce a sum not in excess of 2 per cent. more than they might lawfully have raised in 1907, if in that year they had used as a basis the increased valuation of the state board.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 801.\*]

Appeal from District Court, Harper County.

Action by the Atchison, Topeka & Santa Fe Railway Company against the Board of County Commissioners of Harper County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Geo. E. McMahon and E. C. Wilcox, both of Anthony, for appellees.

PORTER, J. Action to recover taxes alleged to be illegal which the railway company paid under protest. Under the provisions of chapter 409, Laws 1907, the county commissioners of Harper county were authorized to make a general levy of 10 mills on the dollar for general purposes for that year. By the provisions of chapter 78, Laws of 1908, they were authorized to make the same levy for general purposes as in 1907 plus 2 per cent. thereof. In 1907 they made a levy of 10 mills for general purposes. It appears that the local board fixed the value of taxable property in Harper county for 1907 outside of railroad property at \$2,995,206. The state board of equalization raised it to \$3,609,653. In 1908 the county board levied for general purposes a tax of 1.6 mill which

the appellant claims was excessive to the extent of .269 mill on the dollar. In order to determine the extent of authority in the local board to levy a tax for general purposes in 1908, it is necessary as a basis to ascertain what they might have levied lawfully for that purpose in 1907. The question directly involved is whether the local board had the right in 1907 to use the valuation fixed by the state board of equalization as a basis, or was confined to the valuation fixed by the local board itself. In *Geary County v. Railway Co.*, 62 Kan. 168, 61 Pac. 693, it was decided and ruled in the syllabus that: "Whenever the valuation of taxable property in any county is changed by the state board of equalization, the board of county commissioners of such county are authorized to use the valuation so fixed by the state board as a basis for making their levies for all purposes, but are not bound so to do." The same thing was decided again in *Railway Co. v. Miami County*, 67 Kan. 434, 73 Pac. 103. The contention of the appellee is that it is wholly immaterial what basis was in fact used by the local board in 1907 if it was authorized to use the basis fixed by the state board of equalization. We think the contention is sound. The tax levied in 1907 is not involved here. The tax complained of is that of 1908 and the Legislature at the special session of 1908 by chapter 78 of the laws of that year authorized the boards in all counties to make the same levy for general purposes which they were authorized to make in 1907 plus 2 per cent. thereof. The Legislature, if it had seen fit to do so, might have authorized only a levy for general purposes the same as actually made in 1907, but it used broader language, and fixed as a basis for 1908 the same levy authorized in 1907. It is true as appellant contends that it has been frequently held that the valuation fixed by the state board of equalization does not affect local taxes, but relates solely to the tax for state purposes. See *Railway Co. v. Sumner County*, 76 Kan. 618, 92 Pac. 590, and cases cited. And yet, as repeatedly decided, the local board are authorized to use the valuation fixed by the state board if they deem it advisable to do so. *Railway Co. v. Miami County*, supra.

The judgment is affirmed. All the Justices concurring.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**CHARPIE et al. v. STOUT et al.**

(Supreme Court of Kansas. Feb. 8, 1913.)

**1. EJECTMENT (§ 84\*)—PLEADING AND PROOF—ISSUES—RIGHT OF POSSESSION.**

Where, in ejectment, the complaint alleged the right of possession under a verbal agreement to convey land in settlement of a debt, and the proof showed that the agreement, under which possession was taken, was that the land should be taken as security, instead of payment, either agreement was pertinent to the issue, since either would give a right of possession; the fact that a broader claim was made by plaintiffs not depriving them of the lesser one sustained by the proof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 230-234, 236; Dec. Dig. § 84.\*]

**2. EJECTMENT (§ 84\*)—PLEADING AND PROOF—EVIDENCE.**

Declarations of the predecessor in title of plaintiffs in ejectment that the possession of the land in controversy should pass to defendants at her death were as competent to rebut a claim based on a pleaded agreement of sale as to rebut one based on a proven agreement that the land should stand as security for a debt, the right of possession being in issue upon either claim.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 230-234, 236; Dec. Dig. § 84.\*]

**3. APPEAL AND ERROR (§ 1170\*)—TECHNICAL ERRORS.**

Under the express provisions of Code Civ. Proc. §§ 141, 581 (Gen. St. 1909, §§ 5734, 6176), the Supreme Court may direct the rendition of such judgment in ejectment as justice requires, without regard to any misconception of the issues which does not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

On petition for rehearing. Petition denied. For former opinion, see 128 Pac. 396.

**PER CURIAM.** [1] In a petition for rehearing it is strenuously insisted that an issue was decided in this court not presented in the district court. The action is in ejectment. The plaintiffs claimed the right of possession under a tax deed, and also under a verbal agreement alleging that Hiram Stout, being indebted to Belle Charpie in the sum of about \$2,000, agreed to convey the land to her in settlement of that debt, and, in pursuance of that agreement, placed her in possession of the land. On the trial, it appeared that the agreement under which she took and held the possession was that she should have the land as security instead of payment. Either agreement would give her the right of possession, and therefore was pertinent to the issue. It is said that the abstract was deemed sufficient upon the assignments of error presented, but raised no question as to the rights of a mortgagee in possession. Interpreting this as a sug-

gestion that material evidence may not have been abstracted the transcript has been read, but no evidence is found rebutting or qualifying that referred to in the opinion upon which it was held that Belle Charpie had the rights of a mortgagee in possession. On the contrary, other testimony is found confirming that view.

[2] It is said in the petition for rehearing that the defendants might have shown declarations of Belle Charpie that the possession of the land at her death should pass to the appellee had the issue finally decided been raised at the trial. That evidence was as competent to rebut the claim based on an agreement for sale as upon an agreement for security. The right of possession was in issue upon either claim.

It is also urged that the evidence shows that the land was conveyed to Ella Stout by the Kingman Real Estate Company, and the title thereto never vested in Hiram Stout while Belle Charpie was in possession. A deed from Hiram Stout to that company is in evidence the date of which does not appear, but it was made after the tax deeds had been executed as appellees say in their brief, at which time they also say that Mr. Stout owned the land. It was reconveyed by the same company to Ella Stout on July 31, 1909. It therefore appears that both the conveyances were made while Belle Charpie was in full possession, which she held undisturbed until her death. Mr. Stout testified that he owned the land, and no claim was made by any one that he did not until after it was conveyed to his wife.

[3] Section 581 of Code Civ. Proc. (Gen. St. 1909, § 6176) requires this court to render such judgment as justice requires or to direct such judgment to be rendered without regard to technical errors and irregularities. It would be manifestly unjust to hold that the creditor or her heirs should be deprived of the possession of the premises held by her at her death as security for an admitted debt, without payment being made. The fact that a broader claim was made by the plaintiffs does not deprive them of the lesser one sustained by the proof, which was not, as counsel say, outside the issue, but was within it. The decision enforces the agreement. The heirs of Belle Charpie have their security, and the debtor has his right to redeem. This just result should not be defeated by any misconception of the issues, which does not affect the substantial right of the parties. Code Civ. Proc. § 141 (Gen. St. 1909, § 5734). *Worth v. Butler*, 83 Kan. 513, 112 Pac. 111, syl. 3.

The petition for rehearing is denied.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**McCUNE v. RATCLIFF.**

(Supreme Court of Kansas. Feb. 8, 1913.)

(*Syllabus by the Court.*)

**1. EVIDENCE (§ 539\*)—OPINION EVIDENCE.**

Rulings upon the admission of testimony are examined and approved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.\*]

**2. DAMAGES (§ 123\*)—BREACH OF CONTRACT.**

The decision in McCullough v. Hayde, 82 Kan. 734, 109 Pac. 176, relating to the measure of damages upon a building contract for defective construction, is followed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.\*]

**3. APPEAL AND ERROR (§ 1067\*)—INSTRUCTIONS—HARMLESS ERROR.**

Failure to give an instruction stating the measure of damages is immaterial where the evidence is confined to specific items set out in the pleadings, and the instructions restrict the jury to the consideration of such items, and no request is made for an instruction upon that subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

Appeal from District Court, Sedgwick County.

Action by F. G. McCune against J. M. Ratcliff. Judgment for defendant, and plaintiff appeals. Affirmed.

Adams & Adams, of Wichita, for appellant. Blood & McCormick and Geo. McGill, all of Wichita, for appellee.

**BENSON, J.** This is an action to recover the balance alleged to be due on a written contract for the construction of a two-story brick business building and for alleged extra work. A counterclaim was interposed for damages for alleged defects in the plans furnished by the contractor and for defective workmanship. The claim for extra work was denied. The contract price was \$7,725, upon which there was a balance of \$376.23 unpaid, and the value of the alleged extra work was claimed to be \$164.65. The defendant claimed damages to the amount of \$1,585. A verdict was returned in favor of the defendant for \$450.

The appellant alleges error in the rulings upon evidence and in the instructions. Conflicting evidence was given upon the claim for extra work and upon the counterclaim. In the absence of special findings, we are unable to determine how much, if anything, was found due for extra work, or what items of damages specified in the counterclaim were allowed. The amount allowed the appellee was well within his evidence of damages. The testimony tended to prove serious defects, requiring the rebuilding of the front wall above the first story, strengthening the second floor joists, and other necessary work to make the building conform to the contract.

[1] The principal complaint of the ruling upon evidence relates to the admission of

the testimony of an architect who had examined the building and detailed the manner of its construction, the defects therein, and the nature and probable expense of necessary repairs. He was allowed to testify to particulars wherein the job had not been done in a workmanlike manner. Counsel say that the witness was asked and allowed to answer numerous questions, each of which was objected to. These objections are now insisted upon. Upon this very general complaint the questions and answers have been examined without finding any erroneous rulings. The witness was an architect of experience and competent to give opinions upon the matters covered by his examination. Other witnesses, carpenters and builders, described the building and its defects, which, if their evidence is to be believed, were not only serious, but easily apparent. Having heard all the evidence in support of the counterclaim as well as that offered on the part of appellant in rebuttal, a question of fact was fairly presented for the determination of the jury.

[2] The appellant complains that an erroneous measure of damages was allowed, and therefore that the evidence of the architect and others estimating the expense of remedying defects in the building was erroneously admitted. Particular objections are made to questions asking the necessary expense of rebuilding the front wall of the upper story, and of leveling the floor. It is contended that the measure of damages is the difference between the contract price and what the building would have been worth had the contract been complied with. While that rule may apply in some cases, this case was tried upon the right theory. Defects in the building were shown which must be remedied in order to make it conform to the contract, and to make it reasonably fit for use. It appears from the verdict that this can be done by a modest outlay. The entire structure is not to be rebuilt, only the front wall of one story. This and the strengthening of joists and leveling the second floor are the principal items. Other incidental repairs are essential, but the main structure will remain. When only particular changes are necessary to make the building conform to the contract, otherwise substantially performed, the reasonable expense of these items affords a correct measure of damages. McCullough v. Hayde, 82 Kan. 734, 109 Pac. 176.

[3] Complaint is made because the court failed to state any precise measure of damages in the instructions. This omission would doubtless have been supplied had attention been called to it, which the appellant should have done, if he deemed it necessary, suggesting the rule deemed applicable. However, the counterclaim set out the particular defects and the amount of damages claimed in respect to each of them.

The evidence was presented accordingly, and the jury were instructed that if they found the building defective in any of these particulars, and that such defect was caused by the default of the plaintiff, the defendant should recover such damages therefor as the evidence showed that he had sustained. This instruction, in connection with the evidence admitted, restricted the assessment of damages to the items pleaded. The case was tried and the damages awarded upon the correct theory, and the failure to otherwise state the measure of damages is immaterial.

The judgment is affirmed. All the Justices concurring.

### LOFSTED v. BOHMAN et ux.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. MECHANICS' LIENS (§ 115\*)—STAY OF ACTION—SUBCONTRACTORS' CLAIMS.

The owner who has partially paid the contractor for the erection of a building should not be subjected to a judgment in his favor for the claimed balance until the subcontractors have had their claims and liens finally adjudicated.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.\*]

#### 2. CONTRACTS (§ 320\*)—ACTION—DAMAGES.

When the contractor has in good faith constructed the building in substantial compliance with the terms of the contract, he is entitled to recover the agreed price less such sum as will be required to effect strict and literal compliance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1459, 1469, 1493-1527; Dec. Dig. § 320.\*]

Appeal from District Court, Trego County.

Action by Charles J. Lofsted against Otto F. Bohman and Elizabeth S. Bohman. Judgment for plaintiff, and defendants appeal. Modified and remanded.

Monroe & Roark, of Topeka, and I. T. Purcell, of Wa Keeney, for appellants. David Ritchie, of Salina, for appellee.

WEST, J. Bohman owned a farm on which Lofsted contracted to build a house for \$1,600. The contractor bought his materials of Burbeck & Lucas, lumber dealers, who filed a subcontractor's lien for \$559.53. Bohman paid Lofsted \$1,015 on the contract, and furnished material and labor amounting to \$57.40. The subcontractors sued the contractor and owner to foreclose their lien, Bohman and wife, answering, admitting the lien, denying the correctness of the account, and alleging that only a portion of the materials charged for had been used in the construction of the house. Lofsted answered, admitting the correctness of the subcontractors' account, and in a second count alleged a failure of Bohman and wife to pay \$585 of the contract price, for which he

prayed judgment against them. They demurred to the second account, which demurrer was sustained. Lofsted dismissed that cause of action without prejudice, and brought this action to recover the \$585, praying that the same be adjudged a lien on the land. The defendants entered a general denial, and a plea that the action should be dismissed and abated because of the pending suit to foreclose the subcontractors' lien, and further claimed a set-off for \$57.40 for labor and material, afterwards admitted as correct, and \$800 damages for failure to construct the house according to contract. They asked that, if the action be not abated and dismissed, the defendant Bohman have judgment against Lofsted for \$340. The first trial resulted in a verdict in favor of the defendants. Upon a second trial, at the close of the evidence, the defendants moved to abate the action, calling attention to the fact that the contractor had admitted that he claimed only \$547.97, while by his answer in the lien suit he had admitted that there was still due the subcontractors \$569.60. The motion was overruled. The jury returned a verdict in favor of Lofsted for \$275.60, for which sum judgment was rendered against Bohman, the court also finding that the obligation merged in such judgment was for improvements upon defendants' homestead. A motion for new trial was overruled.

[1] It is argued that this action was prematurely brought, for the reason that the lien suit was still pending and undisposed of, and that, as Bohman had paid \$1,015, he could not be required to pay any further sum for material for which the men who furnished it were entitled to receive pay from Lofsted. The defendants also urge that the court erred in refusing to instruct the jury, in substance, that a contractor could not recover a stipulated price for erecting the building until he had substantially complied with his contract, and surrendered it to the owner free from all just claims for material; that he must first pay for the material, and discharge the premises from any and all liability for liens thereon. Complaint is also made of an instruction given to the effect that, if the jury found a substantial compliance with the building contract, then the burden was on the defendants to show the amount of damages by reason of not having fully complied with the letter and spirit thereof; also in sustaining an objection to the evidence of a carpenter as to his estimate of the difference in value between the building actually constructed and the one contracted for. The provision of section 6249, General Statutes 1909 (Code Civ. Proc. § 654), that "until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amount thereof, and such costs and expenses as he may be required to pay," is relied on as an all-sufficient ground for abatement of this action. The section does not in terms, however, authorize abatement, although it is plainly intended to provide against double payment. Section 6246 (Code Civ. Proc. § 651) provides that the owner affected by the lien shall not thereby become liable to any claimant for a greater sum than he agreed to pay the original contractor, but the risk of all payments to him shall be upon the owner until the expiration of 60 days from the time when the material or labor was last furnished, and that he may pay the subcontractor and receive credit on the amount due the contractor. Section 6250 (Code Civ. Proc. § 655) provides for the consolidation of actions brought to enforce liens, and for a stay to permit the filing of a lien if the building be still in course of construction, and section 6253 directs the proceeds of a foreclosure sale to be paid pro rata if insufficient to pay all the claimants in full. It was certainly not intended that the owner should be subjected to a final judgment by the contractor for such portion of the contract price as he still owed the materialmen who had filed liens. Otherwise the owner could be held liable to the contractor for the entire contract price, to be a lien on the land, and also find his property subjected to a lien for a portion of the same price due the subcontractor. This action should have been stayed until the lien suit was determined, and then the owner should have been protected by so shaping the judgment in this case as to same him from double payment or liability. The entire matter should have been adjudicated in the first suit when the court had all the parties before it, and when all the claims could have been adjusted. The jury found a number of items of damage al-

lowed the defendant by reason of the plaintiff's failure to comply with the contract; also, that he made a bona fide effort to comply and employed competent and skilled workmen. Under such circumstances, the rule is that the specific items of damage may be proved. It is only when the building so far departs from the one contracted for that there is no substantial compliance with the contract that the one actually constructed and the one agreed to be erected are to be valued separately so that the defendant may be required only to pay whatever the former is shown to be actually worth.

[2] Here, according to the findings of the jury, the parties contracted in advance as to the value of the building, and its construction in substantial conformity to the plan agreed upon left the defendant entitled to deduct only the damages caused by minor nonconformities. The rule will be found more fully stated in *McCullough v. Hayde*, 82 Kan. 734, 109 Pac. 176, and in *McCune v. Ratcliff*, 88 Kan. —, 129 Pac. 1167, submitted this month. We find no material error in the instructions given, or in the refusal of those offered by the defendants. We are not advised as to the result of the lien suit, and must treat this case as if that were still pending, as it was when the defendants sought to have this action abated.

The cause is remanded, with directions to so modify the judgment as to protect the defendants and the property involved from liability to the plaintiff beyond the contract price as reduced by the jury in this case until the claims due the subcontractors shall have been satisfied.

The defendants might have avoided this condition of things by permitting the entire matter to be litigated in the lien suit, and therefore the costs in this court will be divided. All the Justices concurring.

**JACKSON-WALKER COAL & MATERIAL CO. et al. v. MILLER et al.†**

(Supreme Court of Kansas. Feb. 8, 1913.)

(*Syllabus by the Court.*)

**1. LIMITATION OF ACTIONS (§ 96\*)—COMPUTATION OF PERIOD—ACCRUAL OF CAUSE OF ACTION.**

The decision in *Duval v. Simpson*, 53 Kan. 291, 36 Pac. 330, relating to the period of limitation in actions to correct a mistake in a conveyance of land, is followed.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 337, 475, 476; Dec. Dig. § 96.\*]

**2. SUFFICIENCY OF EVIDENCE AND FINDINGS.**

The evidence is examined, and held sufficient to support the findings of fact. It is also held that the findings support the judgment.

(*Additional Syllabus by Editorial Staff.*)

**3. LIMITATION OF ACTIONS (§ 96\*)—COMPUTATION OF PERIOD—ACCRUAL OF CAUSE OF ACTION.**

For the purpose of determining the time when limitations commence to run against an action to correct a mistake in a deed, the record of the deed does not impart notice of the mistake.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 337, 475, 476; Dec. Dig. § 96.\*]

West, J., dissenting.

Appeal from District Court, Shawnee County.

Action by the Jackson-Walker Coal & Material Company and others against H. B. Miller and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. E. Jones, of Osage City, and Wheeler & Switzer, of Topeka, for appellants. Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellees.

**BENSON, J.** The appellants ask for the reversal of a judgment correcting a mistake in a deed of conveyance made by the Osage Carbon Company to H. B. Miller. The appellants contend that the cause of action is barred by lapse of time; that the mistake was not a mutual one; and that Clyde W. Miller is a bona fide purchaser of the land from H. B. Miller for value and without notice of the mistake, relying upon the terms of the deed as written.

Early in March, 1899, H. B. Miller and his brother, W. W. Miller, negotiated with the Carbon Company for the purchase of the east half of section 14, township 16, range 14, in Osage county, and about 1,300 acres of other land at the price of \$10 per acre; the vendor reserving the coal and mineral on the half section described. This coal was then worth \$25 per acre. It was agreed that one quarter in section 14 should be conveyed to each of the Millers, together with a part of the other land, as divided between them. The deeds were prepared in accordance with this agreement, each containing, however, a

printed clause purporting to reserve all the coal and mineral upon all the land; but by another clause written in each deed, following the covenants of warranty, this reservation was expressly limited to the quarter in section 14 conveyed thereby. Before the deeds were delivered, upon the request of the grantees, changes were made in both deeds so as to convey to each of the grantees the quarter in section 14 originally described in the deed to the other. While these changes were made in the descriptions in the deeds, by mutual mistake corresponding changes were not made in the reservation clause. The deeds were then delivered, and were recorded on May 1, 1899. Taxes were assessed on the mineral reserves on the quarter section in controversy for the year 1905, and the years following, to and including the year 1910, which were paid by the Carbon Company and its successors in the title thereto. Taxes upon the surface of the land were paid by H. B. Miller.

In the year 1905, H. B. Miller offered this quarter section for sale, with a reservation of the coal thereon. On receiving an offer for the land, including the coal, he said he would try to procure a release of the coal reserve. Some time afterward he endeavored to obtain a quitclaim deed from the Cherokee Company, then holding the title of the reserve, but the negotiations failed. A letter from that company, saying that it was unwilling to dispose of the mineral rights, and declining to make the conveyance requested, was received by H. B. Miller June 5, 1906, and was read by his son, Clyde W. Miller. In May or June, 1910, H. B. Miller, through his attorney, notified the Cherokee Company that he claimed the coal measures underlying the southeast quarter of section 14, the land which had been conveyed to him by the Carbon Company. This was the first notice the plaintiffs, or either of them, ever received of any mistake in the deed. The defendants first discovered the mistake early in the year 1910. Just before this suit was brought, the Jackson-Walker Company, plaintiffs' successor in the title to the coal reservations, undertook to sink a shaft for mining coal on the quarter conveyed to W. W. Miller, but were warned by his attorney to desist. In the summer of 1906, Clyde W. Miller had a conversation with a representative of the Cherokee Company with a view of purchasing the coal reserve in controversy, but without success. This was before he read the letter above referred to. H. B. Miller held the possession of the land until March, 1910, when, for a consideration of \$6,000, he conveyed it, without reservation, by warranty deed to Clyde W. Miller, who has been in possession since.

[1] It is argued by appellants that the statutory period allowed for the commencement of the action to correct the mistake began to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1912.

run at the delivery of the deed, and that it was therefore barred by limitation before the suit was brought. Subdivision 6, § 17, of the Civil Code (Gen. St. 1909, § 5610), prescribing a limitation of five years in cases therein referred to, is cited as controlling. Decisions are cited from other states, which appear to support the claim; but we need not go far afield for authorities, for the question has been decided by this court. In *Duvall v. Simpson*, 53 Kan. 291, 38 Pac. 330, it was held: "While the lapse of time will bar equitable relief against a mistake made in describing land intended to be conveyed, the period of limitation will not begin to run until the discovery of the mistake, or until the time at which, by the exercise of reasonable diligence, it might have been discovered." The appellants insist that this decision is opposed to the terms of the statute, and to a later decision in *Railway Co. v. Grain Co.*, 68 Kan. 585, 75 Pac. 1051. The general expressions in the latter opinion, relied upon by appellants, cannot be held to overrule the decision of the particular question in the *Duvall Case*. The grounds of the decision are stated in the opinion, and need not be restated here. That decision has stood for 19 years, and the Legislature has not seen fit to change the rule, and it will be adhered to.

[3] It is argued that the record of the deed imparted notice of the mistake contained in it, and therefore that it must be held that the plaintiffs discovered the mistake by the constructive notice afforded by the record. The record certainly gave no better notice of the mistake than the original instrument. The argument was made in the *Duvall Case* that the statute began to run at the delivery of the deed, but that view was not sustained. The conveyance in that case had been made more than five years before the suit was brought to correct the mistake.

[2] The finding that the mistake was a mutual one is sustained by the evidence. The grantor intended to reserve the coal upon the land in section 14 conveyed by the deed. This was agreed to, and understood by the grantee as found by the court upon competent testimony. The clause, as written, reserved coal upon land not included in the conveyance, and was plainly a mistake easily accounted for by the change made in the deed after it was prepared. Testimony is referred to tending to show that the grantee understood that there was to be no reservation; but any conflict in the evidence is settled by the finding. The district court found that Clyde W. Miller, at the time he received the conveyance, had actual knowledge that the plaintiffs in this action claimed to own the coal reserve, and was a purchaser with notice of such claims. While complaint is made of the finding, it is sustained by evidence, and cannot be set aside here.

Upon the facts found by the district court, supported by competent evidence, the conclusions of law and judgment thereon accord with the well-settled principles of equity.

The judgment is therefore affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and PORTER, JJ., concur.

WEST, J. (dissenting). It was decided in the *Duvall Case* that the statute begins to run when the mistake is or should be discovered; but, after thorough consideration and reconsideration, it was unanimously held in the *Grain Company Case* that the court has no power to add a clause to the statute of limitation. Being oftentimes reminded that it is well enough to let the Legislature make the laws, I obediently abide by the later decision.



**WHITTLE v. HUGHES et al.†**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)***LANDLORD AND TENANT (§ 63\*)—ESTOPPEL TO DENY TITLE.**

The patentee of certain land about to leave for another state put a creditor in possession to hold until the owner's return, in payment of the debt. Subsequently the land went to tax sale, and the grantee in the tax deed stated to the one in possession that he had the owner's title, and entered into a lease for one year, which, at the end of the term, was renewed, in writing, for another year. The lessee, having afterwards procured a conveyance from the patentee, sought to deny title in his own lessor; the tax deed being good on its face, and on record, when the leases were executed. *Held*, that he is estopped by such leases.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 159-163, 165-167, 172-176; Dec. Dig. § 63.\*]

Appeal from District Court, Clark County.

Action by D. A. Whittle against S. H. Hughes and R. A. McFarland. Judgment for plaintiff, and defendants appeal. Affirmed.

F. C. Price and W. W. Harvey, of Ashland, for appellants. H. R. Daigh, of Ashland, for appellee.

WEST, J. Norman McDonald was the patentee of a quarter-section of land in Clark county. About 1888 or 1889 he left the county, and turned the land over to R. A. McFarland to use, as tenant, for the payment of a small debt then due, until McDonald should return. McFarland accepted and took possession, and afterwards put the defendant Hughes in possession of one 80, and possession has ever since been held, unless divested by leases from the plaintiff. After McDonald left, the land went to tax sale, and the plaintiff, Whittle, took out and recorded a tax deed on September 3, 1894. Through his agent he leased the land to McFarland from November 1, 1898, to March 1, 1900, and again for one year from the latter date; both leases being in writing and signed by McFarland. It appears that when the agent negotiated these leases he stated to McFarland that Whittle had acquired the

McDonald title. The tax deed is good on its face, and was about four years old when the first lease was made. McFarland claims that he believed from the agent's statement that McDonald had conveyed the fee title to Whittle, and on that belief he accepted or entered into the leases. The trial court took the position that, having thus recognized Whittle as his landlord, McFarland was estopped to contest the validity of the tax deed after it had become five years old, and directed the jury to return a verdict for the plaintiff. The defendants complain and insist that Whittle, through his agent, obtained possession through stealth and fraud, and that the jury should have been allowed to determine whether the leases were executed on representations that the McDonald title had been acquired.

After learning that the McDonald fee title had not been procured by conveyance from him, the defendants purchased it themselves; Hughes having full knowledge of the situation concerning the leases. McFarland testified that the agent said that Mr. Whittle had the McDonald title; that this was what induced the witness to sign the lease. At the close of the testimony the defendants objected to the instruction requiring the jury to return a verdict for the plaintiff, and requested that the case be submitted on the issue arising from the pleadings and testimony, which request was overruled.

It does not appear in the record that it was ever claimed or asserted that the agent represented that Whittle had procured the fee title by any conveyance, but simply that he had the McDonald title. The tax deed, good on its face, which had been recorded for some time in the county where the land was situated, justified this statement, and vested the title in the holder. Gen. Stat. 1909, § 9479; Board of Regents v. Linscott, 30 Kan. 240 (Syl. 3), 262, 1 Pac. 81. Having fully recognized the holder as their landlord, the defendants are not in position to deny his title. Ireton v. Ireton, 59 Kan. 92 (Syl. 3), 95, 52 Pac. 74; Millikin v. Lockwood, 80 Kan. 600, 103 Pac. 124.

The judgment is affirmed. All the Justices concurring.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied March 15, 1913.

**DOBSON v. TRIPLE TIE BEN. ASS'N.**  
(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

**INSURANCE (§§ 755, 819\*)—MEMBERSHIP—FORFEITURE—ESTOPPEL.**

Ordinarily, if a benefit association receives and retains dues and assessments paid by a member after he is in default and subject to suspension and forfeiture and leads him to believe that he is still a member in good standing, it is estopped to insist on a forfeiture of membership; but on the testimony in the present case it is held that there was a forfeiture of benefits by reason of the nonpayment of dues by the member, and that there was no waiver of such forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916, 2006, 2007; Dec. Dig. §§ 755, 819.\*]

Appeal from District Court, Barber County.

Action by Cora Dobson against the Triple Tie Benefit Association. Judgment for defendant, and plaintiff appeals. Affirmed.

A. M. Appleget, of Woodward, Okl., and G. M. Martin, of Medicine Lodge, for appellant. Dawes & Miller, of Clay Center, for appellee.

**JOHNSTON, C. J.** This action was brought to enforce the payment of insurance on the life of John Dobson, the deceased husband of the appellant. Dobson had become a member of the Triple Tie Benefit Association in 1902, holding his membership in the local council of the association at Kiowa, Kan., and for some time prior to his death on December 25, 1908, he had served as local secretary of the council. The rules and by-laws of the association provided for the prompt payment of the monthly dues and assessments; and they further provided that if such monthly dues and assessments were not paid by the last day of the month the member so failing to pay promptly should thereby be suspended. The by-laws also provided that a report should be made by the local secretary on a certain day of the month, and on failure to receive that report it should become the duty of the Supreme Secretary of the association to notify the officers of the association that the local council had accordingly been suspended; and on a further delay it should become the duty of the Supreme Secretary to publish the suspension of the council in the official organ of the association. While acting as local secretary, Dobson collected money from members, which he failed to promptly remit to the home office, as he was required to do, although repeated demands for payment were made upon him. Considerable of the correspondence relating to the forwarding of the dues paid to him as local secretary by other members of the local council was offered in evidence. It was claimed that Dobson became delinquent in his dues after October 1, 1908, and that under the by-laws his certificate lapsed on the last day of that month, and in one of the

letters sent to him he was notified that he had been suspended. On the other side, it was contended that if there was a default in the payment of dues it was waived by the association in the acceptance of money remitted by Dobson on November 27, 1908, and that by retaining the money it was estopped to declare the certificate invalid. Upon all the testimony the trial court found in favor of the association, and upon this appeal the question is principally one of fact whether Dobson was in good standing as a member when he died, or if there was a waiver of any default made by the retention of dues subsequently paid.

If the association accepted payments of delinquent dues and assessments, and led the insured to believe that he was still a member, and that payments would be accepted notwithstanding the delinquency, it would be estopped to claim a forfeiture of membership. *Foresters v. Hollis*, 70 Kan. 71, 78 Pac. 160, 3 Ann. Cas. 535; *Benefit Association v. Wood*, 78 Kan. 812, 98 Pac. 219; *Mosiman v. Benefit Association*, 82 Kan. 670, 109 Pac. 413.

The testimony tends to show that Dobson was delinquent as to dues which had accrued for the months of October and November prior to his death. The contention is that a payment of \$5.25, made on December 7, 1908, was accepted by the Supreme Secretary, and that it operated to discharge Dobson's obligation for unpaid dues. It appears that a payment of that amount was made at the time; but the testimony tends to show that it was not remitted in payment of his dues, but to pay the dues of other members, which he had collected as local secretary before that time, and which were not sent until letters of the most urgent kind had been written to him. It is also contended that an excess payment of \$2.40 was made in the preceding September, which the Supreme Secretary retained, and if Dobson was credited with that amount there could be no forfeiture. There is testimony, however, that this amount was not remitted in payment of his own dues, but was an excess payment made in behalf of John Piper. In settling for the dues collected by Dobson from other members, it was found that he still owed \$7.65; and it appears that the \$2.40 excess payment for Piper was deducted from the \$7.65, leaving \$5.25, the amount of the money order remitted to pay the dues which Dobson had collected from others as local secretary. There was some confusion in the testimony as to the payment of dues which he received as secretary and those due from him as a member; but we find sufficient testimony to support the ruling of the court that he was delinquent in the payment of his own dues at the time of his death, and, further, that there was no waiver of the delinquency by the association, nor any conduct which es-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

topped it or its officers from insisting on a forfeiture of membership for noncompliance with the by-laws.

The judgment of the district court will be affirmed. All the Justices concurring.

### TRAMEL v. ARMOUR PACKING CO.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 116\*)—NEGLIGENCE—DEFECTIVE APPLIANCES.

Where the floor of a department of a packing house is made of asphalt, in order that it may be smooth and waterproof, so that it can be kept in a clean and sanitary condition, and this purpose would be defeated by the presence of spikes in ladders used therein, the furnishing for use in such department of ladders not so equipped cannot be regarded as negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 207; Dec. Dig. § 116.\*]

#### 2. MASTER AND SERVANT (§ 235\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

The fact that spikes are attached to ladders furnished for use in other departments, having soft floors, does not warrant an employé in assuming, without examination, that a ladder found in a department where the floor is of asphalt is similarly equipped.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

#### 3. MASTER AND SERVANT (§ 239\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

A skilled mechanic who uses a ladder in a way which he knows to be dangerous, unless it is equipped with spikes, without making any effort to ascertain whether the spikes are there, cannot recover from his employer on account of injuries occasioned by their absence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 749, 750; Dec. Dig. § 239.\*]

Appeal from District Court, Wyandotte County.

Action by W. J. Tramel against the Armour Packing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Angevine, Cubblison & Holt, of Kansas City, for appellant. C. R. Cooksey, of Kansas City, for appellee.

MASON, J. W. J. Tramel, a millwright in the employ of the Armour Packing Company, was required to make some repairs in the meat cutting department of the packing plant, near the ceiling, which was about 12 feet high. To reach the place, he stood upon a ladder about 16 feet long; the top resting against a joist, and the bottom on the floor. While he was at work, the bottom of the ladder slipped, and he fell, receiving injuries, on account of which he sued the company. Upon the trial, a verdict was rendered for \$1,500. As a condition of denying a new trial, the court required \$500 to be remitted; and, upon this being done, judgment was rendered for the plaintiff. The defendant appeals.

[1] It is contended that the facts, as established by the findings of the jury, supplemented by the plaintiff's own testimony, preclude his recovery, and we regard the contention as well founded, for these reasons: The conduct of the defendant, relied upon as constituting negligence, is the omission to provide the ladder with spikes to keep it from slipping. The floor of the room in which the injury occurred was of granitoid, or asphalt. The ladders kept and used in rooms having floors of that character were purposely left by the company without spikes, because (as the evidence showed and the jury found) the floors were made smooth and waterproof so that they could be kept clean and in a sanitary condition, and spikes in the ladders would have made holes in the surface, so that grease and water would be absorbed, rendering the floor no longer waterproof, and in time, perhaps, destroying it. In view of these facts, the rule or practice which dispensed with spikes upon ladders used in the departments having such floors was unquestionably reasonable, and the absence of spikes in a ladder kept for use there cannot be regarded as negligence.

There is no evidence that any one in authority directed the plaintiff to use the ladder in the manner described, or to use it at all. A rolling bench was provided to stand upon while doing similar work, and the plaintiff had used this for such purpose a few days before. The mere presence of a ladder in the room cannot be regarded as an invitation to use it, without examination, upon the assumption that it was furnished with spikes. It was provided with hooks 2½ feet from the top, to be hooked over line shafts or other objects, but the plaintiff did not know this, and did not notice them.

[2] Ladders in departments of the plant which had soft floors were provided with spikes. The jury found that the plaintiff did not know that the ladder used by him was not provided with spikes; that the fact was not "apparent and obvious"; and that he was prevented from ascertaining it by the "lack of close inspection." The plaintiff testified that he could have seen whether spikes were attached, if he had made a close examination, and that he could have ascertained that fact by feeling with his hand. No evidence, however, is needed to prove that he could readily have learned what the fact was in this regard, if he had made any effort to do so. But he said that he did not look to see whether there were spikes on the ladder; that he made no examination or inspection whatever in that regard; that he knew the floor was hard, wet, and greasy, and that the ladder, unless it had spikes, was apt to slip; that he paid no attention to the bottom of the ladder; that he relied upon the ladder having spikes in it. The rule that the workman may rely upon the employer's having provided a safe tool or

appliance is not applicable, for two reasons. Its basis is that the employé is justified in assuming that the employer has not been negligent in this regard. But here the company was not negligent. The ladder was not defective. It was in good condition for the use for which it was intended, and to which it was adapted.

There are well-considered cases holding the omission of spikes from ladders not to be negligent under ordinary circumstances. *Blundell v. Mfg. Co.*, 189 Mo. 552, 88 S. W. 103, and cases there cited. It may be said here, with even greater force than in the opinion from which the language is taken: "The failure of the defendant to provide prongs \* \* \* to keep the ladder from slipping is not sufficient to make the defendant liable in this case. The ladder was a very simple appliance; one that is familiar to every grown man. Its liability to slip when not resting firmly or securely is a matter known to all men. \* \* \* There is a total absence of any evidence in this case showing that the ladder furnished was not a reasonably safe appliance, and could not have been safely used for the purposes to which it was applied, or intended to be applied. There is nothing in the case which, in any manner, made it obligatory upon the plaintiff to use the ladder. \* \* \* There was therefore no necessity for the plaintiff to use the ladder at all. But, even if this be not true, no reason appears why the plaintiff could not, or did not,

fasten the ladder so as to prevent it from slipping before ascending it. \* \* \* The plaintiff's case rests upon the proposition that a ladder is an unsafe appliance, \* \* \* unless it has prongs \* \* \* attached thereto to keep it from slipping. No case supporting such a proposition has been cited by counsel, and none has fallen under the observation of the court. On the contrary, among the cases hereinbefore cited, there are several where the claim here made was distinctly denied by the court; and, in other cases, a ladder without prongs \* \* \* has been held to be a reasonably safe appliance for the master to furnish the servant, for such uses as ladders are generally applied to." 189 Mo. 565, 568, 88 S. W. 107.

[3] The necessity of protecting the asphalt floor makes it clear that the defendant was under no obligation to equip the ladder with spikes. But, even if such a duty had rested upon the company, the case seems to fall within the settled rule, with respect to "simple tools," that a recovery cannot be had for injuries resulting from defects which can be as readily detected, and the effect of which can be as readily understood, by the employé as by the employer. Cases on the subject are collected in a recent note in 40 L. R. A. (N. S.) 832, and in other notes in that series there cited, in 22 Ann. Cas. 1004, and in 98 Am. St. Rep. 298.

The judgment is reversed, and judgment for the defendant ordered. All the Justices concurring.

WALTER v. CALHOUN et al.  
(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 186\*)—BEST AND SECONDARY EVIDENCE.

Where the original of a writing cannot be produced, a copy thereof made from memory by one who knew the contents of the original is admissible as secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.\*]

2. MORTGAGES (§ 199\*)—MORTGAGEE IN POSSESSION—LIABILITY FOR RENT.

A mortgagee in possession is chargeable with the reasonable rental value of the use and occupation of the premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525; Dec. Dig. § 199.\*]

3. MORTGAGES (§ 199\*)—MORTGAGEE IN POSSESSION—INTEREST.

Where there has been no application of the proceeds of the rents directed by the mortgagor, interest should be computed on the indebtedness for the whole period without annual rests, and, where the mortgagee is entitled to interest on the debt, he is chargeable with interest on the rents.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525; Dec. Dig. § 199.\*]

4. MORTGAGES (§ 199\*)—MORTGAGEE IN POSSESSION—MANAGEMENT OF PROPERTY—COMPENSATION.

Ordinarily a mortgagee in possession is not entitled to compensation for personal services in the management of the property, but the rule is not inflexible; and, upon the facts stated in the opinion, it is held that an allowance of 10 per cent. as commissions for the collection of rents is not inequitable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525; Dec. Dig. § 199.\*]

5. MORTGAGES (§ 608½\*)—DEED ABSOLUTE IN FORM—REDEMPTION.

In a suit to have a deed declared a mortgage and to redeem therefrom, held, that the court properly refused to credit the mortgagor with usurious interest.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.\*]

Appeal from District Court, Kingman County.

Action by L. F. Walter against Humphrey Calhoun and Ed. Anderson. Calhoun filed a cross-petition. Judgment for plaintiff, and defendant Anderson appeals. Affirmed.

Jenkins & Connaughton, of Kingman, Brubacher & Conly and A. E. Helm, all of Wichita, for appellant. Thornton W. Sargent, of Wichita, and George L. Hay, of Kingman, for appellees.

PORTER, J. In a suit which involved other matters the appellee Calhoun filed his answer and cross-petition on December 31, 1904, against Ed. Anderson, and sought to have a deed absolute in form executed by him to Anderson on December 15, 1902, declared to be a mortgage, and for a decree permitting him to redeem. The court submitted to a jury in an advisory capacity the question whether the parties intended the deed as a mortgage and as security for an

indebtedness. The jury answered in the affirmative. Independently of the verdict, the court came to the same conclusion which appears to be fully supported by the evidence.

[1] Complaint is made that the court admitted secondary evidence as primary evidence. The question arose in this way: Both parties admitted that some kind of writing was executed by Anderson at the time the deed was delivered. They differed as to the nature of this writing, which was not produced, and it appears could not be produced. Anderson claimed it was an agency contract making Calhoun his agent to resell the 400 acres described in the deed. Soon after the original was made, it was left at a bank in Wichita, and became lost or mislaid. Thereafter, and probably as long as two years from the time the original was executed, Calhoun made from memory what he testified was substantially a copy of the contract, and it was received in evidence. The appellant is mistaken in his contention that it was offered or received as original or primary evidence. It was secondary evidence made admissible by proof that it was the best evidence obtainable. *Deltz v. Regnier*, 27 Kan. 94, 107. The jury and the court appear to have believed it to be true. It purported to be a contract of defeasance, which, taken in connection with the deed absolute on its face, made the transaction a mortgage. Appellee might have testified to his recollection of the contents of the original. The court and jury understood that the writing did not purport to be an exact copy made from the original or authenticated by comparison, but that it showed what the witness recollected as to the terms of the original.

[2] In the accounting between the parties Calhoun claimed credit for the rental value of the land. Anderson wanted to allow only what he claimed to have received from the sale of crops. As a matter of law, he was chargeable with the reasonable value of the use of the land. While the amount which he actually received as rents would be some evidence of the reasonable value, it is quite obvious that it would not be conclusive against the mortgagor.

The mortgagee in possession must account for the rents and profits, and is chargeable with the reasonable value of the use and occupation of the premises. *Dyer v. Brown*, 82 Ill. App. 17; *Peugh v. Davis*, 96 U. S. 332, 339, 24 L. Ed. 775.

Complaint is made of the rejection of certain evidence, but there is no showing that it was presented to the trial court in the form of affidavits in support of the motion for a new trial (section 307, Civ. Code [Gen. St. 1909, § 5901]), and therefore it will not be considered. Anderson, the appellant, contends that the oral contract was that Calhoun was to pay 10 per cent. interest. The court allowed the mortgagee 6 per cent., following the case of *Wenger v. Taylor*, 39 Kan.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

754, 18 Pac. 911, where it was held that the statute relating to interest (section 4354, Gen. Stat. 1909) permits a higher than the legal rate only where a written contract stipulates for a higher rate. That decision has stood since 1888. In the meantime the Legislature has lowered the rate of interest, but has not seen fit to alter the rule.

[3] There was no application of the proceeds of the rent directed to be made by the mortgagor, so that the rule adopted by the trial court that interest should be computed for the whole period without annual rests is correct. It appears that the amount of rents as found by the court never equaled the interest. Of course, if the mortgagee is entitled to interest on his debt, the mortgagor should receive interest on the rents. 20 A. & E. Encycl. of Law, 1011, 1012, and cases cited.

[4] There is a cross-appeal in which objection is made to an allowance of \$480 to Anderson as compensation for the collection of rents. The allowance was 10 per cent. of the gross charge for rents. The rule that a mortgagee in possession is not entitled to compensation for personal services in the management of the property is not inflexible, even in those states where the rule obtains. *Turner v. Johnson*, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62. In many jurisdictions

commissions are allowed. 11 Encycl. of Law, 241, and cases cited in note. In this case the court made what we think was a liberal allowance against the mortgagee for rents for the whole period, especially in view of the lack of evidence tending to show negligence or want of care in handling the property, and the court saw fit to lessen the hardship by allowing appellee compensation for collecting the rents. The allowance under all the circumstances was not inequitable, and therefore will not be disturbed.

[5] Another point raised by the cross-appeal is the refusal of the court to credit appellee with usurious interest which he claimed was exacted from him, and to credit him with an additional amount by way of forfeiture. In a recent case (*Live Stock Co. v. Trading Co.*, 87 Kan. 221, 123 Pac. 733), it was ruled in the syllabus that: "Where a party asks a court to declare a deed to be in effect a mortgage, he may be required, as a condition to receiving such equitable relief, to forego the advantage of any statutory penalties for the exaction of usury, and to submit to a charge of the principal of the debt and legal interest." We find no error in the manner in which the court rendered the accounting.

The judgment is affirmed. All the Justices concurring.

**JOLLIFF v. KANSAS CITY WESTERN RY. CO.**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 235\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

An employe cannot recover for injuries received in consequence of the place where he was at work being too dark, where sufficient electric lights were provided, and he, knowing of the location and use of the switch, omitted to turn them on.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

**2. MASTER AND SERVANT (§ 297\*)—INJURIES TO SERVANT—DANGEROUS PREMISES.**

Where it is essential to a plaintiff's case that he prove certain electric lights to have been out because they were in bad condition, and not merely because they were not turned on, a finding that there was no evidence to show why they were not burning is fatal to a recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.\*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by William Jolliff against the Kansas City Western Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Rosenberger & Reed, of Kansas City, Mo., for appellant. Henry Meade and Thomas J. White, both of Kansas City, Kan., and W. O. Rickel, of Kansas City, Mo., for appellee.

MASON, J. William Jolliff was in the employ of an interurban electric railroad company as night repairman. His duties were to take charge of disabled cars brought to a machine shop, and do such work upon them as might be directed. He had been so employed for several years. The cars were brought into the shop over a track, under which was a pit about six feet deep, to enable workmen to get beneath the car. Provision was made for lighting the pit by five electric bulbs, all on the same circuit. Two were below the stringers. One night Jolliff was directed to take a disabled car from the yard to the shop and repair it. He stood upon the rear of the car, while a helper, acting as motorman, backed it into the barn. As it entered the barn, he discovered two pairs of car wheels on the track over the pit. Upon his signal the car was stopped, and he stepped from it to remove them. He pushed one pair a little distance away from the car, and then undertook to move the other in the same direction. Some oil had been spilled on the floor, which caused his foot to slip, and he fell over the moving wheels, which rolled against the other pair. His hand was caught between the wheels, and he was otherwise injured. He sued the company and obtained a judgment, from which the defendant appeals.

The jury found that, while the plaintiff's fall was caused by the oily floor, the defendant was not guilty of any negligence by reason of the oil being there. They also found that the defendant was not negligent with respect to the quality of the oil furnished for use in the plaintiff's lantern, concerning which he had made some complaint. These matters being eliminated, the sole ground of negligence relied upon to sustain the judgment is the failure of the defendant to provide sufficient light in the repair shop. The electric lights already referred to had been out of order several times within the preceding three weeks—had been repaired and burned out, the plaintiff said, probably three or four times. Three days before the injury the plaintiff notified the foreman that the lights were in bad condition, and a promise was made to repair them. They were not burning when the car was brought into the barn. The plaintiff at the time did not know whether or not the lights were out of order.

[1] A switch for turning them on and off was located on the wall of the shop; its location being known to the plaintiff. In view of these facts, the vital question in the case was whether the lights were out of order at the time. Of course, if they were in good condition, but were turned off, the plaintiff could not recover for injuries resulting from his own omission to turn them on. The exact question upon which the case turned was submitted to the jury in these words: "State whether the lights were out of order or whether they were in working order, but were not burning because they were turned off." They answered: "No evidence to show why they were not burning." This was a direct and specific finding against the plaintiff upon the precise matter in issue. In order for him to recover, he was required to prove—that is, to convince the jury by a preponderance of the evidence—not merely that the lights were not burning, but that they were in bad condition, and could not have been lighted by turning on the switch.

[2] The jury, being asked whether the lights were out of order, or were in order, but were dark because they were turned off, answered that there was no evidence to show why they were not burning. This is an explicit statement that there was no evidence—that is, no persuasive evidence, no preponderance of the evidence—that the want of light was due to the fault of the defendant. *Burks v. Railway Co.*, 83 Kan. 144, 100 Pac. 1087. "Where, to a question, the jury respond, 'We don't know,' or in any like manner, such an answer is tantamount to a simple denial; for if, from the testimony, the jury do not know whether an alleged fact exists, it follows that the testimony does not show that it exists, and therefore, for the purposes of the case, it does not exist." *Morrow v. County of Saline*, 21 Kan. 484 (Syl. 2). That is, such an answer is construed as a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

finding against the party bearing the burden of proof as to that particular matter. *Croan v. Baden*, 73 Kan. 364, 85 Pac. 532. Where the jury find that there is no evidence upon a particular matter, the effect is still more obvious. No construction is necessary. The finding is positive and affirmative that there has been a failure of proof, and, where it concerns a fact essential to the plaintiff's case, it precludes his recovery. Here the plaintiff was required to show to the satisfaction of the jury that the reason why the lights in the shop were not burning at the time of his injury was because they were out of order, and not simply because they were not turned on. The jury found that this fact was not proved, and the finding is fatal to a recovery.

The judgment is reversed, with directions to render judgment for the defendant. All the Justices concurring.

**SANBORN v. CITY OF WICHITA.**  
(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 1005\*)—REVIEW—SUFFICIENCY OF EVIDENCE.**

In an action wherein the evidence fairly tends to support the findings and verdict, which are approved by the court, and judgment is rendered in accordance therewith, the judgment will not be reversed in this court on the ground of the insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Appeal from District Court, Sedgwick County.

Action by Nancy L. Sanborn against the City of Wichita. Judgment for plaintiff, and defendant appeals. Affirmed.

Earl Blake, Jean Madalene, S. B. Amidon, and B. F. Hegler, all of Wichita, for appellant. Adams & Adams, of Wichita, for appellee.

**SMITH, J.** The appellee brought this action against the city of Wichita to recover damages for personal injuries alleged to have been received by her in stepping upon a loose brick at a point where she stepped off the sidewalk to cross an intersecting street. She alleged that loose bricks and parts of bricks were scattered upon the walk

and street where she was required to step in pursuing her journey; that such bricks and parts of bricks had been negligently left upon the street by the city, its agents and employes; that stepping upon such brick caused her to fall and caused her injuries, which she details, and which she says were caused by the negligence of the city, to her damage in the sum of \$5,000.

The city denied generally the allegations of the petition, and alleged in answer that at the time and place charged the plaintiff was guilty of contributory negligence, and that her injuries, if any, were caused thereby.

After a somewhat protracted trial the jury returned a general verdict in favor of the plaintiff for \$5,000 damages, and also answered numerous special questions, involving her cause of action and the defense, all favorably to the appellee. The appellant moved the court to set aside the verdict and grant a new trial, which motion was overruled and an appeal duly taken.

Several grounds of error were assigned in the motion for a new trial, but only one ground seems to be specifically urged in the brief of appellant, viz.: "The district court erred in refusing to sustain defendant's motion for a new trial, on the ground that the verdict and the amount thereof are wholly unsupported by the evidence, and are the result of passion and prejudice."

It is especially urged that the amount of damages allowed is excessive. Two physicians testified that the thigh bone was broken near the hip joint, and the bones had never reunited, and the injury was permanent. One of the physicians testified that he had replaced the fracture and bandaged it; that he saw it every day for two months; that the effect of a hip fracture is a great deal of pain and suffering and loss of appetite and a debilitated condition of the whole system; that he took care of her for two months; that she was able to move about some when he left. She was not able to walk. In short, after a fair trial, the evidence fairly supported the findings and verdict, which were approved by the court in overruling the motion for a new trial and rendering judgment thereon. It has been repeatedly held by this court that in such a case the judgment will not be reversed, on the ground that the evidence is insufficient.

The judgment is affirmed. All the Justices concurring.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## HUTCHINS v. STANLEY.†

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*1. **BILLS AND NOTES (§ 360\*)—BONA FIDE PURCHASERS—GAMBLING TRANSACTION—RENEWAL.**

A nonnegotiable promissory note was given to cover margins in a board of trade transaction or speculation in the price of wheat; no actual sale or delivery being intended. The instrument was indorsed before maturity, for full value, to the appellant, who took it without notice of the consideration. At maturity the appellant was informed of the consideration, and accepted a new negotiable note for the principal; the interest being paid. In this action upon the new note it is held that the note was given in a gambling transaction prohibited by law (Gen. Stat. 1909, § 5169), and was void between the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 793; Dec. Dig. § 360.\*]

2. **BILLS AND NOTES (§ 430\*)—NONNEGOTIABLE NOTE—DEFENSES.**

The assignee of a nonnegotiable instrument stands in the shoes of the payee. A defense available against the payee is also available against the assignee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251-1256; Dec. Dig. § 430.\*]

3. **BILLS AND NOTES (§ 141\*)—RENEWAL.**

The new note taken in exchange for the old one is a renewal of the former obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350-354; Dec. Dig. § 141.\*]

4. **BILLS AND NOTES (§ 318\*)—ASSIGNMENT—NOTICE OF INFIRMITY.**

The payee of the new note is chargeable with notice of the infirmity in the original instrument because of his knowledge of the consideration, as well as from its nonnegotiable form.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754; Dec. Dig. § 318.\*]

5. **BILLS AND NOTES (§ 141\*)—RENEWAL NOTE—CONSIDERATION.**

The consideration of the new note is the obligation of the old one. This consideration being illegal, a recovery cannot be allowed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350-354; Dec. Dig. § 141.\*]

Appeal from District Court, Lyon County.

Action by W. E. Hutchins against L. Stanley. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Harvey Frith and L. B. Kellogg, both of Emporia, for appellant. O. S. Samuel, of Emporia, for appellee.

**BENSON, J.** [1] This action is upon a promissory note made by the appellee to the order of the appellant. The defense is based upon the following facts: The appellee gave to the Kemper Grain Company his nonnegotiable promissory note; the words "to order or bearer" not being contained in the instrument. Neg. Inst. Law, 8 (Gen. Stat. 1909, § 5254). This instrument was given to cover margins in a board of trade transaction or speculation in the price of wheat; no ac-

tual sale or delivery having been contemplated. The instrument was transferred by indorsement, without recourse, to the appellant before maturity, for full value, who took it without knowledge of its consideration, or of the transaction in which it was given. At maturity the appellee told the appellant that he had lost the money and had given the note to settle for margins in a board of trade transaction, paid the accrued interest, and gave the note sued upon for the principal sum; thereupon the old instrument was surrendered to him.

The deal out of which the original instrument arose was in violation of section 5169 of the General Statutes of 1909. Having been given in a gambling transaction, in violation of law, it was void between the parties because of illegality of consideration. 1 Randolph on Com. Paper (2d Ed.) §§ 515, 517; 1 Parsons on Notes and Bills, 212; State v. Wilson, 73 Kan. 334, 343, 80 Pac. 639, 84 Pac. 737, 117 Am. St. Rep. 479.

[2] Whether a negotiable promissory note, given for such consideration, is void in the hands of a bona fide holder for value is a question upon which the decisions are in conflict. The annotator, in 119 Am. St. Rep. at page 176, declares that there is a hopeless conflict on this question, and supports his declaration by a multitude of citations. This question, however, is not involved here; for the instrument was not negotiable, and the transferee was not entitled to the protection given to the holder of negotiable instruments in due course. Neither is the action upon that obligation.

[3] It is a general rule that a renewal between the parties of a note void for illegality of consideration is likewise void. 3 Randolph on Com. Paper, § 1584; Bishop on Contracts, § 488. Many decisions support this rule; but the new note here was not given to the payee of the old one, but to his indorsee, and it is contended that the general rule is inapplicable to this situation. The argument of the appellant is that the new note should be treated as a payment, and not as a renewal. This is not the effect of giving a new note, unless it is so intended or agreed; and there is nothing in the evidence to show that it was received otherwise than in the usual way in renewal of the former obligation. 2 Dan. Neg. Inst. (5th Ed.) §§ 1266, 1266a; 3 Randolph on Com. Paper (2d Ed.) § 1571.

While the cases are numerous in which the effect of renewals between the parties of notes tainted by illegality of consideration is considered, not so many have been found involving renewals given to an indorsee or assignee. In Missouri, where the note of a married woman, given for a worthless patent right, was invalid because of her coverture, it was held to be void in the hands of an indorsee; and that a new note, given

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied. February 15, 1913.

to the indorsee in renewal, to which her want of ability did not attach, was also void. The court said: "The original note being void because of the inability of the payor, Mrs. Leedy, to make a contract of this kind on account of her coverture, it was void in the hands of plaintiff as indorsee, even without notice of the fact that it was obtained by fraud, and was without consideration; and, although the last note was given in renewal of the first, there was no consideration therefor, and it was subject to the same defenses as was the original note." *Comings v. Leedy*, 114 Mo. 454, 478, 21 S. W. 804.

In California, in an action upon a promissory note made in renewal to the assignee of a nonnegotiable instrument, which had been given in consideration of a gambling debt and indorsed to the payee of the note sued upon, it was held that an assignee of such an instrument is in no better position than the payee; and that notes given in renewal are of no more validity than the original obligation. It was also held that, although the renewal notes in that case were given in compromise of a suit pending upon the old note, they were still tainted with the illegality of that instrument, and payment could not be enforced. It is true that it was alleged that the assignment was only colorable, and that the assignee to whom the renewals had been executed was only an agent of the first payee. This feature of the case was not, however, deemed important. It was said in the opinion: "Under the rule which we hold applicable here, it would seem that the question as to whether Reid [payee of the renewal notes] or the 'undisclosed equitable owner,' whom he testified that he represented, had actual notice of the circumstances under which the McMahon notes were given was entirely immaterial in this controversy. Those notes, as already stated, were not negotiable, and the successors of McMahon took them subject to any objections that might be made to their validity. They stand here in the shoes of McMahon, and any answer to a claim based thereon that would have been available against him is available against them. This includes not only such defenses as might seasonably be urged by the maker of the notes, but also such objections to the enforcement of the claim on the ground of illegality as might appear to the courts, when an attempt was made to enforce it. They took the notes with knowledge, conclusively imputed to them, that if they were ultimately found to be based upon an illegal consideration there could be no recovery thereon; and that the maker of the notes could not, by any agreement of ratification or compromise, render them, or instruments given in place thereof, enforceable by the courts, when their illegality should be made to appear. The defense of want of notice

of the illegality of a contract is available only where the contract is a negotiable instrument in the hands of one who has acquired it for value before maturity, and in the ordinary course of business. \* \* \*

It is therefore unnecessary to determine whether the evidence shows that Reid had actual notice of the invalidity of the notes at the time they were transferred to him." *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 171, 11 Ann. Cas. 609.

Elsewhere in the same opinion it is said: "That a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them, under the rule expressed in the maxim, 'Ex turpi causa non oritur actio.' It is therefore settled that the failure of the party against whom such relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express consent that the court may enforce such illegal contract, will not justify a court in enforcing the same."

[4] The assignee of a nonnegotiable instrument stands in the shoes of the payee. A defense available against the payee is also available against him. *Graham v. Wilson*, 6 Kan. 489. It should also be observed that when the appellant took the note upon which he sues he was told that the original instrument had been given in settlement of margins in a board of trade transaction.

In *Mason v. Jordan*, 13 R. I. 193, 194, it was held that a note, given in substitution or novation of another note, which had been made without consideration, is also without consideration. In that case a married woman had conveyed realty as a feme sole, which it was held that she could not legally do in the circumstances shown. Her grantee made a conveyance of the property to another. Thereupon the woman referred to canceled a note and mortgage, which she had taken in consideration of her deed, and by substitution or novation took the note and mortgage of the last grantee. The court held that the deed of the married woman was a nullity, and the notes taken therefor were without consideration; that the grantees, having received nothing, had nothing to convey, and consequently the second note was also without consideration. It was said: "It follows, if the original note and promise were both without consideration, that the new note, into which they were transmuted by novation, was likewise without consideration. \* \* \*"

A note, given for an illegal consideration in furtherance of transactions prohibited by statute, and in fact declared to be felonious, is certainly no better than one given without any consideration; and, unless the payment made to the Kemper Grain Company should be treated as the consideration, the appellant

cannot recover. It is believed that the true consideration for the new note is the old obligation. To hold otherwise would seem to give to the nonnegotiable instrument the quality of negotiability, excluding a defense good against the payee. However, decisions bearing upon that question will now be considered. In a case in North Carolina it appeared that a negotiable note had been given for money won at cards. It was indorsed to a holder for value before maturity, without notice of the consideration. In a suit by the indorsee the court said: "A note to secure the payment of money won at cards is void by statute. Although the note be passed by indorsement, for valuable consideration, and without notice to the indorsee, it is void in his hands. So if the maker executes a second note to the *original payee*, either in renewal of the first note simply, or including another debt, the second note is void; for it is to secure the payment of money won at cards, and the taint in the part of the consideration vitiates the whole—'a rotten egg.' *Palmer v. Giles*, 5 Jones' Eq. [58 N. C.] 75. In our case the maker executed the second note to *Calvert*, who was the indorsee for valuable consideration, and without notice. This second note was given to secure the price paid by *Calvert* for the first note, and not to secure the payment of the money which Christmas had won; for the purpose of making it must be referred to the proximate, and not the remote, cause. The consideration, therefore, is not tainted by the illegality which vitiated the first note." *Calvert v. Williams*, 64 N. C. 168.

The all-important distinction between that case and this is that the first note was negotiable. The indorsee, having the right to enforce payment, would have the same right with respect to a renewal note.

In *Burton v. Stewart*, 62 Barb. (N. Y.) 194, a negotiable note, given to the president of a corporation for an illegal consideration, was held to be enforceable by a bank which had discounted it before maturity, without notice of the infirmity; and it was also held that another note, given to the bank in renewal, was a valid obligation against the maker. It was said, however, that if the president of the corporation, payee in the first note, had taken it up at maturity he could not have recovered upon it; for he would have held it clothed with the same rights existing at the time of the transfer. It will be seen that the renewal note in the case last cited was held valid because the original note was negotiable, and was taken in due course.

In a case in Kentucky the subject was considered from a somewhat different point of view. Several notes had been given for lottery tickets—an illegal consideration. They were assigned, and the maker, having obtained forbearance for some time from the assignee, made a new note for the amount of the old ones to a creditor of the assignee, and

thereupon the assignee was given corresponding credit on his indebtedness to the new payee. The new note was held valid, on the ground that the maker could waive the illegality, and had done so by giving the renewal note. The court said: "Whatever illegality there may have been in the lottery, or fraud in the management and drawing thereof, and however availing the illegality and fraud may have been when urged by Olds in vacation of the notes, of which the tickets were the consideration, yet it was competent for him to waive the illegality and fraud and affirm them. This, we think, he has done in a very effectual manner; for it is not pretended that Levin Shreves did not pay a fair and full consideration for them. His claim to this amount was honest, and could have been enforced against the assignor upon his failure to receive it in the exercise of vigilant pursuit, from the obligor. But the obligor, with a full consciousness of his legal exemption from the payment, promises the assignee payment, and by repeated promises of payment obtains repeated forbearance, and at length takes up the four notes and executes to the creditors of the assignee his note for their aggregate amount, whereby the assignee obtains a credit with them for that amount. This, we think, is a strong, practical waiver by Olds of whatever of fraud and illegality there may have been in the original transaction." *William Shreve et al. v. William Olds*, 2 A. K. Marsh. (Ky.) 141.

The proposition that illegality of consideration is waived by a renewal made to the same party or to another, with notice of the taint, is opposed to the weight of authority. Randolph says: "The consideration which belongs to the original paper belongs to a renewal also. This is true also of a note given by the maker of the original note, with its payee as surety, to a subsequent holder of such note, in renewal of it." Randolph on Com. Paper, § 460.

"The principle is that where the original promise is tainted with illegality the taint cannot be removed by a new promise based on the old one." Note, 9 L. R. A. (N. S.) 568.

A contract made for the purpose of giving effect to an agreement, void because opposed to public policy, is also void, unless the contract be negotiable and in the hands of a bona fide holder for value before maturity, without notice of its character. *Greenhood on Public Policy*, rule 10, p. 8.

In an action by the holder of a note made to an indorsee of another note, which had been given by the same maker for an illegal consideration, it was held that: "The same defense which the defendant might have made to an action by an indorsee of the note originally given by him may be made by him in this action on the note given in renewal of the original note. Both notes were given for the same unlawful consideration." *Holden v. Cosgrove*, 78 Mass. (12 Gray) 216.

It has been held that the compromise of an

entirely unfounded claim is not, of itself, a valid consideration for a new promise to pay it. *Creuts v. Heil*, etc., 89 Ky. 429, 12 S. W. 928.

It was said, in *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218, that "the surrender or discharge of a claim which is utterly without foundation, and known to be so, is not a good consideration for a compromise; but it is otherwise if the claims are doubtful, and so understood by the parties; and in such a case the consideration will not be defeated by showing that, in fact, no valid claim really existed." This appears to be the general rule. Wharton on Contracts, § 533. This principle applies with greater force where the claim compromised is based upon an unlawful, as distinguished from a merely insufficient, consideration. *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; *Reed v. Brewer* (Tex. Civ. App.) 36 S. W. 99.

Where a note, given in consideration of the sale of a stock of intoxicating liquors, had been surrendered, and a new note had been taken from a firm to whom the stock had been transferred, and an action was brought and goods attached upon the new note, it was held that the consideration of the first note was illegal, and that this infirmity affected the new note; both having been taken with notice of the illegality. It was also held that a compromise of the suit, whereby the attachment was released upon promise to pay the note, was not a sufficient consideration. The court said: "The original notes of Blake and Caldwell, as between the parties to them, had no legal validity or value (*Fulmer v. Bean*, 30 N. H. 186; *Bliss v. Brainard*, 41 N. H. 261; *Perkins v. Cummings*, 2 Gray [Mass.] 258; *Gray v. Hook*, 4 Const. [4 N. Y.] 449; and see *Viser v. Bertrand*, 14 Ark. 267, 15 U. S. Dig. [O. S.] 19, § 90), and would have been equally valueless in the hands of an indorsee with notice. *Chitty on Bills*, 95. It would seem somewhat strange if the surrender of such notes by one, in whose hands they were void, to the maker or another, in whose hands they would be equally invalid, could furnish a sufficient consideration for a note by either of the latter to the former.

\* \* \* We think that the trouble of the surrender cannot, in a case like this, be held a sufficient consideration for the notes given by Blake & Wilkins; for if either of these latter propositions were true there would be a sufficient consideration for the renewal of the notes between the original parties. The surrender, forbearance, or assignment of a claim having no legal validity is not a sufficient consideration for a promise. \* \* \* The abandonment of legal proceedings commenced where there is palpably no cause of action is not a good consideration for a promise." *Kidder v. Blake*, 45 N. H. 530.

The appellant had already paid his money

to the Kemper Grain Company when he took the new note. He parted with nothing; nor did the appellee receive anything in consideration for it. It was a mere substitution of one promise for another, both resting upon the same illegal consideration, of which the appellant had actual notice, as well as notice afforded by the form of the original instrument. *Graham v. Wilson*, supra. The renewal is not free from the infirmity of the original instrument. The poison of illegality remains in the new note; for it is a continuation of the former.

An observation of the Supreme Court of Texas is deemed applicable here: "If a note is tainted by the consideration of the demand for which it is given, there can be no good reason for drawing the line at the first note. If the first is taken up and a new one given in its stead, to obtain an extension of time, to embrace in it additional demands, or for other purposes, the illegal consideration is as distinctly traced in the second note as in the first. The new considerations dilute, but do not neutralize or extinguish, the poison." *Wegner Bros. v. Bierling & Co.*, 65 Tex. 507.

The appellant cites *Calvin v. Sterritt*, 41 Kan. 215, 21 Pac. 103, in support of his contention that the new note is valid. The result in that case, it will be seen, depended on a question of fact. It was said, however, in the opinion: "The general rule, as laid down in the text by Daniel in his work on Negotiable Instruments, is that, if the consideration of the original note be illegal, a renewal of it will be open to the same objection and defense; but if at the time the renewal was executed the parties signing knew of the fraud in the original they will be regarded as purging the contract of fraud, and cannot then plead it."

The latter part of the above quotation is set out in appellant's brief. It will be observed that the court referred, first, to illegal considerations, and said that renewals in such cases would be open to the same defense, and then referred to cases of fraud which might be purged from a contract by renewal made with knowledge of the fact. This distinction is clearly stated by the author referred to in the opinion: "If the consideration of the original bill or note be illegal, a renewal of it will be open to the same objection and defense; and if the original instrument was obtained by fraud a renewal of it by the original parties, without knowledge of the fraud, would stand upon the same footing. But if at the time the renewal was executed the parties signing knew of the fraud in the original they will be regarded as purging the contract of the fraud, and cannot then plead it." 1 Dan. Neg. Inst. (5th Ed.) § 205.

[5] It will be seen that the opinion in the *Calvin Case* merely undertook to briefly state propositions contained in the treatise referred to, which are not in conflict with, but which

support, the conclusion that, where a renewal note is taken with notice of the illegal consideration of the original instrument, it is tainted with the same illegality, and payment will not be enforced.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, and WEST, JJ., concurring.

MASON, J. (concurring specially). I concur in the affirmance of the judgment of the district court, but do so specifically upon the ground that Hutchins knew, when he accepted the promissory note sued upon, that the original transaction was illegal. If Stanley had given his note, payable in the future, without making known the illegality back of it, I think he would be precluded from making a defense based thereon; for in that case Hutchins would have been misled to his prejudice, because his ignorance of the facts, and Stanley's silence, would have lulled him into security and delayed such steps against the grain company as, with full knowledge, he might have desired to take at once.

#### STATE v. HANCHETTE.

(Supreme Court of Kansas. Feb. 18, 1913.)

(Syllabus by the Court.)

#### 1. DRUGGISTS (§ 3\*)—REGISTERED PHARMACISTS—"STORE."

The word "store," as used in the first sentence of section 8095 of the General Statutes of 1909, means a store of the same kind or class as a pharmacy.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6672-6675; vol. 8, p. 7805.]

#### 2. STATUTES (§ 241\*)—CONSTRUCTION.

In determining the meaning of a statute, consideration should first be given to the language employed therein, but, especially in applying a criminal statute, the courts should have regard to the evil sought to be remedied, for that which is not within the spirit of the statute, although within the letter thereof, is not in legal contemplation a part of it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

#### 3. DRUGGISTS (§ 3\*)—"MEDICINES"—"HYDROGEN PEROXIDE."

Hydrogen peroxide, like water and soap, is applied to the body only as a detergent, a cleanser. It has a curative or beneficial effect, and is technically a medicine, but is not generally and popularly known as a medicine, and hence the sale thereof is not regulated by section 8095 of the General Statutes of 1909.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4466, 4467.]

Johnston, C. J., dissenting.

Appeal from District Court, Shawnee County.

O. W. Hanchette was convicted of selling medicine while not being a registered pharmacist, and appeals. Reversed and remanded.

Hamilton & Hamilton, of Topeka, for appellant. Jno. S. Dawson, Atty. Gen., E. R. Simon, of Topeka, and A. E. Helm, of Wichita, for the State.

SMITH, J. The complaint in this case against the appellant was filed in the court of Topeka, Shawnee county. The complaint alleged that on the ——— day of September, 1911, in the county of Shawnee and state of Kansas, C. W. Hanchette was the manager of a certain store, particularly described, and as the manager thereof did open and conduct said store for retail, dispensing and compounding medicines or poisons, to wit, Western peroxide or hydrogen peroxide, and that at said time the said C. W. Hanchette was not a registered pharmacist within the meaning of section 8095 of the General Statutes of 1909, and did not have at said time a registered pharmacist to conduct said store. A motion to quash the complaint on the ground that it did not state facts sufficient to charge a public offense was overruled. Before the hearing the parties entered into the following stipulation:

"For the purposes of the trial of this case in this court and all superior courts, it is hereby stipulated by and between the plaintiff and the defendant in this case that the following may be taken and considered by the court as the facts in the case:

"First. That the defendant, C. W. Hanchette, is the general manager and conducts a certain store at Nos. 625 and 627 Kansas avenue, city of Topeka, Shawnee county, Kan., commonly known as Woolworth's Five and Ten Cent Store, and that said defendant was such manager and conducting said store at the time and place alleged in the amended complaint filed herein. That the said C. W. Hanchette is not a registered pharmacist within the meaning of section 8095, Gen. Stat. 1909, and that said defendant did not have at the time alleged in said complaint in his employ a registered pharmacist to conduct said store. That said defendant kept for sale in said store a large number of articles of general merchandise, such as are generally kept for sale in what is known as a five and ten cent store. That said defendant as manager conducted said store for retailing and dispensing among other articles the article known as Western peroxide or hydrogen peroxide. That said Western peroxide was displayed upon a counter or shelf in said store, and that while the said defendant was such manager and conducting said store he, as such manager of said store, did sell at retail and permit to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sold, and offered for sale at retail, certain articles known as Western peroxide, or hydrogen peroxide, at the time and place stated in said amended complaint, without being himself a registered pharmacist or a registered assistant pharmacist, or having in his employ a registered pharmacist or a registered assistant pharmacist within the meaning of section 8095, Gen. Stat. 1909. That the said store, located at Nos. 625 and 627 Kansas avenue, in the city of Topeka, Shawnee county, Kan., is within five miles of the location and place of business of a registered pharmacist, and is located in a city of the first class, and not a rural district.

"Second. It is admitted by the parties hereto that at the time and place and in the manner alleged in the amended complaint that the defendant herein, as the manager of said store, sold at retail the two bottles of Western peroxide, or hydrogen peroxide, marked '1' and '2,' and that at that time they bore the labels and directions now contained on said Exhibits 1 and 2.

"Third. It is further stipulated that either party may at the trial offer further and additional testimony in support or upon the issues joined herein."

The directions referred to in paragraph 2 of the stipulation are as follows:

"For Mosquito Bites and Stings of Insects, apply undiluted.

"For Wounds, etc., dilute with from 1 to 3 parts of water and apply.

"For Pimples, Unsightly Skin, etc., nothing is as efficacious as the Western Peroxide. Dilute with from 1 to 3 parts of water, according to the virulence of the symptoms, and apply.

"Shaving. It forms a pleasing and refreshing antiseptic application much more valuable than toilet waters or bay rum, quickly stopping the bleeding of cuts and prevents barber's itch.

"For Washing Mouth and Teeth, there is nothing so pleasant and effectual as the Western Peroxide. Tartar cannot exist where it is used and the teeth and gums are rendered healthy and beautiful.

"Foul Breath is impossible when used equal parts water as a mouth wash or internally. It is strongly deodorant and imparts a refreshing fragrance to the mouth. Removes odor of smoking."

[1] It is contended on the authority of *Laporte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277, *State ex rel. v. C., R. I. & P. Ry. Co.*, 95 Ark. 114, 128 S. W. 555, *State v. Prather*, 79 Kan. 513, 100 Pac. 57, 21 L. R. A. (N. S.) 23, 131 Am. St. Rep. 339, and *State v. Hardin*, 1 Kan. 474, that the word "store," as used in the first sentence of section 8095, supra, means a store of the same class as a pharmacy. By analogy to the cases cited there is much force to this contention. This proposition also received sup-

port from the purpose of the act as stated in the title, the first sentence of which is "An act to prevent incompetent or unauthorized persons from engaging in the practice of pharmacy." The purpose of the whole act, so far as can be determined by the title thereof, is to regulate pharmacies and stores of that character. The store in question, so far as appears from the evidence, bore no resemblance to a pharmacy wherein medicines or poisons are compounded, dispensed, and sold, unless the selling of hydrogen peroxide in sealed-up bottles constitutes such resemblance. The character or effect of the medicine, if medicine it be, would be identically the same whether the bottle were handed out and the price received by the most expert pharmacist or by the veriest tyro. The transaction does not involve the practice of pharmacy. At most, it constitutes a retailing of the article, and does not constitute the store a pharmacy or store of like class or kind to a pharmacy. There is evidence in this case that Western peroxide, as it is called in this case, or hydrogen peroxide, is a medicine; also, that articles usually found in grocery stores and lumber yards and sold in paint shops and all kinds of commercial stores have a medical use; that alcoholic preparations to prevent the hands from being chapped are medicines; that water, zinc, tar, turpentine, copper, olive oil, lemon essence, and resin have a medical use; that an article used as a pleasing and refreshing application after shaving is a medicine; that tooth washes are medicines so far as they have a medical effect; that the water one might use in washing his mouth is medicine so far as it makes any change in the tissues; that soda and some soaps are medicines; that bay rum and glycerine for the hands is a medicine, and also when applied as a tooth wash. Numerous other articles of common use, when used to soften the skin or to render it pleasant or to improve any physical condition, are said to be medicines. This is true in the technical sense of the medical profession, but in the general and popular use of the language few, if any, of these articles would be regarded as medicines. Yet, under the evidence in this case and the construction of the statute contended for by the state, it would be unlawful for appellant to retail or dispense any of these articles in his store. That such is the meaning of the statute seems too absurd to require comment. [3] Hydrogen peroxide is not claimed to be a poison, and is shown to have no medical effect when taken into the stomach, but is simply a detergent, a cleanser, and as a medicinal agent it is shown to be used only to cleanse and soothe the skin, to dissolve and remove impurities from wounds and ulcers, or impurities from the mouth, teeth, and ears. This constitutes medicinal action in the language of the med-

ical profession, and the preparation is therefore called a medicine. It is shown to be in quite common use for the purposes indicated, and in no instance is it shown to have had any poisonous or injurious effect in any way. It is used by people unskilled in medicine without any prescription from a physician, and is shown to have no other or different effect than water except that it is more cleansing. In determining what is and what is not an intoxicating liquor, in *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284, it is said: "Whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, gin, etc., is within the prohibitions and regulations of the statute, and may be so declared as matter of law by the courts. Whatever, on the other hand, is generally and popularly known as medicine, an article for the toilet, or for culinary purposes, recognized, and the formula for its preparation prescribed, in the United States dispensatory, or like standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as tincture of gentian, paregoric, bay rum, cologne, essence of lemon, etc., is without the statute and may be so declared as matter of law by the courts; and this, notwithstanding such articles contain alcohol, and in fact, and as charged, may produce intoxication." Syllabus 5, 6.

[2] The question is raised in this case whether the section of statute under which the prosecution was had was intended to cover hydrogen peroxide, and the rule for determining the meaning of a statute is stated in the *Intoxicating Liquor Cases*, supra, as follows: "While, in order to determine the true scope and meaning of a statute, its letter is to be first examined and considered, yet courts should also have regard to the evil sought to be remedied; for that which is within the letter, though not within the spirit, of the statute is not in legal contemplation a part of it." Syllabus 3. The object of the statute is not to debar one class of dealers from selling the article or to confer the right upon another class, but the object is to protect the people from the injurious effects which might occur from the ignorant and unskillful retailing, dispensing, or compounding of medicines or poisons by persons unqualified for such service. From all the evidence in this case it appears that this preparation falls in the class of witch hazel, Pond's Extract, vaseline, and many other like household remedies which in the technical sense of the physician have curative, alleviative, and pleasant effects from their application, and hence are called medicines, but in the common use of the language are not so designated. That the Legislature has power to regulate the sale of hydrogen peroxide or of any other article of commerce, if the common use thereof is

dangerous or especially liable to injurious effects, is not questioned. We only decide that it does not appear that hydrogen peroxide falls within the purview of this statute.

The judgment is reversed, and the case is remanded, with instructions to discharge the appellant.

BURCH, MASON, PORTER, BENSON, and WEST, JJ., concur.

JOHNSTON, C. J. (dissenting). The pharmacy act was passed for the protection of the health and lives of the people, and to accomplish this purpose the Legislature provided that only experienced persons registered as pharmacists may sell medicines or poisons. Such drugs cannot be sold by unauthorized persons in any kind of a store. The object of the Legislature was not to classify and regulate the conduct of stores, but it was to regulate the means and methods of selling, compounding, or dispensing medicines or poisons. In speaking of the prohibited stores the Legislature manifestly referred to any places in which medicines and poisons are sold at retail by unregistered pharmacists. It is hardly within reason that the Legislature intended to prohibit the sale of medicines and poisons by unauthorized persons in a regular pharmacy, and to permit the sale of such drugs by ignorant and unskilled persons in 10-cent stores or in a grocery. To my mind, the term "medicine" as used in the act fairly embraces hydrogen peroxide. By the testimony of physicians and chemists it was shown that it is a medicine which is prescribed by physicians for the treatment of diseases. While it is used for some other purposes, physicians testified that 90 per cent. of this drug is used as a medicine, and that it is so treated by medical authorities. The professor of pharmacy and chemistry in the University of Kansas testified that: "It is used and recognized by medical men and chemists as a remedial agent like other medicines; that it is carried by drug stores generally; that in his opinion the article in form as prescribed by the standard fixed for it by the U. S. Pharmacopoeia is a medicine." It is in testimony that it is more than a preventative or detergent, as it is frequently prescribed and used as a curative agency. The testimony in the case shows that the primary and principal use of the drug is medicinal. It is so regarded by the state board of pharmacy, and in popular understanding it is regarded as a medicine. On this testimony the trial court held it to be a medicine, and that, therefore, it could only be sold by registered pharmacists.

It is competent for the Legislature to restrict and regulate the sale of domestic remedies as well as those containing poisons, and

I find nothing in the act indicating that the Legislature intended to except domestic remedies, however common their use, from the operation of the act. On the contrary, there is a provision in section 11 of the act which, in terms, regulates the sale of domestic remedies and medicines in rural districts, thus showing that such remedies were within the contemplation of the Legislature. Again, the testimony shows that hydrogen peroxide contains an acid, and that in some cheap and impure forms there is danger in its use, especially if applied to mucous surfaces, so that there are good reasons for requiring that it shall be handled by trained pharmacists. In the recent case of *State Board of Pharmacy v. Matthews*, 197 N. Y. 353, 356, 90 N. E. 966, 967 (28 L. R. A. [N. S.] 1013), the Court of Appeals sustained a pharmacy act, and held that such common remedies as spirits of camphor and tinctures of arnica and iodine were medicines, and that a provision forbidding the sale of such remedies by any one other than licensed pharmacists was a valid exercise of the police power. It was held that there were good reasons why that regulation should be extended so as to embrace what are known as harmless household remedies, such as may be harmless if properly prepared and which might be injurious to the public health if impure articles of that character were compounded or sold. In deciding the case it was said: "It is obvious that the same precau-

tionary regulations may not be required in respect to the sale of medicines which are harmless if pure and properly used, as would be appropriate in respect to the sale of poisonous substances; but I can see no reason why, if the police power embraces the regulation of the sale of medicines of a dangerous character, it may not also legitimately be extended over the sale of medicines generally, if only in order to insure their purity." The Supreme Court of Wisconsin sustained a statute requiring the sale of drugs and medicines by registered pharmacists, and the act related, not merely to the sale of poisons, but to the sale of drugs and medicines, including harmless medicines in common use as well as those of a dangerous character. *State v. Heinemann*, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34. See, also, *State v. Forcier*, 65 N. H. 42, 17 Atl. 577; *State v. Miller*, 54 Or. 381, 103 Pac. 519; *State v. Hamlett*, 212 Mo. 80, 110 S. W. 1082; *State v. Hovorka*, 100 Minn. 249, 110 N. W. 870, 8 L. R. A. (N. S.) 1272, 10 Ann. Cas. 396; *People v. Abraham*, 16 App. Div. 58, 44 N. Y. Supp. 1077; *People v. Moorman*, 86 Mich. 433, 49 N. W. 263; *State Board of Pharmacy v. Bellinger*, 138 App. Div. 12, 122 N. Y. Supp. 651; 10 A. & E. Encycl. of L. 266.

In my opinion the Legislature intended to regulate the sale of medicines like hydrogen peroxide, and to require them to be sold under the supervision of a registered pharmacist.



**STEPHENSON v. ATCHISON RY., LIGHT & POWER CO.**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)***1. EMINENT DOMAIN (§ 106\*)—STREET RAILWAY—DAMAGES TO ABUTTING OWNER.**

An abutting owner is entitled to recover damages from a company which maintains a railroad track in the street in such manner as to cut off his access to his property—his ingress thereto and egress therefrom—notwithstanding it is constructed in accordance with permission given by the public authorities.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 282-289; Dec. Dig. § 106.\*]

**2. EMINENT DOMAIN (§ 106\*)—STREET RAILWAY—DAMAGES TO ABUTTING OWNER.**

A railroad track in the street obstructs an owner's access to abutting lots, and his ingress thereto and egress therefrom, if it prevents his driving on the street to the property, even although, by reason of a difference in level, or for any other independent cause, he could not in any event drive upon the lots from the street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 282-289; Dec. Dig. § 106.\*]

**3. EMINENT DOMAIN (§ 106\*)—STREET RAILWAY—DAMAGES TO ABUTTING OWNER.**

The fact that lots are accessible through an alley in their rear does not prevent the recovery of damages for obstructing access thereto from the street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 282-289; Dec. Dig. § 106.\*]

Appeal from District Court, Atchison County.

Action by William Stephenson against the Atchison Railway, Light & Power Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

C. S. Hull, of Atchison, for appellant. B. P. Waggener, of Atchison, for appellee.

MASON, J. William Stephenson sued a street railway company for damages alleged to have been occasioned by its having so constructed its track in the street in front of three lots owned by him as to cut off his access thereto. A demurrer to his evidence was sustained, and he appeals.

There was evidence showing, or tending to show, these facts: The middle of the street in front of the plaintiff's property is macadamized, and to avoid interference with this paving an ordinance provided that the track should run on the side of the street, near to the curb. The track is laid within a few inches of the curb line, and in some places extends inside of it. Some surfacing has been done with cinders on the outside of the rails, but there is no filling between them. A wagon cannot be driven up next to the curb, although it might be backed up to it by crossing the rails squarely. The curb line is 17½ feet from the lot line. The surface of the plaintiff's lots is about 12 feet above that of the street. The ground is cut away, so as to slope from the lot line to about 3

feet inside of the curb line. In front of the plaintiff's house a flight of steps descends the slope to the street. The lots abut on no other street, but there is an alley in their rear.

There was some evidence which, under a favorable construction, warranted an inference that the car track, in its existing condition, prevented the driving of a vehicle up to the curb line. It was weak and inconclusive, and the plaintiff testified that his grievance against the company was based upon matters having no connection with that aspect of the case. The judgment might be affirmed if it were based upon the view that the track did not substantially obstruct the bringing of vehicles to the curb line. But the theory of the trial court seems to have been that such an obstruction did not constitute a denial of access to the property. The ground of the ruling was thus stated: "The ability to use this property, to get to it and come away from it, has not changed from what it was before the street car track was put there; that is, before the street car track was laid, the plaintiff was not able to use his right to go to and from the property, except as a pedestrian, and his ability to use it now in that manner still exists and has not been abridged. The court is of the opinion that the plaintiff's right of ingress to and egress from, or ability to use, the property has not been changed by the laying of the street car track; and, unless his right in that respect has been disturbed, then there is no liability on the part of the company, and if there is no liability there is no necessity of proving any amount of damages."

[1] Although a car track is laid in the street in accordance with permission granted by the public authorities, if it is so constructed as to cut off an abutting owner from access to his property, from ingress thereto and egress therefrom, he is entitled to damages from the company maintaining it. There are decisions to the contrary, but the weight of judicial opinion supports this view, which is in accordance with previous expressions of this court. In *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203, it was said: "While a railroad company may, when licensed by the proper authorities, occupy a street or alley with its track, yet if \* \* \* it \* \* \* so lays its track as to permanently obstruct access to an adjoining lot, \* \* \* the lot owner may recover damages therefor." Syl. § 1.

While, under the facts of the case, the rule was found not applicable, it was thus stated in *K. & D. Ry. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479: "To entitle a person owning lots abutting on a city street along which a railroad company has constructed and is operating its line by authority of the city council to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

recover damages, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress to and egress from them." Syl.

Cases bearing more or less directly on the subject are collected in notes in 2 Ann. Cas. 536, 43 L. R. A. 554, 25 L. R. A. (N. S.) 1267, 1278, and 36 L. R. A. (N. S.) 764. The note last cited is very elaborate, filling 165 pages of the work referred to, and covering every phase of the abutter's right to compensation for railroads in streets. See, also, *Foster Lumber Co. v. Arkansas Valley & W. Ry. Co.*, 20 Okl. 583, 95 Pac. 224, 100 Pac. 1110, 30 L. R. A. (N. S.) 231, and cases there cited.

[2] The trial court seems to have acquiesced in this rule, which we do not understand to be controverted by the defendant, but was apparently of the opinion that the plaintiff's right of access, and of ingress and egress, was not affected, unless he was prevented from driving so as to pass from the street to the lots and from the lots to the street. We think the right of access to the property, of ingress thereto and egress therefrom, includes the right to use the street for bringing a vehicle up to the curb line, even although that cannot in any event be crossed—the right to get to the property by the ordinary means of conveyance. The elevation of the plaintiff's lots prevents any driving upon them from the street at this time. The construction of a driveway admitting of this seems unlikely, although, doubtless, possible. Still the plaintiff has the right to drive upon the street to and from the point of contact with his lots, and if the exercise of this right is prevented by the car track he is entitled to recover damages therefor, measured by the diminished value of the property so occasioned. A number of the

cases cited in the note in 36 L. R. A. (N. S.) 764 et seq. illustrate that an interference with the approach to property from the street on which it abuts constitutes an obstruction to access thereto. It is obvious that a car track might be so laid as to interfere with access to a business block, and in a sense with ingress thereto and egress therefrom, although there might be no possibility under any circumstances of driving a conveyance into it.

At the present time all but three feet of the space between the curb line and the lot line is covered by the sloping bank. Therefore, even if no car track had been laid, the plaintiff could not now drive upon the street (using that term as including the parking and sidewalk) to a point of actual contact with his lots. This condition is not necessarily permanent. But the plaintiff's right of access includes the right to drive, upon the portion of street adapted and set apart to that kind of travel, to the curb line in front of his property. He is not required to take into account the possibility of driving upon the parking or sidewalk.

[3] The plaintiff's right of recovery is not affected by the fact that he had access to his lots by means of the alley in their rear. In *K., N. & D. Ry. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479, it was said that no recovery could be had for the obstruction of access from one street to a corner lot, because it was accessible from the other; but this was disapproved in *Ft. S., W. & W. Ry. Co. v. Fox*, 42 Kan. 490, 496, 22 Pac. 583. See, also, *L. N. & S. Ry. Co. v. Curtain*, 51 Kan. 432, 33 Pac. 297, and note, 36 L. R. A. (N. S.) 772.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

**DANIELSON v. SCOTT.**

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)***1. SET-OFF AND COUNTERCLAIM (§ 41\*)—PARTIES—MUTUALITY—PARTNERSHIP.**

The purchaser of a stock of merchandise from a partnership agreed to pay certain notes and an account owed by the firm as part of the price. Afterwards he procured the notes to be indorsed and the account to be assigned to him. In further payment of the price, he gave to one of the partners, who owned all the property of the firm, his note. When sued by the payee upon this note, the purchaser counterclaimed upon the firm notes and account which had been transferred to him. *Held*, the individual partner was entitled to the benefit of the purchaser's promise to the firm to pay the firm indebtedness upon which the counterclaim was based.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 76-79, 81; Dec. Dig. § 41.\*]

**2. DEFECTS IN PLEADINGS—SUBSTANTIAL RIGHTS NOT AFFECTED.**

Certain defects in the pleadings and proceedings considered, and *held* to be without prejudice to the substantial rights of the complaining party.

*(Additional Syllabus by Editorial Staff.)***3. PLEADING (§ 176\*)—REPLY—ADMISSIONS.**

Under Code Civ. Proc. § 134 (Gen. St. 1909, § 5727), providing that no variance between the allegations in a pleading and the proof is material, unless it have actually misled the adverse party to his prejudice, the fact that a reply made a denial in the copulative form which was consequently pregnant with one or more admissions was immaterial, where the referee compelled the parties to resort to their proof exactly as if the reply were of good character.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 343, 345-353; Dec. Dig. § 176.\*]

**4. PLEADING (§ 388\*)—VARIANCE—MATERIALITY.**

Under Code Civ. Proc. § 134 (Gen. St. 1909, § 5727), a reply speaking in the name of a firm, and proof that one of the partners owned all the property and effects which were delivered to the defendant, is not a fatal variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305-1308; Dec. Dig. § 388.\*]

Appeal from District Court, Cheyenne County.

Action by Deroy Danielson against Lincoln R. Scott. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, Colo., for appellant. J. L. Finley, of St. Francis, for appellee.

**BURCH, J.** The firm of Whisnant & Danielson was engaged in the retail hardware and implement business at Idalia, Colo. Danielson owned all the property, and Whisnant managed the business for a share of the profits. The firm sold out to Scott. In part payment of the price Scott turned over to Danielson two promissory notes held by

Scott, aggregating \$1,400. Afterwards Scott took up these notes, and substituted for them his own note for \$1,400. When it fell due, he failed to pay, and Danielson sued him. When Whisnant & Danielson sold out, they were indebted to the Moline Plow Company on three promissory notes for \$339 each and to the International Harvester Company of America on an account for \$454. As part of the consideration for the Whisnant & Danielson sale to him Scott agreed to satisfy this indebtedness and afterwards did so. The notes, however, were indorsed, and the account was assigned to Scott, and he set them up as a defense to Danielson's cause of action. The cause was referred to a referee for trial. An extended hearing followed, in which all the dealings and relations of the parties were thoroughly investigated, including a number of collateral matters.

As a result the referee made the following findings of fact:

"From the testimony introduced I find:

"First. That on the 22d day of May, 1909, at the time of the commencement of this action, the plaintiff was the owner and holder of the note set out in the petition as Exhibit A, and that there was due thereon to the plaintiff from the defendant the sum of \$1,400, with interest at the rate of 10 per cent. per annum from May 10, 1908.

"Second. I find that the notes and account set out in the answer of the defendant as offsets against the notes sued by the plaintiff were never in fact owned by the defendant or purchased by him, but at the time the same were taken up by him, as claimed, they were thereby paid and discharged by the defendant, pursuant to a valid existing agreement of the defendant to pay and procure a discharge of liability on the part of the plaintiff on all of the items so pleaded as set-offs.

"Third. That on January 7, 1908, the plaintiff and Chas. Whisnant sold and delivered to the defendant a certain stock of merchandise, goods, notes, and accounts, and as a part payment of the purchase price thereof the said defendant agreed to pay the said notes and accounts pleaded as set-offs in the manner and the form which he afterwards did pay the same.

"Fourth. That the plaintiff ought to have and recover judgment against the defendant for the sum of \$1,400, with interest thereon at the rate of 10 per cent. per annum from the 10th day of May, 1908, and the costs of this action."

These findings were approved by the district court, and judgment was rendered accordingly. Scott appeals.

[3] The reply undertook to deny the purchase of the notes and of the account by the defendant and the indorsement of the notes and the assignment of the account to him. The denial, however, was in the copulative

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

form, and consequently was pregnant with one or more admissions. The subject was presented to the referee, who ruled against the defendant, and held the denial to be sufficient to raise all the issues contemplated by the plaintiff. It is strenuously insisted that the judgment should be reversed because of this ruling. A very learned brief and a very logical and discriminating oral argument submitted on behalf of the defendant make it clear that the plaintiff was guilty of a breach of good form in introducing such a reply to the files. Since, however, the referee compelled the parties to resort to their proof exactly as if the reply were of good character, and since all phases of the rights and liabilities of the litigants have been investigated and determined as if upon issues properly framed, the court is constrained to give some consideration to the merits of the controversy. When the defendant remitted the money due them to the Plow Company and to the Harvester Company, he was merely carrying out his agreement to pay the notes and account, and thereby pay for the property which he received from the plaintiff. Consequently in his hands the notes and account were discharged obligations of Whisnant & Danielson and of Danielson as a member of that firm. Whether or not the forms of the pleadings were such as to define with accuracy the matters upon which proof was necessary is no longer of consequence. Full proof has been made and the court is obliged to ignore defects in the pleadings which do not affect the substantial rights of the adverse party. Code Civ. Proc. § 134 (Gen. Stats. 1909, § 5727).

[4] The reply spoke in the name of Whisnant & Danielson, a partnership. As already indicated, the proof was that Danielson owned all the property and effects of the firm which were sold and delivered to the defendant. It is confidently asserted that there is a fatal variance between the pleadings and the proof. Here, again, the court is prevented from recognizing technicalities in opposition to substance and justice. The statute reads as follows: "No variance between the allegations, in a pleading, and the proof is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just." Code Civ. Proc. § 134 (Gen. Stats. 1909, § 5727). The defendant did not invoke this statute or comply with it. The record shows clearly enough that the defendant was neither misled nor prejudiced, and a formal amendment of the reply must be regarded as

waived, if, indeed, the whole case considered, the reply needed amendment.

The certainty and sufficiency of the reply are challenged in some other particulars, but the defects pointed out are of less gravity than those which have already been considered. Probably the most effective way of reaching such defects would have been by motion made before the cause was referred.

[1] It is asserted that the second finding of the referee is not supported by the evidence, and that as a consequence the plaintiff must fail because he cannot set up the defendant's contract with the partnership to pay the partnership debts as a defense to the plaintiff's individual liability on those obligations. Neither proposition is sound. It is not necessary to recite the evidence warranting the inference that the defendant paid the debts of the partnership, as he agreed to do, and did not buy them. But, conceding the fact to be that he did buy them, the plaintiff is entitled to the benefit of the defendant's promise to pay them. The general rule is that one of two joint contractors cannot alone enforce a joint contract against the party with whom they contracted, but the rule has no application to the facts of this case. By statute the liability of the firm Whisnant & Danielson to the Plow Company and to the Harvester Company was also the several liability of each partner. Gen. Stats. 1909, § 1641. The promise of Scott to discharge this liability was a promise made for the benefit of each partner who might be called upon to pay. The plaintiff was a privy to the consideration for the promise, in fact furnished it, and he has a clear, individual, legal right to its performance by the defendant. In the case of *McKinnon v. Palen*, 62 Minn. 188, at page 192, 64 N. W. 387, at page 389, a partner secured a partnership debt by a mortgage upon his individual property. In an action to foreclose the mortgage he sought to avail himself of items of damage accruing to the partnership, to reduce the debt secured by the mortgage. The court said: "Plaintiff contends that because none of these items of damages accrue to defendant in his individual right, but all of them accrue to him and Wichterman in their joint or partnership right, therefore defendant cannot recoup them in this action, which is against him alone. The contention is not well founded. While this action is against defendant alone, it is for a partnership debt, and he has a right to avail himself of any defense of which the partners would have a right to avail themselves if the suit were against both of them." This rule is founded upon common justice (*Seaman v. Slater* [C. C.] 49 Fed. 37, 40), and prevents a multiplicity of actions to reach the same ultimate result.

The judgment of the district court is affirmed. All the Justices concurring.

**JOHNSON v. CONNELLY**, County Superintendent.

(Supreme Court of Kansas. Feb. 8, 1913.)

(*Syllabus by the Court.*)

**MANDAMUS (§ 79\*)—SCHOOLS AND SCHOOL DISTRICTS (§ 130\*)—COUNTY SUPERINTENDENTS—INDORSEMENT OF TEACHERS' CERTIFICATES.**

Section 7495 of the General Statutes of 1909, which provides that the county superintendent of public instruction "may" indorse unexpired teachers' certificates regularly issued in other counties, when presented to him, imposes a duty upon him and creates a corresponding right in the holder of such certificate to have the same indorsed. Unless valid reasons exist for withholding his indorsement, his duty is imperative; and upon his arbitrary refusal to perform the duty mandamus will lie to compel performance.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79; \**Schools and School Districts*, Cent. Dig. §§ 285, 286; Dec. Dig. § 130.\*]

Application by Rosa Johnson for a writ of mandamus to W. E. Connelly, County Superintendent of Schools. Motion to quash overruled.

Burch, Litowitch & Mason, of Salina, for plaintiff. Frank T. Knittle, H. C. Tobey, and R. A. Lovitt, all of Salina, for defendant.

**PORTER, J.** Rosa Johnson, the plaintiff, holds a teacher's certificate of the second grade, issued by the county board of examiners of Wabaunsee county July 1, 1911, authorizing her to teach school. On September 8, 1912, she sent her certificate, by mail, together with a fee of \$1, addressed to the defendant, who is county superintendent of public instruction of Saline county, and requested him to indorse the same, as provided by law. Not hearing from him, she went to see him and made the same request, which he refused, stating no reason for his refusal. She thereupon brought this action to compel him to perform the duty and to indorse the certificate. The cause is submitted upon defendant's motion to quash the alternative writ.

The contention of the defendant is that the statute providing for the indorsement by the superintendent of certificates from other counties imposes upon him a purely discretionary duty, and one which he may or not perform, as he sees fit. The statute reads: "No certificate shall be of force except in the county in which it is issued: Provided, that the county superintendent may indorse unexpired professional and first grade, second and third grade certificates issued in other counties, on payment of the usual fee of one dollar, which certificate shall thereby be valid in the county in which such indorsement is made for the unexpired term of the certificate. A certificate issued under this act may be revoked by the board of examiners on the ground of immorality or for

any cause that would have justified the withholding thereof when the same was granted." Section 7495, Gen. Stat. 1909.

The statute clearly imposes a mere ministerial duty upon the superintendent, which he may not arbitrarily refuse to perform. If the Legislature had intended to impose upon such officer the duty to inquire into the qualifications of the holder of such certificate to teach school, it doubtless would have used language indicating such a purpose. The certificate is issued, in the first place, by a board with discretion to pass upon the qualifications of the applicant, and when issued is conclusive upon superintendents in other counties, until some valid reason is shown to exist which would make the holder disqualified to become a teacher. The allegations of the writ are that the defendant, without condescending to state any reason, refused to perform a plain duty imposed upon him by the statute.

In *Jordan, Superintendent, v. Davis*, 10 Okl. 329, 332, 61 Pac. 1063, the Oklahoma court had occasion to construe a statute which is in substantially the same language as ours, except that it applies to first-grade certificates alone. The court there held the duty imposed upon the superintendent to be imperative. It was said in the opinion that the purpose of the law is to enable the holders of such certificates to teach school in any county by having their certificates indorsed by the county superintendent; that the law is for the benefit of the teacher, and not the superintendent; and the following language was quoted from the opinion of the Supreme Court of the United States in *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419, where the word "may" in a statute was held to impose an imperative duty: "What they are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depository to meet the demands of right. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

In the Oklahoma case it was expressly stated that no objection was made to the teacher or to her certificate; that the county superintendent stood upon his right to refuse on the ground that the law does not compel him to indorse. In the case at bar the facts recited in the alternative writ and confessed by the motion show an arbitrary refusal to perform the duty. Being asked what his reasons were, the superintendent refused to state any. It is obvious that valid grounds might exist which would justify a county superintendent in refusing to enforce a certificate; but where the certificate had

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been regularly issued it is prima facie valid, and the superintendent may not arbitrarily refuse his indorsement. The statute imposes a duty upon him and creates a corresponding right in the holder of the certificate to have it indorsed. Unless valid reasons exist for withholding his indorsement, his duty is imperative.

The motion to quash is overruled. All the Justices concurring, except BURCH, J., who did not sit.

### ELLIS v. WOODRUFF et al†

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

#### 1. TRUSTS (§ 182\*) — CONSTRUCTION — RIGHT TO POSSESSION OF PROPERTY.

The owner of a stock of merchandise, store furniture, and fixtures, sold the same to two purchasers, who jointly executed promissory notes for the purchase price. At the same time a combined bill of sale and contract was executed between the purchasers, which recited the amount owing by the purchasers to the seller, evidenced by notes of even date with the contract; also, that the purchasers "have agreed to apply the net proceeds from sales from said stock and all other goods put into said stock toward the payment of said notes. It is therefore agreed that Miss — be appointed trustee to receive all moneys coming in from sales of said stock. \* \* \*". Then follows an agreement as to how the money shall be applied, where deposited, etc. Nothing, however, is said in this contract in reference to the possession of the property sold. Whenever the third person is referred to therein it is as "trustee." *Held*, that the instrument did not vest the right of possession of the property in the third person or give her a lien thereon, but simply made her a trustee to receive and apply the money taken in for retail sales or from sales in bulk as directed thereby.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 236; Dec. Dig. § 182.\*]

#### 2. NO ISSUE OF FACT PRESENTED.

No issue of fact is presented by the pleadings in this case.

(Additional Syllabus by Editorial Staff.)

#### 8. CONTRACTS (§ 178\*)—CONSTRUCTION—QUESTION OF LAW OR FACT.

The interpretation and construction of writings is for the court, and not within the province of the jury, and is a question of law, and not of fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 178.\*]

Appeal from District Court, Greenwood County.

Action by E. S. Ellis against M. L. Woodruff and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Howard J. Hodgson, of Eureka, for appellants. Ellis & Yale, of Kansas City, Mo., and Clogston & Clogston, of Eureka, for appellee.

SMITH, J. George D. Ragsdale sold a stock of merchandise, store furniture, and

fixtures to H. B. Cobban and J. H. Beach, and evidenced the transaction by the following contract: "This agreement made and entered into this 18th day of April, 1910, witnesseth: That, whereas, H. B. Cobban and J. H. Beach, herein called parties of the first part have purchased the stock of general merchandise at Eureka, Kansas, known as 'The Cash,' from Geo. D. Ragsdale, herein called party of the second part, and whereas, said parties owe the said second party the sum of \$12,000, evidenced by notes of even date herewith, and whereas, said first parties have agreed to apply the net proceeds from sales from said stock and all other goods put into said stock toward the payment of said notes: It is therefore agreed that Miss Gertrude Miller be appointed trustee to receive all moneys coming in from sales of said stock and to pay first from said receipts all necessary running expenses of said stock and pay for all goods purchased by said first parties put into said stock, as bills come due, and pay the balance to the said second party to apply on said notes, and said Gertrude Miller is hereby constituted and appointed trustee for said purpose. It is agreed, however, that should the net proceeds at any time fail to pay said notes, as they become due, then the said trustee shall apply all the proceeds, except expenses, coming into her hands as such trustee toward payment of all notes past due when requested to do so by the said party of the second part, or his assigns, in writing. Said trustee shall deposit all moneys received by her as such trustee in some bank in Eureka, Kansas, and all checks shall be countersigned by H. B. Cobban, or J. H. Beach, or their authorized agent. And it is further agreed that should the said first parties sell all of said stock, or any part thereof, in a lump the said trustee herein appointed shall receive the proceeds of such sale, or enough thereof to pay the balance on said notes and shall pay said amount to the said party of the second part. The authority herein vested in said trustee shall exist until all of said notes are paid and shall then cease. In case the said Gertrude Miller at any time shall refuse or fail to act as such trustee, or the parties hereto desire to change the trustee, then another trustee may be appointed by the consent and agreement of both parties hereto. And in the case of a failure to agree then the cashier of the citizens' National Bank of Eureka, Kans., acting at that time, shall act as such trustee. H. B. Cobban. J. H. Beach. Geo. D. Ragsdale." It is conceded that Helen Williams was afterwards appointed trustee in place of Gertrude Miller, and succeeded to whatever rights and powers the latter held by the terms of the contract. Cobban and Beach, in turn, sold the stock of merchandise, store furniture, and fixtures to M. L. Woodruff for the consideration of \$1

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 15, 1913.

and the assumption of the indebtedness to Ragsdale and other accounts not to exceed \$1,000.

The appellee thereafter brought suit against Woodruff for \$475 and interest alleged to be due upon a promissory note executed by Woodruff, and procured an attachment on the property bought from Cobban and Beach. A receiver was appointed to take charge of the property attached. Ragsdale filed an interplea, alleging that seven notes for \$1,000 each, Exhibits 1, 2, 3, 4, 5, 6, and 7, besides interest, had become due to him, which were executed to him by Cobban and Beach as a part of the purchase price of the property, and also set forth a copy of the contract between himself and Cobban and Beach, heretofore set forth; also, that by the terms of said contract the stock of merchandise, store furniture, and fixtures were to be held in trust by Gertrude Miller to secure such indebtedness; that such contract was filed for record in the office of the register of deeds of Greenwood county April 20, 1910; that Woodruff, as a part of the purchase price of the property, had assumed the payment, and had paid all of said notes except one note for \$1,000; that on January 20, 1910, and prior to the appointment of the receiver in this action, he commenced an action in the district court of Greenwood county against Woodruff, Cobban, and Beach, and caused all the property involved in this action and now in the hands of the receiver to be attached therein; that by reason thereof he obtained a first and prior lien on all of said property. He prayed judgment for \$1,000 and interest from April 18, 1910, and costs, and that he be decreed a first lien upon all the property attached in this action; also, that he be decreed to be entitled to the proceeds of the sale of such property by the receiver and for all further equitable relief. Helen Williams also intervened by leave of court, and alleged that she had been duly appointed to succeed Gertrude Miller under the contract between Cobban and Beach with Ragsdale. She also alleged the facts substantially as pleaded by Ragsdale. She prayed for judgment against the plaintiff for the value of the store furniture and fixtures, and that the receiver be ordered to pay to her as trustee the proceeds of the sale of said furniture and fixtures. M. L. Woodruff answered, admitting the facts as alleged in the petition. Thereupon the plaintiff moved for judgment in his favor upon the pleadings, which motion was sustained. Judgment was rendered for plaintiff against Woodruff for \$553.35, and plaintiff was adjudged a first

lien on the property attached and the proceeds thereof. The receiver was ordered to pay to plaintiff the proceeds of the sale of the property sold by him less certain costs, attorney's fees, and compensation for the receiver, and execution was awarded for any balance remaining. Ragsdale and Williams were adjudged to pay the costs of their respective interpleas. A motion for new trial was overruled, and Ragsdale and Williams appeal.

[1] The principal contention of appellant is that the contract entered into by Cobban and Beach, of the first part, and Ragsdale, of the second part, invested Gertrude Miller, and, upon her resigning the trust, her successor, Helen Williams, with the possession and right of possession of the property described therein and through such trustee, gave Ragsdale a lien upon the property to secure the payment of the unpaid purchase price of the property. Such is not the effect of the instrument. It simply constituted Gertrude Miller, or her successor, a trustee to receive payment for the merchandise sold in the course of trade or of such of the property as might be sold in bulk, and to dispose of the money so received in the manner prescribed in the contract. The contract expressly recognized the right of Cobban and Beach to sell the whole or any part of the stock in a lump as they did sell the whole to Woodruff. The property was not shown to be incumbered by mortgage or other lien at the time of the levy of appellee's attachment thereon. True, Ragsdale alleged that he procured an attachment to be levied thereon prior to the appointment of the receiver in this action, but this does not constitute an allegation of a prior attachment lien. Time may have elapsed between the levy of plaintiff's attachment and the appointment of the receiver, during which time Ragsdale's attachment may have been levied.

[3] The other issues of fact pleaded by appellants are based upon the interpretation of, or upon inferences drawn from, the contract between Cobban and Beach and Ragsdale. The interpretation and construction of writings is for the court, and not within the province of the jury—questions of law, and not of fact.

We conclude that no issue of fact to be tried by the court or a jury was presented by the pleadings, and that the court did not err in sustaining the motion for judgment on the pleadings nor in rendering judgment for the plaintiff.

The judgment is affirmed. All the Justices concurring.

## CLARK v. MORRIS et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

*(Syllabus by the Court.)*

## 1. MORTGAGES (§ 226\*)—RIGHTS OF PARTIES—MEASURE OF DAMAGES.

The owner of land executed a deed absolute in form, but intended it as a mortgage to secure the payment of a loan from the grantee, and the grantee in violation of the agreement conveyed the land to a bona fide purchaser, and thereby deprived himself of the power to reconvey it to the grantor upon the payment of the debt. The grantor had no notice of the sale, or of the rights acquired by the bona fide purchaser in the land, until some time after the sale was made, and later the grantor tendered full payment of the debt secured by the deed and requested a reconveyance of the land, but both tender and request were refused. In an action brought by the grantor to redeem the land, or for the damages he had sustained in case redemption could not be had, it is held that the measure of damages for which the grantee is liable was the value of the land at the time that the tender of payment and demand for reconveyance of the land were refused, less the amount of the debt secured by the deed, and not its value at the time that the sale was wrongfully made by the grantee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 457, 611-617; Dec. Dig. § 226.\*]

## 2. APPEAL AND ERROR (§ 301\*)—PRESENTING QUESTION IN TRIAL COURT—MOTION FOR NEW TRIAL.

A ruling excluding evidence is not open to review, unless such evidence is produced on the motion for a new trial by affidavit, deposition, or oral testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

Appeal from District Court, Sedgwick County.

Action by Charles W. Clark against Walter Morris and another. From the judgment, defendant Walter Morris appeals. Affirmed.

H. C. Sluss, of Wichita, for appellant. Brubacher & Conly, of Wichita, for appellee.

JOHNSTON, C. J. This was an action to redeem certain city lots which had been mortgaged by Charles W. Clark to secure the payment of \$150 borrowed from Walter Morris on October 17, 1906. The instrument given as security was in form an absolute deed, but was intended as a mortgage. After this transaction Clark purchased the property at a subsequent tax sale, and the certificate then obtained was assigned to Morris as additional security. The borrowed money was to be paid in small installments at fixed times, but Clark failed to make the payments at the times stipulated. On April 9, 1909, Morris sold the lots to Philip Schott, who had no notice of the rights of Clark, or that he was in fact the owner of the lots, and by this sale Morris disabled himself to reconvey the lots to Clark upon the payment of the debt. The writings evidencing the

sale to Schott were not recorded, and Clark had no notice that Schott had purchased the lots until the writings were produced at the trial of this action. Before the sale to Schott, Morris, with four men, went to the lots one morning before daylight and put up a post and single wire fence around them. Clark discovered the action of Morris before the fence was finished, and in an interview Morris informed Clark that he had concluded to take possession of the lots. Morris testified that Clark then consented that he should take possession of the lots and that they should be regarded as his property. On the other hand, Clark's testimony is that he told Morris that because of sickness in his family he had been unable to make the payments as agreed upon, and that he did not know just what his legal rights were, but whatever they were he was going to stand on them. He denied positively that he surrendered possession of the property or disclaimed ownership in the lots, and the fact that he tore down the fence on the same morning and continued to use the property as he had previously done tends to support his testimony. On June 22, 1910, Clark tendered to Morris the full amount of the borrowed money, with the accrued interest, and demanded that he convey the property back to Clark in accordance with the agreement, but both tender and demand were refused. On the trial Morris claimed to be the owner of the lots, and that Clark had voluntarily surrendered possession of them, and at the same time had disclaimed any interest in them. The trial court found in favor of Clark, holding that the deed was intended to be, and was in fact, a mortgage, and that as against Morris he had a right to redeem; but it was also found that Schott, who had been made a party to the action, was a bona fide purchaser of the lots, and therefore redemption could not be enforced as against him.

[1] The first and principal ground assigned as error is that a wrong measure of damages was applied in fixing the liability of Morris. The court decided that he was liable for the value of the lots as they were when the tender of payment was made and the reconveyance of the lots was refused, while, on the other side, it was contended that a cause of action arose when Morris sold the property and placed it beyond his power to reconvey, and that its value at the time of sale was the measure of recovery. In a proceeding of this kind equitable considerations govern, and the measure of damages must depend largely upon the particular circumstances of each case. It appears that the contract of sale from Morris to Schott was not recorded, and that Clark had no knowledge of the contract, or of the sale to Schott, until the trial was begun. Clark had a right to suppose that what was intended to be a mortgage would be treated as a mortgage



by both, and that the rights of each would be finally measured by the terms of the agreement. The transfer of the land in violation of their agreement operated as a fraud upon Clark. In some of the cases it is held that, if there is no actual fraud, the grantee is required to account for the full value of the land at the time he sold it; while other authorities hold that he is only required to pay the amount actually received for the land over and above the debt secured by the deed. In still others it is held that the measure of the owner's recovery is the utmost value of the property at the time of the trial, less the amount of the mortgage debt. 27 Cyc. 1033, and cases cited. In *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799, where the owner of land gave an absolute deed to secure a loan from the grantee, and afterwards transferred the title to a bona fide purchaser, it was held that the measure of the grantor's right to recover was the value of the land at the day of trial, less the debt secured and interest. In *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, Chancellor Kent ruled that where land or other property is held in trust by another, who sells the same in violation of his trust, he "must answer for the value, not as it existed at the time of the sale, for that would not be an indemnity, and would be too great an indulgence to fraudulent breaches of trust, but for the value of the land as it existed at the commencement of the suit, if not at the time of taking the account by the master." Page 117.

In *Burdick v. Seymour*, 39 Iowa, 452, an instrument conveying land was defectively recorded, and the grantor, to defeat the first conveyance, deeded the property to another, and thereby transferred a good title to it, and it was held that the measure of damages was the highest value of the land at any time between the purchase by the first grantee and the commencement of his action to recover damage. It was further held that the liability was not on account of the breach of warranty, but because of the fraud of the grantor in making the transfer. In *Elisha Gibbs v. Reuben Champlin*, 3 Ohio, 335, there was a sale of land, and the vendor refused to convey because the first installment of the purchase price was not paid when it was due. The vendee tendered the full amount of the purchase money when the second installment became due, but the vendor had sold the property to a third person, and had disabled himself to make a conveyance to the vendee. The court held that as the vendor had treated the contract with the vendee as a continuing one, and had taken no steps to relieve the vendee from liability on the contract, it was still binding, and, having transferred the property to an innocent purchaser, he was liable in damages to the vendee, and the measure of damages was

"the difference between the purchase money and the value of the unimproved lot at the time the party entitled himself to a conveyance by tendering the purchase money." Page 337. Other authorities to the same effect are *May v. Le Claire*, 78 U. S. (11 Wall.) 217, 20 L. Ed. 50; *Meehan v. Forrester et al.*, 52 N. Y. 277; *Gibbs v. Meserve*, 12 Ill. App. 613; *Linnell v. Lyford*, 72 Me. 280; *Johnson v. McMullin*, 8 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670.

Some of the authorities referred to in 27 Cyc. 1033, hold that the value should be ascertained as of the time the sale of the property is made, and where there is notice of the sale and freedom from fraud such a rule might be deemed equitable. In view of the circumstances of this case, the rule of the trial court, that damages should be measured by the value of the lots when Clark tendered the amount of the debt and entitled himself to a reconveyance of the property, appears to be equitable and well within the authorities.

[2] Complaint is made as to the exclusion of evidence from the jury as to the surrender of possession and the disclaimer of interest in the property by Clark, but the ruling is not open to our consideration. By section 307 of the Civil Code (Gen. St. 1909, § 5901) a party who wishes to avail himself of a ruling excluding offered evidence as error is required to produce such evidence on the motion for a new trial by affidavit, deposition, or oral testimony of the witnesses. This was not done, and hence that ruling, whatever it may have been, cannot be regarded as a ground for reversal. It might be said, however, that testimony upon this subject was received in evidence in the trial, which was had before the jury was called. At the end of that trial the court appears to have determined every question in the case except as to the amount of damages sustained by Clark, or, in other words, the value of the property when payment of the debt was tendered by Clark. In the testimony then received, including that relating to an alleged disclaimer of ownership, the court determined that Morris held no more than a mortgage lien on the property, and that as against him Clark had a right of redemption. There was testimony, too, before the court at that time, in regard to the value of the lots, and the court might very well have gone farther, and made a final disposition of the case, deciding for itself the value of the property and the amount of recovery. However, the court impaneled a jury and received testimony on the question of value at the time of Clark's tender, and the jury's finding was approved by the court. There was no occasion to resubmit the questions previously determined by the court, and, assuming that the testimony as to the voluntary surrender of possession and the disclaimer of interest in the lots was then admissible, the

question of its rejection, as we have seen, is not preserved for review.

The judgment of the district court will be affirmed. All the Justices concurring.

STATE ex rel. DAWSON, Atty. Gen., v.  
DAVIS et al.

(Supreme Court of Kansas. Feb. 8, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 860\*)—INHERITANCE TAX—  
CONSTRUCTION OF STATUTE.

Where a statute is open to either construction, one preventing the exaction of an inheritance tax upon the same property in two jurisdictions should be favored over one having the contrary effect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1675; Dec. Dig. § 860.\*]

2. TAXATION (§ 867\*)—INHERITANCE TAX—  
CONSTRUCTION OF STATUTE.

A provision of a statute that an inheritance tax (otherwise collectible upon property situated in this state, owned by the resident of another state at the time of his death) shall not be exacted where a similar tax has been paid in the state of the decedent's residence, provided the laws of that state contain a like exemption, applies in any case where no such tax would be imposed by such laws upon similar property there situated, owned by a resident of Kansas at the time of his death, however much the two exemptions may otherwise differ.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1681-1684; Dec. Dig. § 867.\*]

3. TAXATION (§ 867\*)—INHERITANCE TAX—  
"LIKE EXEMPTION."

The Kansas statute provides in substance that ordinarily an inheritance tax shall be collected with respect to property in this state owned by the resident of another state at the time of his death; but that, if a similar tax has been paid in such other state, it will not be exacted here, provided a "like exemption" is made by the laws of such other state in favor of estates of citizens of this state. The laws of New York provide in substance that, upon the death of a nonresident of that state owning property having a situs there, an inheritance tax shall be collected in all cases upon such of it as is tangible, and in no case upon any of it that is intangible, including in that term stock of a corporation. *Held* that, where a resident of New York dies owning stock in a Kansas corporation, the fact that an inheritance tax has been paid thereon in New York is a bar to the collection of one here.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1681-1684; Dec. Dig. § 867.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4159, 4160.]

Appeal from District Court, Shawnee County.

Action by the State, on the relation of John S. Dawson, as Attorney General, against Frank H. Davis and others, as administrators of the estate of Edwin Hawley. From a judgment for defendants, plaintiff appeals. Affirmed.

Jno. S. Dawson, Atty. Gen., in pro. per. Ferry, Doran & Dean, of Topeka, for appellees.

MASON, J. A resident of New York died while owning stock in a corporation organized under the laws of Kansas. Action was brought in this state against his administrators to compel the payment of an inheritance or succession tax upon the transfer of the stock. Judgment was rendered in their favor, and the state appeals.

[3] Where a resident of another state dies owning property in Kansas, our statute ordinarily requires the payment of a succession tax here. If, however, the laws of the state of his residence impose a tax of like character and of equal or greater amount, which has actually been paid, no payment is required here, provided the laws of that state make "a like exemption \* \* \* in favor of estates of citizens of this state." Gen. Stat. 1909, § 9266. Shares of stock are regarded as situated in the state of incorporation. 37 Cyc. 1562. The stock here involved was subject to a tax of like character in New York, which was duly paid, to an amount greater than that claimed here. Upon the death of a nonresident of that state owning property there, whether or not it is liable to a succession tax elsewhere, a tax is collected on account of the tangible property, but none is exacted with respect to that which is intangible, including corporate stock. The sole question in dispute is whether this condition of the New York law amounts to "a like exemption" to that of the Kansas statute.

The section of the Kansas statute, on the interpretation of which the controversy turns, reads as follows: "Property of a resident of the state, which is not therein at the time of his death, shall not be taxable under the provisions of this act if legally subject in another state or country to a tax of like character and amount to that hereby imposed: Provided, such tax be actually paid, guaranteed or secured in such other state or country. If, however, such property be legally subject in another state or country to a tax of like character but of less amount than that hereby imposed, and such tax be actually paid, guaranteed or secured as aforesaid, such property shall be taxable under this act to the extent of the excess for which such property would otherwise be liable hereunder over the tax thus actually paid, guaranteed or secured. Property of the estate of a nonresident decedent, which is situated in the state at the time of his death, if subject to a tax of like character with that imposed by this act by the law of the state or country where decedent had his residence, shall be subject only to such portion of the tax hereby imposed as may be in excess of such tax imposed by the laws of such other state or country: Provided, that a like exemption is made of such other state or country in favor of estates of citizens of this state, but in such cases no exemption shall be allowed un-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

til the tax provided for by the law of such other state or country shall be actually paid, guaranteed or secured in accordance with law." Gen. Stat. 1909, § 9266.

The first part of the section relates to the taxing of property in other states owned by a resident of this state at the time of his death. If a succession tax is collected in the state where the property is located, it is waived here, irrespective of what would be the rule of the other state if the conditions were reversed. This provision is for the benefit of residents of this state. Whether other states legislate in a similar way for the advantage of their citizens does not affect the matter. The second portion of the section relates to the taxing of property in this state owned by a resident of another state at the time of his death. If a succession tax is collected in the state of the decedent's residence, it is waived here only in case the laws of that state make a like exemption in favor of the estates of citizens of this state.

The New York statute relating to an inheritance tax, so far as here important, reads as follows: "A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, \* \* \* in the following cases: \* \* \* (1) When the transfer is by will or by the intestate laws of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state. (2) When the transfer is by will or intestate law, of tangible property within the state, and the decedent was a nonresident of the state at the time of his death." 3 Laws of New York 1911, c. 732, § 1.

This statute defines "intangible property" as including stock in a corporation. Its operation is not affected by the laws of any other state. Upon the death of a resident of New York a tax is imposed upon all of his intangible property, wherever located, and upon such of his tangible property as is there situated; but none is exacted with respect to his tangible property outside of the state. Upon the death of a nonresident of the state of New York owning property there (and this is the phase of the law the effect of which we are now required to determine), a tax is exacted only with respect to such of it as is tangible. A state may impose a tax upon the intangible property of a nonresident which has a situs within its borders, notwithstanding a similar tax has been lawfully charged and collected elsewhere. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *People v. Union Trust Co.*, 255 Ill. 168, 99 N. E. 377. The state of Kansas declines to exercise this power against the resident of a state which grants a similar exemption as to citizens of this state. The state of New York, with respect to property having a situs there, owned at the time of his death by a nonresident, declines in any

event to exercise its right to impose a tax where the property is intangible, but in all cases exercises the right where it is tangible. Does this amount to the granting of a like exemption to that of the Kansas statute, for the purpose of the present case? The exemptions are not wholly alike, yet they have something in common. They are alike in the sense that if the conditions were reversed—if a resident of Kansas had died owning stock in a New York corporation—no tax would be exacted by the laws of that state. The New York exemption is more liberal than that of Kansas, in that its benefits are not restricted to the residents of states which reciprocate the comity; it is less liberal, in that it does not extend to tangible property.

[1] The meaning intended by the Legislature is not entirely clear. There is room for construction. The situation is peculiarly one for the invocation of any just rules of interpretation which are applicable. Several courts have held that the language of a statute imposing a succession or inheritance tax is to be strictly construed against the government, and liberally in favor of the taxpayer. 37 Cyc. 1556; 27 A. & E. Encycl. of L. 340; *Blakemore & Bancroft on Inheritance Taxes*, § 32; note, 127 Am. St. Rep. 1052. As said in the note just cited, no good reason seems to be given for this rule, and none is apparent, except perhaps to the extent that a purpose to require an individual to contribute to the public expense ought to be expressed with reasonable clearness. There is force, however, in the suggestion made in behalf of the defendants that double taxation—the imposition of a like tax with respect to the same property in each of two jurisdictions—although not repugnant to any principle of constitutional law, is so contrary to natural justice that a purpose to exact it ought not to be imputed to the Legislature in any doubtful case. The desire to avoid double taxation is evident in this act as well as in those of most states that have legislated in the matter. As said in *Dos Passos on Inheritance Tax Law* (2d Ed.) p. 187: "On grounds of policy and comity, \* \* \* the rule has been not to impose what would be, in effect, a double tax on nonresidents' estates, where it can possibly be avoided."

[2] We think the spirit of the Kansas act is that, where property in this state owned by a nonresident at the time of his death has been subjected to an inheritance tax in the state of his residence, a similar tax ought not to be required here, except in cases where if the conditions were reversed, and a nonresident of this state had died owning the same character of property in the other state, a payment there would be exacted. That spirit is effectuated by considering that the exemption of the Kansas statutes operates for the benefit of the estate of a resi-

dent of any other state, the law of which would not exact an inheritance tax with respect to similar property in that state, owned by a resident of Kansas at the time of his death, no matter how dissimilar the statutes may otherwise be. In other words, the exemption made by the laws of another state is to be regarded as like that of the Kansas statute, in any circumstances in which, if the conditions were reversed, it would have a like operation.

The section above quoted from the Kansas act is substantially the same as one found in the Massachusetts statute of 1907 (chapter 563, § 3). This was amended in 1909 (chapter 490, pt. 4, § 3) and in 1911 (chapter 502, § 1), but not so as to change the effect of the reciprocal provision. We are not aware of any judicial interpretation of its language, but the authors of one of the text-books already cited express the opinion that the statute of New York brings that state within its operation. Blakemore & Bancroft on Inheritance Taxes, pp. 483, 563. At page 483 it is said: "The Kansas statute contains the same reciprocal clause for avoiding double taxation that is found in Massachusetts. \* \* \* Property of a nonresident in Kansas, including stock wherever situated in a Kansas corporation, will not be taxed (except for the difference if Kansas rates are higher) if owned by a resident of a state which extends similar courtesies to residents of Kansas. Massachusetts, Maine, Vermont, and New York seem to be the only states that do so."

The judgment is affirmed. All the Justices concurring.

# ROOT v. CUDAHY PACKING CO.

(Supreme Court of Kansas. March 8, 1913.)

## (Syllabus by the Court.)

### 1. APPEAL AND ERROR (§ 1177\*)—REVERSAL—RENDITION OF JUDGMENT.

When a judgment is reversed because a demurrer to the plaintiff's evidence has been erroneously overruled, judgment for the defendant will be ordered if the plaintiff's evidence affirmatively establishes some fact or state of facts which precludes recovery. Otherwise the cause will be remanded for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.\*]

### 2. OPINION EVIDENCE.

The rule stated in the second paragraph of the syllabus of the original opinion adhered to.

On motion for modification of opinion. Overruled.

For former opinion, see 129 Pac. 147.

BURCH, J.—The defendant has filed a motion asking for a modification of the judgment of this court remanding the case for a new trial. The evidence in the case was considered, and it was held that the plaintiff

had failed to sustain the allegations of his petition, and that the defendant's demurrer to the evidence should have been sustained. The motion is for a direction to the trial court to enter judgment for the defendant.

[1] In many instances in which demurrers to evidence have been improperly overruled the court has, upon reversal, directed judgments to be entered. In all such cases the plaintiff by admission, proof, or otherwise, affirmatively established some fact or state of facts which precluded him from recovery, and a basis existed for a final judgment putting an end to the controversy. Where, however, the plaintiff merely fails to extend the proof sufficiently, it is impossible to say that no cause of action exists and there is no ground for entering a final judgment against him. It is conceivable that it might clearly appear in some case that the necessary proof could not be produced. In that event judgment might be ordered, but such a case would really belong to the class in which the plaintiff shows himself to be without cause of action. The court is not prepared to say that it is impossible for the plaintiff in this action to produce sufficient proof to go to the jury.

[2] The plaintiff has filed a petition for a rehearing on the ground that the rule stated in the second paragraph of the syllabus of the original opinion ought not to apply universally, particularly where complicated machinery is involved, because it would overwhelm the court with collateral issues. The syllabus begins with the words, "In this case." The rule applies whenever a subject has fairly passed beyond the domain of theory and into the domain of verification. The trial court can tell in any given instance whether or not it will necessarily be embarrassed by collateral issues and can require proof accordingly. A simple case illustrates the difference between theory and fact which the rule emphasizes. A man has his watch cleaned and repaired. Some days later he desires to know whether or not it is keeping time. He does not take the watchmaker's expert opinion upon the subject, considering the make of the watch, the adjustment of its parts, etc. He looks at the regulator and at his watch and sees as a matter of fact whether the watch has gained or lost time. Another simple case illustrates the application of the rule: Several self-binders have been sold by a dealer to farmers in his vicinity, which have been set up by the manufacturer's or seller's expert. The mechanism is quite complicated. Litigation arises in which it becomes important to know whether or not the principle upon which these binders are constructed results in too many missed bundles of grain. The theory of mechanical experts upon the subject is not the best evidence. Proof of the manner in which binders of that particular type actually worked will show the facts, and with the facts before it the ju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ry can say whether or not the mechanism is reasonably adapted to accomplish the results for which it was designed. In this case the plaintiff's own experts had the necessary experience and knowledge to enable them to tell how friction hoist elevators had demonstrat-

ed the principle of their construction. In the presence of demonstration, speculative opinion is very cheap.

The motion to modify the judgment is overruled, and the petition for a rehearing is denied. All the Justices concurring.

END OF CASES IN VOL. 129

# INDEX-DIGEST



## THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and  
Prior Reporter Volume Index-Digests

### ABANDONMENT.

See Appeal and Error, § 1078; Evidence, § 265; Husband and Wife, §§ 303, 304; Mines and Minerals, § 66; Principal and Surety, § 82; Railroads, § 227; Waters and Water Courses, §§ 32, 33, 151, 152.

### ABATEMENT AND REVIVAL.

See Assignments, § 24; Criminal Law, § 1070; Mandamus, § 19.

### II. ANOTHER ACTION PENDING.

§ 17 (Utah) Under Comp. Laws 1907, §§ 2962, 2966, relating to demurrers and answers, *held* that the pendency of another action between the parties, not shown on the face of the complaint, to be available in abatement must be set up in the answer.—Vance v. Heath, 129 P. 365.

### V. DEATH OF PARTY AND REVIVAL OF ACTION.

#### (A) Abatement or Survival of Action.

§ 54 (Cal.) At common law, an heir has no right of action for an injury to his ancestor.—Pritchard v. Whitney Estate Co., 129 P. 989.

#### (B) Continuance or Revival of Action.

§ 72 (Kan.) On the death of the plaintiff in an action on a foreign judgment, both parties being residents of Kansas, a revivor is properly had in the name of the Kansas executor, though an administrator has been appointed in the state where the judgment was rendered.—McLain v. Parker, 129 P. 1140.

A defendant who on the death of the plaintiff expressly consents to an order reviving the action cannot thereafter maintain that the revivor was void because not made in the name of the proper representative.—Id.

§ 77 (Kan.) Where plaintiff dies, and the action is revived in the name of his successor, the petition should be amended so as to allege the interest of the new party in issuable form.—McLain v. Parker, 129 P. 1140.

### ABSTRACTS.

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### ACCEPTANCE.

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### ACCIDENT.

See Exemptions, § 116; Homicide, §§ 17, 60.

### ACCIDENT INSURANCE.

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### ACCOMPLICES.

See Criminal Law, §§ 507, 511.

### ACCORD AND SATISFACTION.

See Payment.

### ACCOUNT.

See Action, §§ 38, 45; Appeal and Error, § 854; Executors and Administrators, § 533; Guardian and Ward, § 146; Limitation of Actions, § 32; Partnership, §§ 322-342; Reference.

### ACCOUNT STATED.

§ 18 (Kan.) In an action on an account stated, defendant may show under a general denial any fact destroying the cause of action, including payment of the debt claimed to be shown by the account stated.—Mayer Coal Co. v. Stallsmith, 129 P. 831.

### ACKNOWLEDGMENT.

See Frauds, Statute of, § 143; Taxation, § 766.

### II. TAKING AND CERTIFICATE.

§ 47 (Or.) Acknowledgment before president of grantee who was also the actual beneficiary of the deed *held* cured by *Seas. Laws* 1907, p. 330, § 1 (L. O. L. § 7154).—Clark v. Latourette, 129 P. 1043.

### III. OPERATION AND EFFECT.

§ 57 (Wash.) A typewritten paper, signed by decedent's widow in Bulgaria by mark, purporting to authorize complainant, as decedent's administrator to sue for his wrongful death, *held* not proved by foreign acknowledgment under Rem. & Bal. Code, §§ 8758, 8760, and inadmissible to show complainant's authority.—Koloff v. Chicago, M. & P. S. Ry. Co., 129 P. 398.

### ACTION.

See Abatement and Revival; Insane Persons; Quieting Title, § 27.

### III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 38 (Cal.App.) Where the main relief sought was the establishment of a partnership and an accounting, a prayer for an injunction and the appointment of a receiver in aid of the main relief did not involve a misjoinder of causes of action.—Doudell v. Shoo, 129 P. 478.

§ 45 (Kan.) In an action against a former guardian of certain minors for an accounting, allegations of fraud, waste, mismanagement, and wrongful appropriation of the minors' property did not render the petition objectionable for misjoinder of causes of action.—Charles v. Witt, 129 P. 140.

§ 53 (Wash.) Where a building was erected under an agreement to lease it for a term, but defendants refused to accept possession, only one right of action, which is for damages, arises; plaintiffs not being entitled to maintain separate actions for each installment of rent.—*Oldfield v. Angeles Brewing & Malting Co.*, 129 P. 1098.

§ 57 (Wash.) Rem. & Bal. Code, § 183, giving an action for death by wrongful act to decedent's "heirs and personal representatives," only creates one cause of action to be prosecuted in a single action by the heirs of personal representatives, so that separate actions brought by children for their father's negligent death were properly consolidated.—*Benson v. English Lumber Co.*, 129 P. 403.

## ADEQUATE REMEDY AT LAW.

See Specific Performance, § 5.

## ADJOINING LANDOWNERS.

See Boundaries; Dedication, § 65; Party Walls.

## ADJUDICATION.

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## ADMINISTRATION.

See Executors and Administrators.

## ADMISSION.

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## ADMISSIONS.

See Evidence, §§ 207-285; Pleading, § 129.

## ADOPTION.

See Evidence, §§ 158, 178.

§ 3 (Kan.) The amendment of the act concerning descent and distribution (Gen. St. 1909, § 2952) did not repeal or limit the rights conferred on an adopted child by the adoption act.—*Riley v. Day*, 129 P. 524.

§ 17 (Okl.) Where many years have elapsed since an adoption proceeding, and the records of the court had been destroyed, and the judge and the clerk thereof had died, testimony of a witness that he was present and heard the order of adoption and read it on the records, and evidence that the child lived from said time until the death of the adopting parent with him, and was recognized as his child, sustains a finding of adoption.—*Coombs v. Cook*, 129 P. 698.

§ 20 (Kan.) Under Gen. St. 1909, § 5066, a child legally adopted takes the name of the adopting parents, and is given the same personal rights as a natural child.—*Riley v. Day*, 129 P. 524.

§ 21 (Kan.) Under Gen. St. 1909, § 5066, a child legally adopted has the same rights of inheritance as a natural child.—*Riley v. Day*, 129 P. 524.

The words "living issue," as used in Gen. St. 1909, § 2952, providing for descent of property to children of decedent surviving him, and the "living issue" of any prior deceased child, mean living children, and an adopted child of a prior deceased daughter inherits a portion of the estate of such intestate through her adopting mother.—*Id.*

## ADVANCEMENTS.

See Wills, § 759.

## ADVANCES.

See Constitutional Law, § 296.

## ADVERSE CLAIM.

See Quietting Title, § 21.

## ADVERSE POSSESSION.

See Ejectment, § 24.

### I. NATURE AND REQUISITES.

#### (F) Hostile Character of Possession.

§ 82 (Colo.) Until a tax deed is recorded, it is not "color of title" within Rev. St. 1908, § 4090, providing that a person having color of title to vacant and unoccupied land shall acquire the legal title thereto by paying all taxes thereon for seven successive years.—*Marks v. Morris*, 129 P. 828.

#### (G) Payment of Taxes.

§ 93 (Colo.) Where less than seven years had elapsed between the first payment of taxes, by the holder of a void tax deed, and the bringing of suit against him for the land, the seven-year statute of limitations (Rev. St. 1908, § 4090) could not avail, though more than seven years had elapsed since the deed was recorded.—*Marks v. Morris*, 129 P. 828.

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 110 (Colo.App.) Evidence to show title by payment of taxes for seven years under claim of title held properly excluded where limitations were not pleaded as a defense.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 521.

## AFFIDAVITS.

See Appeal and Error, §§ 801, 542, 799, 936; Chattel Mortgages, § 97; Contempt, §§ 9, 40; Criminal Law, §§ 547, 548, 576, 1090; Judgment, §§ 159, 490, 951; Jury, § 31; Justices of the Peace, § 159; Replevin, § 25; Venue, § 58.

## AFFRAY.

See Homicide, § 17.

## AGE.

See Insurance, § 290.

## AGENCY.

See Principal and Agent.

## AGGRAVATION.

See Damages, § 83.

## AGRICULTURE.

§ 11 (Or.) Statutes conferring a lien on property for services being in derogation of the common law, one seeking to charge property of another with whom he has not contracted with a lien must show a strict compliance with the statute.—*Thornton v. Hallam*, 129 P. 1046.

A contractor going on land to perform services thereon for the owner does not acquire lawful possession within L. O. L. § 7439, giving to persons clearing land under contract with the owner or "person in lawful possession" a lien for their charges.—*Id.*

Under L. O. L. § 7439, creating a lien for services rendered in clearing land, no lien can be imposed on a particular tract for services rendered in clearing a different tract.—*Id.*

§ 15 (Or.) A complaint to enforce a lien for services rendered in clearing land held insufficient, where the description of the land did not close, and therefore did not constitute a description by metes and bounds or by legal subdivisions as required by L. O. L. § 7440.—*Thornton v. Hallam*, 129 P. 1046.

## AIDER BY VERDICT.

See Pleading, § 433.

**ALIENATION.**

See *Indiana*, § 27.

**ALIENS.**

See *Indiana*.

**ALIMONY.**

See *Divorce*, §§ 231-286.

**ALLOTMENT.**

See *Indiana*, §§ 3, 13, 15.

**ALTERATION OF INSTRUMENTS.**

See *Reformation of Instruments*.

**AMENDMENT.**

See *Appeal and Error*, §§ 390, 889; *Divorce*, § 104; *Indictment and Information*, §§ 156-161; *New Trial*, § 123; *Pleading*, §§ 236-267; *Statutes*, § 142.

**AMOUNT IN CONTROVERSY.**

See *Appeal and Error*, §§ 47, 51.

**ANIMALS.**

See *Carriers*, §§ 215-229; *Guaranty*, § 4; *Highways*, § 181; *Railroads*, §§ 113, 411, 441; *Sales*, §§ 166, 413.

**ANSWER.**

See *Pleading*, §§ 85-129, 258.

**ANTENUPTIAL AGREEMENTS.**

See *Executors and Administrators*, § 185.

**APPEAL AND ERROR.**

See *Attorney and Client*, § 17; *Certiorari*; *Contempt*, § 67; *Costs*, § 240; *Courts*, §§ 90, 91, 208, 240½; *Criminal Law*, §§ 854, 1026-1186; *Divorce*, § 236; *Elections*, § 305; *Execution*, § 456; *Executors and Administrators*, §§ 20, 315, 455; *Homicide*, § 340; *Judgment*, § 650; *Justices of the Peace*, §§ 159-171; *Municipal Corporations*, § 402; *Trial*, § 260; *Wills*, § 384.

**I. NATURE AND FORM OF REMEDY.**

§ 14 (Colo.App.) Under *Mills' Ann. Code*, § 388a, providing for the re-entry of causes as pending on writ of error, after dismissal for want of jurisdiction, *held*, that the dismissal of an appeal for failure to comply with an order requiring a new appeal bond was not a "dismissal for want of jurisdiction," and hence that the cause could not be re-entered as pending on writ of error.—*Davis v. Wright*, 129 P. 524.

**III. DECISIONS REVIEWABLE.****(C) Amount or Value in Controversy.**

§ 47 (Wash.) The original amount sued for, and not the amount of the judgment recovered, determines the Supreme Court's jurisdiction of an appeal.—*Gorham-Revere Rubber Co. v. Broadway Automobile Co.*, 129 P. 89.

§ 51 (Wash.) A counterclaim for more than \$200 authorizes an appeal by either party, although the amount demanded in the complaint is less than \$200 if the appeal involves a review of the ruling on the counterclaim.—*Gorham-Revere Rubber Co. v. Broadway Automobile Co.*, 129 P. 89.

Where the trial court dismissed both the complaint and the counterclaim and plaintiff alone appeals, the Supreme Court has no jurisdiction where the amount claimed in the complaint was less than \$200, although the counterclaim was for more than that amount.—*Id.*

Where no affirmative judgment is rendered on

a counterclaim, but the result of the suit is simply to defeat plaintiff's claim, his right to appeal depends on the amount put in controversy by the complaint.—*Id.*

**(D) Finality of Determination.**

§ 69 (Colo.) An order removing trustees of an estate and appointing a receiver, before final judgment, was reviewable.—*Tuckerman v. Currier*, 129 P. 220.

§ 70 (Wash.) An order of default for failure to answer the complaint within the time fixed by a prior order is not appealable under *Rem. & Bal. Code*, § 1716, defining appealable orders.—*Borell v. Carson*, 129 P. 908.

An interlocutory order directing that defendant specifically perform the contract sued on, and pay to plaintiff a sum named, and, on failure to obey such order, that the property be sold to discharge a lien against the property for money paid by plaintiff, was not appealable, under *Rem. & Bal. Code*, § 1716.—*Id.*

§ 78 (Nev.) An order for quashing personal service of summons on nonresident defendant *held* a final order within *Civil Practice Act*, § 383 (*Rev. Laws*, § 5325), providing for review of final orders.—*Tiedemann v. Tiedemann*, 129 P. 313.

§ 78 (Wash.) An order of default for failure to answer the complaint within the time fixed by a prior order is not appealable, not being a final order.—*Borell v. Carson*, 129 P. 908.

An interlocutory order directing that defendant specifically perform the contract sued on, and pay to plaintiff a sum named, and, on failure to obey such order, that the property be sold to discharge a lien against the property for money paid by plaintiff, was not appealable, not being a final order.—*Id.*

**(E) Nature, Scope, and Effect of Decision.**

§ 91 (Or.) Where, after a decree of divorce, application was made to have an allegation as to the residence of the plaintiff inserted into the complaint, which was necessary to jurisdiction, and it was entered over the objections of the defendant, such decision was a final "order affecting a substantial right," and was appealable under *L. O. L.* § 548.—*Holton v. Holton*, 129 P. 532.

§ 91 (Wash.) An order refusing to retax costs is not appealable, and an appeal therefrom will be dismissed.—*White v. Stout*, 129 P. 917.

§ 100 (Okl.) An order denying a motion to vacate a temporary injunction pending suit is not an appealable order.—*Brown-Beane Co. v. Rucker*, 129 P. 1.

§ 112 (Or.) The mere fact that an order was void because out of time and dependent upon a proceeding originally void does not render it not appealable.—*Holton v. Holton*, 129 P. 532.

**V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.****(A) Issues and Questions in Lower Court.**

§ 169 (Cal.) Issues not made or found upon in the trial court are not open to review on appeal.—*In re Yoell's Estate*, 129 P. 999.

§ 171 (Okl.) Appellant cannot on appeal change front and try to prevail on a different theory from that below.—*Coombs v. Cook*, 129 P. 698.

§ 171 (Okl.) A plaintiff who recovers the full amount sued for cannot complain because he might have recovered more had he sued on a different theory.—*Advance Thresher Co. v. Doak*, 129 P. 736.

**(B) Objections and Motions, and Rulings Thereon.**

§ 189 (Wash.) Defendant's objection to dismissal of mortgage foreclosure proceedings can-



not be first made on appeal.—*Van Alstine v. Gray*, 129 P. 106.

§ 193 (Okl.) On error to reverse judgment by default, such defects in the petition as could have been taken advantage of by general demurrer may be reviewed, and, if the allegations of the petition are insufficient to sustain a judgment, it will be reversed.—*Grissom v. Beidleman*, 129 P. 853.

§ 203 (Wyo.) A ruling on evidence not objected to at the trial will not be reviewed on writ of error.—*Carney Coal Co. v. Benedict*, 129 P. 1024.

§ 204 (Mont.) An objection to the admission of evidence could not be considered on appeal when not made below.—*Myers v. Bender*, 129 P. 330; *Hollenback v. Stone & Webster Engineering Corporation*, Id. 1053.

§ 205 (Cal.) Where the defendant made no statement to the court showing the substance of a conversation sought to be introduced, it cannot be determined on appeal whether its exclusion was error.—*Snowball v. Snowball*, 129 P. 784.

§ 216 (Mont.) Though an instruction be of doubtful value in enlightening the jury, it cannot be complained of, in the absence of a request for a more specific instruction.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

§ 220 (Cal.App.) Defendants' objection to adoption of referee's report could not be reviewed where they had ample notice of filing of the report, and made no objection before its adoption.—*Doudell v. Shoo*, 129 P. 478.

§ 237 (Mont.) A party, who did not request that evidence be withdrawn, cannot complain of its admission.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

(C) Exceptions.

§ 248 (Okl.) Alleged errors will not be reviewed, unless they appear in the record of the case, and exceptions have been taken to the rulings.—*Lawless v. Raddis*, 129 P. 711.

§ 248 (Okl.) Where error is apparent in the record, it will be considered on review, though no exception was taken.—*Grissom v. Beidleman*, 129 P. 853.

(D) Motions for New Trial.

§ 301 (Kan.) Objections to the rejection of evidence not brought to the attention of the trial court on motion for new trial as required by Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), are not reviewable.—*Williams v. Withington*, 129 P. 1148.

§ 301 (Kan.) A ruling excluding evidence is not open to review, unless the evidence is reduced on the motion for a new trial by affidavit, deposition, or oral testimony.—*Clark v. Morris*, 129 P. 1195.

§ 302 (Cal.App.) A proposed unsettled statement of the case, incorporated in a bill of exceptions to be used on an appeal never taken from an order striking it from the files, does not entitle it to consideration as a statement in support of the motion for a new trial, and hence, for want of a sufficient statement, the motion must be denied.—*De Mitchell v. Croake*, 129 P. 946.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

§ 356 (Cal.App.) An appeal from a final judgment not taken within six months after entry of such judgment as provided by Code Civ. Proc. § 939, subd. 1, and section 941b, must be dismissed.—*Cook v. Suburban Realty Co.*, 129 P. 801.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 390 (Okl.) An appeal bond signed by a licensed attorney, being void, cannot be amended after the time for taking the appeal has expired.—*Schaffer v. Troutwein*, 129 P. 696.

(D) Writ of Error, Citation, or Notice.

§ 415 (Cal.App.) Where petitioner sued two defendants, and had judgment against one of them only, who appealed, it was not necessary that the appellant should serve his notice of appeal upon the codefendant.—*Jackson v. Superior Court of California in and for Los Angeles County*, 129 P. 946.

§ 422 (Or.) Where the notice of appeal does not sufficiently designate the judgment appealed from or the court to which the appeal is taken, the undertaking may be examined together therewith to supply the defects.—*Holton v. Holton*, 129 P. 532.

§ 430 (Cal.App.) Where defendant gives no notice of appeal either from an order striking his unsettled statement from the files or dismissing his motion for a new trial, such orders cannot be reviewed.—*De Mitchell v. Croake*, 129 P. 946.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 484 (Colo.App.) Where an appeal, which operated as a supersedeas, was taken from a decree ordering the dissolution of a corporation, the corporation could act pending the appeal, and the affirmance of the order of dissolution would not retroact so as to make ineffective an assignment made during that time.—*Houston v. Walton*, 129 P. 263.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 499 (Cal.App.) Where no cause of objection to the admission of evidence is stated in the record, error in its admission cannot be considered on appeal.—*Bakersfield & V. R. Co. v. Fairbanks, Morse & Co.*, 129 P. 610.

(B) Scope and Contents of Record.

§ 520 (Okl.) Motions before the trial court and rulings thereon and exceptions thereto must be brought to the attention of the Supreme Court by bill of exceptions or case-made.—*Brown-Beane Co. v. Rucker*, 129 P. 1.

§ 542 (Cal.App.) Affidavits charging plaintiff with misconduct as to the jury in the transcript following the certificate of the clerk to the record or the bill of exceptions are not incorporated in a bill of exceptions, as required by rule 29 (119 Pac. xiv) of this court, are not authenticated, and cannot be regarded as part of the record, or be considered on appeal.—*Cook v. Suburban Realty Co.*, 129 P. 801.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 564 (Okl.) Neither the court nor the judge in vacation after the time prescribed by statute or granted by the court has power to extend the time in which to make and serve a case-made.—*Perry v. Hoblit*, 129 P. 693.

A judge of a district court has no power to extend the time to make a case-made when he is out of the state.—Id.

§ 564 (Okl.) Where a case-made is not served on the defendant in error or its counsel within three days after the motion for a new trial has been overruled, nor within the extension of time granted, the writ of error will be dismissed.—*Lorenson v. J. H. Conrad & Co.*, 129 P. 732.

(E) Abstracts of Record.

§ 587 (Kan.) The practice of filing abstracts agreed to by counsel for both sides is commended.—*Kaill v. Ball*, 129 P. 1135.

**(K) Questions Presented for Review.**

§ 690 (Kan.) Rulings on evidence cannot be reviewed in the absence of a transcript of the evidence and proceedings in the trial court.—*Davidson v. Timmons*, 129 P. 133.

**XI. ASSIGNMENT OF ERRORS.**

§ 719 (Ok.) Where plaintiff in error failed to assign as error the overruling of a motion for a new trial, no assignment that seeks to have reviewed errors alleged to have occurred during the trial is reviewable.—*Butler v. Oklahoma State Bank of Durant*, 129 P. 750.

§ 731 (Cal.App.) A specification that the evidence is wholly insufficient to justify a judgment for plaintiff is not a compliance with Code Civ. Proc. § 648, requiring specification of the particulars wherein the evidence is insufficient to justify the decision.—*Rousseau v. Cohn*, 129 P. 618.

**XII. BRIEFS.**

§ 758 (Ok.) Where a party alleges error in rulings on evidence, but fails to set out in his brief the substance of such evidence, stating specifically his objection thereto, it will not be reviewed.—*Hanson v. Kent & Purdy Paint Co.*, 129 P. 7.

§ 773 (Ok.) Where plaintiff in error has filed a brief insisting that the judgment appealed from is contrary to the law and the evidence, and there is no brief filed by defendant in error, where the brief filed reasonably sustains the assignments of error, the court may reverse the judgment.—*Clark v. First Nat. Bank of Marseilles, Ill.*, 129 P. 696.

§ 773 (Ok.) Where the case has been assigned for submission, and no briefs have been filed by either party, the appeal will be dismissed.—*Payne v. Wilks*, 129 P. 705.

§ 773 (Ok.) Where a cause has been assigned for hearing, and is duly reached, and no briefs are filed as required by Supreme Court rule, it will be dismissed.—*M. Goble & Co. v. Mills*, 129 P. 708.

§ 773 (Ok.) Where no briefs have been filed as required by Supreme Court rule 7 (20 Okl. viii, 95 Pac. vi), the cause reached on the calendar will be dismissed.—*Crone v. Duncan*, 129 P. 711.

§ 773 (Wash.) Where appellant delays for more than 15 months after notice of appeal is given to file his briefs, prejudice from such delay will be presumed, and the appeal dismissed.—*Levold v. Stirrat*, 129 P. 406.

**XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

§ 799 (Mont.) In the absence of counter affidavits to affidavits in opposition to a motion to dismiss an appeal, the statements in the affidavits are to be taken as true.—*Bush v. Baker*, 129 P. 550.

**XV. HEARING AND REHEARING.**

§ 832 (Utah) While an application to the Supreme Court is a matter of right, yet, when it has decided all the material questions involved, a rehearing should not be applied for unless it has overlooked a material fact, statute, or decision, or acted on an incorrect principle of law, so as to clearly affect the results.—*Cummings v. Nielson*, 129 P. 619.

§ 833 (Wyo.) Supreme Court rule 23 (104 Pac. xiv), requiring petitions for rehearing to be filed within 30 days, has the force of a statute, as provided by Comp. St. 1910, § 881, and petitions filed after that time are unavailing.—*Dean v. Omaha-Wyoming Oil Co.*, 129 P. 1023.

**XVI. REVIEW.****(A) Scope and Extent in General.**

§ 854 (Cal.App.) A general order granting a new trial, on motion specifying the insufficiency

of the evidence and errors at the trial as grounds, will not be disturbed, on the ground that it was unnecessarily granted for the single reason that the court had failed to allow interest on the indebtedness.—*Shea-Bocqueraz Co. v. Hartman*, 129 P. 807.

Where the court, granting a new trial, does not limit the order in any way, the court, on appeal, must uphold it, if it can be sustained on any ground embodied in the notice of intention.—*Id.*

§ 854 (Utah) On appeal from a final order settling an executrix' account and refusing distribution where there might have been reasons for refusing the distribution, and the trial court's reason did not appear, the court would not search the record to ascertain whether a distribution should be ordered.—*In re Pickard's Estate*, 129 P. 353.

§ 856 (Cal.App.) Only in rare instances and upon very strong grounds will the Supreme Court set aside an order granting a new trial, and other grounds for supporting such an order than those mentioned therein may be considered, except that the trial court may limit its order so as to exclude, as ground for its action, the insufficiency of the evidence.—*Briggs v. HaH*, 129 P. 288.

§ 856 (Mont.) Where the ruling below is justified on any ground, the Supreme Court will not interfere.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

§ 864 (Ariz.) Under Civ. Code 1901, para. 1212, 1213, 1214, and 1498, an appeal from the judgment does not authorize a review of anything but fundamental errors in the judgment roll; and the court may not look into the evidence and alleged errors in its admission or rejection; and one failing to appeal from an order overruling a motion for a new trial, abandoned any error propounded by it.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

§ 864 (Cal.) Failure of the complaint and findings to support the judgment is a defect reviewable on appeal from the judgment.—*Van Buskirk v. Kuhns*, 129 P. 587.

§ 867 (Cal.App.) On appeal from an order denying a motion for a new trial, rulings on a demurrer to the complaint cannot be reviewed.—*Cook v. Suburban Realty Co.*, 129 P. 801.

**(C) Parties Entitled to Allege Error.**

§ 882 (Cal.) An unsuccessful party cannot complain on appeal of the improper admission of evidence offered by himself.—*Gjurich v. Fieg*, 129 P. 464.

§ 882 (Cal.) Defendant having requested instructions submitting to the jury the meaning of an agreement could not complain because the court did not determine its meaning as a matter of law.—*Gray v. Ellis*, 129 P. 791.

§ 882 (Cal.) Where defendant persisted in presenting his motion for a change of venue in the face of plaintiff's objection to its consideration for want of notice, he cannot complain because the court denied the motion instead of deferring action to enable him to give the proper notice.—*Bohn v. Bohn*, 129 P. 981.

**(D) Amendments, Additional Proofs, and Trial of Cause Anew.**

§ 889 (Wash.) In view of Rem. & Bal. Code, § 258, *held*, that a complaint seeking a mere recovery of installments of rent cannot be treated as amended to conform to the proof, where plaintiff's sole cause of action was one for damages for breach of a contract of leasing, and evidence thereof was admitted over objection.—*Oldfield v. Angeles Brewing & Malting Co.*, 129 P. 1098.

**(E) Presumptions.**

§ 907 (Or.) Where original town plat was received in evidence without objection, but copy

sent up on appeal contained no dedication of the street, it would be presumed that the original plat was properly executed under L. O. L. § 3264, in view of section 799, subd. 34, requiring a presumption that the law has been obeyed.—*Bernard v. Willamette Box & Lumber Co.*, 129 P. 1039.

§ 927 (Wash.) On appeal from a judgment dismissing the complaint on a demurrer, all the allegations of the complaint must be accepted as true.—*Donofrio v. City of Seattle*, 129 P. 1094.

§ 928 (Cal.App.) Where the record does not contain the evidence, the instructions given must be assumed to be applicable to the proof, and that those refused were properly disallowed.—*Cook v. Suburban Realty Co.*, 129 P. 801.

§ 931 (Cal.App.) Where a judge stated that he would "take judicial notice of the laws of another state, it is so stipulated," to which neither party dissented, and no evidence other than the judgment of that state was introduced, and the judge found that such judgment was void, it must be presumed that he found some law of that state justifying his conclusion.—*Fox v. Mick*, 129 P. 972.

§ 931 (Colo.App.) Where a case was tried without a jury, evidence, admissible for one purpose only, will be presumed considered only for that purpose.—*Central Trust Co. v. Culver*, 129 P. 253.

§ 933 (Cal.App.) Where defendant offered no amendment to a proposed statement in support of plaintiff's motion for a new trial, it will be presumed on appeal that it correctly stated the evidence considered by the trial court.—*McCann v. McCann*, 129 P. 966.

§ 936 (Colo.) On affidavit with motion to retract costs, alleging that the adverse party obtained an order for subpoenas for witnesses ex parte, and that such witnesses were not called and knew nothing of the facts, the court on appeal, in the absence of the order and the affidavits on which it was based, cannot assume that it was made without notice, or impute bad faith in obtaining it.—*Kinderman v. Hersch*, 129 P. 228.

#### (F) Discretion of Lower Court.

§ 954 (Idaho) Where plaintiff mining company claims that a vein, apexing in its claim, extends on its dip outside of the boundaries of said claim and underneath surface boundaries of defendant's claim, and the defendant is extracting ore therefrom, the refusal of an injunction asked by plaintiff pendente lite will not be disturbed, unless an abuse of discretion is shown.—*Stewart Mining Co. v. Ontario Mining Co.*, 129 P. 932.

§ 970 (Ariz.) The order of the court striking out incompetent evidence after its admission was not such an abuse of discretion as to call for a reversal.—*Logia Suprema de la Alianza Hispano-Americana v. De Aguirre*, 129 P. 503.

§ 973 (Wash.) The dismissal of an action without costs to either party is a matter within the discretion of the trial court, not reviewable unless there is a manifest abuse of discretion.—*Van Alstine v. Gray*, 129 P. 106.

§ 974 (Mont.) It is within the discretion of the trial court to determine whether special interrogatories shall be submitted, and its action will not be disturbed in absence of abuse.—*Rairden v. Hedrick*, 129 P. 498.

§ 977 (Okla.) An order granting a new trial will not be reversed, unless it appears to have been based on an erroneous determination of a pure question of law.—*Revell v. City of Muskogee*, 129 P. 833.

§ 979 (Nev.) An order granting a new trial for insufficiency of conflicting evidence will not be disturbed in the absence of a clear abuse of discretion.—*Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 129 P. 315.

#### (G) Questions of Fact, Verdicts, and Findings.

§ 987 (Or.) Const. art. 7, § 3, as amended in 1910 (L. O. L. xxiv), prohibiting review of a jury's verdict unless there is no evidence to support it, does not require the Supreme Court to sustain a judgment based on a verdict returned after the erroneous exclusion of material evidence.—*Forrest v. Portland Ry., Light & Power Co.*, 129 P. 1048.

§ 994 (Okla.) The Supreme Court will not examine the evidence to ascertain its credibility.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 858.

§ 995 (Cal.App.) The appellate court cannot determine where the preponderance of the evidence lies.—*Channel Commercial Co. v. Hourihan*, 129 P. 947.

§ 1001 (Cal.) A verdict attacked for insufficiency of evidence cannot be interfered with on appeal, where there is substantial evidence in its support.—*Gjurich v. Fieg*, 129 P. 464.

§ 1001 (Idaho) If the facts are such that more than one reasonable conclusion may be drawn from the circumstantial facts in evidence, and the jury decides that negligence has been shown, its action should not be disturbed.—*Calkins v. Blackwell Lumber Co.*, 129 P. 435.

§ 1001 (Okla.) A verdict will not be disturbed, where there is any substantial evidence to sustain it.—*Chicago, R. I. & P. Ry. Co. v. Ashlock*, 129 P. 726.

§ 1001 (Okla.) A judgment will not be reversed for insufficiency of the evidence where it reasonably tends to support the same.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 858.

§ 1001 (Or.) Under the substantially direct provisions of Const. art. 7, § 3, as amended November 8, 1910 (see Laws 1911, p. 7), the Supreme Court cannot disturb a verdict reached under proper instructions, where there is any evidence to support it.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 1002 (Okla.) Where the evidence is conflicting, the court will sustain the verdict, if there is any evidence reasonably tending to support it.—*Sands v. David Bradley & Co.*, 129 P. 732.

§ 1002 (Or.) The Supreme Court will not consider any conflict in the evidence; that being settled by the verdict of the jury.—*Hofer v. Smith*, 129 P. 761.

§ 1002 (Wash.) A finding on conflicting evidence that an employer's agent was authorized to contract that the employer would furnish treatment in case of injury to plaintiff, an employé, will not be disturbed on review.—*Klodek v. May Creek Logging Co.*, 129 P. 89.

§ 1003 (Okla.) The Supreme Court will not investigate the record to determine whether the verdict is contrary to the weight of the evidence.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 858.

§ 1005 (Kan.) A verdict approved by the district court rendered on conflicting evidence cannot be disturbed.—*Bowen v. City of La Harpe*, 129 P. 832.

§ 1005 (Kan.) Where the verdict supported by the evidence is approved by the trial court, the judgment will not be reversed for insufficiency of evidence.—*Sanborn v. City of Wichita*, 129 P. 1179.

§ 1005 (Mont.) A finding by the jury, based on conflicting evidence, and adopted by the court, will not be disturbed on appeal.—*O'Malley v. O'Malley*, 129 P. 501.

§ 1010 (Cal.App.) Where there was some evidence to sustain the trial court's findings, an appellate court cannot weigh the evidence.—*Lundeen v. Nowlin*, 129 P. 474.

§ 1010 (Cal.App.) Where the meaning of a witness' testimony is uncertain, its uncertainty is to be resolved by the trial court; and on appeal such reasonable interpretation as will support the trial court's finding will be accepted as

correct.—*Oppenheimer v. Radke & Co.*, 129 P. 798.

§ 1010 (Cal.App.) If there is any evidence in the record to sustain findings, they cannot be reviewed.—*Chanel Commercial Co. v. Hourihan*, 129 P. 947.

§ 1019 (Okla.) Where a cause is tried to the court, without a jury, the court's findings of fact will be given the same weight on appeal as a verdict, and will not be set aside if there is any evidence reasonably tending to support them.—*Wat-tah-noh-zhe v. Moore*, 129 P. 877.

§ 1010 (Or.) There being any evidence to support them, findings of fact, in an action at law, cannot be reviewed, the credibility of witnesses being for the court trying the case without a jury.—*Darling v. Miles*, 129 P. 753.

§ 1010 (Wash.) A trial court's findings will not be disturbed on appeal if sustained by a fair preponderance of the evidence.—*Brounny v. Majors*, 129 P. 93.

§ 1011 (Cal.App.) The decision of the trial court upon the weight and preponderance of conflicting evidence will not be disturbed on review.—*Doudell v. Shoo*, 129 P. 478.

§ 1011 (Colo.App.) A judgment will not be disturbed, which is founded on controverted facts, if there be sufficient evidence to support it.—*Central Trust Co. v. Culver*, 129 P. 253.

§ 1011 (Nev.) Findings of the lower court upon conflicting evidence are binding upon this court.—*Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 129 P. 308.

§ 1011 (Nev.) A finding of fact on conflicting evidence is conclusive on appeal.—*Girton v. Daniels*, 129 P. 555.

§ 1015 (Cal.App.) An order granting a new trial, because the trial judge concludes that he has reached an erroneous determination from the evidence, will not be disturbed, where the evidence is conflicting, and there is no error of law rendering the order improper.—*McCann v. McCann*, 129 P. 965.

§ 1024 (Cal.App.) The court on appeal from an order denying a change of venue on the ground of the nonresidence of defendant must accept as established the facts recited in the affidavits of plaintiff, and, if therefrom an inference can be drawn justifying the order, it must be affirmed.—*Marston v. Watson*, 129 P. 611.

The court on appeal will not disturb an order denying a change of venue on the ground of the nonresidence of defendant, where the affidavits of plaintiff show the residence of plaintiff in the county in which the action was brought.—*Id.*

#### (H) Harmless Error.

§ 1026 (Okla.) Not every error will warrant a reversal, but the Supreme Court in every stage of the action must disregard error, where the substantial rights of the adverse party are not affected.—*American Trust Co. v. Chitty*, 129 P. 51.

§ 1036 (Ariz.) Where one who had furnished supplies to a contractor got judgment against him and garnished the owner, a denial of his application to intervene in a suit by others, who had perfected mechanics' liens on the property, where the amount necessary to pay such liens exceeded the amount due the contractor, was not prejudicial.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

§ 1039 (Okla.) A judgment will not be reversed for variance in a case where an amendment should have been allowed to conform the petition to the facts proved.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 858.

§ 1045 (Mont.) Error in selection of a jury in equity cases is harmless, since the jury's verdict and findings are advisory merely.—*O'Malley v. O'Malley*, 129 P. 501.

§ 1046 (Cal.) Statements by the court as to findings in a former action between the parties

are harmless, where the findings subsequently admitted showed the statements to be correct in fact.—*Gjurich v. Fleg*, 129 P. 464.

§ 1046 (Colo.App.) In an action for damages for the destruction of property, where the defendants offered no excuse for the destruction and the court practically directed a verdict for plaintiff, remarks having a natural tendency to prejudice defendants with the jury were harmless.—*Houston v. Walton*, 129 P. 263.

§ 1047 (Ariz.) It was immaterial that an order striking out incompetent evidence is made during the trial after its admission without objection, since the appellant could suffer no injury from the exclusion of incompetent evidence at any stage of the trial.—*Logia Suprema de la Alianza Hispano-Americana v. De Aguirre*, 129 P. 503.

§ 1048 (Or.) Error in overruling an objection to questions calling for improper evidence of remarks made is harmless, where the witness replies that he does not remember such remarks.—*Morgan v. Bross*, 129 P. 113.

Where an answer to an improper question is not responsive, error in overruling an objection to the question is harmless.—*Id.*

§ 1050 (Cal.App.) In action by mortgagor against assignee to determine amount of lien, admission of mortgagor's testimony that he was compelled to borrow money elsewhere, because the mortgagee failed to advance the agreed amount, was not prejudicial error.—*Mentry v. Broadway Bank & Trust Co.*, 129 P. 470.

§ 1051 (Cal.App.) Any error in an action against a corporation for the price of property sold in admitting written admissions of the amount due executed by defendant's manager was immaterial, where the liability and nonpayment were clearly established by other competent evidence.—*Robinson v. Four Metals Smelting & Mining Co.*, 129 P. 963.

§ 1052 (Colo.App.) A party cannot complain that the court admitted in evidence deeds to an irrigation ditch, which had been executed prior to a decree declaring the title in him, where the court decided in his favor as to the ownership at the time of the decree, but that he abandoned his rights therein after the decree.—*Central Trust Co. v. Culver*, 129 P. 253.

§ 1056 (Cal.) The exclusion of a statement of a beneficiary that he was satisfied with the will, and had no intention of contesting it, though tending to show bad faith in his later actions in threatening to contest, was not reversible error in an action on notes given him in settlement of the estate arising out of such threats when he conveyed his entire interest in the estate, and thus divested himself of the right to make a contest.—*Snowball v. Snowball*, 129 P. 784.

§ 1056 (Kan.) Where the question of ownership in attachment was tried without a jury, a judgment will not be reversed because of limitations placed by the court upon the inquiry, where there is no probability that admission of rejected evidence would change the result.—*Parker v. McLain*, 129 P. 939.

§ 1056 (Or.) Where, on an issue of damages, plaintiff introduced ten witnesses, three of whom were physicians, and defendant called three witnesses besides a physician whom plaintiff had consulted, but whom she did not call, error in excluding the physician's testimony was not rendered innocuous by L. O. L. § 856, authorizing the court to stop the introduction of further evidence on a point proved beyond a reasonable doubt.—*Forrest v. Portland Ry., Light & Power Co.*, 129 P. 1048.

§ 1057 (Kan.) In an action for injuries caused on the running away of a horse by defects in a highway, where there was evidence that the horse was unsafe before the accident, exclusion of evidence as to his disposition after the accident was harmless error.—*Bowen v. City of La Harpe*, 129 P. 832.

§ 1058 (Cal.) The exclusion of questions was not prejudicial error, where everything of consequence that could have been brought out thereby was covered by other answers of the witnesses.—*In re Packer's Estate*, 129 P. 778.

The exclusion of a question whether a witness had ever heard Mrs. P. "say anything to her husband" about a certain matter was not prejudicial error, where she subsequently testified that she never heard any conversation between P. and his wife regarding the same matter.—*Id.*

§ 1058 (Cal.App.) Exclusion of defendant's testimony as to total amount of payments, if error, *held* harmless, where he was permitted to testify to separate payments from which the total could easily be determined.—*Doudell v. Shoo*, 129 P. 478.

§ 1058 (Colo.App.) Where a physician testified to opinions of his own in accord with those found in a medical book, the exclusion of questions on cross-examination as to whether he agreed with the medical book *held* not prejudicial.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

Where the physicians for both parties in a personal injury action testified to all of the information that was material in the pages of a medical book offered in evidence, the exclusion of the pages was not erroneous.—*Id.*

§ 1058 (Wash.) Exclusion of evidence *held* harmless, where the same fact was testified to by other witnesses.—*Klodek v. May Creek Logging Co.*, 129 P. 99.

§ 1061 (Or.) Though plaintiff, when he rested, had not offered sufficient proof to warrant submission of the cause, a ruling denying a nonsuit will not be disturbed, if such failure was supplied by evidence subsequently introduced.—*Hofer v. Smith*, 129 P. 761.

§ 1062 (Utah) Error, if any, in not submitting the issue whether a written contract was the contract of the agent making it or of his undisclosed principal, *held* harmless.—*Child v. Gillis Const. Co.*, 129 P. 356.

§ 1067 (Kan.) Failure to instruct as to the measure of damages is immaterial, where the evidence is confined to specific items and the instructions restrict the jury to the consideration of such items.—*McCune v. Ratcliff*, 129 P. 1167.

§ 1068 (Cal.) In an action for services, improper instructions on the statute of limitations are harmless, where the jury found there was no liability whatever on the part of defendant.—*Gjurich v. Fleg*, 129 P. 464.

§ 1068 (Mont.) Plaintiff was not prejudiced by the refusal of an instruction, where the jury found according to his theory as outlined there.—*Rairden v. Hedrick*, 129 P. 498.

§ 1069 (Or.) Where the jury returned, with their verdict, after retiring to consider additional instructions, a paper which contained a verdict for the same amount with the foreman's name crossed out, any error in giving the additional instructions after the jury had arrived at a verdict was harmless to defendant.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 1071 (Colo.) Where the judgment for defendant rendered upon practically undisputed facts was right, error, if any, in refusing plaintiff's request for special findings of law and fact, was without prejudice.—*Kinderman v. Hersch*, 129 P. 228.

§ 1073 (Cal.App.) Mere error in computing the amount of the judgment is not reversible, where all of the items entering into it are established.—*Callan v. Empire State Surety Co.*, 129 P. 978.

#### (I) Error Waived in Appellate Court.

§ 1078 (Utah) An assignment of error, not mentioned in the brief, will be deemed abandoned.—*Vance v. Heath*, 129 P. 365.

## XVII. DETERMINATION AND DISPOSITION OF CAUSE.

### (A) Decision in General.

§ 1122 (Utah) The Supreme Court should not be required to make findings of fact upon the material issues, either affirmatively or negatively; that being the trial court's duty.—*Glaucque v. Salt Lake City*, 129 P. 429.

### (C) Modification.

§ 1153 (Okla.) Where plaintiffs prayed for the cancellation of a mining lease, which defendant admitted was void, but the court omitted to grant the relief, which was alleged as error on a writ of error, the Supreme Court will order such cancellation.—*Wat-tah-noh-zhe v. Moore*, 129 P. 877.

### (D) Reversal.

§ 1170 (Kan.) Under the express provisions of Code Civ. Proc. §§ 141, 581 (Gen. St. 1909, §§ 5734, 6176), the Supreme Court may direct the rendition of such judgment in ejectment, as justice requires without regard to any misconception of the issues which does not affect the substantial rights of the parties.—*Charpie v. Stout*, 129 P. 1166.

§ 1170 (Okla.) The Supreme Court is required to disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party.—*Lawless v. Raddis*, 129 P. 711.

§ 1170 (Or.) Under Const. art. 7, § 3, providing that a proper judgment shall be affirmed notwithstanding error, giving of technically incorrect instruction on measure of damages in personal injury case *held* not reversible error where it appeared that the jury could not have been misled.—*Morgan v. Bross*, 129 P. 118.

§ 1177 (Kan.) Where judgment is reversed because demurrer to plaintiff's evidence has been erroneously overruled, judgment for defendant will be ordered if plaintiff's evidence shows some fact precluding recovery; but otherwise the case will be remanded for new trial.—*Root v. Cudahy Packing Co.*, 129 P. 1199.

### (F) Mandate and Proceedings in Lower Court.

§ 1195 (Idaho) Questions decided on a prior appeal constitute the law of the case no retrial on the same pleadings, and with some additional evidence insufficient to change the weight of evidence.—*Beymer v. Monarch*, 129 P. 919.

§ 1212 (Utah) Where a surety files a separate answer setting up both negative and affirmative defenses, and judgment is rendered against the principal, but the surety's motion for nonsuit is improperly sustained at the close of plaintiff's evidence, the surety is entitled on remand to present its evidence upon the issue of facts presented by its answer.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

§ 1212 (Wash.) Where, in an action for an installment of rent, it was determined on appeal that only one action, which was for breach of the contract to lease, could be maintained, the opinion declares the law, and cannot be treated as a pleading which will authorize recovery of damages for the breach under the original complaint.—*Oldfield v. Angeles Brewing & Malting Co.*, 129 P. 1098.

## APPEARANCE.

See Criminal Law, § 101; Divorce, § 91; Motions, § 23.

## APPLICATION.

See New Trial, § 150.

## APPOINTMENT.

See Executors and Administrators, §§ 9-35; Guardian and Ward, § 15.

**APPRAISEMENT.**

See Homestead, § 200.

**APPROPRIATION.**

See Statutes, §§ 180, 182, 181; Waters and Water Courses, §§ 19, 24, 33, 152.

**ARBITRATION AND AWARD.**

See Reference.

**ARCHITECTS.**

See Contracts, §§ 196, 278; Evidence, § 539.

**ARGUMENT OF COUNSEL.**

See Criminal Law, §§ 720, 721, 1171, 1186; Trial, § 867.

**ARRAIGNMENT.**

See Criminal Law, § 1088.

**ARREST.**

See Criminal Law, § 218; False Imprisonment, §§ 7, 15, 27, 30, 34-36, 40; Rewards.

**II. ON CRIMINAL CHARGES.**

§ 63 (Okla.) An officer can arrest for a misdemeanor only when he has a warrant, or when the misdemeanor is committed in his presence.—*Holmes v. Le For*, 129 P. 718.

An officer may arrest without warrant any person in possession of intoxicating liquor for the purpose of violating any of the provisions of the prohibitory law.—*Id.*

**ASSAULT AND BATTERY.**

See Criminal Law, § 93.

**ASSESSMENT.**

See Municipal Corporations, §§ 445-513; Taxation, § 349.

**ASSESSMENT ROLL.**

See Taxation, § 438.

**ASSIGNMENT OF ERRORS.**

See Appeal and Error, §§ 719, 731, 1078.

**ASSIGNMENTS.**

See Appeal and Error, § 484; Bills and Notes, § 818; Estoppel, § 110; Frauds, Statute of, § 138; Guaranty, § 24; Limitation of Actions, § 84; Mines and Minerals, §§ 58, 112; Mortgages, §§ 226, 256; Schools and School Districts, § 95; Set-Off and Counterclaim.

**I. REQUISITES AND VALIDITY.**

(A) Property, Estates, and Rights Assignable.

§ 18 (Wash.) As a rule, rights arising out of an executory contract are assignable, when they would survive to the assignor's personal representative.—*King v. West Coast Grocery Co.*, 129 P. 1081.

A writing which recited that there was "sold" to the buyers for account, and subject to approval of the seller, the amount of preserves named, and stating the terms, and that the seller guaranteed all goods sold under the contract to comply with the pure food law, was assignable.—*Id.*

§ 19 (Wash.) Rights which are coupled with liabilities or involve a relation of personal confidence or personal service are not assignable.—*King v. West Coast Grocery Co.*, 129 P. 1081.

To make a contract for the sale of personality for future delivery nonassignable, the liability

and right must be dependent upon some future dealing with the property, as between the parties.—*Id.*

§ 24 (Or.) A cause of action for a tort creating a right of action which abates with the death of the person sustaining the injury is not assignable; but a tortious act causing damage to property, or an act of negligence producing an injury to the person generally creates a cause of action that survives, and is assignable.—*Sperry v. Stennick*, 129 P. 130.

A cause of action for money received arising out of defendants' alleged false representations to plaintiff's assignor inducing a purchase of an interest in real property held a cause of action that would survive, and therefore assignable.—*Id.*

(B) Mode and Sufficiency of Assignment.

§ 37 (Utah) Delivery of a contract for exchange of irrigation water by the grantor of certain land to complainant without assignment held to transfer to plaintiff the grantor's interest in the contract.—*Mathews v. Berrett*, 129 P. 419.

§ 48 (Cal.) No precise form of words or writing is necessary to an equitable assignment of an indebtedness due the assignor.—*Goldman v. Murray*, 129 P. 462.

§ 49 (Cal.) A nonnegotiable order for part of a fund or debt operates as an equitable assignment pro tanto as between the drawer and payee.—*Goldman v. Murray*, 129 P. 462.

§ 58 (Cal.) Where a bona fide creditor of a corporation took from it notes evidencing its debt to him, and he, believing that the notes were valid, while in fact they were invalid as corporate obligations, indorsed them in due course to a third person in payment of a debt due him, acknowledgment and acceptance by the corporation of the assignment of its indebtedness were not essential to the validity of the assignment created by the indorsement.—*Goldman v. Murray*, 129 P. 462.

(C) Validity.

§ 68 (Wash.) Where the goods were accepted by the purchaser after an assignment to plaintiff of the contract to sell jellies to defendant, as meeting the terms of the contract, and retained with knowledge of the assignment, and invoices gave notice of the assignment, a finding that the purchaser was estopped to question the assignment was sustained.—*King v. West Coast Grocery Co.*, 129 P. 1081.

§ 70 (Colo.App.) One who wrongfully destroyed property to which he was in no way entitled cannot challenge the owner's assignment of his cause of action on the ground of lack of consideration.—*Houston v. Walton*, 129 P. 263.

**II. OPERATION AND EFFECT.**

§ 79 (Cal.) Where a bona fide creditor of a corporation took from it promissory notes evidencing its debt, and he believed that the notes were valid, though they were in fact invalid, and he indorsed them in due course to a third person in payment of a debt due him, the indorsement operated as an assignment of the indebtedness of the corporation.—*Goldman v. Murray*, 129 P. 462.

**IV. ACTIONS.**

§ 137 (Wash.) If a contract was assignable, evidence of any assignment sufficient to pass title as between the parties thereto was sufficient to entitle the assignee to sue thereon.—*King v. West Coast Grocery Co.*, 129 P. 1081.

**ASSOCIATIONS.**

See Beneficial Associations.

**ASSUMPSIT, ACTION OF.**

See Money Received, §§ 8, 17; Work and Labor.

**ASSUMPTION OF RISK.**

See Carriers, § 333; Master and Servant, §§ 203-228, 273, 288; Negligence, § 136.

**ATTACHMENT.**

See Appeal and Error, § 1056; Election of Remedies, § 3; Homestead; Justices of the Peace, § 119.

**I. NATURE AND GROUNDS.**

(A) Nature of Remedy, Causes of Action, and Parties.

§ 1 (Wash.) While attachment is a mere ancillary remedy where personal service is had, the other proceedings in an action are merely incidental to the attachment so far as jurisdiction is concerned, where service is by publication.—Clifford v. Pateros Transfer Co., 129 P. 369.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 219 (Wash.) Rem. & Bal. Code, § 668, providing for collection of amount due on judgment after sale of attached property, does not apply where jurisdiction was obtained only by the attachment and service by publication.—Clifford v. Pateros Transfer Co., 129 P. 369.

**ATTEMPT.**

See Rape, § 15.

**ATTORNEY AND CLIENT.**

See Appeal and Error, § 390; Bills and Notes, § 534; Criminal Law, §§ 593, 641, 1166½; Divorce, § 231; Trial, § 121; Vendor and Purchaser, § 294; Witnesses, § 220.

**I. THE OFFICE OF ATTORNEY.**

(B) Privileges, Disabilities, and Liabilities.

§ 17 (Okla.) An appeal bond signed by a licensed attorney employed in the trial is void under Comp. Laws 1909, § 273.—Schaffer v. Troutwein, 129 P. 696.

(C) Suspension and Disbarment.

§ 39 (Utah) A negro attorney, who maintained a house of ill fame for white and colored patrons and permitted the use of opium and intoxicants thereat, was morally unfit to be a member of the bar.—In re Marsh, 129 P. 411.

**IV. COMPENSATION AND LIEN OF ATTORNEY.**

(A) Fees and Other Remuneration.

§ 148 (Mont.) Under contract providing for 12½ per cent. of the value of all land recovered from railroad company by compromise or otherwise, attorney held entitled to 12½ per cent. of value of land obtained indirectly from company through relinquishment to the government.—Myers v. Bender, 129 P. 330.

Such attorney held entitled to receive his compensation in money, though the word "value" was omitted from another similar clause of the contract.—Id.

Such attorney's right to compensation accrued when the compromise agreement was signed; and hence the 12½ per cent. was based upon the value of the land at such time.—Id.

§ 149 (Mont.) Failure of client to pay attorney fee when due under an employment contract was "a breach of an obligation arising from contract," within Rev. Codes, § 6048, providing that the measure of damages for such breach is the amount which will compensate

for all detriment; and hence the measure of damages was the principal amount due, with interest, allowing credit for payments made.—Myers v. Bender, 129 P. 330.

**AUTHENTICATION.**

See Elections, § 254.

**AUTHORITY.**

See Appeal and Error, § 564; Bridges, § 15; Brokers, §§ 18, 40, 43; Elections, §§ 259, 299; Evidence, § 373; Grand Jury, § 27; Municipal Corporations, § 78; Officers, § 103.

**AUTOMOBILES.**

See Bridges, § 46; Highways, §§ 172-181; Municipal Corporations, §§ 705, 706; Negligence, §§ 93, 134; Street Railroads, § 85.

**BAGGAGE.**

See Carriers, §§ 405, 408.

**BAILMENT.**

See Innkeepers; Replevin, § 46.

§ 31 (Kan.) On an issue as to the worth of the use of a steam engine per day, where there is no absolute standard, evidence of the value of the article itself, to be considered with other circumstances, is admissible.—Carey Coal Co. v. Beebe Concrete Co., 129 P. 191.

On an issue of the value of the use of a steam engine per day, evidence of the price at which the renter subsequently sold the engine is admissible.—Id.

**BALLOTS.**

See Elections, §§ 166-194.

**BANKS AND BANKING.**

See Bills and Notes, §§ 356, 525, 534; Criminal Law, § 434; Evidence, § 364; Intoxicating Liquors, § 327; Parties; Witnesses, § 298.

**II. BANKING CORPORATIONS AND ASSOCIATIONS.**

(E) Insolvency and Dissolution.

§ 73 (Okla. Cr. App.) Under the act creating a state banking board and establishing a state depositors' guaranty fund, all of the books, records, and papers of an insolvent bank taken over by the Bank Commissioner are public records, and become the property of the state.—Burnett v. State, 129 P. 1110.

**III. FUNCTIONS AND DEALINGS.**

(C) Deposits.

§ 143 (Cal.App.) Bank held not justified in refusing payment of a check signed by both members of a partnership, although the signature card gave the name of the firm and of the members, and provided that "both signatures" were required.—Reeves v. First Nat. Bank, 129 P. 800.

Where a bank has customarily paid checks signed in a particular way, it cannot change this custom without express notice to the depositor, and refuse to pay checks so signed.—Id.

The wrongful dishonor of a check drawn by a party established in business raises the presumption that the drawer has sustained substantial damage, even though the dishonor was not the result of ill will or malice.—Id.

§ 148 (Wash.) Where a person obtained a loan by misrepresenting that he was another's agent, obtained checks therefor to the order of his alleged principal, and forged the principal's indorsements thereon, payment by the bank was not justified on the theory that the person re-



celving payment was the payee intended.—*Goodfellow v. First Nat. Bank*, 129 P. 90.

Where a person obtained a loan, representing that he was the agent of another, and received checks for the amount of the loan to the order of his principal, the drawer of the check did not vouch to the bank for such alleged agent's authority to indorse the name of the payee thereon.—*Id.*

It is the duty of a bank, on which a check is drawn payable to a certain person or order, to ascertain the identity of the person therein named as payee; and payment to any other person is justified only where the bank has been misled by the negligence or other fault of the drawer.—*Id.*

## BAR.

See *Estates Tail*, § 7.

## BENEFICIAL ASSOCIATIONS.

See *Insurance*, §§ 755, 819.

§ 12 (Okl.) In controversies between individual members of a secret fraternal organization where the rights are purely fraternal, created under and determined by the constitution and by-laws of such order, the civil courts have no jurisdiction.—*National Grand Lodge of United Brothers of Friendship and Sisters of the Mysterious Ten v. United Brothers of Friendship of the Jurisdiction of Oklahoma*, 129 P. 724.

## BEST AND SECONDARY EVIDENCE.

See *Evidence*, §§ 158-186.

## BIAS.

See *Witnesses*, § 872.

## BIDS.

See *Municipal Corporations*, § 241.

## BIGAMY.

See *Jury*, § 83.

## BILLS AND NOTES.

See *Assignments*, §§ 58, 79; *Banks and Banking*, §§ 143, 148; *Contribution*; *Insurance*, §§ 372, 392; *Intoxicating Liquors*, § 327; *Judgment*, § 698; *Payment*, § 70; *Principal and Agent*, § 194; *Set-Off and Counterclaim*; *Vendor and Purchaser*, § 266; *Set-Off and Counterclaim*; *Vendor and Purchaser*, § 266.

### I. REQUISITES AND VALIDITY.

#### (C) Execution and Delivery.

§ 64 (Okl.) A note may be delivered to the payee conditionally, with instructions as to the condition.—*Horton v. Birdsong*, 129 P. 701.

### III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 141 (Kan.) Where the consideration of a note is illegal, a recovery cannot be had on a renewal note, the consideration of which is the obligation of the old note.—*Hutchins v. Stanley*, 129 P. 1180.

### V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

#### (C) Assignment or Sale.

§ 318 (Kan.) The assignee of a nonnegotiable note is subject to any defense available against the payee.—*Hutchins v. Stanley*, 129 P. 1180.

The assignee of a negotiable note taking a renewal note is chargeable with notice of the infirmity in the original instrument, where he has knowledge of its illegal consideration.—*Id.*

#### (D) Bona Fide Purchasers.

§ 332 (Okl.) To defeat recovery by the indorsee of a note for value and before maturity from the apparent owner, the maker must not only plead circumstances causing one of ordinary prudence to suspect that the indorser had no interest, but must plead that the indorsee had actual notice thereof.—*City State Bank of Hobart v. Pickard*, 129 P. 38.

§ 339 (Okl.) Suspicion of a defect of title, or knowledge of circumstances which would excite suspicion, will not defeat the title of a bona fide holder of a negotiable note.—*McPherrin v. Tittle*, 129 P. 721.

§ 344 (Okl.) The fact that interest is due and unpaid on a note is a circumstance bearing on the question of good faith of a purchaser acquiring the note without notice of prior equities or infirmities of title.—*McPherrin v. Tittle*, 129 P. 721.

§ 356 (Cal.App.) A bank, by discounting a note and passing its amount to the credit of its indorser, does not become a purchaser for value.—*Oppenheimer v. Radke & Co.*, 129 P. 798.

Bank discounting note and placing it to its indorser's credit held to become a purchaser for value, if it subsequently pays out the amount of the credit, even though by subsequent deposits a constant balance is preserved to the credit of the indorser.—*Id.*

§ 360 (Kan.) Where a nonnegotiable note was given to cover margins in a wheat speculation, and was indorsed before maturity to plaintiff, who took it without notice of consideration, but on its maturity accepted a new negotiable note, with knowledge of the consideration, the new note was given in a gambling transaction, and was under Gen. St. 1909, § 5169, void between the parties.—*Hutchins v. Stanley*, 129 P. 1180.

§ 363 (Okl.) The owner of a negotiable note obtaining it before maturity for a valuable consideration, in good faith, holds it by a title valid against all the world.—*McPherrin v. Tittle*, 129 P. 721.

### VII. PAYMENT AND DISCHARGE.

§ 430 (Kan.) A new note taken in exchange for an old one is a renewal of the former obligation.—*Hutchins v. Stanley*, 129 P. 1180.

### VIII. ACTIONS.

§ 481 (Okl.) In an action by an indorsee on a note, the plea of defendants held not to show that the indorser had no title to the note, or that the indorsee had notice that he had no title.—*City State Bank of Hobart v. Pickard*, 129 P. 38.

§ 525 (Cal.App.) In an action on a note, evidence held to show that a bank which discounted it without notice of any defenses thereto subsequently paid out the amount of the credit on its indorser's checks before notice of any defense.—*Oppenheimer v. Radke & Co.*, 129 P. 798.

§ 534 (Okl.) Where a customer of a bank asks for the balance due on a note and pays the amount stated, the bank cannot subsequently recover an attorney's fee because the note had been placed in the hands of an attorney who made no effort to collect it.—*Security State Bank v. Fussell*, 129 P. 746.

## BOARDS.

See *Colleges and Universities*, § 8; *Counties*, §§ 46, 47, 122, 204; *Elections*, §§ 250, 253, 254, 259, 261; *Turnpikes and Toll Roads*.

## BONA FIDE PURCHASERS.

See *Bills and Notes*, §§ 332-363; *Mortgages*, § 226; *Vendor and Purchaser*, §§ 228-231.



**BONDS.**

See Appeal and Error, §§ 14, 390; Attorney and Client, § 17; Constitutional Law, § 312; Criminal Law, §§ 1026, 1084; Executors and Administrators, § 533; Guardian and Ward, §§ 15, 174, 177; Injunction, § 235; Insurance, §§ 141, 646; Justices of the Peace, § 159; Mechanics' Liens, § 3; Municipal Corporations, §§ 347, 864, 1000; Pleading, § 250; Principal and Surety, §§ 10-82, 128; Recognizances; Replevin, § 25; Schools and School Districts, § 97.

**I. REQUISITES AND VALIDITY.**

§ 9 (Cal.) In the absence of statute, it is not essential that a bond shall designate money of any particular form or kind, but it is sufficient that it calls for "lawful money of the United States."—*Kings County v. Rea*, 129 P. 772.

**V. ACTIONS.**

§ 128 (Okl.) Where the petition on a builder's bond charged that the building had not been constructed according to the contract, but the contract was not pleaded, nor was it charged that it was lost or beyond the reach of plaintiff, nor were its contents proved, the plaintiff was not entitled to recover.—*National Surety Co. v. Board of Education of City of Hugo*, 129 P. 25.

**BOOKS.**

See Corporations, § 181; Evidence, § 363; Witnesses, § 257.

**BOUNDARIES.**

See Appeal and Error, § 954; Logs and Logging, § 33; Mines and Minerals, §§ 9, 31, 38; Municipal Corporations, §§ 18, 292; Trial, § 396.

**II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.**

§ 42 (Utah) A finding merely that a lot five by ten rods is bounded by a picket fence does not refer to the fence as a monument, and hence cannot extend the lot beyond the five by ten rods called for.—*Giaouque v. Salt Lake City*, 129 P. 429.

**BREACH.**

See Insurance, § 290; Sales, §§ 156-182, 340, 343, 344-418.

**BREACH OF MARRIAGE PROMISE.**

See Trial, § 256.

§ 28 (Kan.) In an action for damages for the breach of a contract of marriage, seduction may be proven and considered in aggravation of the damages.—*Dalrymple v. Green*, 129 P. 1145.

But resulting pregnancy, miscarriage, and sickness cannot be considered by the jury.—*Id.*

Where there is evidence that after seduction sexual intercourse was repeated, resulting in pregnancy, miscarriage, and sickness, evidence of pregnancy and its results are not the proximate results of the marriage promise and its breach.—*Id.*

§ 35 (Kan.) Where plaintiff testified that defendant made considerable noise in entering her room for sexual intercourse, while others slept on the same floor, the court should instruct that the jury may consider the circumstances under which plaintiff claims defendant had intercourse with her.—*Dalrymple v. Green*, 129 P. 1145.

**BRIBERY.**

See Criminal Law, § 423; Indictment and Information, § 125.

§ 1 (Colo.) A county commissioner is a "ministerial officer" within Rev. St. 1908, § 1720, making one guilty of bribery who gives any

sum to any officer, ministerial or judicial, to influence him.—*Sheely v. People*, 129 P. 201.

§ 2 (Colo.) Rev. St. 1908, § 1720, making one guilty of bribery who gives any sum to any ministerial or judicial officer, etc., with intention to influence him, should be strictly construed as against the state and liberally in favor of the accused, consonant, however, with ascertaining the legislative intent.—*Sheely v. People*, 129 P. 201.

**BRIDGES.**

See Judgment, § 725.

**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 15 (Cal.) Pol. Code, § 4041, subd. 33, relative to franchisees to take tolls on highways does not apply to bridges across waters separating two counties.—*Gardella v. Amador County*, 129 P. 993.

The board of supervisors of the county on the left bank of a river cannot grant authority to construct a toll bridge over it under Pol. Code, § 2843, unless sections 2870 and 2872 are complied with.—*Id.*

A grant by a board of supervisors of the right to construct a toll bridge which is not in accordance with the statute cannot be upheld under the board's general powers to make contracts.—*Id.*

County held not estopped to deny validity of franchise to construct toll bridge by its receipt of the benefits of the grantee's expenditures thereunder.—*Id.*

§ 26 (Cal.) Bridge over river between two counties held to become a free public highway at the expiration of the period during which the collection of tolls was authorized, even if Pol. Code, § 2619, providing that on expiration of franchise a bridge is free, did not apply to bridges between counties.—*Gardella v. Amador County*, 129 P. 993.

**II. REGULATION AND USE FOR TRAVEL.**

§ 37 (Wash.) A city must keep a bridge within its limits in a reasonably safe condition for public use; and it is liable for injuries due to a dangerous condition of the bridge, when, by reasonable care, it ought to have known of such condition.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

§ 46 (Kan.) Where an automobile was driven over a highway at night into a river at a public crossing, where the bridge had been carried away and there was no barrier, it was not error to refuse to instruct that the approach to the stream was a warning of danger to a person unacquainted with the road and driving an automobile at night.—*Super v. Model Tp. in Norton County*, 129 P. 1162.

An instruction that the crossing of a stream is an indication that caution is required to one driving an automobile in the night, together with an instruction that one driving an automobile on a dark night over a strange road at such speed that he is unable to stop within such distance as he may clearly see an obstacle in the highway, sufficiently states the duties of the driver of the machine.—*Id.*

It is a question for the jury as to whether the speed of an automobile at from 12 to 15 miles an hour on a dark night was negligence precluding the driver from recovering for injuries from being precipitated into a stream at which a bridge had been washed away, and no barrier placed to guard against accidents.—*Id.*

**BRIEFS.**

See Appeal and Error, §§ 758, 773, 1078; Criminal Law, §§ 1130, 1178.

**BROKERS.**

See Contracts, § 187; Evidence, § 317; Parties.

**II. EMPLOYMENT AND AUTHORITY.**

§ 8 (Or.) Evidence, in an action for a real estate broker's commission, *held* to show that plaintiff's assignor was never employed by the defendant owner.—*Sorenson v. Smith*, 129 P. 757.

§ 9 (Or.) The agency of a broker employed to procure a purchaser within a fixed time terminates at the expiration of that time, unless extended.—*Sorenson v. Smith*, 129 P. 757.

§ 18 (Or.) The power of a real estate broker to give an option for a limited time, and to extend such time, is in the nature of a personal trust, so as to negative any implied power to appoint a subagent, for whose services the principal will be liable.—*Sorenson v. Smith*, 129 P. 757.

**III. DUTIES AND LIABILITIES TO PRINCIPAL.**

§ 21 (Kan.) Where an agent employed to find a buyer for land has communicated an offer to his absent principal, receiving his acceptance, and then obtained knowledge of a better offer, it is his duty to communicate the new offer to the principal, and not to communicate the acceptance to the maker of the first offer.—*Kershaw v. Schafer*, 129 P. 1137.

§ 38 (Kan.) Where an agent to find a buyer for land, after receiving his principal's acceptance of an offer, received a better offer, but completed the transaction with the maker of the first offer, and then immediately resold the land for the purchaser to the maker of the new offer, the fact that the first vendor extended the time of payment of a part of the consideration by the first purchaser did not affect his right to recover damages from the agent in the absence of proof that the first purchaser conspired to defraud his vendor.—*Kershaw v. Schafer*, 129 P. 1137.

**IV. COMPENSATION AND LIEN.**

§ 40 (Or.) Where a real estate broker, merely under his general authority, employs a subagent to procure a purchaser, the principal is not thereby made liable for the subagent's commission.—*Sorenson v. Smith*, 129 P. 757.

§ 43 (Or.) Under L. O. L. § 808, requiring a broker's authority to sell land to be in writing, that an owner consented to sell to a purchaser procured by a subagent of his broker, with knowledge that the purchaser had been so procured, was not such a ratification of the subagent's oral employment as would hold the owner for the commission.—*Sorenson v. Smith*, 129 P. 757.

§ 48 (Okla.) To entitle a real estate agent to his commission, he must find a purchaser ready, willing, and able to buy, and procure a written agreement to buy from the purchaser, which will be enforceable against him, if accepted and signed by the seller, unless the seller and purchaser have come together, and an oral agreement to buy accepted by the seller.—*Gilliland v. Jaynes*, 129 P. 8.

§ 50 (Or.) Where a subagent, employed by a real estate broker under his general authority, was directed by the broker to continue his efforts, after an option which he had procured to be taken had been canceled, the principal was not liable for a commission on a sale by reason of the subagent's acts pursuant to these directions.—*Sorenson v. Smith*, 129 P. 757.

§ 65 (Okla.) When a real estate agent finds a purchaser ready, willing, and able to buy on the terms on which the property is listed, that he has an agreement with the purchaser to subdivide the property and sell it as town lots for

a contingent commission will not defeat his right to a commission from his original client.—*Gilliland v. Jaynes*, 129 P. 8.

§ 65 (Okla.) Where brokers, having a farm for sale, learned that plaintiff was negotiating with the owner and offered to divide commissions with him if he purchased through them, which he did, the agreement was illegal, and plaintiff, on making a purchase, could not recover one-half of the commissions.—*Skirvin v. Gardner*, 129 P. 729.

**V. ACTIONS FOR COMPENSATION.**

§ 82 (Okla.) A petition to recover broker's commissions, which shows that plaintiff acted for both parties, is demurrable unless it also alleges that the dual relationship was known and assented to by both.—*Skirvin v. Gardner*, 129 P. 729.

§ 88 (Cal.App.) An instruction that, if the owner sold, in breach of his contract, for less than \$13,000, the agent was entitled to his commission was misleading so as to call for a new trial, where, after the sale, a rebate to the purchaser was made by the owner for a shortage of half an acre; the question being whether the land was sold for \$13,000.—*Briggs v. Hall*, 129 P. 288.

**VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.**

§ 94 (Wash.) Where a breeder of cattle sold a bull calf under an agreement to furnish a certificate of registration, he could not escape liability for failure to furnish the certificate by showing that he acted only as a broker in the sale.—*Yamaoka v. Kloeber*, 129 P. 387.

**BUILDING CONTRACTS.**

See Principal and Surety, §§ 10-82, 123, 160.

**BUNCO GAMES.**

See Larceny, § 14.

**BURGLARY.**

See Criminal Law, §§ 59, 422, 423, 427, 434, 893, 1169; Jury, § 99; Witnesses, § 289.

**II. PROSECUTION AND PUNISHMENT.**

§ 37 (Kan.) In a prosecution for a burglary committed in November, testimony that in August defendant threw a flash light on persons sitting at night in the rear of his premises, at the same time having a revolver in his hand, was properly admitted.—*State v. Hoerr*, 129 P. 153.

**CANALS.**

See Waters and Water Courses, § 179.

**CANCELLATION OF INSTRUMENTS.**

See Appeal and Error, § 1153; Deeds, § 212; Reformation of Instruments.

**CAPITAL**

See Insurance, § 33.

**CARNAL KNOWLEDGE.**

See Rape.

**CARRIERS.**

See Constitutional Law, § 62; Courts, § 489; Damages, § 130; Evidence, §§ 119, 370; False Imprisonment, §§ 7, 15, 34, 36; Judgment, § 239.

**II. CARRIAGE OF GOODS.**

(F) Loss of or Injury to Goods.

§ 127 (Okla.) Where the owner and consignee of freight is at the depot when his goods arrive

and demands them, and is refused, and the goods are reshipped to some other destination, and the carrier refuses to pay for them, the owner may sue for conversion.—*St. Louis & S. F. R. Co. v. Dunham*, 129 P. 862.

§ 135 (Okl.) In an action against a carrier for loss of household goods and wearing apparel having no fixed market value, the measure of damages is their value to the owner.—*St. Louis & S. F. R. Co. v. Dunham*, 129 P. 862.

### III. CARRIAGE OF LIVE STOCK.

§ 215 (Okl.) Where cattle, on arrival at their destination, were unloaded by the carrier and dipped in oil and turned into another pen and held there after the consignee had demanded possession, and it was alleged that while in that pen they drank crude oil and died, there had been no delivery until the consignee was permitted to remove them from the pen.—*Midland Valley R. Co. v. Ezell*, 129 P. 734.

§ 218 (Okl.) Where, on the arrival of live stock at destination, the agent of the carrier is notified that some of the stock has been injured, and he examines the stock and has opportunity to ascertain the extent of the injuries, there is a substantial compliance with the shipping contract requiring notice of injury before the stock is removed.—*Atchison, T. & S. F. Ry. Co. v. Robinson*, 129 P. 20; *Same v. Moore*, Id. 24.

Where a shipment of live stock is made under a verbal contract, and every move up to the starting in transit of the shipment is under the parol agreement, and a written shipping contract is then presented to the shipper, he may assume that it embodies the verbal agreement and the carrier cannot escape liability under its provisions at variance with the parol contract unless the shipper's attention was called to them.—Id.

§ 229 (Okl.) Certain evidence as to value of the cattle held inadmissible.—*Midland Valley R. Co. v. Ezell*, 129 P. 734.

### IV. CARRIAGE OF PASSENGERS.

#### (A) Relation Between Carrier and Passenger.

§ 238 (Wash.) Where plaintiff boarded a car, believing it to be one on which her husband was a conductor, at a regular stopping place, with intent to pay her fare, she was a passenger entitled to the highest degree of care, though the car was in fact going to the barn, and made only a safety stop.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

§ 247 (Or.) In an action for injuries plaintiff claimed to have sustained in boarding a street car, held, that a requested instruction by the carrier that no relation of passenger and carrier arose unless plaintiff gave some notice of intention to become a passenger was improperly refused.—*Zurcher v. Portland Ry., Light & Power Co.*, 129 P. 126.

#### (B) Personal Injuries.

§ 280 (Wash.) The degree of care demanded from a carrier toward a passenger, whatever the character of the train on which he rides, is the highest degree of care consistent with good railroading.—*Wile v. Northern Pac. Ry. Co.*, 129 P. 889.

§ 286 (Cal.App.) Common carriers must furnish sufficient light at night at their stations to enable passengers boarding or leaving their trains to do so with safety; a failure to do so being culpable negligence, and it is not material that the light was shut off from the alighting place by a row of box cars.—*Teale v. Southern Pac. Co.*, 129 P. 949.

Where a plaintiff while alighting from defendant's train in the dark fell to the ground, and was seriously hurt, it was an accident which should have been reasonably anticipated from a railroad's omission to sufficiently light its station.—Id.

§ 298 (Wash.) A passenger on a freight train cannot recover for injuries from a jolt, without showing that it was something more than an ordinary jolt necessarily incident to the operation of such trains, or was an unusual happening.—*Wile v. Northern Pac. Ry. Co.*, 129 P. 889.

A passenger on a mixed train assumes the usual and incidental jerks necessary to its operation, but not the extraordinary jerks and jars resulting from negligence of those operating the train.—Id.

§ 313 (Mont.) The superintendent of a street railway company, whose negligence caused an accident, was properly joined with the company as defendant in a passenger's action for resulting injuries.—*Emerson v. Butte Electric Ry. Co.*, 129 P. 319.

§ 316 (Mont.) A presumption of negligence by a common carrier arises from the happening of an accident resulting in injury to a passenger, due to some agency over which the carrier has control.—*Emerson v. Butte Electric Ry. Co.*, 129 P. 319.

§ 316 (Wash.) A jerk or jar causing passenger's injuries held to be assumed to have been an ordinary one, and not one caused by negligence, in the absence of proof of negligence.—*Wile v. Northern Pac. Ry. Co.*, 129 P. 889.

The doctrine of *res ipsa loquitur* applies to a passenger's injury only where the act causing it would not ordinarily happen without negligence; and hence did not apply to an accident from a jerk or jar not shown to have been caused by negligence.—Id.

§ 318 (Cal.App.) In an action by a passenger for personal injuries received by a fall while descending from defendant's coach, evidence held to warrant a finding that the accident was due to defendant's negligent failure to maintain sufficient lights at its depot.—*Teale v. Southern Pac. Co.*, 129 P. 949.

§ 318 (Mont.) Evidence, in a street car passenger's action for injuries in a derailment, held to support a verdict in some amount for plaintiff.—*Emerson v. Butte Electric Ry. Co.*, 129 P. 319.

§ 321 (Wash.) An instruction that if plaintiff, injured while alighting from a street car, was led to believe that she would not be carried on the car, because it was going to the barn, it was her duty to immediately alight therefrom, is not erroneous.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

#### (C) Contributory Negligence of Person Injured.

§ 333 (Cal.App.) A woman well along in years, but who was robust, was not guilty of contributory negligence in getting off of defendant's train without assistance at her destination, carrying a small valise and a suit case, in the dark, there being no assistance at hand.—*Teale v. Southern Pac. Co.*, 129 P. 949.

That a woman, injured while alighting from her train in the dark without assistance, there being none at hand, realized the risk of doing so, did not make her act the voluntary assumption of the risk, so as to charge her with contributory negligence.—Id.

#### (F) Ejection of Passengers and Intruders.

§ 363 (Okl.) Under the express provisions of Comp. Laws 1909, § 1394, a passenger refusing to pay fare may be ejected at any usual stopping place or near a dwelling house.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

#### (G) Passengers' Effects.

§ 405 (Nev.) If a carrier may limit its liability as insurer of baggage exceeding a fixed value, a contract so limiting its liability does not relieve it of liability for the loss of baggage through its negligence.—*Zetler v. Tonopah & G. R. Co.*, 129 P. 299.

The delivery of a passenger's baggage at the carrier's baggage room to a person not entitled

to receive it is such negligence as makes the company liable, notwithstanding a contract limiting its liability to a fixed value.—*Id.*

§ 408 (Colo.) Plaintiff had the burden of establishing that a trunk admitted to have been received by defendant carrier at a certain address, was his trunk.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

### CASE-MADE.

See Appeal and Error, §§ 520, 564; Criminal Law, § 1098.

### CATTLE GUARDS.

See Railroads, § 411.

### CAUSA MORTIS.

See Gifts, § 78.

### CERTIFICATE.

See Elections, §§ 250, 253; Indians, § 27; Judgment, § 944; Mines and Minerals, § 38; Physicians and Surgeons, § 6; Schools and School Districts, § 130.

### CERTIORARI.

See Contempt, § 67; Judgment, § 725.

#### I. NATURE AND GROUNDS.

§ 5 (Wash.) The refusal to order a recount in an election contest was not reviewable by certiorari on the theory that the delay incident to an appeal under Rem. & Bal. Code, § 4956, rendered an appeal inadequate, where it did not appear that the contestee's term would expire before the disposition of the appeal.—*State v. Superior Court for King County*, 129 P. 83.

Certiorari will not lie where the remedy by appeal is adequate.—*Id.*

§ 28 (Wash.) The Supreme Court may determine whether the superior court has acted within its jurisdiction or exercised its jurisdiction contrary to law in a local option election contest, although Rem. & Bal. Code, § 6313, makes that court's decision on the merits final.—*State v. Superior Court, Cowlitz County*, 129 P. 900.

### CHALLENGE.

See Jury, §§ 103, 110, 131.

### CHANCERY.

See Equity.

### CHANGE OF VENUE.

See Venue, §§ 58, 63.

### CHARACTER.

See Criminal Law, § 680.

### CHARGE.

Telephone rates, see Telegraphs and Telephones, §§ 83, 84.

To jury, see Criminal Law, §§ 673, 763, 764-841, 922, 1056, 1172; Homicide, §§ 300-309, 340; Trial, §§ 191-296.

### CHATTEL MORTGAGES.

#### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 34 (Mont.) Both the general rule and Rev. Codes, § 5768, recognize that a bill of sale, absolute on its face, may in fact be a chattel mortgage.—*Rairden v. Hedrick*, 129 P. 498.

A bill of sale, with an agreement to repurchase, may amount to a chattel mortgage or condition-

al sale, depending upon the intention, as shown by the surrounding circumstances.—*Id.*

§ 38 (Mont.) In claim and delivery for horses claimed by defendant to have been merely mortgaged to plaintiff, though a bill of sale was executed, evidence as to statements by plaintiff, implying that the transaction was a mortgage, held admissible as showing plaintiff's construction of the transaction.—*Rairden v. Hedrick*, 129 P. 498.

Parol evidence is admissible to show that a bill of sale absolute in form is a chattel mortgage, though such evidence tends to contradict or vary the terms of the writing in view of the provisions of Rev. Codes, §§ 7876 and 7877.—*Id.*

§ 40 (Mont.) Evidence in claim and delivery proceedings for horses held to make it a jury question whether the transaction between the parties amounted to a sale or a chattel mortgage.—*Rairden v. Hedrick*, 129 P. 498.

#### II. FILING, RECORDING, AND REGISTRATION.

##### (B) Renewal.

§ 97 (Utah) The affidavit and statement required by Comp. Laws 1907, §§ 155, 156, to be filed in order to keep a chattel mortgage in force after a year, may be filed at any time subsequent to the 30 days, after the expiration of the year, from the filing of the mortgage, provided no rights exist or have been acquired against the mortgaged property before such filing.—*Grubb v. Lashus*, 129 P. 1029.

#### III. CONSTRUCTION AND OPERATION.

##### (D) Lien and Priority.

§ 138 (Utah) A livery stable keeper's lien, conferred by Comp. Laws 1907, § 1401, for feeding, held not prior in right to a valid prior recorded chattel mortgage on the animal.—*Grubb v. Lashus*, 129 P. 1029.

§ 156 (Utah) Where a chattel mortgagee of a stallion took possession to foreclose the mortgage within a year and 30 days after the recording thereof, he was not required to file the affidavit required by Comp. Laws 1907, §§ 155, 156, to keep the mortgage in force and enforceable as a prior lien on a horse to that of a livery stable keeper for board of the horse after the recording of the mortgage.—*Grubb v. Lashus*, 129 P. 1029.

#### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 159 (Mont.) While the lien of a pledge depends upon possession as between the parties, a chattel mortgage is valid though mortgagor retains possession.—*Rairden v. Hedrick*, 129 P. 498.

§ 169 (Okla.) Where a chattel mortgagee, after condition broken, takes possession without lawful foreclosure, and sells the property to another, who takes possession and detains the chattels from the mortgagors, the mortgagee is guilty of conversion.—*Advance Thresher Co. v. Doak*, 129 P. 736.

§ 172 (Okla.) In replevin to recover certain chattels by virtue of a mortgage, the answer setting up only a partial failure of consideration, judgment was properly entered for plaintiff.—*Jones v. Bostick*, 129 P. 718.

#### VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 237 (Mont.) A tender of the debt by a chattel mortgagor need not be proved where mortgagor denied the existence of a mortgage so that a tender would have been futile.—*Rairden v. Hedrick*, 129 P. 498.

## CHILDREN.

See Infants; Parent and Child.

## CITIES.

See Municipal Corporations.

## CITIZENS.

See Indians.

## CLAIM AND DELIVERY.

See Replevin.

## CLAIMS.

See Counties, §§ 122, 204; Executors and Administrators, §§ 122, 222, 431.

## CLERKS OF COURTS.

See Criminal Law, § 101; Execution, § 66; Judgment, § 944; Justices of the Peace, § 80.

§ 11 (Nev.) The fees of the clerk of the Supreme Court prescribed by Comp. Laws, § 2469, are limited to orders and motions defined by section 3586.—*State v. Baker*, 129 P. 452.

§ 14 (Nev.) The clerk of the Supreme Court in an original proceeding must on request issue subpoenas, and fees therefor will be disallowed unless the party against whom the charge is made applied for and obtained a written order for the subpoenas.—*State v. Baker*, 129 P. 452.

§ 66 (Cal.App.) The clerk of the superior court has no judicial power to pass on the sufficiency of an answer filed in due time, but the question is for the court on motion for judgment on the pleadings, or on motion to strike out the answer.—*Rose v. Leland*, 129 P. 599.

## CLUBS.

See Intoxicating Liquors, § 258; Municipal Corporations, § 605.

## COHABITATION.

See Marriage, § 22.

## COLLATERAL ATTACK.

See Divorce, § 255; Executors and Administrators, § 29; Judgment, §§ 490-497; Process, § 111; Schools and School Districts, § 28.

## COLLATERAL INHERITANCE TAXES.

See Taxation, §§ 860, 867.

## COLLEGES AND UNIVERSITIES.

§ 8 (Idaho) Under Rev. Codes, § 490, giving the Board of Regents of the State University power to remove the president or any professor or officer of the University, when expedient, an action will not lie against such regents and the state by professor for his salary for one year after dismissal by the regents.—*Hyslop v. Board of Regents of University of Idaho*, 129 P. 1073; *Shinn v. Same*, Id. 1074.

## COLOR OF TITLE.

See Adverse Possession, § 82.

## COMMERCE.

See Courts, § 489; Master and Servant, § 276.

### II. SUBJECTS OF REGULATION.

§ 27 (Kan.) An interstate railroad while moving cars of water or coal over its line from one state to another for use in its own engines is engaged in interstate commerce within the Federal Employers' Liability Act regulating lia-

bility of railroads so engaged for injuries to employees.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

## COMMERCIAL PAPER.

See Bills and Notes.

## COMMISSION.

See Constitutional Law, § 62; Railroads, §§ 6, 9, 227.

## COMMISSIONERS.

See Banks and Banking, § 73; Counties, §§ 46, 47, 122, 204; Elections, § 307; Highways, § 63; Officers, § 6; Public Lands, § 39; Quo Warranto; Schools and School Districts, § 97; United States Commissioners.

## COMMISSIONS.

See Brokers, §§ 8, 40-88; Principal and Agent, § 84.

## COMMON LAW.

See Abatement and Revival, § 54; Corporations, § 181; Death, § 11; Ejectment, § 9; Estates Tail, § 1; Evidence, § 80; Logs and Logging, § 24; Mandamus, § 129; Marriage, § 22; Money Received, § 8; Statutes, § 239.

## COMMON SCHOOLS.

See Schools and School Districts.

## COMMUNITY PROPERTY.

See Husband and Wife, §§ 246, 262.

## COMPENSATION.

See Attorney and Client, §§ 148, 149; Brokers, §§ 8, 40-88; Clerks of Courts, §§ 11, 14; Colleges and Universities, § 8; Contracts, § 278; Counties, § 46; Elections, § 307; Eminent Domain, §§ 74-152, 275, 276; Master and Servant, § 80; Mortgages, § 199; Municipal Corporations, § 162; Nuisance, § 72; Officers, § 94; Principal and Agent, § 84; Schools and School Districts, §§ 47, 145; Work and Labor.

## COMPETENCY.

See Evidence, §§ 539-543; Jury, §§ 99, 103; Witnesses, §§ 52-220.

## COMPLAINT.

See Indictment and Information; Pleading.

## COMPROMISE AND SETTLEMENT.

See Attorney and Client, § 148; Contracts, §§ 246, 305; Corporations, § 416; Divorce, §§ 255, 256; New Trial, § 56.

## CONCEALMENT.

See Contempt, § 15.

## CONCLUSION.

See Evidence, § 471; Pleading, § 8.

## CONCLUSIVENESS.

See Judgment, §§ 650-744; Municipal Corporations, §§ 358, 365.

## CONCURRENT JURISDICTION.

See Courts, § 489.

## CONDEMNATION.

See Eminent Domain.

## CONDITIONAL SALES.

See Sales, § 477.

**CONDITIONS.**

See Bills and Notes, § 64; Deeds, §§ 111, 155; Executors and Administrators, § 431; Insurance, § 646; Quieting Title, §§ 14, 19; Vendor and Purchaser, §§ 116, 339.

**CONFESSION.**

See Criminal Law, § 1169; Evidence, § 230.

**CONFIRMATION.**

See Judicial Sales, § 31.

**CONFLICT OF LAWS.**

See Acknowledgment, § 57; Appeal and Error, § 981.

**CONSENT.**

See Forcible Entry and Detainer, §§ 4, 12; Principal and Surety, §§ 128, 160.

**CONSIDERATION.**

See Assignments, § 70; Bills and Notes, §§ 141, 318, 360; Contracts, §§ 59-88; Fraud, § 47; Fraudulent Conveyances, §§ 74, 168, 277.

**CONSPIRACY.**

See Criminal Law, §§ 422-424, 656; Evidence, §§ 222, 253; Witnesses, § 220.

**CONSTITUTIONAL LAW.**

See Appeal and Error, §§ 1001, 1170; Contempt, §§ 45, 54; Courts, §§ 42, 208; Criminal Law, §§ 93, 106, 573, 575, 627, 635, 641, 1213; Death, § 9; Elections, §§ 84, 319; Eminent Domain, §§ 2, 28, 275, 276; Executors and Administrators, § 9; Husband and Wife, § 303; Indictment and Information, § 156; Intoxicating Liquors, §§ 11, 14-21, 279; Jury, §§ 21, 33, 34; Justices of the Peace, § 171; Master and Servant, § 296; Municipal Corporations, §§ 34, 883, 884; Negligence, § 136; Pleading, § 433; Railroads, § 223; Schools and School Districts, § 47; Statutes, §§ 64, 72-96, 289; Waters and Water Courses, § 3; Witnesses, §§ 2, 298.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

§ 29 (Colo.) Constitutional provisions are self-executing if it appears that they are intended to take immediate effect and ancillary legislation is not necessary to put them into complete effect.—*Town of Lyons v. City of Longmont*, 129 P. 198.

§ 33 (Colo.) Const. art. 16, § 7, giving all corporations the right of way across public and corporate lands for constructing ditches and flumes for conveying water for domestic purposes, is self-executing.—*Town of Lyons v. City of Longmont*, 129 P. 198.

§ 42 (Colo.) The State Auditor may, in a suit to compel his obedience to a statute providing for his drawing warrants payable out of public funds, question its constitutionality.—*Stockman v. Leddy*, 129 P. 220.

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.****(A) Legislative Powers and Delegation Thereof.**

§ 55 (Colo.) The constitutional provision vesting the judicial power in equity in specified courts does not inhibit legislation prescribing procedure.—*Cary v. Mine & Smelter Supply Co.*, 129 P. 230.

§ 58 (Colo.) Laws 1911, p. 671, in making a joint committee of members of the Senate and House to conduct an investigation, on which the committee should come to a conclusion and act in the matter of prosecuting or defending actions for the benefit of the state, confers executive power on a collection of its own members in contravention of Const. art. 3.—*Stockman v. Leddy*, 129 P. 220.

§ 62 (Colo.) Railroad Commission Act 1910, §§ 2, 5, 12, 25, 27, held to require common carriers to furnish adequate railway service, and to authorize the Railroad Commission to administer the law, and not to delegate to the Commission legislative powers contrary to Const. art. 3, and article 5, § 1, as amended by Laws 1910, p. 11.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

§ 66 (Colo.) While the General Assembly cannot delegate the power to make a law, it may delegate the power to determine some fact or state of things upon which the law as prescribed makes its action depend.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

**(B) Judicial Powers and Functions.**

§ 70 (Colo.) In a suit by patrons of a telephone company to restrain the company from discriminating against plaintiff by changing the character of the service which they had been enjoying, the court has no power to fix the rates of service, as that is a purely legislative function.—*Colorado Telephone Co. v. Wilmore*, 129 P. 204.

**VIII. RETROSPECTIVE AND EX POST FACTO LAWS.**

§ 186 (Cal.App.) The Legislature may pass retroactive laws not impairing the obligation of contracts or vested rights.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

**IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.**

§ 205 (Cal.) St. 1907, p. 119, amending Civ. Code, § 1970, and giving a right of action for damages against an employer in favor of an employé whose death is caused from negligence of a fellow servant, is not in violation of Const. art. 1, § 21, forbidding grant of special privileges.—*Pritchard v. Whitney Estate Co.*, 129 P. 989.

A law establishing rules of liability for negligence applying only to actions arising from the relation of master and servant does not violate Const. art. 1, § 21, forbidding grant of special privileges.—*Id.*

**X. EQUAL PROTECTION OF LAWS.**

§ 241 (Kan.) An ordinance requiring a railroad to open a street under its track by removing an embankment wrongfully obstructing the street did not deny it equal protection of the law.—*City of Emporia v. Atchison, T. & S. F. Ry. Co.*, 129 P. 161.

**XI. DUE PROCESS OF LAW.**

§ 268 (Okla.Cr.App.) A conviction on hearsay evidence or suspicion is not obtained by due process of law within the requirements of the fourteenth amendment of the federal Constitution.—*McRae v. State*, 129 P. 71.

§ 296 (Wash.) The provision of Laws 1909, c. 84, making it illegal for a manufacturer or wholesaler of liquor to advance money to pay a retail dealer's liquor license, or to become surety for payment thereof, does not deprive the manufacturer or wholesaler of his property without due process; the act being but a regulation of traffic in intoxicating liquors, which is in the powers of state governments.—*Lewer v. Cornelius*, 129 P. 911.

§ 297 (Colo.) Railroad property is protected by constitutional guaranties against deprivation without due process of law, but these rights are not abridged by the reasonable exercise of the governmental power to regulate.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

§ 297 (Kan.) An ordinance requiring a railroad to open a street through an embankment wrongfully obstructing the street, and leaving the railroad tracks upon a viaduct, does not deprive the railroad of its property without due process of law.—*City of Emporia v. Atchison, T. & S. F. Ry. Co.*, 129 P. 161.

§ 312 (Colo.) Code Civ. Proc. § 164, authorizing summary judgment on an emergency injunction bond and execution therefor on the finding that no emergency existed for the issuance of an injunction, held not unconstitutional as denying due process of law.—*Cary v. Mine & Smelter Supply Co.*, 129 P. 230.

## XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 321 (Okla.Cr.App.) That a fair trial was unintentionally denied accused does not cure the error committed.—*Gilbert v. State*, 129 P. 671.

### CONSTRUCTION.

See Chattel Mortgages, §§ 138, 156; Contracts, §§ 147-213; Deeds, §§ 93-155; Guaranty, § 5; Justices of the Peace, § 32; Libel and Slander, § 19; Mechanics' Liens, § 5; Principal and Surety, § 59; Statutes, §§ 181-277; Taxation, §§ 772, 775; Vendor and Purchaser, §§ 54-78; Wills, §§ 439-630.

Of instructions to jury, see Trial, §§ 295, 296.

### CONSTRUCTIVE TRUSTS.

See Trusts, §§ 91-109.

### CONTEMPT.

See Courts, § 240½; Criminal Law, §§ 573, 627, 635, 641, 662; Intoxicating Liquors, §§ 21, 279; Jury, § 21; Witnesses, § 2.

#### I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 3 (Okla.Cr.App.) "Criminal contempts" are all those acts or conduct in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute.—*Burnett v. State*, 129 P. 1110.

§ 4 (Okla.Cr.App.) Civil contempts are those quasi contempts which consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceedings.—*Burnett v. State*, 129 P. 1110.

§ 9 (Utah) Affidavits charging that defendant newspaper, well knowing that certain publications were calculated to greatly prejudice the minds of the summoned jurors and other persons against a defendant then on trial, caused copies containing such publication to be delivered to such veniremen and others, and that such publication did prejudice many of them, making it difficult to obtain qualified jurors, showed contempt.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

Although a newspaper can publish anything that is said or done in the court while attempting to impanel a jury, it cannot print conclusions and evidence and a confession by an alleged confederate which would not be admissible on the trial, where such facts had been published fully at the time of the crime, without committing at least a technical contempt as interfering with judicial action.—*Id.*

§ 15 (Okla.Cr.App.) A party to a suit, who willfully destroys or conceals its subject-matter with intent to withdraw it from the jurisdiction of the court, defies the power and offends the

dignity of the court, and renders himself liable to punishment for criminal contempt.—*Burnett v. State*, 129 P. 1110.

#### II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 30 (Okla.Cr.App.) The power to punish contempt is inherent in all courts, and is expressly conferred by Bill of Rights, art. 2, § 25, and its exercise has a twofold aspect, namely, the punishment for disrespect of the court or its order, and compelling performance of a duty required by the court.—*Burnett v. State*, 129 P. 1110.

§ 40 (Okla.Cr.App.) By the filing of an affidavit charging a contempt committed out of the presence of the court or judge, and the issuance of attachment or rule to show cause, a criminal action is commenced.—*Nichols v. State*, 129 P. 673.

Contempts prosecuted to preserve the power and vindicate the dignity of the court, and punish the offender, are criminal contempts, and the proceedings should conform as nearly as possible to proceedings in criminal cases.—*Id.*

§ 45 (Okla.Cr.App.) A person accused of contempt committed out of the presence of the court or judge is entitled to a trial in the county in which the offense was committed, as guaranteed by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

§ 54 (Okla.Cr.App.) A person accused of contempt committed out of the presence of the court or judge is entitled to be informed of the nature and cause of the accusation against him, as required by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

§ 58 (Okla.Cr.App.) The sworn answer of one charged with contempt in disobeying an order of court is evidence to purge him, but is not conclusive; and the court may consider all evidence adduced and give judgment accordingly.—*Burnett v. State*, 129 P. 1110.

§ 58 (Utah) The old rule that a constructive criminal contempt was purged by a denial under oath is changed, and the matter is regulated by statute.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

§ 60 (Utah) In a prosecution for criminal contempt for publishing matters which tended to interfere with judicial action, evidence that there was no intent to interfere, and that there was no harm done in fact, is admissible in mitigation of punishment.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

Where one is charged in an affidavit for contempt with intent to interfere with judicial action, the burden is on the state to show such intent.—*Id.*

§ 61 (Utah) One charged with criminal contempt committed out of the presence of the court must be given a hearing and evidence be taken, unless his answer is, or amounts to, a plea of guilty under Comp. Laws 1907, §§ 3360, 3366, and 3367.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

A conviction of contempt cannot be rendered on pleadings on the theory that intent and circumstances of a publication were wholly immaterial, and then be defended on the theory that the burden of proof to such matters was on the accused.—*Id.*

§ 63 (Utah) Although a newspaper charged with constructive criminal contempt by its answer shows that it is guilty of only a technical contempt without intent to interfere with judicial action, a judgment of conviction that it was guilty "as charged in the affidavit" which charged wrongful intent and knowledge of harm, etc., was erroneous.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

The recital in a judgment that the accused "having stated that they had no legal reason to give why judgment should not be pronounced against them," etc., does not show that they were given an opportunity to be heard.—*Id.*

A recital in a judgment of conviction for con-

structive contempt that "the matter is submitted upon its merits upon the affidavit and answers," etc., does not show a waiver of a trial or hearing.—*Id.*

§ 67 (Utah) Where the Supreme Court allows an application for certiorari to be filed, and the right of appeal is lost by passage of time, the court will review the proceeding.—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624.

## CONTEST.

See Elections, §§ 269-307; Wills, §§ 277, 384.

## CONTINUANCE.

See Criminal Law, §§ 586-596, 1151.

## CONTRACTORS.

See Principal and Surety, §§ 10-82.

## CONTRACTS.

See Assignments; Attorney and Client, §§ 148, 149; Bills and Notes; Bonds; Breach of Marriage Promise; Carriers, § 218; Chattel Mortgages; Contribution; Corporations, §§ 78, 82, 118, 416, 642; Counties, §§ 122, 204; Damages, § 123; Deeds; Evidence, §§ 384-461; Exchange of Property; Executors and Administrators, § 431; Frauds, Statute of; Guaranty; Habeas Corpus, § 99; Husband and Wife, §§ 278, 279, 281; Infants, §§ 50, 58; Injunction, § 7; Insurance; Intoxicating Liquors, § 327; Judgment, § 714; Landlord and Tenant; Master and Servant, § 80; Mechanics' Liens; Mines and Minerals, § 112; Mortgages; Municipal Corporations, §§ 231, 241, 347-365; Officers, § 114; Partnership, §§ 1, 11; Patents; Pleading, § 267; Principal and Agent, §§ 143, 189; Principal and Surety, §§ 10-82, 97, 128, 160; Railroads, § 171; Reformation of Instruments; Rewards; Sales; Schools and School Districts, §§ 84, 145; Specific Performance; Stipulations; Towns, § 31; United States; Vendor and Purchaser; Wills, §§ 58, 67, 88; Work and Labor.

### I. REQUISITES AND VALIDITY.

#### (D) Consideration.

§ 59 (Cal.) An agreement by a subscriber to stock to give the defendants a preferred right to buy it was a sufficient consideration for an agreement of defendants to pay dividends on the stock and, at the subscriber's option, to buy the stock at a stated price.—*Vickrey v. Maler*, 129 P. 273, 276.

§ 75 (Or.) A contract to care for decedent in consideration of his making J. his residuary beneficiary *held* unsustainable, where J. had previously agreed to perform the same services under contract with decedent's agent.—*Hillman v. Young*, 129 P. 124.

§ 88 (Cal.) Under Civ. Code, § 1614, it will be presumed that the consideration consisted of something of value not mentioned in the agreement itself, unless the terms thereof forbid such assumption.—*Vickrey v. Maier*, 129 P. 273, 276.

#### (F) Legality of Object and of Consideration.

§ 123 (Wash.) Where landowners under a reclamation project outside a city, by subscribing to a contract between the company and a city, were allowed six inches of water free, such contract is void as against public policy.—*Gantenbein v. City of Pasco*, 129 P. 374.

§ 138 (Wash.) A court will not aid in furtherance of an illegal transaction, from whatever source it gets knowledge of the illegality, and so will inquire into the matter, though informed by an allegation in the answer, which

defendant was estopped as against plaintiff to make.—*Lewer v. Cornelius*, 129 P. 911.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 147 (Utah) In ascertaining the intention of the parties to a contract, all the words must be given their ordinary effect, when considered in the light of the subject-matter and nature of the agreement.—*Cummings v. Nielson*, 129 P. 619.

In construing a contract, the court's duty is, if possible, to ascertain and enforce the intention of the parties.—*Id.*

§ 154 (Utah) Courts incline toward giving the language of a contract a reasonable construction so as to avoid any absurdity, if possible.—*Cummings v. Nielson*, 129 P. 619.

§ 162 (Cal.App.) Every part of a contract must be given some effect if possible, and apparently conflicting provisions must be reconciled, if this can be done without doing actual violence to the language of the contract.—*Royal Ins. Co. of Liverpool, Eng., v. Caledonian Ins. Co. of Edinburgh, Scotland*, 129 P. 597.

§ 168 (Utah) That which is implied in a contract is as much a part thereof as its express provisions.—*Cummings v. Nielson*, 129 P. 619.

§ 176 (Kan.) The construction of writings is for the court, and not for the jury; it being a question of law, and not of fact.—*Ellis v. Woodruff*, 129 P. 1193.

### (B) Parties.

§ 187 (Cal.App.) Broker *held* entitled to sue on contract for exchange of land binding each of the parties to pay the broker a specified sum, under Civ. Code, § 1559, authorizing suits by parties for whose benefit contracts are made.—*Lundeen v. Nowlin*, 129 P. 474.

§ 187 (Okla.) Where a contract is expressly made for the benefit of a third person, he is authorized by Comp. Laws 1909, § 1044, to enforce the same at any time before the parties rescind it.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 358.

K., the president and manager of the K. Company, orally agreed with L., a stockholder, who was also manager of the S. Company, whereby the beneficial interest of the K. Company and of K. should be transferred to the S. Company in consideration of a specified sum, to be paid into the treasury of the K. Company, and the same, being paid, was appropriated by individuals owning one-half of the K. Company's stock. *Held*, that an action was maintainable by the K. Company to recover the amount so appropriated.—*Id.*

### (C) Subject-Matter.

§ 196 (Wash.) Under the contract of an architect to draw plans for a courthouse, he, if contract for building be not let, to receive only \$1,000 for plans, to be applied as part payment in the event of "the building" going ahead at some future time, he is entitled to nothing more; the subsequent construction being according to plans of another.—*Gaunt v. Chehalis County*, 129 P. 888.

### (D) Place and Time.

§ 213 (Cal.) In an action on an oral promise to repay borrowed money "when able," the plaintiff must allege and prove the debtor's ability to pay.—*Van Buskirk v. Kuhns*, 129 P. 587.

## III. MODIFICATION AND MERGER.

§ 246 (Utah) Owner *held* to have right to rescind compromise agreement which the building contractor refused to perform, and to sue for breach of the original contract.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.



**V. PERFORMANCE OR BREACH.**

§ 278 (Cal.App.) Though a contract of employment of architects stipulated that the plans and specifications were to be accepted in writing, and the contractor procured was to be satisfactory to defendant, they are entitled to compensation for services rendered and damages for prevention of complete performance, where the specifications were approved by defendant, and there is no evidence that the contractor was objectionable.—*Rousseau v. Cohn*, 129 P. 618.

§ 279 (Cal.App.) Where a party to a contract of sale had repudiated his contract, the other party would be excused from himself performing as a condition to relief against such first party.—*Butterfield v. Harris*, 129 P. 614.

§ 305 (Utah) Occupancy of house by owner under protest that it was incomplete, and in reliance on compromise agreement which contractor failed to perform, held not a waiver of owner's right to claim damages for defective construction, though the original contract provided that occupancy by the owner should be conclusive evidence of performance.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

§ 320 (Kan.) Where a contractor has constructed a building substantially according to the contract, he can recover the agreed price, less such sum as will be required to effect literal compliance.—*Lofsted v. Bohman*, 129 P. 1168.

§ 322 (Mont.) Part payment under a contract with full knowledge of the facts tends to prove waiver of defects in performance.—*Lackman v. Simpson*, 129 P. 325.

**VI. ACTIONS FOR BREACH.**

§ 350 (Okla.) The party who alleges a contract, either as a cause of action or defense, has the burden of proving it, and must prove every fact essential to the cause of action or defense, whether the contract is express or implied.—*National Surety Co. v. Board of Education of City of Hugo*, 129 P. 25.

In an action for breach of a contract, the burden is on plaintiff to show what the terms of the contract were, what the plans and specifications were when the building was to be done according to them, and a compliance with them.—*Id.*

**CONTRADICTION.**

See *Witnesses*, § 398.

**CONTRIBUTION.**

See *Judgment*, § 698.

§ 1 (Wash.) The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by those demanding contribution.—*Peterson v. Nichols*, 129 P. 373.

§ 9 (Wash.) In an action by makers of a promissory note, given for the purchase price of a stallion, against another maker for contribution, in which defendant pleaded breach of guaranty, exclusion of deposition to show that transferee of note, who had obtained judgment against plaintiffs, which they had paid, had acted merely as a collecting agent held improper.—*Peterson v. Nichols*, 129 P. 373.

In an action by makers of a note given for the purchase price of a stallion against another maker for contribution, defendant should have been permitted to prove a guaranty of the stallion and a breach.—*Id.*

**CONTRIBUTORY NEGLIGENCE.**

See *Negligence*, §§ 93, 122, 138.

**CONTROVERSY.**

See *Appeal and Error*, §§ 47, 51.

**CONVERSION.**

See *Trover and Conversion*.

**CONVEYANCES.**

See *Deeds*; *Estates Tail*, § 1; *Fraudulent Conveyances*; *Homestead*, § 118; *Indians*, § 15; *Mines and Minerals*, § 55; *Public Lands*, § 135.

**COPY.**

See *Evidence*, § 186; *Statutes*, § 289.

**CORPORATIONS.**

See *Appeal and Error*, § 484; *Assignments*, §§ 58, 79; *Banks and Banking*; *Carriers*; *Constitutional Law*, § 33; *Contracts*, § 59; *Courts*, § 12; *Eminent Domain*, § 28; *Fraud*, § 47; *Insurance*; *Limitation of Actions*, § 95; *Mandamus*, § 129; *Mines and Minerals*, §§ 104, 112; *Money Received*, §§ 8, 12, 17; *Municipal Corporations*; *Principal and Agent*, § 136; *Railroads*; *Street Railroads*; *Telegraphs and Telephones*; *Trover and Conversion*, § 49; *Vendor and Purchaser*, § 229.

**IV. CAPITAL, STOCK, AND DIVIDENDS.**

(A) *Nature and Amount of Capital and Shares.*

§ 67 (Cal.) The prohibition of Civ. Code, § 309, against dividing, withdrawing, or paying out the capital stock of a corporation by the board of directors applies equally to stockholders.—*Schulte v. Boulevard Gardens Land Co.*, 129 P. 582; *Nichols v. Same*, *Id.* 585.

§ 67 (Wash.) Under the express provisions of Rem. & Bal. Code, §§ 3697, 3698, the capital stock of a corporation can only be reduced in the manner therein prescribed.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

(B) *Subscription to Stock.*

§ 78 (Cal.) A subscriber to the stock of a corporation whose contract was to take stock as an original subscriber could not be compelled to accept stock which had been subscribed for by, issued to, and was then owned by other persons.—*Gray v. Ellis*, 129 P. 791.

§ 82 (Cal.) A contract to repurchase on demand held to contemplate delay in the demanding of performance, and that plaintiff's action was not barred by laches.—*Vickrey v. Maier*, 129 P. 273, 276.

§ 82 (Cal.) Despite the prohibition of Civ. Code, § 309, against withdrawing or paying to stockholders any part of the capital stock of a corporation, an agreement by the corporation on a sale of its stock, to redeem it at a future time at a fixed price, is valid and enforceable.—*Schulte v. Boulevard Gardens Land Co.*, 129 P. 582; *Nichols v. Same*, *Id.* 585.

While stipulations limiting the apparent liability of subscribers to corporate stock are invalid as a fraud upon other subscribers, an agreement by the corporation, when selling its stock, it being abundantly solvent, to repurchase its stock at a future time is not in itself such a fraud.—*Id.*

(D) *Transfer of Shares.*

§ 118 (Cal.App.) One who agreed to pay a certain sum in consideration of the transfer of stock to her would be required to offer to pay the balance of such sum, if due, as a condition to obtaining the stock.—*Butterfield v. Harris*, 129 P. 614.

**V. MEMBERS AND STOCKHOLDERS.**

(A) *Rights and Liabilities as to Corporation.*

§ 174 (Cal.) A corporation is the agent and trustee of the stockholders, holding and managing the business for their benefit.—*Hobbs v. Tom Reed Gold Mining Co.*, 129 P. 781.

§ 181 (Cal.) At common law a stockholder has a right to inspect the corporate books.—*Hobbs v. Tom Reed Gold Mining Co.*, 129 P. 781.

**(D) Liability for Corporate Debts and Acts.**

§ 222 (Wash.) A stockholder of a corporation who, by false representations as to the amount of its subscribed capital stock, induces another in reliance thereon to sell its goods, resulting in loss, *held* liable for the loss, if not exceeding the difference between the subscribed stock and the amount represented as subscribed.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

Rem. & Bal. Code, §§ 8677, 8698, *held* to relate only to the contractual liability of stockholders of corporations, and not to exempt them from liability for actual misrepresentation as to its capital stock, inducing a third party to extend it a credit and to suffer a loss thereby.—*Id.*

§ 240 (Wash.) A judgment creditor of an insolvent corporation may maintain an action against the stockholders for their unpaid subscriptions.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

§ 259 (Wash.) In a suit against a corporation and individual defendants for falsely representing the amount of its subscribed capital stock, in reliance on which plaintiff had sold its goods, *held* that the contention that the suit could not be maintained in favor of other creditors was without force, where there was a prayer for general relief.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

**VI. OFFICERS AND AGENTS.**

**(D) Liability for Corporate Debts and Acts.**

§ 330 (Wash.) The fact that a corporation commences and transacts business before all its capital stock has been subscribed does not of itself render its officers and trustees liable to creditors.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

§ 335 (Wash.) An officer of a corporation who, by false representations as to amount of its subscribed capital stock, induces another in reliance thereon to sell its goods, resulting in loss, *held* liable for the loss if not exceeding the difference between the subscribed stock and the amount represented as subscribed.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

**VII. CORPORATE POWERS AND LIABILITIES.**

**(B) Representation of Corporation by Officers and Agents.**

§ 409 (Wash.) Evidence that an alleged corporate lease was signed by the president, secretary, and the three trustees, and attested with the corporate seal, and acknowledged by the president and secretary in the statutory form for corporate acknowledgments, *held* to show prima facie the execution of a valid lease by the corporation.—*King v. West Coast Grocery Co.*, 129 P. 1081.

§ 416 (Utah) A surety company was bound by the act of its president in consenting to a compromise agreement between a contractor, for which the company was surety, and the owner, by which the contractor agreed to build a retaining wall as compensation for defects in the performance of the building contract.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

§ 425 (Cal.) A purchaser of a lease of a corporation, having collected rents of the corporation's sublessee, may not thereafter assert invalidity of the sublease, which the corporation treated as valid, because it was not ratified by

the stockholders, as required by statute.—*Standard Oil Co. v. Slye*, 129 P. 589.

§ 425 (Wash.) Where the trustees of a corporation knew of the purported lease of the corporate business, and that a contract made by it with defendant was being performed by lessee, without questioning the validity of the contract, the corporation was estopped from denying that the lease or assignment was authorized.—*King v. West Coast Grocery Co.*, 129 P. 1081.

**VIII. INSOLVENCY AND RECEIVERS.**

§ 538 (Wash.) The entry of a judgment against a corporation, though at the suit of a third party, on which execution is returned unsatisfied, in itself shows its insolvency.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

§ 542 (Wash.) Under the doctrine that the assets of a corporation are a trust fund for the payment of its debts, persons who divert and appropriate its capital stock commit a fraud against creditors and are liable therefor.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

§ 557 (Wash.) Complaint charging that individual defendants, by false representations as to the amount of stock subscribed to the defendant corporation, induced plaintiff to extend credit to the corporation to a stated amount which was still owing to plaintiff, and that defendant corporation was insolvent, *held* to state grounds for the appointment of a receiver.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 129 P. 389.

**XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.**

§ 605 (Idaho) Under Rev. Codes, § 2732, describing the liabilities of corporate directors for the payment of illegal dividends in the event of dissolution of the corporation, when a corporation ceases business because of its insolvency and is put in the hands of a receiver, it is dissolved.—*Stoltz v. Scott*, 129 P. 340.

§ 610 (Idaho) Rev. Codes, §§ 5185, 5186, providing for the dissolution of a corporation on its voluntary application, apply only to the voluntary dissolution brought about by the stockholders themselves.—*Stoltz v. Scott*, 129 P. 340.

§ 625 (Idaho) An action against directors under Rev. Codes, § 2732, is based on the illegal payment of dividends in fraud of creditors, and the receiver, as the representative of the creditors, may maintain such action.—*Stoltz v. Scott*, 129 P. 340.

It is not necessary to allege that when the dividends were paid the creditors' claims existed.—*Id.*

It is not necessary to allege that, at the time they were paid, the corporation was insolvent.—*Id.*

It is not necessary to a recovery that the corporate assets be first exhausted, or the corporation's liability be first adjudicated.—*Id.*

A complaint against directors to recover illegal dividends paid *held* to state a cause of action.—*Id.*

Under Rev. Codes, § 2732, it is not necessary to the liability of a director for the payment of illegal dividends that he should be a director when the corporation was dissolved.—*Id.*

**XII. FOREIGN CORPORATIONS.**

§ 642 (Okla.) Where a domestic mercantile corporation contracts with a foreign manufacturing corporation to purchase the latter's goods, and to sell them within the state, it does not constitute "doing business" by the nonresident corporation, and service of summons on the domestic corporation is not service on the foreign

corporation.—Harrell v. Peters Cartridge Co., 129 P. 872.

The sending of traveling agents into the state by a foreign manufacturing corporation to advertise its goods and assist the agents of a domestic mercantile corporation in selling them does not constitute "doing business" within the state, and service of summons on the Secretary of State is not a valid service on the foreign corporation.—Id.

## CORRECTION.

See Elections, § 254.

## CORROBORATION.

See Criminal Law, §§ 507, 511; Incest.

## COSTS.

See Appeal and Error, §§ 91, 936, 973; Elections, § 307; Eminent Domain, § 74.

## I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 3 (Nev.) Costs are recoverable only by express statutory provisions.—State v. Baker, 129 P. 452.

## V. AMOUNT, RATE, AND ITEMS.

§ 146 (Colo.) The trial court has power to refuse to tax costs unreasonably incurred by the successful party.—Kinderman v. Hersch, 129 P. 228.

§ 184 (Colo.) Costs for witnesses regularly subpoenaed, though not called, may be taxed against a losing party, unless he shows that they were not subpoenaed in good faith, but for purposes of oppression.—Kinderman v. Hersch, 129 P. 228.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 240 (Nev.) Each party to an appeal or proceeding in the Supreme Court is primarily liable for the costs made by him, and there is no statutory authority for charging to relator or appellant, or requiring the payment by them before judgment, of fees incurred by respondent.—State v. Baker, 129 P. 452.

Where costs are incurred on both sides on appeal or original proceeding, the clerk must collect his costs in advance from the respective parties incurring them.—Id.

§ 256 (Kan.) Where appellee filed a counter abstract containing 550 pages when there was no occasion for more than 15 pages, the excess would be taxed to him.—Charles v. Witt, 129 P. 140.

## COUNCIL.

See Municipal Corporations, §§ 78, 80, 365.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTIES.

See Bribery, § 1; Bridges, §§ 15, 26; Contracts, § 196; Dedication, § 53; Elections, § 259; Estoppel, § 68; Grand Jury, § 27; Intoxicating Liquors, § 11; Jury, § 33; Mandamus, §§ 2, 19, 74, 79, 154; Mechanics' Liens, § 3; Mortgages, §§ 422, 497; Schools and School Districts, §§ 30, 42; Taxation, § 915.

## II. GOVERNMENT AND OFFICERS.

### (C) County Board.

§ 46 (Idaho) A member of the board of county commissioners cannot claim compensation for extra services not authorized by law where he is paid a salary, though the extra services are

for the benefit of the county.—Robinson v. Huffaker, 129 P. 334.

§ 47 (Colo.) The duties of county commissioners are to administer the affairs of the county, to exercise the powers expressly given them by statute, and such implied powers as are reasonably necessary to execute their express powers.—Sheely v. People, 129 P. 201.

Since the general scope of the duties of county commissioners is the administration of the county affairs, they are "administrative officers," rather than judicial or legislative officers.—Id.

§ 47 (Idaho) Under Sess. Laws 1911, c. 60, §§ 887c, 887d, imposing duties on county commissioners and requiring certain reports, they have no authority to determine that such reports are unnecessary, and cannot justify failure to make them on the ground that they believe it will not be necessary to obey the law.—Robinson v. Huffaker, 129 P. 334.

## III. PROPERTY, CONTRACTS, AND LIABILITIES.

### (B) Contracts.

§ 122 (Idaho) A member of the board of county commissioners cannot lease or contract with the board for the use of realty or personality owned by him, and an allowance of a claim against the county for the price is void.—Robinson v. Huffaker, 129 P. 334.

Where a county commissioner presents a claim for the price of a book press, or for services in inspecting roads and bridges, or for superintending the transcribing of records where the county is created out of another county, or for other services not specifically provided by law, such claims are void.—Id.

## V. CLAIMS AGAINST COUNTY.

§ 204 (Idaho) Where a member of the board of county commissioners enters into a contract with the board for the sale of personality to the county, in violation of Rev. Codes, §§ 255, 1946, 1956, the board cannot allow the claim for the price as a claim against the county.—Robinson v. Huffaker, 129 P. 334.

## COUNTY BOARDS.

See Counties, §§ 46, 47, 122, 204.

## COURTS.

See Appeal and Error, §§ 14, 47, 51; Beneficial Associations, § 12; Certiorari, § 28; Clerks of Courts; Contempt; Criminal Law, §§ 84-101, 276; Divorce, § 91; Executors and Administrators, §§ 9, 194; Guardian and Ward, § 177; Homestead, § 150; Indiana, § 15; Injunction, § 7; Intoxicating Liquors, § 14; Judgment, §§ 17, 385, 497, 818, 944; Jury, § 33; Justices of the Peace; Mines and Minerals, § 38; Mortgages, § 494; Public Lands, §§ 39, 108; Quo Warranto; Railroads, § 98; Stipulations; Wills, § 215.

## I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 12 (Cal.) Where a foreign corporation holds its directors' meetings in the state and its directors reside here, and a part of its business is done here, mandamus will issue to compel the officers to order the persons in charge of its mine in another state to permit a stockholder to examine it; Code Civ. Proc. § 1097, providing adequate remedy to compel obedience by authorizing punishment for refusal to obey an injunction.—Hobbs v. Tom Reed Gold Mining Co., 129 P. 781.

§ 29 (Cal.) A writ of mandamus cannot run to persons or be enforced upon realty without the state.—Hobbs v. Tom Reed Gold Mining Co., 129 P. 781.

§ 40 (Or.) Jurisdiction over the subject-matter of a suit cannot be acquired by a mere amendment subsequent to the final submission of

the cause, since a court cannot move affirmatively until it has jurisdiction.—*Holton v. Holton*, 129 P. 532.

## II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

### (A) Creation and Constitution, and Court Officers.

§ 42 (Wash.) The only limitation imposed upon the Legislature in creating courts, by Const. art. 4, § 1, vesting the judicial power in such inferior courts as the Legislature may provide, and section 12, requiring it to prescribe the jurisdiction of inferior courts, is that the courts shall, in fact, be inferior courts.—*State v. Milroy*, 129 P. 384.

The Legislature had power under Const. art. 4, § 12, authorizing it to prescribe the jurisdiction of inferior courts established, to establish police courts in second class cities as inferior courts, and give them jurisdiction of petit larceny committed within the city limits.—*Id.*

### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 90 (Cal.) An order properly made will be affirmed, even though the court has in another case reversed an order similar in all respects.—*Bohn v. Bohn*, 129 P. 981.

§ 91 (Cal.) The Supreme Court, by refusing to transfer a cause from the District Court of Appeal for hearing and determination, does not adopt the opinion of the Court of Appeal, so as to give such opinion the authoritative effect of a Supreme Court decision.—*Bohn v. Bohn*, 129 P. 981.

## III. COURTS OF GENERAL ORIGINAL JURISDICTION.

### (B) Courts of Particular States.

§ 150½ [New, vol. 12 Key-No. Series] (Okl.) The district court has jurisdiction of actions against township officers for misconduct in office under Public Funds Act March 8, 1901, §§ 2, 3 (Laws 1901, c. 25, art. 2; Comp. Laws 1909, §§ 7413, 7414).—*McGuire v. Skelton*, 129 P. 739.

## VI. COURTS OF APPELLATE JURISDICTION.

### (A) Grounds of Jurisdiction in General.

§ 208 (Colo.) Under Const. art. 6, § 3, the Supreme Court must determine for itself as to the solemnity of the occasion and the importance of the questions propounded to it by the Governor, Senate, or House of Representatives under that section.—*In re Lieutenant Governorship*, 129 P. 811.

Questions propounded to the Supreme Court under Const. art. 6, § 3, must relate to purely public rights, be propounded upon a solemn occasion, and possess a peculiar importance, and executive questions must be exclusively public juris, and legislative ones must relate either to the constitutionality of pending legislation or to matters of purely public right connected therewith.—*Id.*

Death of the Lieutenant Governor elect, statement of the then Lieutenant Governor that he intended to hold over, and the election by the Senate of a president pro tempore, all prior to the expiration of the Lieutenant Governor's term of office, held not to create an occasion of such solemnity as justified the Supreme Court in expressing its opinion of the Lieutenant Governor's right to hold over, under Const. art. 6, § 3.—*Id.*

Supreme Court held not authorized by Const. art. 6, § 3, to express its opinion in answer to questions propounded by the Senate as to a Lieutenant Governor's right to hold over upon the death of his successor before the commencement of his term, because it involves private

rights not determinable in an ex parte proceeding.—*Id.*

### (B) Courts of Particular States.

§ 240½ [New, vol. 8 Key-No. Series] (Okl. Cr. App.) Under Const. art. 7, § 2, and Comp. Laws 1909, §§ 1916, 1917, giving the Criminal Court of Appeals exclusive appellate jurisdiction, a proceeding and judgment for criminal contempt are reviewable in that court.—*Burnett v. State*, 129 P. 1110.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (B) State Courts and United States Courts.

§ 489 (Cal. App.) Under section 9 the federal courts have exclusive jurisdiction of an action for damages for overcharges or for violation of section 8 of the interstate commerce act.—*Olcovich v. Grand Trunk Ry. Co. of Canada*, 129 P. 290.

Under sections 8 and 9 of the interstate commerce act, making a carrier liable for violations thereof, and giving jurisdiction to the Interstate Commerce Commission and to the federal courts, and Act March 3, 1875, as amended by Act August 13, 1888, and Act March 3, 1911, §§ 24, 289, defining the jurisdiction of the federal courts, held, that the state courts had concurrent jurisdiction of an action under section 20 of the interstate commerce act, as amended, for injury to goods.—*Id.*

## COVENANTS.

See Deeds, § 111; Landlord and Tenant, §§ 76, 83, 85½.

## CREDITORS.

See Fraudulent Conveyances.

## CREDITORS' SUIT.

See Evidence, § 230.

## CRIMINAL LAW.

See Arrest, § 63; Bribery; Burglary; Constitutional Law, § 268; Contempt, §§ 3, 30-58, 60; Divorce, § 311; Elections, § 319; Embezzlement; Extradition; False Pretenses; Forgery; Grand Jury; Highways, § 151; Homicide; Husband and Wife, §§ 303, 304; Incest; Indictment and Information; Intoxicating Liquors, §§ 139-239; Jury, § 34; Larceny; Lewdness; Parent and Child, § 17; Perjury; Rape; Sodomy; Statutes, § 241.

### I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 37 (Kan.) That purchases of liquor were made by persons seeking to ascertain if the seller was engaged in the unlawful sale thereof constitutes no defense to the charge.—*State v. Spiker*, 129 P. 195.

### II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 53 (Kan.) Voluntary drunkenness is not, of itself, an excuse for crime in ordinary cases.—*State v. Guthridge*, 129 P. 1143.

### III. PARTIES TO OFFENSES.

§ 59 (Kan.) Where a burglary was committed by several persons, it was not necessary on the trial of one of them to prove his personal presence at the time and place of the crime.—*State v. Hoerr*, 129 P. 153.

### IV. JURISDICTION.

§ 84 (Wash.) Since Rem. & Bal. Code, § 7657, expressly gives police courts jurisdiction of the crime of petit larceny, a subsequent change of penalty by statute does not oust

that court of jurisdiction.—*State v. Milroy*, 129 P. 394.

§ 93 (Okl.Cr.App.) The jurisdiction of a district court over a felonious assault is not defeated because the information may be duplicitous nor on the theory that under Const. art. 7, § 12, county courts have exclusive jurisdiction of an offense necessarily included in the charge.—*Odum v. State*, 129 P. 445.

§ 101 (Okl.Cr.App.) When an indictment charging a misdemeanor is returned to the district court, the judge must transfer it to the county court for trial.—*Warner v. State*, 129 P. 76.

Where an order is made by the district court transferring a misdemeanor indictment to the county court, the clerk of the district court must enter the order on its minutes and certify the same with the indictment to the county court.—*Id.*

When a misdemeanor indictment is transferred from the district to the county court, and the clerk fails to enter the order on the minutes, and the papers are certified without an order of transfer, a certified order made nunc pro tunc takes the place of the original order and validates the proceedings.—*Id.*

Where, after transfer of a cause from the district to the county court, accused appears, gives bond, waives arraignment, and pleads to the indictment, any defects in the transfer are waived.—*Id.*

§ 101 (Okl.Cr.App.) Under a plea to its jurisdiction, a county court cannot set aside an indictment of a lawful grand jury charging an offense within the jurisdiction of such court and transferred to it by the order of the district court.—*State v. Hunter*, 129 P. 440.

No indictment should be set aside by an inferior court for technical errors, informalities, or irregularities in the district court in returning the indictment and transferring it to the inferior court.—*Id.*

## V. VENUE.

### (A) Place of Bringing Prosecution.

§ 106 (Cal.App.) The rule that the trial of an offense must be in the county where committed does not apply where, under the Constitution, the place of trial is subject to legislative determination.—*Ex parte MacDonald*, 129 P. 957.

## VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 218 (Okl.) A warrant directing an officer to arrest any person he may find engaged in violating the law is void.—*Holmes v. Le Fors*, 129 P. 718.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 276 (Kan.) A plea to the jurisdiction in a criminal case, which goes only to matters of defense, may be properly denied.—*State v. Gilmore*, 129 P. 1123.

A plea to the jurisdiction in a criminal case is not receivable unless proved or positively verified.—*Id.*

## X. EVIDENCE.

### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 351 (Or.) Although it is competent to prove flight after a crime, yet the fact must be determined by the movements of the defendant, and the admission of evidence as to the travels of a posse who were searching for him is error.—*State v. Hogg*, 129 P. 115.

To explain his departure after an offense a defendant may show that he was in danger of being mobbed in the vicinity, and that a certain person had made threats of violence against him.—*Id.*

§ 365 (Okl.Cr.App.) Testimony that a person on trial has committed another crime is admissible, where the acts disclosed are a part of the *res gestæ*.—*Green v. State*, 129 P. 683.

### (C) Other Offenses, and Character of Accused.

§ 371 (Okl.Cr.App.) In a prosecution for unlawfully transporting beer evidence concerning violations of other provisions of the prohibitory law was not admissible; proof of intent being unnecessary.—*Proctor v. State*, 129 P. 77.

§ 373. (Or.) Under an indictment charging that on a certain date the defendant made false representations and obtained a signature by false pretenses, etc., 'it was proper to admit evidence of representations made before that date, such as the issuing of an untrue prospectus and representations made during the negotiations; the acts being cheats or frauds of a continuing nature.—*State v. Whiteaker*, 129 P. 534.

### (E) Best and Secondary and Demonstrative Evidence.

§ 404 (Or.) On trial for incest, exhibition to jury of alleged issue of the illicit intercourse for the purpose of showing resemblance held proper.—*State v. Russell*, 129 P. 1051.

### (F) Admissions, Declarations, and Hearsay.

§ 409 (Or.) While under the express provisions of L. O. L. § 868, subd. 4, the jury should be instructed to view oral admissions of a party with caution, this affects their weight merely, and not their admissibility.—*State v. Russell*, 129 P. 1051.

§ 412 (Kan.) The admission of evidence of defendant's statement, in reply to a remark of a police judge, that he did not see defendant do any work, that he kept a boarding house, and was boarding the kind of men that had money, was proper.—*State v. Hoerr*, 129 P. 153.

### (G) Acts and Declarations of Conspirators and Codefendants.

§ 422 (Kan.) Evidence of the identification of associates with accused and their presence near the place of the burglary was competent, and the fact that some of them were identified as persons afterwards seen in jail is not objectionable.—*State v. Hoerr*, 129 P. 153.

Where a burglary was committed by several persons, evidence was admissible on the trial of one of them of the arrest of others at his home for another crime and his dealings with them after their arrest, for the purpose of showing his associations.—*Id.*

§ 422 (Okl.Cr.App.) Any fact or circumstance which has probative value as to a conspiracy, or the purpose for which it was formed, and anything done in pursuance thereof, is admissible against a co-conspirator on trial for a specific offense included in the conspiracy.—*Bond v. State*, 129 P. 666.

§ 423 (Kan.) Where several persons committed a burglary, evidence, on the trial of one of them, as to a conversation with defendant and the finding of articles furnished to his associates on a chicken ranch rented by him, held admissible.—*State v. Hoerr*, 129 P. 153.

§ 423 (Okl.Cr.App.) Where a conspiracy is entered into to do an unlawful act or accomplish an unlawful purpose, the conspirators are responsible for all that is said or done pursuant to the conspiracy by their co-conspirators till the purpose has been fully accomplished.—*Burns v. State*, 129 P. 657.

The responsibility of conspirators for the language or conduct of co-conspirators is not confined to the accomplishment of the common purpose, but extends to all declarations and acts incident to the common design.—*Id.*

§ 423 (Okl.Cr.App.) Where persons enter into a conspiracy to bribe officers, all said and done pursuant thereto by any of the conspirators

which tends to throw light on the specific charge of bribery against one is admissible in evidence.—*Bond v. State*, 129 P. 666.

§ 424 (Okla. Cr. App.) In a prosecution for assault with intent to kill, declarations of a former wife of the prosecuting witness, illicit relations between whom and the defendant gave rise to the difficulty, six months after the shooting, but prior to her marriage to defendant, were admissible in evidence; a conspiracy between her and defendant being claimed.—*Burns v. State*, 129 P. 657.

Declarations and conduct of a co-conspirator after the conspiracy has terminated, and not in the presence of defendant, are not admissible against him.—*Id.*

§ 427 (Kan.) Where a burglary is committed by several persons, some actively participating, others counseling and abetting, and one is on trial, evidence of his association with others tending to show a guilty combination, when limited to a reasonable time before the burglary, is admissible.—*State v. Hoerr*, 129 P. 153.

**(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.**

§ 430 (Okla. Cr. App.) A certified copy of the record of the United States internal revenue collector, showing the payment of a special revenue tax as a retail liquor dealer, is admissible.—*Hargrove v. State*, 129 P. 74, following *Billingsley v. Same*, 113 P. 241, 4 Okla. Cr. 597.

§ 434 (Kan.) An objection to the testimony of a cashier to the correctness of ledger entries showing the amount of money in the bank when burglarized, based on the fact that he did not personally make the entries, cannot be sustained.—*State v. Hoerr*, 129 P. 153.

**(J) Testimony of Accomplices and Codefendants.**

§ 507 (Okla. Cr. App.) The term "accomplice," in Comp. Laws 1909, § 6836, relating to the uncorroborated testimony of an accomplice, means one culpably implicated in the commission of the crime; in other words, an associate, one who knowingly co-operates in the commission of the crime.—*Hendrix v. State*, 129 P. 78.

A participant in a game of poker or other prohibited game played for money is an accomplice of his adversary within Comp. Laws 1909, § 6836, relating to corroboration of testimony of an accomplice.—*Id.*

§ 511 (Nev.) Evidence of other unlawful games played on defendant's premises, and that the game in question was played behind locked doors, held to furnish sufficient corroboration of the evidence of accomplices required by Rev. Laws, § 7180, to sustain a conviction.—*State v. Williams*, 129 P. 317.

§ 511 (Okla. Cr. App.) Testimony of an accomplice held sufficiently corroborated by other evidence to justify a conviction of guilt of playing a game of poker.—*Hendrix v. State*, 129 P. 78.

**(L) Evidence at Preliminary Examination or at Former Trial.**

§ 547 (Wash.) Upon the second trial in a prosecution for forgery, a copy of an affidavit which had been introduced at the first trial is admissible, where the officials having charge of the files testified that a diligent search had failed to enable them to find it, and that this was a reproduction of the original.—*State v. Peoples*, 129 P. 108.

§ 548 (Wash.) A copy of an affidavit admitted in evidence, the original having been lost after the first trial, is as much evidence of what was said or sworn to as the original.—*State v. Peoples*, 129 P. 108.

**(M) Weight and Sufficiency.**

§ 554 (Cal. App.) Where there was circumstantial evidence that defendant killed deceased, testimony by defendant that he killed deceased,

but in self-defense, need not be accepted as a whole by the jury, but they could credit or disbelieve any of the narrated circumstances.—*People v. Rqselle*, 129 P. 477.

§ 556 (Colo.) Where statements of accused were introduced by the state as a part of its case in chief, the state was not concluded thereby, but the weight to be given them was for the jury.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 558 (Okla. Cr. App.) Though the testimony of defendant and his witnesses is uncontradicted and not directly impeached, the jury may disregard it or give it such weight as is deemed proper, where there are facts and circumstances in evidence tending to lessen the probability that such testimony is true.—*Wainscott v. State*, 129 P. 656.

**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 573 (Okla. Cr. App.) A person charged with contempt committed out of the presence of the court or judge is entitled to a speedy trial guaranteed by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

§ 575 (Wash.) Const. art. 1, § 22, guaranteeing a speedy public trial, but prescribing no definite time, applies to all the time during which accused is subject to trial; and, after a statutory provision therefor has been satisfied by a first trial, the time of retrial is necessarily left to the discretion of the trial court.—*State v. Miller*, 129 P. 1100.

The right to a speedy public trial under Const. art. 1, § 22, is waived by failure to ask for a trial or to claim the right until the cause has been definitely set for trial upon the request of the state, and then only by a motion to dismiss.—*Id.*

§ 576 (Wash.) Rem. & Bal. Code, § 2312, requiring a dismissal of an information, unless accused is tried within 60 days after it is filed, held mandatory, but satisfied by a first trial within the 60 days, and that the time for a retrial was addressed to the discretion of the court.—*State v. Miller*, 129 P. 1100.

A demand for trial, resistance of a postponement, or some other effort to obtain a speedy trial, must be shown to entitle accused to a discharge, under a directory statute providing for a speedy trial; and even a mandatory statutory provision is waived by a failure to ask for a dismissal until just before trial.—*Id.*

On appeal by the state from a judgment dismissing a criminal action on the ground that defendant had not been brought to trial within the time limited by law, held that the affidavit of the prosecuting attorney in opposition to the motion to dismiss showed sufficient excuse for failure to bring defendant to an earlier trial.—*Id.*

§ 586 (Okla. Cr. App.) An application for a continuance is addressed to the sound discretion of the court.—*Houghton v. State*, 128 P. 1105.

§ 593 (Okla. Cr. App.) A continuance for absence of one of appellant's local attorneys was not error where the leading counsel was an able criminal lawyer and was assisted by a local counsel.—*Jones v. State*, 129 P. 446.

§ 596 (Okla. Cr. App.) The defendant is not entitled to a continuance, as a matter of right, to secure cumulative testimony.—*Jones v. State*, 129 P. 446.

**XII. TRIAL.**

**(A) Preliminary Proceedings.**

§ 627 (Okla. Cr. App.) A person accused of contempt committed out of the presence of the court or judge is entitled to a copy of the accusation, as required by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

**(B) Course and Conduct of Trial in General.**

§ 635 (Okl.Cr.App.) A person accused of contempt committed out of the presence of the court or judge is entitled to a public trial, as guaranteed by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

§ 641 (Okl.Cr.App.) A person accused of contempt committed out of the presence of the court or judge is entitled to be heard by himself and counsel, as guaranteed by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

§ 656 (Okl.Cr.App.) A remark of the court in ruling on the admissibility of evidence as to a conspiracy that the connection of defendant therewith had been shown was cured by its prompt withdrawal, and an instruction to the jury not to consider it.—*Bond v. State*, 129 P. 668.

Where the trial court in the presence of the jury inadvertently expresses an opinion as to the effect of testimony and on objection promptly withdraws the remarks, and instructs the jury not to consider them, this will ordinarily cure the error.—*Id.*

**(C) Reception of Evidence.**

§ 662 (Okl.Cr.App.) A person accused of contempt committed out of the presence of the court or judge is entitled to be confronted with the witnesses against him.—*Nichols v. State*, 129 P. 673.

§ 673 (Okl.Cr.App.) Where evidence of the reasons for the presence of an officer in a certain place is admitted to show his motive in going there, such evidence should be limited by instruction prohibiting the jury to consider it for any other purpose.—*McRae v. State*, 129 P. 71.

§ 680 (Okl.Cr.App.) On trial for murder, it is error to hold that evidence of good character is inadmissible until after defendant has testified, or there is evidence of self-defense.—*Gilbert v. State*, 129 P. 671.

**(D) Objections to Evidence, Motions to Strike Out, and Exceptions.**

§ 696 (Cal.App.) A motion to strike out the testimony of a witness not preceded by an objection to the question eliciting the testimony is properly denied on that ground.—*People v. Anthony*, 129 P. 963.

**(E) Arguments and Conduct of Counsel.**

§ 720 (Wash.) In a prosecution for forgery, statements made by the prosecuting attorney held not improper, being argumentative in their nature and not assertions of facts.—*State v. Peoples*, 129 P. 108.

§ 721 (Nev.) A statement by the district attorney that defendant did not dare call witnesses or put his brother on the stand in his defense held not objectionable as a reference to defendant's failure to testify in his own behalf.—*State v. Williams*, 129 P. 317.

**(F) Province of Court and Jury in General.**

§ 742 (Okl.Cr.App.) The credibility of defendant's witnesses is within the exclusive province of the jury.—*Waincott v. State*, 129 P. 655.

§ 743 (Okl.Cr.App.) The credibility of defendant, testifying in his own behalf, is within the exclusive province of the jury.—*Waincott v. State*, 129 P. 655.

§ 753 (Okl.Cr.App.) Where there is proof reasonably tending to sustain the allegations of the information, the court has no right to advise the jury to acquit.—*State v. Duerksen*, 129 P. 881.

§ 763, 764 (Colo.) An instruction that "deliberately" did not mean brooded over or reflected upon, but meant an intent to kill executed by "the" defendant in a cool state of

blood, was not on the weight of the evidence for using "the" instead of "a."—*King v. People*, 129 P. 235.

In view of Rev. St. 1908, § 1622, defining murder as an unlawful killing with malice aforethought, and section 1624, making it first-degree murder to deliberately kill in attempting to perpetrate a robbery, an instruction that if another willfully, etc., killed decedent, and accused willfully, etc., abetted in such killing, he was guilty of first-degree murder, was not erroneous, as taking the degree of the murder from the jury.—*Id.*

An instruction that if, while accused and another were attempting to take money from decedent by violence, the other unlawfully killed decedent when accused was present, unlawfully aiding in the attempt to rob, accused would be guilty of first-degree murder, was not erroneous, as taking the degree of murder from the jury; Rev. St. 1908, § 1624, making it first-degree murder to unlawfully kill while attempting to rob.—*Id.*

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 774 (Kan.) Where evidence of accused's intoxication at the time of the assault did not show that he was not responsible for his acts, the court's omission to charge the exceptions to the rule that drunkenness is no excuse for crime was not error.—*State v. Guthridge*, 129 P. 1143.

§ 778 (Kan.) Instructions requiring the state to prove that defendant, if not personally present, counseled or aided in the commission of a crime by actually helping and assisting others and knowingly concealing the crime and aiding the escape of the perpetrators, place an unnecessary burden on the state; proof of concealment not being essential in connection with the other facts under Code Cr. Proc. § 115 (Gen. St. 1909, § 6691).—*State v. Hoerr*, 129 P. 153.

§ 786 (Colo.) Where the court had charged generally as to the tests to be applied by the jury in determining the credibility of the witnesses, it was not error to charge that accused, who testified on his own behalf, was subject to the same test as other witnesses, and that the jury should consider his interest in the result of the trial.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 789 (Cal.) An instruction in a trial for murder that a doubt to justify acquittal must be reasonable, and that, if upon all the evidence the jury had an abiding conviction of the truth of the charge, they were satisfied beyond a reasonable doubt, was objectionable.—*People v. Smith*, 129 P. 785.

§ 789 (Okl.Cr.App.) When the court instructs that it is necessary to find, beyond a reasonable doubt, that a person having possession of intoxicating liquor had such liquor for his own use, a conviction cannot be sustained.—*McGill v. State*, 129 P. 75.

§ 800 (Or.) An instruction that if the jury believed there were other people near by, and that prosecutrix made no outcry, there would be a presumption that no rape was committed "unless she has satisfactorily explained why she did not make an outcry," is incorrect, where the jury was not informed as to what would be a satisfactory explanation.—*State v. Hogg*, 129 P. 115.

§ 814 (Okl.Cr.App.) It is not error to refuse a requested charge abstractly correct, which is not applicable to the evidence.—*Ryan v. State*, 129 P. 685.

§ 814 (Or.) An instruction that if the jury believed there were other people near by, and that prosecutrix made no outcry, there would be a presumption that no rape was committed "unless she has satisfactorily explained why she did not make an outcry," was error, as to the quoted part, where there was no evidence of any explanation.—*State v. Hogg*, 129 P. 115.



§ 815 (Or.) An instruction that flight is a fact which the jury could consider in determining guilt was faulty for failure to advise the jury to consider other facts, where there was evidence of other reasons than fear of arrest for causing the defendant to flee.—*State v. Hogg*, 129 P. 115.

§ 823 (Colo.) Any omission in an instruction that, to convict of first-degree murder, the jury must find that the killing was with deliberation and premeditation, in not requiring such finding to be upon the evidence and beyond a reasonable doubt, was cured by other instructions to substantially that effect.—*King v. People*, 129 P. 235.

#### (H) Requests for Instructions.

§ 825 (Cal.App.) Where the court fully and fairly charged on the law applicable to the facts, a failure to instruct on any particular matter deemed essential by accused was not error, in the absence of a requested instruction.—*People v. Anthony*, 129 P. 968.

§ 829 (Kan.) The refusal of a general instruction that it is the policy of the law that it is better that a guilty person should escape rather than that an innocent man shall be convicted is not error, where the jury was fully instructed on the presumption of innocence and the necessity of proof of guilt beyond a reasonable doubt.—*State v. Hoerr*, 129 P. 153.

§ 829 (Okla.Cr.App.) It is not error to refuse a requested charge, the subject of which is covered by instructions given.—*Ryan v. State*, 129 P. 685.

#### (I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 841 (Wash.) Under Rem. & Bal. Code, § 384, exceptions to the refusal of instructions, where not called to the attention of the trial court before the motion for new trial, are insufficient.—*State v. Peoples*, 129 P. 106.

#### (J) Custody, Conduct, and Deliberations of Jury.

§ 854 (Okla.Cr.App.) Under Comp. Laws 1909, § 6851, making it discretionary with the trial court to permit the jury to separate before the case is submitted to them, the separation of the jurors and conversations between them and outsiders while in charge of a bailiff, but not in his immediate presence, do not require a reversal.—*Burns v. State*, 129 P. 657.

§ 854 (Wash.) Under Rem. & Bal. Code, § 348, forbidding the jury to be kept together, except in felony cases, and section 2159 prohibiting separation in criminal cases except by consent, the separation of a juror in a felony case is reversible error, irrespective of prejudice.—*State v. Bennett*, 129 P. 409.

§ 864 (Cal.App.) Where the jury, after deliberating, returned to the courtroom for information, and for the removal of a doubt as to what a witness had testified to, and the court gave them the information sought, and the doubt was removed by agreement of counsel, the action of the court sufficiently protected the rights of accused.—*People v. Anthony*, 129 P. 968.

§ 868 (Wash.) Since Rem. & Bal. Code, §§ 348, 2159, in effect prohibits the separation of jurors in a felony case, if the court knew that a juror had separated, accused could not waive his rights under the statute by failing to sufficiently object to the separation when he called a question to the court's attention.—*State v. Bennett*, 129 P. 409.

#### (K) Verdict.

§ 893 (Kan.) A verdict finding defendant guilty of burglary and larceny in the second degree was properly interpreted as a conviction of burglary in the second degree and larceny.—*State v. Hoerr*, 129 P. 153.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 922 (Okla.Cr.App.) When the court gives an instruction requiring the jury to find that accused is innocent beyond a reasonable doubt, and a conviction results, it should be set aside and a new trial granted.—*McGill v. State*, 129 P. 75.

§ 954 (Okla.Cr.App.) A motion for new trial for newly discovered evidence, failing to state the circumstances showing that the evidence is newly discovered and could not have been earlier discovered by the exercise of proper diligence, is insufficient.—*Ryan v. State*, 129 P. 685.

### XV. APPEAL AND ERROR, AND CERTIORARI.

#### (A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1026 (Wash.) The giving of a bond for the performance of an order requiring accused to pay a certain amount for his child's support was not a waiver of his right to appeal from such order.—*State v. Coolidge*, 129 P. 1088.

#### (B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1056 (Okla.Cr.App.) In the absence of exceptions to instructions, they will only be reviewed on appeal for fundamental errors.—*Ryan v. State*, 129 P. 685.

#### (C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1070 (Okla.Cr.App.) Where it is made to appear to the court that an appellant has died pending an appeal, the cause will be abated.—*Smith v. State*, 129 P. 445.

§ 1084 (Kan.) Under Gen. St. 1909, § 6861 (Code Cr. Proc. § 287), defendant, on conviction of a felony, who appeals, may be granted a stay bond pending hearing on appeal on a sufficient undertaking given by others, which bond appellant is not required to sign.—*State v. Price*, 129 P. 940.

Where a bond is presented to the proper officer for approval, he may approve the same and grant a stay, though the bond indicates that it was intended to be signed by others than those in fact signing it.—Id.

Where such bond is not signed by all the parties who it was agreed should sign it, the signers thereof are not excused from liability.—Id.

#### (D) Record and Proceedings Not in Record.

§ 1087 (Cal.App.) The record on appeal must show that notice of appeal has been given as provided by Pen. Code, § 1247.—*People v. Measor*, 129 P. 469.

§ 1088 (Okla.Cr.App.) The original indictment and its indorsements constitute a necessary part of the record, and whatever is properly shown by them is considered as shown by the record.—*State v. Hunter*, 129 P. 440.

§ 1088 (Okla.Cr.App.) Failure of a record to show arraignment and plea is not a fatal defect, where the record shows that defendant, without objection, announced ready for trial and was fairly tried.—*Ryan v. State*, 129 P. 685.

§ 1090 (Wash.) In the absence of a statement of facts or bill of exceptions, an alleged error in that the court recalled the jury and gave additional instructions cannot be reviewed, though the surrounding facts were set out by affidavit, a copy of which appeared in the certified transcript.—*State v. Rice*, 129 P. 911.

§ 1097 (Wash.) A proper bill of exceptions, without a statement of facts, is sufficient to authorize a review of the question whether accused, a divorced husband, could be convicted for nonsupport of his minor child awarded to the



mother, with directions in the decree to compel the husband to contribute to its support.—*State v. Coolidge*, 129 P. 1088.

§ 1098 (Okla.Cr.App.) A case-made must contain a correct index.—*Burns v. State*, 129 P. 657.

§ 1104 (Okla.Cr.App.) A transcript of the record must contain a correct index.—*Burns v. State*, 129 P. 657.

**(E) Assignment of Errors and Briefs.**

§ 1130 (Okla.Cr.App.) When an appeal is taken from a conviction, and no brief is filed on behalf of the appellant, and no appearance made for oral argument, the reviewing court will examine the record for fundamental errors only, and, if none be disclosed, the judgment will be affirmed.—*Moore v. State*, 129 P. 71.

§ 1130 (Okla.Cr.App.) In their briefs counsel should cite the volume and page of the Oklahoma reports of the decisions on which they rely.—*Johns v. State*, 129 P. 451.

§ 1130 (Okla.Cr.App.) Where decisions of the Supreme Court or the Court of Criminal Appeals of Oklahoma are cited in briefs of counsel, the volume and page of the state reports should be cited.—*Ryan v. State*, 129 P. 685.

**(F) Dismissal, Hearing, and Rehearing.**

§ 1131 (Okla.Cr.App.) Where a plaintiff in error accepts a parole pending determination of his case, and the attention of the reviewing court is called thereto, the writ of error will be dismissed.—*Odum v. State*, 129 P. 445.

§ 1133 (Okla.Cr.App.) Where counsel for appellant has notice of motion to dismiss, and makes no reply, it is too late after decision to apply for rehearing.—*Vian v. State*, 129 P. 450.

**(G) Review.**

§ 1141 (Colo.) Every presumption is indulged by the Supreme Court in favor of the correctness of the trial court's ruling, and a judgment will be affirmed unless the record affirmatively shows error.—*King v. People*, 129 P. 235.

§ 1144 (Cal.App.) It cannot be presumed that an indictment filed May 25, 1912, for an offense against the local option law, effective November, 1911, alleging that an offense was committed "on or about the 19th day of May, 1912," was intended to charge the commission of an offense at a time when the act described was no offense under the law.—*People v. Hill*, 129 P. 475.

§ 1144 (Okla.Cr.App.) Unless the record affirmatively shows the absence of the defendant during his trial, the objection that he was not present cannot be raised on appeal.—*Burns v. State*, 129 P. 657.

§ 1151 (Okla.Cr.App.) A conviction will not be reversed for refusal of a continuance unless an abuse of discretion is shown.—*Jones v. State*, 129 P. 446.

§ 1153 (Cal.App.) The exercise of the court's discretion in allowing leading questions will not be disturbed on appeal, save for abuse.—*People v. Anthony*, 129 P. 968.

§ 1159 (Cal.App.) As the weight of the evidence is for the jury, where the record shows affirmative evidence establishing all of the elements of the crime charged, this court cannot review the evidence.—*People v. Hill*, 129 P. 475.

§ 1159 (Okla.Cr.App.) The jury have the right to fix the degree of crime where the court submits different degrees, and their verdict, finding guilty of a lesser offense than the evidence establishes, will not be disturbed.—*Jones v. State*, 129 P. 446.

§ 1159 (Or.) The weight of the testimony in a criminal case was for the jury, and could not be reviewed.—*State v. Bilyeu*, 129 P. 768.

§ 1160 (Wash.) Where the verdict of conviction was supported by evidence, the appellate

court cannot, motion for new trial having been denied, interfere, unless there was error in the admission of evidence or conduct of the trial.—*State v. Peebles*, 129 P. 108.

§ 1163 (Okla.Cr.App.) The term "injury," used with reference to the presumption as to effect of an error means an error which affects the result.—*Ryan v. State*, 129 P. 685.

§ 1166½ (Colo.) Accused in a prosecution for murder was not prejudiced by the act of a chief of police in failing to produce articles of clothing taken from accused in response to a subpoena duces tecum in order to show that such clothing contained no blood stains, where the chief of police testified that the clothes contained no blood stains, and there was no evidence that accused had worn such clothes at the time of the homicide.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 1166½ (Okla.Cr.App.) Attorneys for defendant are entitled to absolutely fair treatment from the trial court, and when this is not accorded, as where counsel is fined on making request for submission of the question of punishment to the jury, a conviction will be reversed.—*McSpadden v. State*, 129 P. 72.

§ 1166½ (Okla.Cr.App.) Where there is nothing to show that an incompetent juror was forced on defendant, an assignment based on a ruling on a challenge for cause will not be reviewed.—*Jones v. State*, 129 P. 446.

§ 1166½ (Okla.Cr.App.) Courts should carefully abstain from expressing an opinion in the presence of the jury as to the effect of the testimony, and, where the evidence presented any issue on which an acquittal may be based, such an expression will be reversible error.—*Bond v. State*, 129 P. 666.

§ 1169 (Colo.) Accused was not prejudiced by the admission of a statement made to the chief of police, where he subsequently testified in his own behalf to substantially the same facts.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 1169 (Kan.) Error in the admission of evidence as to the sale of clothes by defendant several months before the burglary, improper cross-examination of defendant as to a debt contracted several years previously, and testimony of one of his associates that skeleton keys in his possession were watch charms, were not prejudicial.—*State v. Hoerr*, 129 P. 153.

Where a burglary was committed by several persons, the admission of evidence on the trial of one of them of statements of one of his associates that he went under other names was not prejudicial where that fact had been proven already.—*Id.*

§ 1169 (Nev.) The admission of improper evidence is not as a rule prejudicial, where subsequently withdrawn with directions to the jury to disregard it.—*State v. Urie*, 129 P. 305.

Any error in admitting a confession in evidence was cured by the court's action in subsequently striking it and directing the jury not to consider it, and afterwards instructing that the evidence stricken by order of court should not be considered.—*Id.*

Any error in admitting an alleged confession in evidence could not have prejudiced accused, where he testified to substantially the same facts stated in the confession.—*Id.*

§ 1169 (Okla.Cr.App.) Where hearsay evidence, erroneously admitted, reasonably contributed to the conviction, its reception could not be regarded as harmless.—*McRae v. State*, 129 P. 71.

§ 1169 (Okla.Cr.App.) Any error in the admission of testimony of prosecuting witness was not ground for reversal where, on defendant's own testimony, the jury could not have done otherwise than convict.—*Burns v. State*, 129 P. 657.

§ 1169 (Okla.Cr.App.) If the guilt of accused is conclusively established, and a jury could not have arrived at a different verdict, a conviction will not be set aside because of the

admission of illegal testimony.—*Bond v. State*, 129 P. 666.

§ 1171 (Colo.) Accused was not prejudiced by a narration of purported confessions in the opening statement, where such confessions were afterwards held competent and admitted in evidence.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 1171 (Wash.) Circumstance that assisting counsel for the state, in seeking a copy of the information, may have unintentionally uncovered defendant's picture taken in prison, to the notice of any one then observing him, in the absence of a showing that any of the jurors saw it, held harmless.—*State v. Cohen*, 129 P. 891.

§ 1172 (Colo.) Error in an instruction in placing the burden on accused of showing that the homicide was not committed in an attempt to rob in order to authorize a conviction of second-degree murder, held prejudicial, where the instructions submitted the theory of an actual design to kill and also of a homicide committed in perpetrating robbery without actual design.—*King v. People*, 129 P. 235.

§ 1172 (Kan.) Instructions placing an unnecessary burden on the state do not prejudice the defendant.—*State v. Hoerr*, 129 P. 153.

§ 1172 (Kan.) An instruction treating an attempt to commit rape as a degree of the crime of rape, while it is a separate offense, was not prejudicial.—*State v. Guthridge*, 129 P. 1143.

§ 1172 (Okla. Cr. App.) Where the guilt of accused is conclusively established, errors in instructions which could not have injured the appellant are not ground for reversal.—*Johns v. State*, 129 P. 451.

§ 1175 (Okla. Cr. App.) Where defendant, indicted for murder, is found guilty of manslaughter in the second degree, a conviction will not be reversed on the ground that he should have been convicted of murder or manslaughter in the first degree or acquitted.—*Jones v. State*, 129 P. 446.

§ 1175 (Okla. Cr. App.) A conviction of manslaughter will not be reversed because the appellate court is of the opinion that the accused should have been convicted of murder.—*Ryan v. State*, 129 P. 685.

§ 1178 (Nev.) Accused's counsel waived assignments of error not discussed in his brief.—*State v. Urie*, 129 P. 305.

#### (H) Determination and Disposition of Cause.

§ 1182 (Okla. Cr. App.) Where the evidence clearly establishes the commission by accused of the crime alleged, and no material error in the trial is shown, the conviction will be affirmed.—*Green v. State*, 129 P. 683.

§ 1183 (Okla. Cr. App.) Where the court refuses to submit the question of punishment to the jury, such refusal will not necessarily result in a reversal, but the reviewing court may so modify the judgment by reducing the punishment as to prevent injustice.—*McSpadden v. State*, 129 P. 72.

§ 1186 (Mont.) In view of Rev. Codes, §§ 9415 and 9548, requiring technical errors to be disregarded, improper argument of counsel is no ground for reversal, where not affecting accused's substantial rights.—*State v. Murphy*, 129 P. 1058.

### XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1206 (Idaho) Rev. St. 1887, § 6312, only prescribes the punishment for felonies where punishment is not prescribed by other sections.—*Ex parte Miller*, 129 P. 1075.

The maximum punishment for misdemeanors is fixed by Rev. St. 1887, § 6313, where it is not otherwise fixed by other sections of the statute.—*Id.*

§ 1213 (Kan.) Laws 1911, c. 163, making it an offense for a husband to desert and omit to support his wife and children, is not unconstitutional as providing an unusual punishment.—*State v. Gillmore*, 129 P. 1123.

### CROPS.

See Railroads, § 481.

### CROSS-COMPLAINT.

See Pleading, § 267.

### CROSS-EXAMINATION.

See Evidence, § 558; Witnesses, §§ 268-277, 372, 388.

### CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, § 1213.

### CUSTODY.

See Divorce, §§ 289-303; Habeas Corpus, §§ 85, 99; Insane Persons.

### CUSTOMS AND USAGES.

See Banks and Banking, § 143.

### DAMAGES.

See Appeal and Error, §§ 1067, 1170; Attorney and Client, § 149; Breach of Marriage Promise, § 28; Brokers, § 38; Carriers, § 135; Death, §§ 95, 99; Execution, § 472; False Imprisonment, §§ 27, 30, 34-36; Husband and Wife, § 209; Infants, § 88; Injunction, §§ 40, 196; Mortgages, § 226; Municipal Corporations, §§ 402, 671, 845; Officers, § 119; Principal and Agent, § 84; Railroads, § 481; Sales, § 418; Towns, § 61; Trover and Conversion, § 49.

### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 33 (Wash.) If the person injured was, at the time of the injury, infirm in body, and such infirmity was aggravated by such injury, the jury should estimate the amount to be allowed for such aggravation.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (Wash.) Purchaser of animals to which seller agreed to furnish registration certificates held under no obligation to mitigate his damages by himself procuring the certificates, where such procurement necessitated information not in his possession, but in the possession of the seller.—*Yamaoka v. Kloeber*, 129 P. 387.

### VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§ 109 (Okla.) For injuries to real property susceptible of remedy by abatement, the owner may recover damages on account of the impaired use up to the time of suit.—*City of Ardmore v. Orr*, 129 P. 867.

When a cause of injury to real property is abatable either by an expenditure of labor or money, it will not be regarded as permanent in determining the measure of damages therefor.—*Id.*

§ 110 (Okla.) For permanent injuries to real property, the owner may recover the amount representing any permanent depreciation.—*City of Ardmore v. Orr*, 129 P. 867.

(C) Breach of Contract.

§ 123 (Kan.) Where only particular changes are necessary to make a building conform to the

contract otherwise substantially performed, their reasonable cost is the measure of damages.—*McCune v. Ratcliff*, 129 P. 1167.

## VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 130 (Mont.) Evidence, in a street car passenger's action for personal injuries in a derailment, *held* not to show injuries of such severity as to sustain a verdict for \$2,750.—*Emerson v. Butte Electric Ry. Co.*, 129 P. 319.

§ 131 (Wash.) A recovery of \$1,000 for severe injuries, consisting of two broken ribs and other bruises, was not excessive.—*Gasof v. Standard Ice Co.*, 129 P. 101.

§ 132 (Kan.) Where a postal clerk was 25 years of age when injured, and received a salary of \$1,300, and his general health and prospects were good, and his injury permanently affected his kneejoint, and he was internally injured, a verdict for \$9,000 was not excessive.—*Madison v. Kansas City, M. & O. Ry. Co.*, 129 P. 1157.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

§ 158 (Colo.App.) The allegations of the complaint *held* to justify the evidence of injury to the spine and back and nervous system directly resulting from the specific injuries alleged.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

§ 158 (Or.) Where the complaint in a personal injury case charged that the injury permanently impaired plaintiff's hearing on the left side, the testimony of a doctor that hearing on that side was not totally destroyed was properly admitted.—*Morgan v. Bross*, 129 P. 118.

### (C) Proceedings for Assessment.

§ 208 (Colo.App.) Evidence of a blow on the head breaking the bridge and knocking out plaintiff's false teeth, and of severe wounds and bruises on the back and left hip, *held* to carry to the jury the question of damages for permanent injury to back, spine, or left hip.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

§ 215 (Colo.App.) An instruction directing the jury to consider all the facts in evidence in awarding damages was not objectionable as permitting exemplary damages, especially where the verdict indicated that no such damages were allowed.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

## DEATH.

See Abatement and Revival, §§ 54-77; Action, § 57; Assignments, § 24; Constitutional Law, § 205; Courts, § 208; Criminal Law, § 1070; Electricity, § 19; Evidence, § 373; Marriage, § 50; Master and Servant, §§ 89, 270, 278, 289; Negligence, § 134; Statutes, §§ 72, 117.

## II. ACTIONS FOR CAUSING DEATH.

### (A) Right of Action and Defenses.

§ 9 (Cal.) Civ. Code, § 1970, while not repealing Code Civ. Proc. § 377, *held* to bar an administrator's right of action to recover damages from an employer suffered by a dependent nephew of a deceased servant who was killed because of the negligence of a servant engaged in another line of work.—*Pritchard v. Whitney Estate Co.*, 129 P. 989.

St. 1907, p. 119, amending Civ. Code, § 1970, and giving a right of action for damages against an employer in favor of an employé whose death is caused from negligence of a fellow servant is constitutional.—*Id.*

§ 11 (Wash.) Since no right of action for wrongful death existed at common law, the right is entirely governed by statute.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 14 (Cal.) Under Civ. Code, § 1970, giving a right of action to the administrator of employes

killed, *held*, that the administrator of an employé killed by the negligence of a servant engaged in another line of work had no right of action for damages suffered by a dependent nephew of the deceased.—*Pritchard v. Whitney Estate Co.*, 129 P. 989.

§ 31 (Wash.) Under Rem. & Bal. Code, § 183, the widow may initiate the action by consent for herself and children to the administrator to sue.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 32 (Wash.) Under Rem. & Bal. Code, § 183, creating a right of action for wrongful death, the sole beneficiaries are the decedent's widow and children, and not the parents or collateral heirs.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

### (C) Parties and Process.

§ 42 (Wash.) Under Rem. & Bal. Code, § 183, only a single action for wrongful death may be maintained, either by the widow and children or by the decedent's personal representative, with the consent of the widow and children for their benefit.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

### (E) Damages, Forfeiture, or Fine.

§ 95 (Mont.) Plaintiff, the mother of deceased, who was altogether dependent on him for support, in an action for his wrongful death, was entitled to recover all his wages until he became of age, charged, however, with the burden of his support, and such proportion of his earnings after he became of age as she might reasonably have expected to receive from him.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

§ 99 (Idaho) Where a husband and father in good health, 32 years old, and earning \$85 per month, was electrocuted through the negligence of defendant, a verdict for \$15,000 for the widow and two minor children is not excessive.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

§ 99 (Mont.) In view of Rev. Codes, § 6486, providing that damages for wrongful death may be such as, under all the circumstances of the case, may be just, and of the evidence in a mother's action for death of her minor son, *held*, that a verdict for \$18,000 was not excessive.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

## DEBTOR AND CREDITOR.

See Fraudulent Conveyances.

## DECEIT.

See Fraud.

## DECLARATION.

See Pleading.

## DECLARATIONS.

See Criminal Law, § 412; Evidence, §§ 274, 318.

## DECREE.

See Divorce, §§ 158, 303, 320; Mortgages, §§ 494, 497, 543; Quieting Title, § 49.

## DEDICATION.

See Municipal Corporations, § 450.

## II. OPERATION AND EFFECT.

§ 53 (Kan.) Under Gen. St. 1909, § 5523, the execution and recording of a plat by the owner of land in which a block was reserved for a park vested the fee in the county in trust for use by the public as a park.—*City of Hutchinson v. Danley*, 129 P. 168.

§ 65 (Kan.) In Laws 1877, c. 190, § 5, providing that alleys and streets or other public reservations, when vacated, shall revert to the

owners of lots adjacent or abutting thereto, the word "adjacent" includes lots fronting on a vacated park which is surrounded by streets, and the park reverts to the owners of such lots rather than to the original dedicator.—*City of Hutchinson v. Danley*, 129 P. 163.

In Laws 1877, c. 190, § 5, providing for reversion of public reservations when vacated to owners of lots adjacent or abutting thereto, the term "abutting" implies closer proximity than "adjacent," and is an apt term as applied to the vacation of a street or alley, but not as relating to lots lying near but not adjoining the vacated reservation.—*Id.*

## DEEDS.

See Acknowledgment, § 47; Easements, §§ 16, 27; Ejectment, § 12; Estates Tail, § 7; Estoppel, § 68; Executors and Administrators, § 388; Homestead, § 118; Husband and Wife, § 279; Limitation of Actions, § 96; Mortgages; Partition; Taxation, §§ 736, 757-775, 796, 813; Vendor and Purchaser, §§ 229, 230.

### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 3 (Okl.) A deed is a written instrument containing a contract, which has been delivered by the party to be bound, and accepted by the obligee or covenantor.—*Couch v. Addy*, 129 P. 709.

(D) Delivery.

§ 64 (Okl.) To constitute a valid deed, there must have been not only an intent by the grantors to deliver, but the grantee must accept the same in person or by an authorized agent.—*Couch v. Addy*, 129 P. 709.

### III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 93 (Cal.) The actual intent of the parties to a deed must be adequately expressed in the deed itself.—*Fitzgerald v. Modoc County*, 129 P. 794.

§ 100 (Cal.) The circumstances surrounding the execution of a deed cannot enlarge or restrict the estate granted, but merely aid in determining the intent of the parties.—*Fitzgerald v. Modoc County*, 129 P. 794.

(B) Property Conveyed.

§ 111 (Wash.) The rule of strict construction against the grantor applies where possession is taken under the deed, and also as to covenants, conditions, and limitations, but should be applied with caution in construing the description of the property conveyed.—*Golden v. Pilchuck Tribe No. 42, Improved Order of Redmen*, 129 P. 93.

(E) Conditions and Restrictions.

§ 155 (Cal.) Conditions subsequent, tending to restrict and defeat an estate, are construed strictly against the grantor, and can only be created by apt language.—*Fitzgerald v. Modoc County*, 129 P. 794.

A clause of re-entry is not necessary where the language declares a condition and imports a forfeiture.—*Id.*

A provision in a deed immediately following the description, "to be used as and for a county high school ground and premises," did not create a condition subsequent, but merely declared the purpose for which the grantor expected the land to be used.—*Id.*

### IV. PLEADING AND EVIDENCE.

§ 207 (Or.) In an action to quiet title, evidence held to show that former owner under whom plaintiffs claimed made a deed to defendant's grantor.—*Clark v. Latourette*, 129 P. 1043.

§ 212 (Okl.) In an action to cancel a deed of conveyance conditioned on the grantee erecting and operating a cotton gin, where the evidence showed that defendant operated the gin one year and then let it remain idle for two years, it justified a finding that the condition subsequent in the deed had not been performed.—*Richardson v. Chatfield*, 129 P. 728.

## DEFAULT.

See Appeal and Error, §§ 70, 78, 193; Judgment, §§ 17, 106-159; Vendor and Purchaser, §§ 334, 335.

## DELAY.

See Corporations, § 82.

## DELEGATION.

See Constitutional Law, § 66.

## DELIVERY.

See Assignments, § 37; Bills and Notes, § 64; Carriers, §§ 215, 405; Deeds, §§ 3, 64; Gifts, § 78; Guaranty, § 4; Sales, §§ 156, 182.

## DEMAND.

See Eminent Domain, § 279; Extradition, § 21; Limitation of Actions, § 66; Officers, § 119; Waters and Water Courses, § 152.

## DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404; Evidence, § 188.

## DEMURRER.

See Indictment and Information, § 133; Pleading, §§ 192, 194.

## DENIALS.

See Pleading, § 378.

## DE NOVO.

See Justices of the Peace, § 171.

## DENTISTS.

See Physicians and Surgeons, § 11.

## DEPOSITIONS.

See Appeal and Error, § 301; Contribution; Witnesses, § 393.

## DEPOSITOR'S GUARANTY FUND.

See Banks and Banking, § 78.

## DEPOSITS.

See Banks and Banking, §§ 143, 148.

## DESCENT AND DISTRIBUTION.

See Abatement and Revival, § 54; Action, § 57; Adoption, §§ 3, 21; Executors and Administrators; Taxation, §§ 860, 867; Wills.

## II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

§ 35 (Utah) Where a mother having children as the issue of two marriages died after inheriting property from a deceased son, such property was distributable among his surviving brothers and sisters and their descendants of both the whole and the half blood, under Comp. Laws 1907, § 2840.—*Gardner's Estate v. Gardner*, 129 P. 360.

(B) Surviving Husband or Wife.

§ 62 (Kan.) The rights of inheritance in the property of the wife are not to be denied the

husband on account of a separation agreement, unless the purpose is expressed or clearly inferable.—*Dennis v. Perkins*, 129 P. 165.

### DESCRIPTION.

See *Mechanics' Liens*, § 136; *Mines and Minerals*, § 55.

### DESTRUCTION.

See *Contempt*, § 15.

### DEVASTAVIT.

See *Executors and Administrators*, § 85.

### DEVELOPMENT.

See *Mines and Minerals*, § 112.

### DILIGENCE.

See *Evidence*, § 183; *Limitation of Actions*, § 96.

### DIRECTING VERDICT.

See *Trial*, §§ 143, 178.

### DIRECTORS.

See *Corporations*, §§ 67, 625.

### DISBARMENT.

See *Attorney and Client*, § 39.

### DISCHARGE.

See *Habeas Corpus*, § 32; *Principal and Surety*, §§ 97-128.

### DISCOVERY.

See *Mines and Minerals*, §§ 27, 38.

### DISCRETION OF COURT.

See *Appeal and Error*, §§ 954-979; *Criminal Law*, §§ 575, 576, 586, 1151, 1153; *Divorce*, §§ 104, 240, 286, 303; *Eminent Domain*, § 220; *Evidence*, § 553; *Jury*, §§ 14, 103; *Mandamus*, § 7; *Mines and Minerals*, § 38; *New Trial*, § 71; *Sodomy*; *Trial*, § 59; *Witnesses*, § 240.

### DISMISSAL AND NONSUIT.

See *Appeal and Error*, §§ 14, 51, 91, 189, 356, 430, 564, 773, 799, 927, 973; *Criminal Law*, §§ 575, 576, 1131, 1133; *Estoppel*, § 3; *Justices of the Peace*, §§ 159, 166; *Statutes*, § 64; *Trial*, § 165.

### I. VOLUNTARY.

§ 26 (Idaho) Where a telephone company and an electric light company were both made defendants in an action for damages, it was not error for plaintiff to elect as to which defendant he would proceed against, and dismiss the other.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

### DISORDERLY HOUSE.

See *Attorney and Client*, § 39.

### DISSOLUTION.

See *Corporations*, §§ 605-625.

### DISTRIBUTION.

See *Appeal and Error*, § 854; *Executors and Administrators*, § 315.

### DISTRICT AND PROSECUTING ATTORNEYS.

See *Criminal Law*, §§ 720, 721; *Indictment and Information*, §§ 159, 161.

### DISTRICTS.

See *Municipal Corporations*, §§ 450, 487; *Waters and Water Courses*, § 225.

### DIVERSION.

See *Waters and Water Courses*, §§ 33, 151, 152.

### DIVIDENDS.

See *Corporations*, § 625.

### DIVORCE.

See *Appeal and Error*, § 91; *Dower*, § 52; *Habeas Corpus*, § 99; *Marriage*, §§ 3, 22.

### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

#### (C) Pleading.

§ 91 (Or.) Where the complaint in a divorce case failed to allege plaintiff's residence in the state for a year, as required by L. O. L. § 509, the court did not have jurisdiction, though the parties appeared, and the whole proceeding was void.—*Holton v. Holton*, 129 P. 532.

§ 104 (Okl.) In an action for divorce and alimony, the refusal of leave to file a third amended plea three years after the first amended petition, which was filed when plaintiff knew all the facts as to the title to property sought to be reached, was not an abuse of the discretion of the trial court.—*Lake v. Winslow*, 129 P. 863.

#### (F) Judgment or Decree.

§ 158 (Colo.App.) Rev. St. 1908, § 2122, prohibiting parties to a divorce to remarry within one year from the granting of a decree, held not to suspend the operation of the decree.—*Griswold v. Griswold*, 129 P. 560.

### V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 231 (Cal.App.) Under Civ. Code, §§ 130, 137, authorizing the court denying a divorce to provide for the maintenance of the wife and children, the court finding that neither party was entitled to a divorce could not award permanent alimony and counsel fees in the absence of findings as to whether the parties were living together and as to their financial condition.—*Bensen v. Bensen*, 129 P. 596.

§ 240 (Colo.) An award of \$8,000 alimony was not an abuse of discretion where the defendant's estate was valued at from \$14,700 to \$35,000, and was accumulated during the married life of 31 years.—*Van Gorder v. Van Gorder*, 129 P. 226.

§ 252 (Colo.) Where husband and wife have lived together until she is unable to perform hard labor, and have by their joint labor acquired property sufficient to support them both comfortably, when living together, and she is forced to seek a separation by the misconduct of the husband, she is entitled to sufficient property to support her, living alone.—*Van Gorder v. Van Gorder*, 129 P. 226.

§ 255 (Utah) Sale of land made pursuant to an order and judgment for alimony by a court having jurisdiction held not subject to collateral attack in proceeding to enforce specific performance of contract made in compromise of the judgment for alimony.—*Moore v. Moore*, 129 P. 344.

§ 256 (Utah) Where the husband failed to comply with his agreement made in compromise of a judgment against him for alimony, the wife was entitled, on the day to which her motion had been continued by consent, to a decree directing the sale of land upon which her judgment was a lien.—*Moore v. Moore*, 129 P. 344.

§ 286 (Colo.) The decision of the lower court as to the amount of alimony in a divorce case

will not be disturbed except for a clear abuse of discretion.—*Van Gorder v. Van Gorder*, 129 P. 226.

## VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 289 (Cal.App.) Provisions of the Civil Code relating to guardians and wards do not control the power given the court under Civ. Code, § 138, in actions for divorce, to provide for the custody, etc., of minor children.—*Russell v. Russell*, 129 P. 467.

§ 294 (Cal.App.) Under Civ. Code §§ 136, 137, authorizing the court, denying a divorce, to provide for the maintenance of the wife and children, the court finding that neither party was entitled to a divorce could not award the custody of the children to the wife, in the absence of findings that the interest of the children demanded that their custody be awarded to her, and as to whether the parties were living together and as to their financial condition.—*Bensen v. Bensen*, 129 P. 596.

§ 303 (Cal.App.) After divorce granted a wife for cruelty, the parties having agreed that the custody of their son should alternate between them every six months, a modification of the decree giving custody of the son, then 10 years old, to the father, with provision that the mother have him during all vacations, etc., held no abuse of discretion.—*Russell v. Russell*, 129 P. 467.

Where a divorce decree is entered, and the custody of a child is given to each parent for six months out of the year, in accordance with an agreement between such parents, such decree does not render such agreement final and binding, but the decree is still subject to modification by the court.—Id.

§ 311 (Wash.) It is the policy of the law to intrust the enforcement of orders requiring support of minor children after divorce to the courts granting the divorce, so that as a rule such orders should not be enforced in criminal proceedings.—*State v. Coolidge*, 129 P. 1088.

## VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 320 (Colo.) Marriage contracted in New Mexico between residents of this state, within one year after a divorce decree between one of the parties and a third person, held valid under Rev. St. 1908, §§ 2122, 4165.—*Loth v. Loth's Estate*, 129 P. 827.

§ 320 (Colo.App.) Under Rev. St. 1908, § 2122, which provides that a decree granting a divorce may be opened or vacated within one year, and which forbids the parties to remarry within that time, the vacation of such decree restoring the former married status makes a second marriage within that time ipso facto void in this state.—*Griswold v. Griswold*, 129 P. 560.

## DOCUMENTS.

See Criminal Law, §§ 430, 434; Evidence, §§ 333-373.

## DOMICILE.

See Venue, § 32.

§ 1 (Cal.App.) Residence defined by Pol. Code, § 52, as the place where one remains when not called elsewhere for a temporary purpose, indicates permanency of occupation.—*Marston v. Watson*, 129 P. 611.

## DOWER.

### II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

§ 52 (Mont.) Under Rev. Codes, § 3642, providing that a divorce shall restore the parties

to the state of unmarried persons, a divorced woman cannot become the widow of her former husband, and she can have no dower interest in his estate under section 3708, providing that a widow shall be endowed, etc.—*O'Malley v. O'Malley*, 129 P. 501.

## DRAINS.

See Municipal Corporations, §§ 835, 845; Waters and Water Courses, § 154.

## DRAMSHOPS.

See Intoxicating Liquors.

## DRUGGISTS.

§ 3 (Kan.) The word "store," as used in Gen. St. 1909, § 8095, prohibiting the opening of a store to retail medicine by any one other than a registered pharmacist means a store of the same kind or class as a pharmacy.—*State v. Hanchette*, 129 P. 1184.

Hydrogen peroxide is applied to the body only as a cleanser, and, while technically is a medicine, is not popularly known as such, and the sale thereof is not regulated by Gen. St. 1909, § 8095, relating to sales of medicines.—Id.

## DRUNKARDS.

See Criminal Law, §§ 53, 774.

## DUE PROCESS OF LAW.

See Constitutional Law, §§ 268-312.

## DUPLICITY.

See Indictment and Information, § 125.

## DYING DECLARATIONS.

See Homicide, §§ 203, 210.

## EARNINGS.

See Death, § 95.

## EASEMENTS.

See Highways; Waters and Water Courses, § 154.

### I. CREATION, EXISTENCE, AND TERMINATION.

§ 16 (Cal.) Deeds by a trustee in a deed of trust given to secure payment of money and authorizing trustor to demand reconveyance would reconvey any easements attached to the land conveyed if the trustor be treated as owner; the trustee's conveyance being as trustor's agent.—*Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593.

§ 27 (Cal.) A deed by the owner of a dominant easement to the owner of the servient tenement extinguishes all easements held by the owner of the dominant easement in the land conveyed.—*Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593.

§ 28 (Cal.) "Release" is the appropriate word used for the extinguishment of an easement.—*Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593.

## EJECTION.

See Carriers, § 363.

## EJECTMENT.

See Appeal and Error, § 1170; Judgment, §§ 495, 744; Jury, § 14; Stipulations.

### I. RIGHT OF ACTION AND DEFENSES.

§ 9 (Okl.) At common law plaintiff must recover on the strength of his own title.—*Mitchell v. Humphrey*, 129 P. 744.

§ 12 (Colo.App.) Recitals in trustee's deed held prima facie evidence of facts therein stated and sufficient proof of title, in the absence of evidence contradicting them, to put defendant on his proof in ejectment.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 521.

§ 13 (Okl.) Under Comp. Laws 1909, § 6122, an equitable title will support ejectment.—*Mitchell v. Humphrey*, 129 P. 744.

§ 24 (Colo.App.) A payment of taxes by a defendant in ejectment, after the filing of the complaint, is not available to invoke the seven-year statute of limitations.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 521.

§ 35 (Or.) Ejectment will not lie against a mere servant of a landowner.—*Thornton v. Hallam*, 129 P. 1046.

### III. PLEADING AND EVIDENCE.

§ 84 (Kan.) Where plaintiff in ejectment claimed right of possession under a verbal agreement to convey land in settlement of a debt, and the proof showed that possession was taken under an agreement that the land should stand as security, either agreement was pertinent to the issue.—*Charpie v. Stout*, 129 P. 1166.

Declarations of the predecessor in title of plaintiffs in ejectment that the land in controversy should pass to defendants at her death were as competent to rebut a claim based on an agreement for sale as one based on an agreement for security.—*Id.*

§ 95 (Okl.) Evidence held not to show title, either legal or equitable, in plaintiff.—*Mitchell v. Humphrey*, 129 P. 744.

### ELECTION.

See Indictment and Information, § 182.

### ELECTION OF REMEDIES.

See Dismissal and Nonsuit, § 26.

§ 3 (Cal.App.) Where a contract for the sale of a piano on installments provided that, upon failure to pay installments, the seller might retake the instrument or declare the whole amount due, the bringing of a suit on default, in payment for the whole amount due, was a waiver of the right to retake the piano, and vested the title in the purchaser, so as to render it subject to attachment in the action.—*George J. Birkel Co. v. Nast*, 129 P. 945.

### ELECTIONS.

See Certiorari, § 5; Intoxicating Liquors, § 33; Mandamus, § 74; Municipal Corporations, §§ 34, 149; Quo Warranto.

### IV. QUALIFICATIONS OF VOTERS.

§ 84 (Okl.) Under Const. art. 3, § 4a, when any person who was not entitled to vote under any form of government on January 1, 1866, and did not then reside in some foreign nation and was not a lineal descendant of such person, presented himself to vote, the precinct officers might require him to read and write a section of the Constitution before permitting him to vote.—*Snyder v. Blake*, 129 P. 34.

### VII. BALLOTS.

§ 166 (Nev.) A ballot from which the number has not been torn by the election officers is valid.—*State v. Baker*, 129 P. 452.

§ 180 (Nev.) Under Rev. Laws, § 1852, providing for the marking of ballots on voting for or against constitutional amendments, the cross need not be placed in the square, but may be

placed after the word "yes" or "no."—*State v. Baker*, 129 P. 452.

§ 186 (Nev.) Under Rev. Laws, § 1853, providing for the marking of ballots, a ballot containing a cross after the names of each candidate for the same office cannot be counted for either.—*State v. Baker*, 129 P. 452.

§ 194 (Nev.) Under Rev. Laws, § 1852, providing for the marking of ballots by a cross in the square after the name of a candidate voted for, a ballot with a cross after the name of a candidate and before the square is invalid.—*State v. Baker*, 129 P. 452.

A ballot containing a cross placed in the square and another cross placed before the square and after the word "yes" or "no" in voting on a constitutional amendment must be rejected.—*Id.*

Under Rev. Laws, § 1853, providing for the marking of ballots, a ballot containing a cross in the square following a blank space for filling in the name of a candidate for an office for which no nominations are made, or containing a name written by the voter, must be rejected.—*Id.*

Ballots containing crosses made with lead pencil or pen, or by marking with the wrong end of the stamp, must be rejected.—*Id.*

A ballot containing an erasure destroying the texture of the paper, or containing holes rubbed or torn through the paper by the voter, must be rejected.—*Id.*

A ballot containing marks other than those required for voting, apparently designed for identification, or which may be readily used for that purpose, will not be counted.—*Id.*

### IX. COUNT OF VOTES. RETURNS, AND CANVASS.

§ 241 (Cal.App.) Pol. Code, § 1258, prescribing the duty of election clerks and the manner of placing tallies upon the tally sheets as the name is called aloud by the proper officer, is a mandatory provision.—*People v. Butler*, 129 P. 600.

§ 250 (Cal.App.) Where a precinct board of election fail to certify returns within the time prescribed by Pol. Code, § 1174, such act of certifying, being purely ministerial, could subsequently be completed seasonably, provided the contents of the returns were in no way modified.—*People v. Butler*, 129 P. 600.

Election returns from precincts were not invalidated because the number of votes received by each candidate were written in the certificate in figures, instead of words, or because the names of the candidates did not appear in the certificate where they appeared on the same horizontal lines on the opposite page which contained the tally sheet.—*Id.*

Where more than 100 tally marks appear after the name of one candidate for presidential elector, and few or none after the names of the other candidates in the same class, the number opposite the name of each candidate must control, though the certificate of the board of election shows that each candidate received more than 100 votes.—*Id.*

§ 251 (Cal.App.) Premature breaking of sealed envelopes held not such an irregularity as required election returns to be entirely rejected.—*People v. Butler*, 129 P. 600.

§ 253 (Cal.App.) That the board of canvassers permitted a board of election to insert in their certificate the total number of votes received by candidates for presidential elector did not authorize rejection of the election returns which showed tally marks from which the canvassing board could determine the total vote received by each candidate.—*People v. Butler*, 129 P. 600.

§ 254 (Okl.) Where precinct election returns were not authenticated by signatures of two of the counters as required by Session Laws 1911, c. 106, § 7, it was the duty of the board of county canvassers to permit their correc-

tion or treat the returns as corrected and canvass same.—*Moren v. Nichols*, 129 P. 741.

§ 259 (Cal.App.) The board of supervisors acting as board of canvassers have no authority to take extrinsic evidence with reference to election returns.—*People v. Butler*, 129 P. 600.

The county board of canvassers is unauthorized to change the tally list opposite the name of a candidate voted for.—*Id.*

§ 259 (Cal.App.) The board of canvassers must consider the entire returns, and, in case of a discrepancy, determine whether the certificate of the election officers or the tally list is correct, and make their abstract of the vote accordingly.—*People v. Murphy*, 129 P. 603.

Canvassing board held entitled to use duplicate certificate of election officers and tally list of a precinct where the originals had been lost.—*Id.*

§ 259 (Cal.App.) The board of supervisors can only make returns in accordance with the lists.—*Devlin v. Donnelly*, 129 P. 607; *Same v. Wright*, *Id.* 610.

§ 259 (Okl.) Under *Sess. Laws* 1911, c. 106, § 8, county canvassers had no authority to open the envelope returned from a precinct containing the "voted ballots" and "tally sheets," in order to search for the certificate of returns which should have been inclosed in a separate envelope labeled, "Returns," that the vote of the precinct might be canvassed.—*Moren v. Nichols*, 129 P. 741.

§ 261 (Cal.App.) The District Court of Appeal has power to direct a county board of canvassers to canvass election returns as required by statute.—*People v. Butler*, 129 P. 600.

§ 261 (Cal.App.) While cases may occur where the court will direct a canvassing board in case of a discrepancy which particular part of the return should be conclusive, they will not do so, unless all the matters contained in the return before the board are before the court.—*People v. Murphy*, 129 P. 603.

## X. CONTESTS.

§ 269 (Wash.) Election contests are governed solely by the statute providing therefor.—*State v. Superior Court for King County*, 129 P. 83.

§ 291 (Okl.) One who seeks to have an election declared void for irregularities and fraud of the election officers in preventing persons from voting must show that such persons were qualified voters and that their number was sufficient if they had cast their vote for the next highest candidate to change the result.—*Snyder v. Blake*, 129 P. 34.

§ 293 (Nev.) A party to an election contest may attach all ballots in the same precinct to which he objects and have them filed as one exhibit, but the ballots of each precinct should be kept separate.—*State v. Baker*, 129 P. 452.

§ 299 (Cal.App.) Where a recount is sought in an action, as authorized by *Pol. Code*, § 1258, the court has authority to go behind the returns, examine the ballots, and correct the tally sheet so as to make them speak the truth.—*Devlin v. Donnelly*, 129 P. 607; *Same v. Wright*, *Id.* 610.

§ 305 (Wash.) On appeal in election contest, ballots may be preserved, although not received in evidence, and notwithstanding *Rem. & Bal. Code*, § 4928, requiring their destruction at the end of six months.—*State v. Superior Court for King County*, 129 P. 83.

§ 307 (Nev.) The compensation due a commissioner appointed by the Supreme Court in an election contest for services rendered may be taxed as costs against the losing party, but the court may not require relator to advance compensation.—*State v. Baker*, 129 P. 452.

## XI. VIOLATIONS OF ELECTION LAWS.

§ 319 (Okl.) Under *Const. art. 3, § 4a*, where a proposed voter reads intelligibly and writes

legibly the section of the Constitution designated by the election officers, acts of the election officers in detaining him for a great length of time under pretense of examination, thereby delaying others from entering the polls, are without authority of law.—*Snyder v. Blake*, 129 P. 34.

## ELECTRICITY.

§ 14 (Idaho) A company engaged in generating and distributing electricity must handle it with such care as to protect the public, and especially those who may be called upon to come near the transmission wires, from dangers they might not see, or might readily overlook.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

§ 15 (Idaho) A telephone lineman, whose regular hours were from 7:30 a. m. to 5:30 p. m., and whose duty was to respond to calls at all times when needed, was not a trespasser or mere volunteer when he responded to a call after regular hours, and received an injury from an electric light company's wire.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

§ 16 (Idaho) Where an electric company maintains its poles within a foot of the poles of a telephone company, and maintains live wires charged with electrical current, it is chargeable with notice that laborers on the telephone line may come in close contact with the electric light wires, and is chargeable with the duty of protecting them from injury.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

§ 19 (Idaho) In an action against an electric company for the death of a telephone lineman, evidence held to justify a verdict that death was primarily caused by an electric shock, and that the decedent did not expose himself to risks that he might have reasonably expected would inflict mortal injuries.—*Staab v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

## ELEVATORS.

See *Master and Servant*, §§ 117, 265, 286.

## EMBEZZLEMENT.

§ 5 (Okl.Cr.App.) Where an agent comes into possession of money of his principal, and converts the same without the consent of the principal, fraudulent intent is implied, and it is no defense under *Comp. Laws* 1909, § 2612, that he intended to restore the property.—*State v. Duerksen*, 129 P. 881.

## EMINENT DOMAIN.

See *Evidence*, §§ 142, 474, 543; *Judgment*, § 228; *Municipal Corporations*, § 487.

## I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Colo.) The constitutional protection of railroad property against devotion to a public use without compensation is not abridged by reasonable exercise of the governmental power to regulate.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

§ 28 (Colo.) *Constitution*, art 10, § 7, providing that all corporations shall have a right of way across public, private, and corporate lands for ditches and flumes for conveying water for domestic purposes, authorized a city to condemn a right of way in the streets of a town for a pipe line to carry water for its inhabitants.—*Town of Lyons v. City of Longmont*, 129 P. 198.

§ 29 (Wash.) A private owner may condemn a right of way for an irrigation ditch over



lands of another private owner.—*White v. Stout*, 129 P. 917.

§ 45 (Cal.) The word "lands," as used in Street Opening Act 1889 (St. 1889, p. 70), held used in the sense of "territory," and not as meaning the exposed surface of the earth, and hence the section authorized extension of streets over tide lands.—*West Berkeley Land Co. v. City of Berkeley*, 129 P. 281.

## II. COMPENSATION.

### (A) Necessity and Sufficiency in General.

§ 74 (Wash.) Upon defendants' affirmative demand to condemn a right of way for an irrigation ditch over plaintiff's land, compensation, including the costs in the superior court, must be made and paid into court before a decree of appropriation.—*White v. Stout*, 129 P. 917.

### (B) Taking or Injuring Property as Ground for Compensation.

§ 82 (Utah) If the land on which shade trees adjacent to a sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land upon paying a just compensation.—*Giauque v. Salt Lake City*, 129 P. 429.

§ 106 (Kan.) An abutting owner can recover damages from a company maintaining a railroad track in a street so as to cut off access to his property, though it is constructed by permission of the public authorities.—*Stephenson v. Atchison Ry., Light & Power Co.*, 129 P. 1188.

A railroad track in a street obstructs an owner's access to abutting property if it prevents his driving on the street, though because of a difference in level he could not in any event drive from the street onto the property.—*Id.*

The fact that lots are accessible from an alley in the rear does not prevent recovery by an abutting owner of damages for obstructing access from the street by the building of a street railway.—*Id.*

### (C) Measure and Amount.

§ 131 (Okl.) Market value of land taken by eminent domain is the test of the amount to be awarded, and not its value for a particular use, though its adaptability for such use is a factor in determining its market value.—*Revell v. City of Muskogee*, 129 P. 833.

§ 133 (Wash.) The character, condition, and uses to which a building on condemned property might be put were items for the jury's consideration.—*City of Sedro-Woolley v. Lederle*, 129 P. 372.

### (D) Persons Entitled and Payment.

§ 152 (Nev.) The owner of a valid, subsisting, but unpatented, lode mining claim, is entitled to an award for condemnation of a portion of the surface for a railroad right of way.—*Las Vegas & T. R. Co. v. Summerfield*, 129 P. 303.

## III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 178 (Nev.) Parties claiming an interest in land sought to be condemned and in the award held expressly authorized to intervene by St. 1907, c. 128, § 8.—*Las Vegas & T. R. Co. v. Summerfield*, 129 P. 303.

§ 220 (Wash.) Rem. & Bal. Code, § 344, permitting a view of the premises in the court's discretion, applies to condemnation proceedings.—*City of Sedro-Woolley v. Lederle*, 129 P. 372.

## IV. REMEDIES OF OWNERS OF PROPERTY.

§ 274 (Utah) A property owner is entitled to enjoin a city from cutting shade trees from a part of his lot, irrespective of whether his damage be large or small.—*Giauque v. Salt Lake City*, 129 P. 429.

§ 275 (Wash.) Under Const. art. 1, § 16, a city which makes a cut or fill in grading a street, which necessitates the invasion of abutting property for the slope, damages the property, and the abutting owner is entitled to an injunction until compensation has been determined and paid.—*Donofrio v. City of Seattle*, 129 P. 1094.

§ 276 (Wash.) Const. art. 1, § 16, requiring compensation for damaging property, will not authorize an injunction to restrain the operation of trains on a private warehouse switch until the right as against plaintiff, an adjoining owner, is acquired by condemnation, on the ground that the smoke and vibration damages his property.—*De Kay v. North Yakima & V. Ry. Co.*, 129 P. 574.

The owner of a lot abutting on an alley, at a point about nine feet from which defendant's switch track crossed the alley under permission from the city council, would at most have only the right to have the track so constructed across the alley as not to interfere with the usual travel, and could not wholly enjoin its operation by virtue of his ownership.—*Id.*

§ 279 (Wash.) In an action to restrain defendants from trespassing on lands of the plaintiff, defendants' affirmative demand for condemnation of a right of way for an irrigation ditch amounts to a defense to the plaintiff's action, and defeats the plaintiff's right to injunctive relief.—*White v. Stout*, 129 P. 917.

## EMPLOYÉS.

See Master and Servant.

## ENTRY.

See Judgment, § 270.

## EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, § 241.

## EQUITABLE ASSIGNMENTS.

See Assignments, §§ 48, 49.

## EQUITY.

See Appeal and Error, § 1045; Assignments, §§ 48, 49; Bills and Notes, § 344; Constitutional Law, § 55; Ejectment, §§ 13, 95; Easements, §§ 55-110; Evidence, § 274; Executors and Administrators, § 194; Fraudulent Conveyances, §§ 155, 271; Husband and Wife, § 281; Injunction; Jury, § 14; Limitation of Actions, § 96; Mechanics' Liens, § 18; Mines and Minerals, §§ 38, 55; Mortgages, §§ 277, 559; Municipal Corporations, § 671; Partition; Quieting Title; Receivers; Refutation of Instruments; Set-Off and Counterclaim; Specific Performance; Trusts.

## VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 377 (Okl.) While, in cases of equitable cognizance, the judge may submit questions of fact to a jury, it is not only his right, but his duty, to finally determine all questions of fact as well as law.—*Wat-tah-noh-zhe v. Moore*, 129 P. 877.

## ERASURE.

See Elections, § 194.

## ERROR, WRIT OF.

See Appeal and Error.

## ESTABLISHMENT.

See Highways, §§ 1-80.

## ESTATES.

See Descent and Distribution; Dower; Estates Tail; Executors and Administrators; Life Estates; Tenancy in Common; Wills.

## ESTATES TAIL

See Wills, § 605.

§ 1 (Kan.) Estates tail resulting from the statute de donis (13 Ed. I, c. 1, June 28, 1285), as modified by subsequent statutes and decisions, were introduced into the United States as a part of the common law, and still exist in Kansas.—*Ewing v. Nesbitt*, 129 P. 1131.

One of the characteristics of an estate tail as incorporated into the common law received from England was the quality of being barred by fine and by common recovery, which had the effect of conveyances of record.—*Id.*

§ 7 (Kan.) Fines and common recoveries being inconsistent with existing modes of procedure, an estate tail may be barred by an ordinary deed.—*Ewing v. Nesbitt*, 129 P. 1131.

## ESTOPPEL

See Assignments, § 68; Bridges, § 15; Contracts, § 138; Corporations, § 425; Executors and Administrators, § 222; Husband and Wife, § 279; Insurance, § 755; Judgment, § 951; Landlord and Tenant, §§ 63, 76; Mechanics' Liens, § 291; Partnership, §§ 35, 37; Reformation of Instruments, § 23; Schools and School Districts, § 106; Trial, § 397; Vendor and Purchaser, § 189.

### I. BY RECORD.

§ 3 (Colo.App.) A party is not estopped by his sworn pleadings or testimony in another action, which was dismissed, as to the ownership of an irrigation ditch, in the absence of a showing that the other party has been led to change his conduct to his damage, and should be allowed to explain them.—*Central Trust Co. v. Culver*, 129 P. 253.

In order to apply the doctrine of estoppel as to matters contained in a sworn complaint in a prior action, statements in the pleader's favor should be noticed, as well as those against his interest.—*Id.*

### III. EQUITABLE ESTOPPEL.

#### (A) Nature and Essentials in General.

§ 55 (Cal.App.) Person held not entitled to set up estoppel because of the promise of another unless she had not only changed her position but had been injured in reliance on such promise.—*Mentry v. Broadway Bank & Trust Co.*, 129 P. 470.

#### (B) Grounds of Estoppel.

§ 68 (Wash.) In an action to quiet title as against a claim of title under a quitclaim deed and for partition, defendant cannot be heard to say that such deed is not a cloud upon plaintiff's title and at the same time claim title thereunder.—*Crowley v. Byrne*, 129 P. 113.

§ 68 (Wash.) A petition to the county commissioners for the vacation of certain portions of a highway did not estop one of the petitioners to deny that one of such portions was a public highway, or to assert his title thereto.—*In re Twenty-Second Ave. Southwest*, 129 P. 884.

§ 93 (Kan.) A vendor of lots by oral contract who permits his vendee to go into possession and begin a house thereon is estopped to claim, as against persons contracting with the vendee, that a cash payment was a condition precedent to vesting of equitable title.—*E. W. Smith Lumber Co. v. Arnold*, 129 P. 178.

#### (E) Pleading, Evidence, Trial, and Review.

§ 110 (Cal.App.) Assignee of mortgage who failed to plead facts estopping mortgagor from setting up a defense available against the original mortgagee held not entitled to rely on the defense of estoppel.—*Mentry v. Broadway Bank & Trust Co.*, 129 P. 470.

§ 110 (Or.) The defense of estoppel could not be considered when not pleaded.—*Gladstone Lumber Co. v. Kelly*, 129 P. 763.

## EVIDENCE

See Acknowledgment, § 57; Adoption, § 17; Adverse Possession, § 110; Appeal and Error, §§ 203, 205, 231, 237, 301, 690, 731, 758, 773, 854, 856, 864, 882, 907-936, 970, 979, 987, 994, 995, 1001, 1002, 1005, 1010, 1011, 1015, 1047, 1048, 1050-1058, 1171; Assignments, § 137; Bailment, § 31; Banks and Banking, § 143; Bills and Notes, § 525; Breach of Marriage Promise, § 28; Brokers, § 8; Burglary, § 37; Carriers, §§ 229, 316, 318, 408; Chattel Mortgages, §§ 38, 40; Constitutional Law, § 268; Contempt, §§ 9, 58, 60; Contracts, §§ 88, 278, 305, 350; Contribution; Corporations, § 409; Criminal Law, §§ 59, 276, 351-558, 596, 662-696, 778, 800, 814, 954, 1153, 1159, 1166½, 1169, 1172, 1182; Damages, §§ 130, 208; Deeds, §§ 193, 212; Ejectment, §§ 12, 84, 95; Elections, §§ 259, 291, 293; Electricity, § 19; Executors and Administrators, § 72; False Imprisonment, §§ 27, 30; False Pretenses, §§ 42, 43; Forgery, § 44; Fraud, §§ 50, 58; Fraudulent Conveyances, §§ 146, 269, 271-301; Habeas Corpus, § 85; Highways, § 68; Homicide, §§ 39, 203, 210, 282; Husband and Wife, § 262; Incest; Indictment and Information, § 133; Insurance, §§ 645, 646, 659, 665, 819; Intoxicating Liquors, §§ 139, 223, 224, 226, 233, 236; Judgment, §§ 744, 818, 944, 951; Jury, § 34; Larceny, § 55; Libel and Slander, § 101; Limitation of Actions, §§ 195, 197; Marriage, §§ 40, 50; Master and Servant, §§ 80, 265-278, 330; Mechanics' Liens, § 281, 291; Mines and Minerals, §§ 38, 117; Mortgages, §§ 38, 605; Municipal Corporations, §§ 294, 671; Negligence, §§ 121-134; New Trial, §§ 71, 79, 104, 108, 150; Partnership, §§ 56, 217; Party Walls; Payment, §§ 65, 70, 73; Perjury, § 11; Physicians and Surgeons, §§ 6, 18; Principal and Surety, § 160; Railroads, §§ 9, 441, 481, 482; Reference; Rewards; Sales, § 417; Schools and School Districts, §§ 95, 145; Specific Performance, § 121; Statutes, § 289; Stipulations; Taxation, §§ 736, 775; Trial, §§ 59-89, 194, 252, 340; Trusts, §§ 43, 109; Vendor and Purchaser, § 281; Waters and Water Courses, §§ 33, 130, 152, 179, 225; Wills, §§ 55, 163, 166, 384, 487, 488; Witnesses; Work and Labor, §§ 7, 27, 28.

### I. JUDICIAL NOTICE.

§ 10 (Ok.) The Supreme Court will take judicial notice that Chickasha, Okl., is within that portion of the state which was formerly Indian Territory.—*Anheuser-Busch Brewing Ass'n v. Doss*, 129 P. 49.

§ 34 (Ok.) The Supreme Court will take judicial notice that the shipment of intoxicating liquors into Chickasha, Okl., which is within that portion of the state which was formerly Indian Territory, is illegal.—*Anheuser-Busch Brewing Ass'n v. Doss*, 129 P. 49.

### II. PRESUMPTIONS.

§ 80 (Cal.) In the absence of evidence of the Nebraska law of limitations, it was presumed the same as Code Civ. Proc. § 339, subd. 1, which provides that an action on an oral agreement to repay money loaned must be brought within two years.—*Van Buskirk v. Kuhns*, 129 P. 587.

§ 80 (Cal.) The statute law of Arizona as to a mining stockholder's right to examine the corporation's mines is presumed to be the same as that of California.—*Hobbs v. Tom Reed Gold Mining Co.*, 129 P. 781.

§ 80 (Cal.App.) The rule that the law of a sister state is presumed to be the same as the

law of the forum applies to statutory as well as the common law.—*Wilson v. Durkee*, 129 P. 617.

§ 80 (Utah) In absence of contrary evidence, it is presumed that the law of California relating to the forfeiture of the custody of minor children is the same as the law of Utah.—*Stanford v. Gray*, 129 P. 423.

§ 83 (Or.) Notice to property holders before issuance of warrant for the collection of a tax as required by city charter *held* presumed to have been given in the absence of an allegation to the contrary.—*Hendry v. City of Salem*, 129 P. 531.

#### IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

##### (A) Facts in Issue and Relevant to Issues.

§ 113 (Mont.) Evidence of the value of land at a time subsequent to signing of a compromise agreement *held* improper to determine plaintiff's compensation as an attorney, which was to be a certain percentage of the value at the time the agreement was signed.—*Myers v. Bender*, 129 P. 330.

Evidence of value of land for city lot purposes *held* competent to show its market value at a certain time, though it was not then being used for such purposes.—*Id.*

§ 113 (Or.) Testimony as to the price paid for land two and one-half years before it was taken for a street *held* properly excluded; the time being too remote to make it admissible on the question of value.—*City of Portland v. Tiggard*, 129 P. 755.

##### (B) Res Gestæ.

§ 119 (Mont.) In a street car passenger's action for personal injuries in a derailment, evidence as to how many people were on the car, and where they were located, was admissible as *res gestæ*, though such evidence did not bear on the negligence alleged.—*Emerson v. Butte Electric Ry. Co.*, 129 P. 319.

##### (C) Similar Facts and Transactions.

§ 142 (Or.) In a proceeding to assess the damages to property condemned for a street, testimony as to the selling price of lots three blocks from the property in question, and a part of a tract platted into lots adjoining those in question, was admissible on the question of value.—*City of Portland v. Investment Co.*, 129 P. 758.

#### V. BEST AND SECONDARY EVIDENCE.

§ 158 (Okla.) Where an adoption is effected under the statute by order of court, the records of the court constitute the best evidence to establish such adoption.—*Coombs v. Cook*, 129 P. 698.

§ 178 (Cal.App.) Where the right of any person depends on the contents of a writing which is lost, destroyed, or cannot be found, its contents may be proved by secondary evidence.—*People v. Murphy*, 129 P. 603.

§ 178 (Okla.) Where the records of an adoption by the court have been destroyed, parol evidence of their contents and evidence of acts and declarations of the adopting parent are admissible to establish adoption.—*Coombs v. Cook*, 129 P. 698.

§ 183 (Or.) In a creditor's action to set aside a conveyance from husband to wife, secondary evidence of bond and application therefor *held* improperly admitted, where there was no showing of due diligence to procure the original instruments.—*Gladstone Lumber Co. v. Kelly*, 129 P. 763.

§ 186 (Kan.) Loss of certain railroad waybills indicating the destination of certain cars in question having been proved, letter press copies thereof were admissible.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 186 (Kan.) Where the original of a writing cannot be produced, a copy thereof made

from memory by one knowing its contents is admissible.—*Walter v. Calhoun*, 129 P. 1176.

#### VI. DEMONSTRATIVE EVIDENCE.

§ 188 (Okla.) Ordinarily, where the question of physical injury, its extent or permanency, is in issue, it is not error to permit plaintiff to exhibit the injured part of the body to the jury.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

#### VII. ADMISSIONS.

##### (A) Nature, Form, and Incidents in General.

§ 207 (Wash.) A retort by defendant's counsel in an action for injuries to a miner by a gas explosion, made when interrupted by plaintiff's counsel, that the mine was a gaseous mine and gas was likely to come quickly in some parts of it did not amount to an admission that the mine was gaseous.—*Dollar v. Northwestern Improvement Co.*, 129 P. 578.

§ 208 (Or.) A pleading served in another action, if material, may be used in evidence in the present action though the party offering it was not a party to the action in which the pleading was served.—*Hofer v. Smith*, 129 P. 761.

A verified complaint in another action brought by defendants, which alleged that they were copartners for a certain period, *held* admissible in evidence to charge defendants as partners, in order to show a partnership between them during the times alleged in the complaint in the present action.—*Id.*

##### (B) By Parties or Others Interested in Event.

§ 222 (Okla.) Where several defendants are charged with conspiring with a common purpose, testimony as to conversation and acts of one as to his relations with another is admissible as against all.—*American Trust Co. v. Chitty*, 129 P. 51.

##### (C) By Grantors, Former Owners, or Privies.

§ 230 (Or.) Where, in a suit by a judgment creditor to set aside a conveyance of the debtor as fraudulent, the debtor is made a defendant, the default or confession of the debtor is hearsay, as against the grantee.—*Ball v. Danton*, 129 P. 1032.

##### (D) By Agents or Other Representatives.

§ 252 (Ariz.) In an action on a policy of insurance, defended on the ground that the insured had misrepresented his age, *held* that affidavits containing statements of the insured as to his age, made when registering as a voter, were inadmissible, not being *res gestæ* and relating to immaterial matters.—*Logia Suprema de la Alianza Hispano-Americana v. De Aguirre*, 129 P. 503.

§ 253 (Or.) Declarations of persons engaged in a conspiracy, made prior to its consummation, are binding on all of the conspirators; but, after the conspiracy is accomplished, a declaration of one of them is binding on him alone.—*Ball v. Danton*, 129 P. 1032.

##### (E) Proof and Effect.

§ 265 (Cal.App.) In an action for expenditures in repairing a motor car purchased from defendant and repaired by plaintiff on defendant's authority when it became defective, a statement by plaintiff's counsel that he did not propose to rely on the warranty as such, but was relying upon an express promise of defendant to pay the money, and also upon the quantum meruit, was not an admission that plaintiff abandoned all claim that the motor was not properly constructed.—*Bakersfield & V. R. Co. v. Fairbanks, Morse & Co.*, 129 P. 610.

§ 265 (Wash.) Admission that a mine in which a gas explosion occurred was gaseous

and gas was likely to come quickly in some parts of it was not proof that the work in progress when the explosion occurred was "approaching" a place where there was likely to be an accumulation of gases so as to require safety lamps under Rem. & Bal. Code, § 7400.—*Dollar v. Northwestern Improvement Co.*, 129 P. 578.

### VIII. DECLARATIONS.

#### (A) Nature, Form, and Incidents in General.

§ 274 (Nev.) In an equitable action to quiet title to a mining claim, field notes made by plaintiff's surveyors, containing an exclusion of conflict area from one claim in favor of another, were properly excluded as self-serving acts by an agent of the plaintiff which could not be binding on the defendant.—*Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 129 P. 308.

#### (B) Proof and Effect.

§ 313 (Colo.) An oral statement or declaration, not followed by any act, cannot change conditions.—*Green Valley Ditch Co. v. Frantz*, 129 P. 1006.

### IX. HEARSAY.

§ 317 (Cal.App.) In an action by an agent for commissions on the ground that the owner had sold for less than he had agreed to in his contract, providing that in such a case he would pay the agent a commission, testimony of the agent that the purchaser had said to him that he would have bought the place from him, but had done better in dollars and cents, was inadmissible as hearsay.—*Briggs v. Hall*, 129 P. 288.

§ 318 (Wash.) A letter held hearsay and inadmissible to show authority by decedent's widow to complainant to prosecute a suit for decedent's wrongful death as administrator.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

### X. DOCUMENTARY EVIDENCE.

#### (A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 333 (Okla.) A printed copy of the final rolls of citizens and freedmen of the Five Civilized Tribes, prepared by the Commission, approved by the Secretary of the Interior, and printed under authority conferred by the act of Congress, is admissible in evidence.—*Lawless v. Raddis*, 129 P. 711.

#### (C) Private Writings and Publications.

§ 354 (Okla.) The original passbook containing the original notice of deposits, and the original checks signed by the customer on which the deposits were withdrawn, are competent evidence of the facts disclosed.—*Security State Bank v. Fussell*, 129 P. 746.

§ 363 (Colo.App.) Medical works are not admissible in evidence.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

#### (D) Production, Authentication, and Effect.

§ 370 (Colo.) In an action for the loss of baggage, where plaintiff testified that he received checks of the same number from defendant and from a hotel company, held, that the admission of defendant's purported check of that number, without identification, was erroneous.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

§ 373 (Wash.) In an action for wrongful death by decedent's administrator, a certificate alleged to have been executed by the mayor and secretary of the city where decedent's widow and children lived in Bulgaria held incompetent to prove complainant's authority to main-

tain the action.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

Where decedent died, leaving a foreign widow and children, their authority to decedent's resident administrator to sue for decedent's wrongful death should be proved by the testimony or deposition of a person who saw the widow execute the paper conferring such authority.—*Id.*

### XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

#### (A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 384 (Cal.App.) Where a writing purports upon its face to completely express the whole agreement, it is presumed that the parties embodied every material term therein.—*Channel Commercial Co. v. Hourihan*, 129 P. 947.

§ 408 (Cal.App.) A memorandum of an agreement to sell beans in the following form: "Sep. 30, '10, Rec'd C. C. Co., \$160.45 to apply on 1 M sk lot pink beans as per sample at 4 1/2c"—signed by the seller, was not a memorandum of a contract of sale, but a mere receipt, so that it could be varied by parol evidence.—*Channel Commercial Co. v. Hourihan*, 129 P. 947.

The terms of a written receipt may be varied by parol evidence.—*Id.*

§ 423 (Colo.) As the indorsement of a nonnegotiable sheep contract or lease did not fix any liability as indorser, it was competent for the indorser to show by parol what liability he did assume when the contract was so assigned and delivered.—*Kinderman v. Hersch*, 129 P. 228.

#### (B) Invalidating Written Instrument.

§ 433 (Cal.) When an instrument is sought to be avoided for mistake in law or fact, evidence is admissible as to what grantor intended to do or convey.—*Jersey Farm Co. v. Atlantic Realty Co.*, 129 P. 593.

§ 434 (Cal.) When an instrument is sought to be avoided for fraud, evidence is admissible as to what grantor intended to do or convey.—*Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593.

§ 434 (Okla.) Parol evidence is admissible to show that a purported deed or contract is not in fact that made by the parties; the object being to show that by mistake or fraud a different deed or contract was made than the one inquired about.—*American Trust Co. v. Chitty*, 129 P. 51.

#### (C) Separate or Subsequent Oral Agreement.

§ 441 (Utah) Where plaintiff contracted in writing to sell improvements to defendant's tenant, evidence that plaintiff and the tenant orally agreed that title should remain in plaintiff until paid was inadmissible.—*Vance v. Heath*, 129 P. 365.

#### (D) Construction or Application of Language of Written Instrument.

§ 459 (Utah) Parol evidence is admissible to show that the person who made and signed a written contract was acting as the agent of the undisclosed principal by whom action thereon is brought.—*Child v. Gillis Const. Co.*, 129 P. 356.

§ 461 (Okla.) Where a written contract is ambiguous, so that the intention of the parties cannot be understood, extrinsic evidence of the relation of the parties and the facts surrounding them may be received for the proper interpretation of the instrument.—*Richardson v. Chatfield*, 129 P. 728.

### XII. OPINION EVIDENCE.

#### (A) Conclusions and Opinions of Witnesses in General.

§ 471 (Cal.) The exclusion of questions asked witnesses which called for conclusions or opin-

ions rather than facts was proper.—In re Pack-er's Estate, 129 P. 778.

§ 471 (Cal.App.) Witnesses must state the very facts from which the facts pleaded are drawn, and not mere conclusions from such facts.—Doudell v. Shoo, 129 P. 478.

§ 474 (Okl.) In an action for loss of household goods and wearing apparel having no market value, the owner, who is familiar with the lost articles, has purchased, and used them, was competent to testify as to their value to him.—St. Louis & S. F. R. Co. v. Dunham, 129 P. 862.

§ 474 (Wash.) A property owner, who occupies his property and is familiar with the purposes for which it may be used and with land values in the community, may testify as to its value in condemnation proceedings.—City of Sedro-Woolley v. Lederle, 129 P. 372.

The fact that persons testifying to the value of realty valued it higher than the price procured for other property in that vicinity did not of itself make their evidence incompetent.—Id.

#### (B) Subjects of Expert Testimony.

§ 506 (Kan.) Opinions of experts are admissible with reference to an ultimate fact in issue, where the subject can be presented to the jury so that it is capable of drawing the ultimate inference.—Root v. Cudahy Packing Co., 129 P. 147.

§ 506 (Wash.) Questions asked experts as to whether the treatment used by a physician sued for malpractice was such as an ordinary skillful surgeon would have used *held* proper, though that was the ultimate question for the jury.—Taylor v. Kidd, 129 P. 406.

§ 513 (Kan.) In an action for injuries to a servant by the fall of a friction elevator, the opinions of experts that such elevators were unsafe and improper to be used was inadmissible, the best evidence of reliability being the demonstrated results of their use, which could be shown by evidence.—Root v. Cudahy Packing Co., 129 P. 147.

§ 524 (Or.) Expert witnesses may give their opinions as to the increase in the market value of a lot by reason of a street improvement, and are not limited to giving their opinion of its value before and after the improvement.—City of Portland v. Tigard, 129 P. 755.

#### (C) Competency of Experts.

§ 539 (Kan.) In an action to recover a balance due on a contract for the construction of a building, an architect who examined the building and detailed the defects therein could testify as to the particulars wherein the job had not been done in a workmanlike manner.—McCune v. Ratcliff, 129 P. 1167.

§ 542 (Kan.) A manager of a cold storage plant of nine years' experience having had occasion to observe the condition of frozen products was qualified to testify whether "egg meats," having been once solidly frozen, would thaw in a temperature lower than 32 degrees.—Stewart v. Henningsen Produce Co., 129 P. 181.

§ 543 (Or.) Real estate dealer *held* qualified by his knowledge of values of land in that vicinity to testify to the value of land sought to be condemned.—City of Portland v. Tigard, 129 P. 755.

#### (D) Examination of Experts.

§ 553 (Mont.) A quotation from a standard work on medical jurisprudence may, in the court's discretion, be permitted to be incorporated in a hypothetical question to a physician.—Emerson v. Butte Electric Ry. Co., 129 P. 319.

§ 558 (Colo.App.) Where a physician, testifying as an expert, stated that he had not read a medical work and was not familiar with it, the medical work could not be used on his cross-

examination to contradict him.—Denver City Tramway Co. v. Gawley, 129 P. 258.

Where a physician did not base his opinions on medical works, cross-examination as to whether he agreed with a medical author was improper unless he testified that he had read the author and regarded him as of sufficient merit on which to base his opinion.—Id.

#### XIV. WEIGHT AND SUFFICIENCY.

§ 595 (Mont.) The jury are not confined in their determination to the precise language in which the evidence is given, but may find a verdict upon any fair inference deducible therefrom.—Hollenback v. Stone & Webster Engineering Corporation, 129 P. 1058.

§ 596 (Utah) In civil actions, one holding the affirmative of an issue, to entitle him to prevail, need only establish it by a preponderance of the evidence.—Vance v. Heath, 129 P. 365.

§ 601 (Kan.) Evidence that an unknown person had written the name of a station on a freight car of a train, and that destinations were some times so indicated, was of insufficient probative force to warrant a finding that the car was then being moved to such station.—Barker v. Kansas City, M. & O. Ry. Co., 129 P. 1151.

#### EXAMINATION.

See Evidence, §§ 553, 558; Jury, § 131; Witnesses, §§ 236-305.

#### EXCEPTIONS.

See Appeal and Error, § 248; Criminal Law, §§ 841, 1056; Trial, §§ 31, 273, 284.

#### EXCEPTIONS, BILL OF.

See Appeal and Error, § 302, 520, 542; Criminal Law, §§ 1090, 1097.

#### EXCHANGE OF PROPERTY.

See Assignments, § 37; Contracts, § 187; Specific Performance, § 14.

§ 3 (Cal.App.) Representations as to what a ranch will produce in the future are not representations of existing facts, but are merely speculative surmises, and are not ground for rescission of an exchange of land.—Bickel v. Munger, 129 P. 958.

Representations by an owner of a fruit ranch as to the condition and quality of the soil while exhibiting the property to a prospective purchaser, made with knowledge of the ignorance and inexperience of the prospective purchaser, are, if false, ground for rescission of a contract to exchange lands.—Id.

Representations by an owner of a fruit ranch that orange trees thereon are young, while in fact they are old, and false representations of the amount of oranges produced by the trees in a season, *held* representations of an existing fact and ground for rescission of a contract of exchange.—Id.

#### EXCUSE.

See Contracts, § 279.

#### EXECUTION.

See Corporations, § 538; Dedication, § 53; Deeds, § 100; Exemptions, § 119; Homestead.

#### III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 66 (Okl.) The clerk of the district court with whom a transcript of a judgment of a county court of another county is filed cannot issue execution thereon.—Hudson v. Ely, 129 P. 11.

#### XII. WRONGFUL EXECUTION.

§ 455 (Kan.) Former Code Civ. Proc. § 467 (Gen. St. 1901, § 4913), authorizing restitution



by a judgment creditor of the money for which lands were sold, applied only where the judgment was afterwards reversed by a superior tribunal.—*Erath v. Glenn*, 129 P. 830.

§ 472. (Kan.) In an action against a judgment creditor to recover damages for land sold under a judgment obtained by publication, where the judgment was afterwards vacated under former Code Civ. Proc. § 77 (Gen. St. 1901, § 4511), the measure of damages is the value of the land when the bona fide purchaser acquired a sheriff's deed.—*Erath v. Glenn*, 129 P. 830.

## EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival, § 72; Appeal and Error, § 854; Death, §§ 14, 31, 42; Descent and Distribution; Statutes, § 82; Wills.

## II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 9 (Colo.) Under Const. art. 6, § 23, and Mills' Ann. St. § 4720 (Rev. St. 1908, § 7121), a county court on the death, removal, or resignation of executors had power to appoint others in their stead with all the powers given to the original executors by the will.—*Tuckerman v. Currier*, 129 P. 210.

§ 19 (Wash.) Right of surviving spouse and next of kin to administer, conferred by Rem. & Bal. Code, § 1389, is waived by their failure to apply for letters within 40 days after death.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 20 (Cal.) The title of an appeal from an order denying a new trial of an application for letters of administration should be "In the matter of the Estate of N., Deceased."—*O'Brien v. Nelson*, 129 P. 985.

§ 23 (Cal.) After final settlement of an estate, the court should not issue further letters of administration, unless property remains undisposed of, or some act is to be done which only an administrator can do, especially in view of Code Civ. Proc. § 1698.—*O'Brien v. Nelson*, 129 P. 985.

§ 29 (Wash.) Appointment of decedent's brother as his administrator before the expiration of the 40 days within which his widow and children were entitled to apply for letters held valid as against collateral attack.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 35 (Colo.) Where beneficiaries attacked the appointment, conduct, and good faith of substituted executors, they were entitled to incur legitimate expense, to sustain the validity of the will, their appointment, and acts, and to an allowance out of the estate funds for reasonable expenditures in that behalf.—*Tuckerman v. Currier*, 129 P. 210.

In a suit to remove substituted executors and to recover, for a devastavit, a portion of a decree, finding that there had been an increase instead of a devastavit and awarding the same to the beneficiaries for life under the will, was not within the issues.—*Id.*

## III. ASSETS, APPRAISAL, AND INVENTORY.

§ 72 (Okl.) The inventory is prima facie evidence as to the value of the estate in the administrator's hands, but in a proper case he may show by inadvertence that property has been put into it which did not in fact belong there.—*Pennington v. Newman*, 129 P. 693.

As a general rule, an administrator's inventory may not be impeached, but the proper method is by motion after notice.—*Id.*

## IV. COLLECTION AND MANAGEMENT OF ESTATE.

### (A) In General.

§ 122 (Wash.) Under Rem. & Bal. Code, §§ 1420-1424, inclusive, a special administrator has

nothing to do with claims against the estate, and can neither pay, allow, nor reject them, and hence, under section 1479, requiring presentation of claims, presentation to the special administrator is insufficient.—*Ward v. Magaha*, 129 P. 395.

## V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 185 (Cal.) By either an antenuptial or post-nuptial contract a widow may waive her right to an allowance, when the rights of minor children are not involved.—*In re Yoell's Estate*, 129 P. 999.

Under an agreement between husband and wife contemplating a permanent separation, and making final distribution of their property, and providing that neither should claim any right or interest as heir or survivor in the property of the other, the surviving wife released her right to make application for a family allowance.—*Id.*

§ 188 (Cal.) Where a wife voluntarily severed her connection with the family, she was not entitled to a widow's allowance out of her husband's estate.—*In re Yoell's Estate*, 129 P. 999.

§ 194 (Cal.) Under the pleadings in a wife's application for a family allowance, the question of fraud by the husband in obtaining a separation agreement held not in issue.—*In re Yoell's Estate*, 129 P. 999.

Where a separation agreement between husband and wife making complete disposition of their property rights has been fully executed, and the wife is making unwarranted claim to a widow's allowance, the probate court has equitable jurisdiction to pass upon the validity and effect of such agreement.—*Id.*

## VI. ALLOWANCE AND PAYMENT OF CLAIMS.

### (B) Presentation and Allowance.

§ 222 (Wash.) Where an executor adopted the pleadings of special administrator in action on claim, and did not plead the nonpresentation of the claim to the executor, such presentation was not waived; the executor having no power to waive any requirement of the statute.—*Ward v. Magaha*, 129 P. 395.

An executor cannot ratify the rejection of a claim by the special administrator, and hence, even if his conduct amounted to a ratification, he was not estopped to raise the objection that a claim, although presented to the special administrator, had never been presented to him.—*Id.*

## VII. DISTRIBUTION OF ESTATE.

§ 315 (Cal.) Error in holding that the whole property was community property, and in distributing it to the surviving husband's grantee, did not render an administration proceeding void, but should have been corrected by motion for a new trial, or by an appeal.—*O'Brien v. Nelson*, 129 P. 985.

## VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

### (C) Sale.

§ 388 (Wash.) A purchaser at an administrator's sale may rely upon deceased's record title the same as any other purchaser, where the rights of minors or incompetent persons are not involved.—*Golden v. Pilchuck Tribe No. 42*, Improved Order of Redmen, 129 P. 93.

Deed to grantor's one-half undivided interest in four lots "and lots 19 and 20" held, as against a subsequent purchaser from the grantor's administrator, to convey only a one-half interest in lots 19 and 20, although the grantor owned the whole of those lots and only owned a one-half interest in the four other lots.—*Id.*

**X. ACTIONS.**

§ 423 (Or.) In general, only the executor or administrator can sue to recover property belonging to the estate, but if he is in collusion with the debtor, or obstructs the course for the transmission of the estate, the distributees may sue joining the representative and the debtor as codefendants.—*Hillman v. Young*, 129 P. 124.

§ 431 (Ok.) A claim on contract must be presented to the administrator for allowance or rejection before suit thereon, but not so a claim in tort or for other wrongful act of the deceased.—*American Trust Co. v. Chitty*, 129 P. 51.

§ 431 (Wash.) Failure to present a claim against an estate to the executor or administrator, as required by Rem. & Bal. Code, § 1479, is not a mere matter of abatement, but the presentation is a fact essential to the cause of action.—*Ward v. Magaha*, 129 P. 895.

§ 455 (Colo.) In general, executors have no personal interest in a decree awarding certain increase of the estate to the life tenants, as against the residuary legatees, and are not entitled to appeal therefrom.—*Tuckerman v. Currier*, 129 P. 210.

**XIII. LIABILITIES ON ADMINISTRATION BONDS.**

§ 533 (Ok.) Neither an administrator nor his sureties can be sued for breach of a bond until a settlement or final accounting is had, and a decree entered showing a breach of the bond and failure of the administrator to comply with the decree.—*Pennington v. Newman*, 129 P. 693.

**EXEMPLARY DAMAGES.**

See Damages, § 215.

**EXEMPTIONS.**

See Homestead; Process, § 119.

**IV. PROTECTION AND ENFORCEMENT OF RIGHTS.**

§ 116 (Ok.) Under the rule that a debtor is excused by unavoidable accident in failing to make a claim for exemptions, an "accident" is an event which is unusual and unexpected, or the happening of an event without the concurrence of the will of the person by whose agency it was caused.—*Hocker v. Carroll*, 129 P. 56.

§ 119 (Ok.) Where a United States commissioner, after issuing an execution, absented himself from his district so that the judgment debtor could not give notice of his claim of exemption, and at the execution sale the debtor gave notice thereof, he can recover possession from the purchaser.—*Hocker v. Carroll*, 129 P. 56.

**EXHIBITS.**

See Elections, § 293; False Pretenses, § 43.

**EXPENSES.**

See Executors and Administrators, § 35.

**EXPERT TESTIMONY.**

See Evidence, §§ 506-558.

**EXPRESS TRUSTS.**

See Trusts, §§ 1-43.

**EXTRADITION.****II. INTERSTATE.**

§ 21 (Kan.) A charge of crime, flight, discovery, and a formal demand for return are all that are necessary to create the obligation of the state to which a fugitive fled to deliver him.—*Ex parte Flack*, 129 P. 541.

§ 41 (Kan.) One charged with an extraditable offense, having been returned to the state

from which he fled, may there be prosecuted for crimes other than that specified in the demand for his delivery without first offering him a reasonable opportunity to return to the state which surrendered him.—*Ex parte Flack*, 129 P. 541.

**EXTRA WORK.**

See Counties, § 46.

**FACTORS.**

See Brokers.

**FALSE IMPRISONMENT.****I. CIVIL LIABILITY.**

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (Ok.) A passenger cannot be arrested for refusing to pay fare, except by tendering a nontransferable ticket issued to another, on the train auditor taking up the ticket as invalid.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

§ 15 (Ok.) Where a carrier's train auditor directed an officer to arrest a passenger for refusal to pay fare, except by a nontransferable ticket issued to another, each acted within the general scope of his authority; and, the arrest being wrongful, the company was liable for damages for the injury sustained.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

**(B) Actions.**

§ 27 (Ok.) In an action for unlawful arrest, where the defense is that defendant had possession of liquor with intent to violate the prohibitory law, and the question of the officer's good faith is involved on the measure of damages, evidence of the surrounding circumstances is competent.—*Holmes v. Le Fors*, 129 P. 718.

§ 30 (Ok.) If an arrest was unlawful, the jury could consider plaintiff's occupation in estimating the damages.—*Holmes v. Le Fors*, 129 P. 718.

§ 34 (Ok.) In an action by a passenger against a carrier for false arrest, plaintiff may recover for bodily and mental suffering.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

§ 35 (Ok.) An officer making an illegal arrest is not liable for punitive damages, where he made the arrest in good faith.—*Holmes v. Le Fors*, 129 P. 718.

§ 36 (Ok.) Where a carrier's train auditor wrongfully procured plaintiff's arrest for refusing to pay fare, except with a nontransferable ticket issued to another, and the officer handcuffed plaintiff and took him to the station house under a false charge of disorderly conduct, until released on bail, a verdict allowing him \$625 was not excessive.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

§ 40 (Ok.) An instruction in an action for false imprisonment that, as plaintiff was a retail liquor dealer, he had no such character as could be injured by arrest by defendant endeavoring to enforce the prohibitory law, was error.—*Holmes v. Le Fors*, 129 P. 718.

**FALSE PRETENSES.**

See Criminal Law, § 373; Physicians and Surgeons, § 11.

§ 6 (Or.) In view of L. O. L. § 1541, the false pretenses denounced by section 1964, if expressed orally, must be accompanied by a false token or writing; and if not so accompanied the false pretense, or some note or memorandum thereof, must be in writing, signed by or in the handwriting of defendant.—*State v. Whiteaker*, 129 P. 534.

The "false token or writing" contemplated by L. O. L. §§ 1541, 1964, must be something real, visible, substantial, or some writing pur-

porting to be the act of some person, and so framed as to have more weight and influence than the mere assertion of the party defrauding; but such writing need not be subscribed by or in the handwriting of the defendant.—*Id.*

§ 42 (Or.) The admission in evidence of statements of one charged with obtaining a signature by means of false pretenses, after the transaction, was proper to show previous intent.—*State v. Whiteaker*, 129 P. 534.

§ 43 (Or.) The prospectus of an oil company, and a bottle of oil labeled "Taken from Our Property" held proper exhibits to go to the jury as tokens, within the contemplation of L. O. L. §§ 1541, 1964, making it an offense to obtain the signature to an instrument by false pretenses.—*State v. Whiteaker*, 129 P. 534.

## FALSE SWEARING.

See Perjury.

## FALSE TOKEN.

See False Pretenses, §§ 6, 43.

## FEES.

See Attorney and Client, § 149; Clerks of Courts, §§ 11, 14; New Trial, § 131; Officers, § 94.

## FELLOW SERVANTS.

See Master and Servant, §§ 179-190.

## FENCES.

See Highways, § 6; Railroads, § 113.

## FILING.

See Chattel Mortgages, § 97; Judgment, §§ 292, 385; Justices of the Peace, §§ 164, 166; Mines and Minerals, § 114; New Trial, §§ 123, 131.

## FINDINGS.

See Appeal and Error, §§ 1010-1015, 1122; Trial, §§ 121, 389-397.

## FINES.

See Criminal Law, § 1166½; Estates Tail, § 7; Justices of the Peace, § 164.

## FIRE INSURANCE.

See Insurance.

## FIRES.

See Negligence, § 134; Railroads, §§ 481, 482.

## FLIGHT.

See Criminal Law, §§ 351, 815; Extradition, § 21.

## FLOWAGE.

See Waters and Water Courses, § 179.

## FOOD.

See Assignments, § 18.

## FORCIBLE DEFILEMENT.

See Rape.

## FORCIBLE ENTRY AND DETAINER.

### I. CIVIL LIABILITY.

§ 4 (Cal.App.) Entry without consent of the occupant is "unlawful" within Code Civ. Proc. § 1160, subd. 2, declaring who is guilty of forcible detainer.—*Dutcher v. Sanders*, 129 P. 809.

§ 9 (Cal.App.) One who, being in peaceable possession of land, leased it is, on expiration of the lease, "occupant," though not residing on it, within Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one entering during absence of "occupant."—*Dutcher v. Sanders*, 129 P. 809.

§ 12 (Cal.App.) The question of defendant's right of possession, unless based on consent of plaintiff, is not involved, and so is immaterial in an action based on Code Civ. Proc. § 1160, subd. 2, declaring who is guilty of forcible detainer.—*Dutcher v. Sanders*, 129 P. 809.

## FORECLOSURE.

See Chattel Mortgages, §§ 156, 169; Mechanics' Liens, § 271; Mortgages, §§ 374-559.

## FOREIGN CORPORATIONS.

See Corporations, § 642.

## FOREIGN JUDGMENTS.

See Judgment, §§ 818, 823, 929, 944.

## FORFEITURES.

See Deeds, § 155; Evidence, § 80; Insurance, §§ 755, 819; Vendor and Purchaser, § 334.

## FORGERY.

See Banks and Banking, § 148; Criminal Law, §§ 547, 720; Witnesses, § 277.

§ 16 (Wash.) The constituent elements of forgery in the first degree by uttering a forged instrument are first the spurious character of the instrument; second, its utterance by accused; and, third, his guilty knowledge of its spurious character.—*State v. Peoples*, 129 P. 108.

§ 44 (Wash.) Guilty knowledge of the spurious character of an instrument uttered by accused may, like any other fact, be proven by circumstantial evidence.—*State v. Peoples*, 129 P. 108.

In a prosecution for forgery, evidence held sufficient to establish accused's guilty knowledge of the spurious character of the instrument which he uttered.—*Id.*

## FORMA PAUPERIS.

See Justices of the Peace, § 159.

## FORNICATION.

See Incest.

## FRANCHISES.

See Bridges, §§ 15, 26; Turnpikes and Toll Roads.

## FRAUD.

See Action, § 45; Assignments, § 24; Banks and Banking, § 148; Corporations, §§ 82, 222, 259, 335, 542, 557, 625; Criminal Law, § 373; Elections, § 291; Embezzlement, § 5; Evidence, § 434; Exchange of Property, § 3; Executors and Administrators, § 194; False Pretenses; Frauds, Statute of; Fraudulent Conveyances; Guardian and Ward, § 54; Habeas Corpus, § 85; Insurance, §§ 290, 646; Judgment, § 944; Limitation of Actions, §§ 1, 45; Money Received, § 8; Municipal Corporations, §§ 241, 365; Principal and Agent, § 158; Process, § 65; Vendor and Purchaser, §§ 36, 229.

### I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 11 (Cal.App.) An assertion of something not true must be of a fact, not warranted by the



information of the person making the assertion, in order to be a fraudulent representation, and not merely the opinion of such person, however positively asserted.—*Winkler v. Jerrue*, 129 P. 804.

A statement of value of itself is merely a matter of opinion, but representations as to value may be representations of fact depending on the circumstances.—*Id.*

§ 25 (Cal.App.) Fraud is not actionable unless injury results, so that a fraudulent misrepresentation made to the vendee that a mortgage on the land only drew 6 per cent. interest when the mortgage on its face was in excess thereof, did not injure the vendee, where he could deduct from the deferred payments the amount of excess interest.—*Winkler v. Jerrue*, 129 P. 804.

## II. ACTIONS.

### (B) Parties and Pleading.

§ 47 (Or.) Where a corporation was fraudulently induced to purchase an interest in certain real property and later transferred such interest to plaintiffs, an allegation that the transfer was for a valuable consideration did not show that it was for an adequate consideration and that the corporation was therefore not damaged.—*Sperry v. Stennick*, 129 P. 130.

### (C) Evidence.

§ 50 (Cal.) Fraud is not presumed, but must be pleaded.—*In re Yoell's Estate*, 129 P. 999.

§ 58 (Okl.) In an action for fraud in the sale of land in that defendant had no title, evidence held to sustain a verdict for plaintiff.—*Lawless v. Raddis*, 129 P. 711.

## FRAUDS, STATUTE OF.

### V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 46 (Nev.) An agreement to bear one-third the expense of development on a two-year mining lease is not void, where the parties contemplate that the work shall be done within a year.—*Girton v. Daniels*, 129 P. 555.

§ 51 (Nev.) An oral agreement to bear one-third the expenses of developing a two-year mining lease was not void, where the lease could have been terminated by act of the parties within a year according to its specific provisions.—*Girton v. Daniels*, 129 P. 555.

### VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Cal.App.) A partnership formed under an oral agreement to carry on a certain business was not invalid under Civ. Code, § 1624, making void an oral agreement for the sale of real property, though it provided for the purchase of real property to be used in the partnership business.—*Doudell v. Shoo*, 129 P. 478.

## VII. SALES OF GOODS.

### (A) Contracts Within Statute.

§ 83 (Colo.) A contract by plaintiff to manufacture and deliver to defendant a soda fountain of particular dimensions according to a special design furnished by a third person, plaintiff assembling the various parts and delivering the completed fountain to defendant, was a contract for work and labor and not within the statute of frauds.—*Bond v. Bourk*, 129 P. 223.

### (C) Giving Earnest or Part Payment.

§ 95 (Colo.App.) Where defendant individually bought and accepted lambs, and made a part payment, the contract was taken out of the statute of frauds, though defendant refused to pay the balance of the price because the firm of which the seller was a member failed to fulfill a contract of sale made with defendant's firm.—*Butscher v. Yozall*, 129 P. 519.

## IX. OPERATION AND EFFECT OF STATUTE.

§ 123 (Wash.) A parol lease for a term exceeding a year, where lessee has taken possession with lessor's consent, is enforceable as a tenancy from month to month, not being wholly void.—*Backus v. Feeks*, 129 P. 86.

§ 129 (Cal.App.) A partnership formed under a partly executed oral agreement that it shall continue for not less than three years exists until dissolved, notwithstanding the statute of frauds: Civ. Code, § 1624, subd. 1, making void an oral agreement not to be performed within a year.—*Doudell v. Shoo*, 129 P. 478.

§ 129 (Cal.App.) A part performance of an oral contract to convey by paying part of the price, and the taking of possession under the contract, took the contract out of the statute of frauds.—*Winkler v. Jerrue*, 129 P. 804.

§ 138 (Nev.) Where an interest in a mining lease is assigned consideration of an oral agreement to bear one-third the expense of development, the assignee is liable for his share of the development work which was done by the other contracting party, though the agreement be void under the statute of frauds.—*Girton v. Daniels*, 129 P. 555.

§ 139 (Okl.) The defense of the statute of frauds cannot be interposed against an executed contract.—*Love v. Kirkbride Drilling & Oil Co.*, 129 P. 858.

Where a parol contract for the sale of certain oil leases had been fully performed by a proper transfer, nothing remaining but to pay the price, it was no defense to a recovery thereof that the parol contract was originally within the statute of frauds.—*Id.*

§ 143 (Wash.) Under a suretyship contract guaranteeing that a lessee under a five-year lease should perform "all the covenants, agreements and obligations in said lease contained," held, that the sureties were liable on the termination of the lease by the act of the lessee in giving a month's notice, though the lease was voidable because unacknowledged and for a term longer than a year.—*Backus v. Feeks*, 129 P. 86.

The statute referring to the execution of leases for longer than a year is a statute of frauds so that a surety of the performance of a lease voidable under the statute because unacknowledged and for a longer term than a year cannot take advantage of the statute to escape liability; the defense of the statute of frauds being personal to the principal.—*Id.*

## FRAUDULENT CONVEYANCES.

See Evidence, § 230; Partnership, § 217.

### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (E) Consideration.

§ 74 (Or.) Gross inadequacy of price is a circumstance to show fraud in the conveyance as against the creditors of the grantor.—*Ball v. Danton*, 129 P. 1062.

#### (H) Preferences to Creditors.

§ 115 (Or.) A creditor may secure himself or collect his debt from the debtor to the exclusion of other creditors.—*Ball v. Danton*, 129 P. 1032.

### (I) Retention of Possession or Apparent Title by Grantor.

§ 146 (Cal.App.) Transfer of certain personal property by judgment debtor to his mother-in-law prior to levy held void under Civ. Code, § 3440, providing that a transfer of personal property, without immediate delivery or actual and continued change of possession, is presumptively fraudulent as against creditors.—*Center v. Kelton*, 129 P. 960.

**(J) Knowledge and Intent of Grantee.**

§ 155 (Or.) L. O. L. § 7401, providing that the provisions of the chapter relating to fraudulent conveyances, sections 7397 and 7400 of which make every conveyance with intent to defraud creditors void, shall not affect a purchaser for a valuable consideration, unless he had prior notice of the fraud, is a statutory rule of equity and to defeat such a purchaser, it must appear that he had prior notice.—Ball v. Danton, 129 P. 1032.

§ 168 (Or.) Inadequacy of consideration alone will not invalidate a conveyance made in good faith and for a valuable consideration.—Ball v. Danton, 129 P. 1032.

**III. REMEDIES OF CREDITORS AND PURCHASERS.****(F) Pleading.**

§ 269 (Or.) Under L. O. L. §§ 725, 726, providing that the evidence must correspond with the allegations, the court, in a judgment creditor's suit to set aside a debtor's conveyance as fraudulent, on the ground that it was without consideration, may not set aside the conveyance, subject to the payment to the grantee of the consideration paid by him, on proof of payment by him of a substantial sum for the property.—Ball v. Danton, 129 P. 1032.

**(G) Evidence.**

§ 271 (Or.) Equity will not presume that a conveyance is fraudulent as against the creditors of the grantor, where the transaction is clearly susceptible of good faith and fair dealing.—Ball v. Danton, 129 P. 1032.

§ 277 (Or.) Under L. O. L. § 7401, declaring that the chapter relating to fraudulent conveyances shall not affect the title of a purchaser for a valuable consideration, unless he had prior notice of the fraud of his grantor, a grantee showing good faith and a valuable consideration need not affirmatively show that the consideration paid was adequate.—Ball v. Danton, 129 P. 1032.

§ 301 (Or.) The fact that a purchaser had actual notice of the intent of his grantor to defraud his creditors may be proved by circumstantial evidence.—Ball v. Danton, 129 P. 1032.

Evidence held not to show that a grantee paying a valuable consideration for the conveyance had prior notice of the intent of the grantor to defraud his creditors.—Id.

**GAME.**

§ 3½ (Or.) The right to take wild game being a mere privilege which may be prohibited or regulated by the state, the Legislature may prohibit the having in possession of wild game out of season, though killed in season.—State v. Pulos, 129 P. 128.

§ 7 (Or.) L. O. L. § 2289 (Sp. Laws 1909, p. 526), held to prohibit the having in possession of the carcasses of wild duck out of season, though they were killed in season.—State v. Pulos, 129 P. 128.

**GAMING.**

See Bills and Notes, § 360; Criminal Law, §§ 507, 511; Larceny, § 14.

**GAS.**

See Injunction, § 118; Negligence, § 32.

**GEOGRAPHICAL FACTS.**

See Evidence, § 10.

**GIFTS.**

See Wills, § 759.

**II. CAUSA MORTIS.**

§ 78 (Or.) In an action to recover personal property as part of a decedent's estate, an allegation held insufficient to charge the creation of a gift causa mortis for failure to allege that the transfer specified was made by decedent in contemplation of death, and that there was a delivery to the beneficiary or to some one for him.—Hillman v. Young, 129 P. 124.

An allegation of the delivery of certain personal property by decedent to Y. to collect and pay the proceeds as needed to J., and, after decedent's death, to pay J. the remainder, held insufficient to show a delivery to Y. as agent of J. to establish a gift causa mortis.—Id.

**GRAND JURY.**

See Indictment and Information.

§ 15 (Nev.) A grand juror held not to have a disqualifying opinion under Rev. Laws, § 7005, as to the guilt of accused, where he stated that his opinion would not justify a charge against accused.—State v. Williams, 129 P. 317.

§ 27 (Nev.) Under Rev. Laws, §§ 7028, 7029, authorizing the grand jury to inquire into the willful and corrupt misconduct of public officers, and to examine all public records, the grand jury cannot hire an accountant to examine the books of public officials; it being their duty to request an audit by the county commissioners or the state auditor who are required by sections 1508, 4148, 4153, to examine such books.—Stone v. Bell, 129 P. 458.

Despite Rev. Laws, §§ 4924, 7028, providing that the district judge shall charge the grand jury as to their duties and that it shall examine into the willful misconduct of county officers, the district judge has no inherent authority to hire, upon the request of the grand jury, a private accountant to examine the books of all county officials.—Id.

**GUARANTY.****I. REQUISITES AND VALIDITY.**

§ 4 (Colo.) Indorsement of a nonnegotiable contract for lease of sheep on which the lessee was to deliver a certain number at the end of the year, without guaranty of delivery, held, in effect, only a warranty that the contract was genuine, and a direction to deliver such sheep to the assignee, and to impose no liability on defendant upon the lessee's failure to deliver.—Kinderman v. Hersch, 129 P. 228.

§ 5 (Wash.) A guaranty contract may stand by itself, though the obligation guaranteed is invalid; the question whether the guarantor's liability is measured by that of the principal debtor being largely a matter of the construction of the guaranty contract.—Backus v. Feeks, 129 P. 86.

§ 24 (Kan.) Where a written contract for the sale of land to be paid for in school orders expressly guaranteed the validity of the orders, an assignment thereof to the vendor of the land without recourse did not abrogate the written guaranty.—Kaill v. Bell, 129 P. 1135.

**GUARANTY FUND.**

See Banks and Banking, § 73.

**GUARDIAN AND WARD.**

See Action, § 45; Contribution; Divorce, § 286; Habeas Corpus, § 99; Indians, § 15; Pleading, § 260.

**II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.**

§ 15 (Okla.) Where a guardian's bond recites that the principal has been appointed guardian of a certain minor and shows clearly its purpose, it is valid though the name of the ob-

ligee does not appear in the blank therefor in the first paragraph of the bond.—United States Fidelity & Guaranty Co. v. Hansen, 129 P. 60, 67.

### III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 44 (Kan.) Under Gen. St. 1909, § 3975, a guardian may not lawfully lease the lands of his wards except by direction of the court.—Charles v. Witt, 129 P. 140.

§ 54 (Kan.) Where a guardian of certain minors without order of the probate court leased the minors' lands for grain rental and purchased the grain himself without keeping proper accounts, it was proper to charge him with the cash rental value of the lands for the whole period.—Charles v. Witt, 129 P. 140.

Where a guardian was guilty of misfeasance and fraud in the management of his wards' estate, the court properly charged him with compound interest on yearly balances.—Id.

§ 56 (Kan.) Under Gen. St. 1909, § 3975, a guardian may not lawfully loan the money of his wards except by direction of the court.—Charles v. Witt, 129 P. 140.

§ 62 (Kan.) A guardian may not trade with himself on account of the ward or use or deal with the ward's property for his own use and benefit.—Charles v. Witt, 129 P. 140.

### VI. ACCOUNTING AND SETTLEMENT.

§ 146 (Kan.) Under Gen. St. 1909, § 3975, a substituted guardian held entitled to sue his predecessor for an accounting without joining his wards as parties plaintiff.—Charles v. Witt, 129 P. 140.

§ 163 (Kan.) Final settlement of an administrator, who at the same time is guardian of minor distributees, is not conclusive on the minors, but is voidable by them or their representatives.—Charles v. Witt, 129 P. 140.

### VIII. LIABILITIES ON GUARDIANSHIP BONDS.

§ 174 (Okl.) The general guardian's bond is liable for the failure of the guardian to pay over money received for land sold by order of court, though he gave a special bond as required by Comp. Laws 1909, § 5509.—United States Fidelity & Guaranty Co. v. Hansen, 129 P. 60, 67.

§ 177 (Okl.) A probate court has jurisdiction to release a guardian's bond from liability for defaults occurring after the order is made.—United States Fidelity & Guaranty Co. v. Hansen, 129 P. 60, 67.

Where a guardian's bond has been released by order of court, no recovery can be had thereon for a default of the guardian occurring after the order was made.—Id.

### GUARDS.

See Master and Servant, §§ 121, 270.

### HABEAS CORPUS.

#### I. NATURE AND GROUNDS OF REMEDY.

§ 32 (Cal.App.) Under the express provisions of Pen. Code, § 1487, the unconstitutionality of a law or ordinance is ground for discharge on habeas corpus before trial and conviction.—Ex parte Zany, 129 P. 295.

#### II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 85 (Utah) Evidence, in habeas corpus to obtain custody of plaintiff's child which she surrendered to another, held not to sustain a finding that the contract surrendering custody was executed by plaintiff through fraud or coercion.—Stanford v. Gray, 129 P. 423.

The burden is on a parent who has contracted away the custody of a minor child

and seeks to recover it to show that the child is not receiving proper care or proper physical, moral, and intellectual training.—Id.

§ 90 (Nev.) After an order discharging a prisoner on habeas corpus, a rehearing will not be granted in view of the Habeas Corpus Act, § 29 (Rev. Laws, § 6254).—Eureka County Bank Habeas Corpus Cases, 129 P. 308.

§ 99 (Cal.) Under Civ. Code, § 196, providing that the parent entitled to the custody of a child shall support him, the legal effect of a divorce obtained in another state and of guardianship obtained in this state held to be to give the mother custody of the children without charging the father with their support.—Ex parte McMullin, 129 P. 773.

§ 99 (Utah) A contract by a parent, fairly made, surrendering the custody of a child, is valid as between the parties, but is unenforceable if contrary to the child's interest.—Stanford v. Gray, 129 P. 423.

### HARMLESS ERROR.

See Appeal and Error, §§ 1026-1073; Criminal Law, §§ 1163-1175; Homicide, § 340.

### HEARING.

See Reference.

### HEARSAY EVIDENCE.

See Evidence, §§ 230, 317, 318.

### HEIRS.

See Descent and Distribution.

### HIGH SCHOOLS.

See Schools and School Districts, §§ 22, 28, 30, 42, 154.

### HIGHWAYS.

See Appeal and Error, § 1057; Bridges; Estoppel, § 63; Injunction, § 195; Judgment, § 725; Trial, § 251; Turnpikes and Toll Roads.

### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 1 (Wash.) To establish a highway by prescription, the public use must be general, uninterrupted, and continuous for 10 years under a claim of right.—In re Twenty-Second Ave. Southwest, 129 P. 884.

§ 6 (Wash.) Strip held not to have become a highway by prescription, where, before it had become such, the owner built fences across it, with gates for the use of the public, and posted notices declaring it private property.—In re Twenty-Second Ave. Southwest, 129 P. 884.

(B) Establishment by Statute or Statutory Proceedings.

§ 63 (Colo.App.) Where the jurisdiction of the commissioners to establish a public highway is once established, the further proceedings will be construed liberally on collateral attack, and a substantial compliance with the statute will be sufficient.—Missouri Pac. Ry. Co. v. Atkinson, 129 P. 566.

§ 68 (Colo.App.) Where, in an action for injuries from the obstruction of a highway, the validity of the proceedings establishing the highway are involved only incidentally, every reasonable presumption should be indulged in favor of such validity.—Missouri Pac. Ry. Co. v. Atkinson, 129 P. 566.

Where, in an action for damages from the obstruction of a highway, the answer is a general denial, plaintiff need prove only the jurisdiction to establish the highway; but when he introduces the entire highway proceedings as a

basis of recovery defendant may collaterally attack same.—Id.

Where the complaint states a cause of action for injuries from the wrongful obstruction of a "public highway," and the instructions follow this theory, evidence tending to prove long user of the road by the public, as licensees, should be excluded, unless the complaint be amended in accordance with such evidence.—Id.

**(D) Title to Fee and Rights of Abutting Owners.**

§ 80 (Cal.) Location of a highway over a mining claim does not affect the claim except to the extent of the public easement for use on the surface as a highway.—*Olaine v. McGraw*, 129 P. 460.

**IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.**

§ 122 (Or.) Laws 1909, p. 295, amending Laws 1903, p. 272, § 34 (L. O. L. § 6320), by adding section 6321, empowering the taxpayers of a road district to vote an additional road tax on notice of meeting, is so defective, as to the giving of notice and calling of meeting, and in not prescribing a method of proving notice, or that the persons participating in the meeting were taxpayers, as to be invalid.—*Leffingwell v. Lane County*, 129 P. 538.

§ 125 (Or.) The certificate by the chairman and secretary of a meeting of taxpayers of a road district held under Laws 1909, p. 295 (L. O. L. § 6321), on notice by taxpayers of the levy of an additional road tax, is insufficient to render the tax enforceable, without proof of the levy by a proper resolution on the minutes, or the giving of the notice, as required by sections 6384, 6387 and 6390, in case of meeting under section 6384 on notice by the road supervisor, at petition of freeholders.—*Leffingwell v. Lane County*, 129 P. 538.

§ 151 (Okla. Cr. App.) Comp. Laws 1909, § 7854, making it the duty of the road overseer to file a complaint against persons failing to perform road work, does not preclude the county attorney from prosecuting violations of the road law in any township in the county.—*Gourley v. State*, 129 P. 684.

Under Sess. Laws 1909, c. 32, § 17, all persons subject to road duty are required either to work four days, pay \$5, or furnish a substitute acceptable to the road overseer.—Id.

**V. REGULATION AND USE FOR TRAVEL.**

**(A) Obstructions and Encroachments.**

§ 159 (Or.) The remedy for obstruction of a highway by a criminal prosecution under L. O. L. § 2210, is not such an adequate remedy for the protection of abutters' rights as precludes equitable relief by injunction under L. O. L. § 389.—*Bernard v. Willamette Box & Lumber Co.*, 129 P. 1039.

**(B) Use of Highway and Law of the Road.**

§ 172 (Kan.) A driver on a public highway, whether of an automobile or of domestic animals, is required to look ahead to see whatever there may be in the line of his vision which would affect his driving, and, if the driver of a team knows that an automobile is approaching from the rear, to act with reasonable prudence in the light of such knowledge.—*Arrington v. Horner*, 129 P. 1159.

§ 177 (Kan.) Under Gen. St. 1909, §§ 450, 451, regulating the operation of automobiles, a driver of such machine on a rural highway is limited to 20 miles an hour, and is bound not to operate it at a greater speed than is reasonable with reference to the traffic or danger to any other person using the highway.—*Arrington v. Horner*, 129 P. 1159.

§ 181 (Kan.) Under Gen. St. 1909, § 452, regulating the operation of automobiles, a chauffeur approaching an animal that appears frightened is bound to reduce speed, if practicable turn to the right, and give the road, and on signal from the rider or driver of the animal stop, and remain stationary long enough for them to pass.—*Arrington v. Horner*, 129 P. 1159.

Under Gen. St. 1909, § 452, regulating the use of automobiles, a driver meeting or passing persons riding or driving domestic animals, in addition to turning out or stopping if required, must exercise the care which a reasonably prudent person would exercise, considering all the elements of the situation.—Id.

A person riding or driving domestic animals, when approached by an automobile on the highway, is bound to take cognizance of the conditions, and to exercise the care and caution which a reasonably prudent person would display in their presence.—Id.

Gen. St. 1909, § 452, providing that an automobilist when approaching a vehicle drawn by horses must exercise "every precaution" to prevent frightening such horses, does not make the automobilist an insurer; "every reasonable precaution" meaning merely the precaution which a reasonably prudent man would take in view of the danger to be apprehended.—Id.

**(C) Injuries from Defects or Obstructions.**

§ 213 (Colo. App.) In an action for injuries from obstruction of highway, a question in issue, whether defendant's acts were wanton, willful, and reckless was for the jury, and not the court.—*Missouri Pac. Ry. Co. v. Atkinson*, 129 P. 566.

**HOMESTEAD.**

**II. TRANSFER OR INCUMBRANCE.**

§ 118 (Okla.) Where a husband and wife sign a deed to the homestead, not to be delivered to the grantee named, and the husband, without the consent of the wife, delivers the deed to the grantee having notice of the agreement, the deed may be avoided by the wife after the death of the husband, under Wilson's Rev. & Ann. St. 1903, § 883, permitting her to avoid a deed in which she did not join.—*Couch v. Ady*, 129 P. 709.

**III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.**

§ 150 (Cal.) In probate proceedings to set off property as homestead to a widow, the superior court has no jurisdiction to determine the validity of any claim of title adverse to that of the estate.—*In re Niccolls' Estate*, 129 P. 278.

§ 151 (Cal.) Code Civ. Proc. § 1468, as amended in 1881 (St. 1881, p. 8), held to prevent the setting apart of property to a widow as a homestead in probate proceedings, except for a limited period, where no homestead had been previously selected.—*In re Niccolls' Estate*, 129 P. 278.

**V. PROTECTION AND ENFORCEMENT OF RIGHTS.**

§ 187 (Wash.) Under Rem. & Bal. Code, § 591, upon the confirmation of a judicial sale, the right of homestead in vacant land, under mere declaration of intention, cannot be adjudicated.—*Scott v. Guiberson*, 129 P. 886.

§ 200 (Wash.) Laws 1895, c. 64, § 9 et seq., relating to appraisement, cover only those cases where an execution is levied upon an existing homestead, and do not require an appraisement where no homestead was asserted or in existence at the time of the levy, and no declaration of intention had then been filed.—*Scott v. Guiberson*, 129 P. 886.

## HOMICIDE.

See Criminal Law, §§ 424, 554, 680, 763, 764, 789, 823, 1166½, 1172, 1175; Indictment and Information, § 189; Witnesses, § 269.

### II. MURDER.

§ 17 (Colo.) Where defendant committed an offense in taking the life of a person at whom he shot, he was guilty of a like offense in causing the death of a bystander by accidental shooting in the course of the affray.—*Henwood v. State*, 129 P. 1010.

§ 21 (Okla.Cr.App.) The purpose of the various classifications in the statute as to homicide is to mitigate the common law and to furnish rules for the admission of evidence and for instructions.—*Jones v. State*, 129 P. 448.

### III. MANSLAUGHTER.

§ 33 (Colo.) Under Rev. St. 1908, §§ 1625-1628, the unlawful killing of a human being without malice and deliberation, and upon sudden heat of passion caused by a provocation apparently sufficient to excite irresistible passion in a reasonable person, constitutes "voluntary manslaughter."—*Henwood v. State*, 129 P. 1010.

§ 39 (Colo.) Defendant, who claimed to have acted in self-defense, is not thereby precluded from asserting that a homicide was committed under circumstances reducing it to manslaughter, where there is evidence both that he acted in sudden heat of passion, and also that he acted in self-defense.—*Henwood v. State*, 129 P. 1010.

§ 60 (Colo.) Where defendant, though justified in shooting to protect his life, did so without due caution, or taking into consideration the presence of others, he could be found guilty of involuntary manslaughter in causing the death of a bystander.—*Henwood v. State*, 129 P. 1010.

§ 74 (Colo.) Under Rev. St. 1908, §§ 1625-1628, "involuntary manslaughter" may consist in the taking of a human life without any intent to do so, while in the commission of a lawful act without due caution or circumspection.—*Henwood v. State*, 129 P. 1010.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 114 (Okla.Cr.App.) Where a person armed with a deadly weapon unnecessarily enters into a mutual combat in order to slay his adversary, the right of self-defense will not arise, no matter to what extremity he may be reduced during their combat.—*Johns v. State*, 129 P. 451.

§ 116 (Cal.) One may rely upon appearances and act in self-defense if the appearances are sufficient to excite the fears of a reasonable man that he is then in immediate danger of death or great bodily injury at the hands of another.—*People v. Smith*, 129 P. 785.

### VII. EVIDENCE.

#### (C) Dying Declarations.

§ 203 (Cal.) Where deceased after a necessarily fatal wound stated that he did not know that he was badly hurt, that the doctor had not told him that he had a poor chance, that he hoped he was not going to die, his version of the encounter was not made without hope or expectation of recovery, so as to be admissible as a dying declaration.—*People v. Smith*, 129 P. 785.

It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that at such a time a man will tell the truth that justify the reception of dying declarations against the defendant.—*Id.*

§ 203 (Okla.Cr.App.) Where deceased was shot between 5 and 6 p. m. and died that night, and immediately after being shot stated to persons that saw him that he was a dead man, could

not live, and was going to die, his subsequent declarations with reference to the shooting were admissible as dying declarations.—*Ryan v. State*, 129 P. 685.

§ 210 (Cal.) While statements not so made under fear of impending death as to be admissible as dying declarations may be reaffirmed, *held*, that later statements made by deceased when he either could not appreciate their consequences or when through extreme illness or recklessness he was willing to give the answers he thought wanted, were not sufficient to show a reaffirmance.—*People v. Smith*, 129 P. 785.

### VIII. TRIAL.

#### (B) Questions for Jury.

§ 271 (Colo.) Where immediately preceding the shooting of a bystander defendant and another were engaged in a conversation, and such other person knocked defendant down, so that he struck the floor hard, the circumstances raised a question for the jury as to whether there was sudden heat of passion.—*Henwood v. State*, 129 P. 1010.

Whether circumstances amounted to the statutory provocation, and were sufficient to cause that passion which the statute denominates irresistible, is not for the court to determine.—*Id.*

§ 282 (Colo.) Where there was any evidence relevant to the issue of manslaughter, its credibility and force were for the jury.—*Henwood v. State*, 129 P. 1010.

On evidence in a trial for the murder of a bystander, *held*, that the question whether defendant sought out a third person for the purpose of taking his life and shot him in pursuance of a preconceived design was for the jury.—*Id.*

#### (C) Instructions.

§ 300 (Cal.) Instructions on self-defense excusing defendant for a mistake in the actual extent of his danger if a "judicious" man, instead of an ordinarily reasonable and prudent man, would have been so mistaken, and an instruction as to the circumstances which would justify an "ordinarily courageous man," instead of an ordinarily reasonable man, in acting in self-defense, *held* to be disapproved.—*People v. Smith*, 129 P. 785.

In a prosecution for murder, *held*, that an instruction that threats would not justify self-defense in the absence of some "demonstration, real or apparent, of an attempt coupled with ability to take life," instead of a demonstration "or" attempt, coupled with a real or apparent ability to take life, *held* erroneous.—*Id.*

§ 308 (Colo.) Where the absence of preconceived design to take life does not reduce the grade of the offense, as where the killing was committed in perpetrating robbery, the court need not instruct on the lesser degrees of murder.—*King v. People*, 129 P. 235.

An instruction that if the jury found that the killing was unlawful, but without deliberation, they should convict of second-degree murder, provided accused was not then engaged in an attempt to rob, was erroneous as placing the burden on accused to negative first-degree murder by showing that the killing was not committed in an attempt to rob.—*Id.*

§ 309 (Colo.) Where it was admitted that deceased was murdered, and the only issue was as to who committed the crime, it was not error to refuse a requested instruction on manslaughter.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 309 (Okla.Cr.App.) It is the duty of the trial court to charge on manslaughter if there is any reasonable evidence that the killing might have been done under circumstances that would reduce the crime to manslaughter.—*Ryan v. State*, 129 P. 685.

### X. APPEAL AND ERROR.

§ 340 (Cal.App.) A defendant cannot complain that the court instructed on manslaughter when he was charged with murder.—*People v. Roselle*, 129 P. 477.

**HOTELS.**

See Innkeepers.

**HUSBAND AND WIFE.**

See Criminal Law, § 1213; Death, §§ 31, 32, 42, 99; Descent and Distribution, § 62; Divorce; Dower; Executors and Administrators, §§ 185, 188, 194, 315; Homestead, §§ 118, 150, 151; Marriage; Witnesses, §§ 52, 56, 159.

**V. WIFE'S SEPARATE ESTATE.**

(C) Liabilities and Charges.

§ 149 (Or.) Property purchased by a husband with his wife's money was not subject to his debts, where he took title in his own name, contrary to her instructions.—Gladstone Lumber Co. v. Kelly, 129 P. 763.

**VI. ACTIONS.**

§ 209 (Wash.) The loss of the wife's services is a proper element of damages, in an action by a husband for personal injuries to her.—Zola-wenski v. City of Aberdeen, 129 P. 1090.

**VII. COMMUNITY PROPERTY.**

§ 246 (Cal.) Where a husband and wife accumulated personalty in Illinois, where the law of community property does not obtain, and removed to California, neither the property so accumulated, nor that for which it was exchanged in California, became community property.—In re Nicolls' Estate, 129 P. 278.

§ 262 (Cal.) Property acquired by either spouse during the marriage is presumed to be community property, and the burden is on the party claiming the contrary to establish the same by clear and satisfactory evidence.—In re Nicolls' Estate, 129 P. 278.

**VIII. SEPARATION AND SEPARATE MAINTENANCE.**

§ 278 (Cal.) An agreement between husband and wife to live separate and apart, with property provision for each, is not against public policy, and may be enforced according to its terms, when no undue advantage is taken of either spouse.—In re Yoell's Estate, 129 P. 999.

The fact that, when a separation agreement was made, there were minor children, whose right to a family allowance from the husband's property pending administration on his estate could not be contracted away, is immaterial on the issue of the validity of the agreement after all the children have reached majority.—Id.

Where the provision for deeds to and from a third person was a mere means to effectuate the purposes of a separation agreement between husband and wife, and not an essential part of it, the validity of the agreement after execution and acceptance by the parties will not be affected by the alleged invalidity of the means adopted.—Id.

§ 279 (Cal.) Where a separation agreement provided for deeds by a husband and wife to a third person, who, in turn, should convey as contemplated by the agreement, the parties after execution of such deeds and the receipt of the benefits thereunder were estopped, while retaining the benefits, to question the validity of the agreement.—In re Yoell's Estate, 129 P. 999.

§ 279 (Kan.) Reconciliation and resumption of marital relations do not necessarily avoid a separation agreement; such effect depending on whether the contract and the conduct and circumstances show an intention to treat the agreement as no longer in force.—Dennis v. Perkins, 129 P. 165.

Reconciliation and resumption of marital relations do not warrant the court in deeming a separation agreement avoided any further, if at all, than its terms, taken in connection with

the conduct of the parties, indicate their intention to avoid it.—Id.

§ 281 (Cal.) During the lives of a husband and wife a court of equity is the proper forum for the enforcement of any rights conferred by a separation agreement.—In re Yoell's Estate, 129 P. 999.

**IX. ABANDONMENT.**

§ 303 (Kan.) Laws 1911, c. 163, making it an offense for a husband to desert and omit to support his wife or children, is not unconstitutional in so far as it provides (section 4) for orders for periodical payments for the wife's benefit, or (section 7) relates to wages of one confined at hard labor.—State v. Gillmore, 129 P. 1123.

§ 304 (Kan.) Under Laws 1911, c. 163, making it an offense for a husband to desert and omit to support his wife, the husband is bound to provide for the wife wherever he deserts her in a destitute or necessitous condition, unless some reason is shown why she should follow him elsewhere.—State v. Gillmore, 129 P. 1123.

Where a husband deserted his wife and left her in destitute circumstances prior to the enactment of Laws 1911, c. 163, making such act a punishable offense, and, after the act became operative, he voluntarily returned to Kansas as a witness in a civil action between other parties, and while there neglected to provide for her, she then being in necessitous circumstances, he was subject to prosecution under the act.—Id.

**HYPOTHETICAL QUESTIONS.**

See Evidence, § 553.

**IDEM SONANS.**

See Names, § 16.

**IDENTIFICATION.**

See Elections, § 194.

**IMPAIRING OBLIGATION OF CONTRACT.**

See Constitutional Law, § 186.

**IMPEACHMENT.**

See Witnesses, §§ 379, 383, 388.

**IMPLICATION.**

See Contracts, § 168; Statutes, §§ 158, 161.

**IMPLIED CONTRACTS.**

See Contribution.

**IMPROVEMENTS.**

See Eminent Domain, § 133; Estoppel, § 93; Municipal Corporations, §§ 365, 445; Waters and Water Courses, § 203.

**IMPUTED NEGLIGENCE.**

See Negligence, § 93.

**INCEST.**

See Criminal Law, § 404; Jury, § 33.

§ 15 (Or.) Evidence on a trial for incest held to sufficiently corroborate the testimony of the prosecuting witness, with whom the crime was alleged to have been committed.—State v. Russell, 129 P. 1051.

**INCOMPETENT PERSONS.**

See Insane Persons.

**INCONSISTENCY.**

See Pleading, § 93; Trial, § 243.

**INDEMNITY.**

See Mines and Minerals, § 38.

**INDEPENDENT CONTRACTORS.**

See Master and Servant, § 315.

**INDIANS.**

See Evidence, § 333.

§ 3 (Okl.) Act Cong. April 28, 1904, § 2, providing for additional United States judges in the Indian Territory and other purposes, did not repeal by implication or otherwise Supplemental Creek Agreement, section 6 relating to the devolution of Creek allotments.—*Washington v. Miller*, 129 P. 58.

§ 13 (Okl.) The final rolls of citizens and freedmen of the Five Civilized Tribes, prepared by the Commission and approved by the Secretary of the Interior, are conclusive of the quantum of Indian blood of any enrolled citizen of any of the tribes for the purpose of fixing the Indian's allotment status and the capacity of the allottee to alienate.—*Lawless v. Rad-dis*, 129 P. 711.

§ 15 (Okl.) Under Indian Appropriation Bill May 27, 1902, § 7, providing that the interests of minor heirs shall be sold by a guardian duly appointed by the proper court, the probate courts of Oklahoma territory were the proper courts to appoint guardians of minor heirs of a deceased Indian, and had jurisdiction to order a sale of his lands.—*United States Fidelity & Guaranty Co. v. Hansen*, 129 P. 60, 67.

Where allotted lands of a deceased Indian were sold pursuant to Indian Appropriation Bill May 27, 1902, § 7, the price remained a trust fund so long as the United States government retained possession or control, but the trust character ended when the possession was relinquished.—*Id.*

Under Indian Appropriation Bill May 27, 1902, § 7, the United States government had the option either to retain the control of the purchase money on sale of lands of a deceased Indian, or to relinquish its control, and the Secretary of the Interior had the authority to exercise the option.—*Id.*

§ 15 (Okl.) Where an adult, not of Indian blood, but a member of the Cherokee Tribe, prior to his allotment conveyed certain land, a part of the public domain of the Cherokee Indians afterwards selected by him as his surplus allotment, Act Cong. April 24, 1904, removing restrictions on the alienation of the land of such allottees, did not apply till after he had selected his allotment.—*Bledsoe v. Wortman*, 129 P. 841.

Mansf. Dig. Ark. § 642, providing that, on conveyance of real estate by a person not having the legal title, a subsequent after-acquired title shall pass to the grantee, has no application to a conveyance by an Indian where at the time it was invalid, being expressly prohibited by law, though thereafter the grantor obtained title, and was authorized by law to convey.—*Id.*

§ 15 (Okl.) A full-blood Creek Indian, who died March, 1900, could not dispose, by will, of lands subsequently allotted to his heirs.—*Coachman v. Sims*, 129 P. 845.

§ 15 (Okl.) Under Osage Allotment Act, § 2, par. 4, lands allotted to members of the Osage Tribe were inalienable for 25 years from the date of selection.—*Neilson v. Alberty*, 129 P. 847.

Under Osage Allotment Act, § 2, par. 7, allottees to whom certificates of competency have been issued may sell and control the disposition of their surplus allotments, but may not sell

the oil, gas, coal, and other minerals contained in the lands.—*Id.*

§ 15 (Okl.) An assignment of royalty due under a mining lease of land allotted to a Quapaw Indian is not an alienation of a part of the land, in violation of Act Cong. March 2, 1895, § 1, making such allotments inalienable for 25 years.—*Wat-tah-noh-zhe v. Moore*, 129 P. 877.

§ 18 (Okl.) Where a full-blood Seminole married a full-blood Creek in 1893, land allotted to one of their children who died unmarried descended by virtue of the Supplemental Creek Agreement approved June 30, 1902, to the Creek mother and her Creek children, and the Seminole father acquired no interest therein.—*Washington v. Miller*, 129 P. 58.

Supplemental Creek Agreement approved June 30, 1902, controlled the devolution of real property of a descendant of a Creek Indian under descent cast November 3, 1907.—*Id.*

§ 20 (Okl.) Osage Allotment Act, § 2, par. 7, authorizing members to whom certificates of competency have been issued to sell surplus allotments, applies only to voluntary conveyances, and not to the creation of liens or transmissions of title by operation of law, unless arising out of taxation.—*Neilson v. Alberty*, 129 P. 847.

The words "manage," "control," and "to dispose of," as used in Osage Allotment Act, defined, and *held* not to include a sale of underlying minerals or surplus land by a judgment lien.—*Id.*

§ 27 (Okl.) Issuance of a certificate of competency to an Osage Indian under Osage Allotment Act, and the filing of a transcript of a judgment against the Indian in the county where his surplus lands were located, did not remove the restrictions on alienation so as to subject such surplus lands to the judgment.—*Neilson v. Alberty*, 129 P. 847.

**INDICTMENT AND INFORMATION.**

See Criminal Law, §§ 93, 101, 627, 1088, 1144; Intoxicating Liquors, § 202; Lewdness, § 5.

**V. REQUISITES AND SUFFICIENCY OF ACCUSATION.**

§ 71 (Okl.Cr.App.) An information should be sufficiently definite to disclose jurisdictional facts.—*Gourley v. State*, 129 P. 684.

§ 87 (Cal.App.) The precise date on which the offense of lewdness punishable by Pen. Code, § 288, was committed, is not a material element, and an indictment charging commission within the period of limitations and prior to the finding of the indictment is sufficient.—*People v. Anthony*, 129 P. 968.

§ 110 (Wash.) Information charging a crime nearly in the language of Rem. & Bal. Code, § 2601, subd. 2, relative to larceny by trick, device, or bunco game, *held* sufficient notwithstanding other allegations relied on to show that no crime was charged; they being regarded as surplusage.—*State v. Ferrato*, 129 P. 898.

**VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.**

§ 125 (Okl.Cr.App.) An indictment charging that defendant gave a bribe to several county officers to influence their action in the enforcement of liquor laws, and in other counts separately charging him with bribing each of the officers named in the first count is not bad for duplicity.—*Bond v. State*, 129 P. 666.

§ 125 (Or.) A complaint, stating that the defendant did unlawfully "sell" and "give away" intoxicating liquor with intent to evade the provisions of the Local Option Law, *held* to state but one crime, the unlawful disposal of liquor in violation of L. O. L. § 4934.—*State v. Bilyeu*, 129 P. 768.

§ 132 (Okl.Cr.App.) Where different counts are based on the same act and charge the same

offense, it is not error to refuse to require the state to elect on which count it will put the defendant on trial.—Bond v. State, 129 P. 666.

## VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 133 (Okl.Cr.App.) Where defendant, after the jury has been sworn, for the first time questions the information by objecting to the introduction of evidence, the objection will be overruled, if by any reasonable construction or intentment the information is sufficient.—Wilsford v. State, 129 P. 80.

§ 133 (Okl.Cr.App.) An objection to an information should be by motion or demurrer before plea, unless the facts stated do not constitute a public offense, when advantage may be taken of the defect by an objection to the introduction of evidence.—Gourley v. State, 129 P. 684.

## VIII. AMENDMENT.

§ 156 (Cal.App.) A statute which permits an indictment to be amended as to mere matters of form is not violative of the right of accused to be prosecuted by indictment as provided by Const. art. 1, § 8.—People v. Anthony, 129 P. 968.

§ 159 (Cal.App.) Pen. Code, § 1008, as amended by St. 1911, p. 436, authorizing the district attorney without leave of court to amend an indictment without changing the offense charged, authorizes amendments merely affecting the formal parts of an indictment.—People v. Anthony, 129 P. 968.

Under Pen. Code, § 1008, as amended by St. 1911, p. 436, authorizing amendments to indictments not changing the offense charged, an indictment charging lewdness punishable by section 288 may be amended by the district attorney by changing the date of the offense.—Id.

§ 161 (Okl.Or.App.) The county attorney should be directed to make a proper amendment of an information which is not sufficiently definite to disclose jurisdictional facts.—Gourley v. State, 129 P. 684.

## X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189 (Colo.) An information for murder in the first degree includes all the lower grades of criminal homicide.—Henwood v. State, 129 P. 1010.

§ 189 (Kan.) Under an information charging accused with rape, as defined in Crimes Act, § 31, he may be convicted of an attempt to commit that offense, though the overt acts are not specifically set forth in the information.—State v. Guthridge, 129 P. 1143.

§ 189 (Okl.Cr.App.) Where an indictment charges a premeditated murder, a conviction can be had for manslaughter in the second degree.—Jones v. State, 129 P. 446.

## INFANTS.

See Evidence, § 80; Guardian and Ward; Parent and Child.

## IV. CONTRACTS.

§ 50 (Okl.) Where action was brought in the name of a minor, by direction of her next friend, to protect title to real estate, the counsel could not recover, in an action against the minor; such services not being necessities.—Grissom v. Beidleman, 129 P. 853.

§ 58 (Okl.) The disaffirmance of a contract by an infant renders it void ab initio, and any one may take advantage of such disaffirmance.—Grissom v. Beidleman, 129 P. 853.

Any act of an infant, showing unequivocally a renunciation of a contract made during minority, is sufficient to avoid it.—Id.

## VII. ACTIONS.

§ 88 (Colo.App.) Substitution of name of daughter for that of her father upon her becoming of age, pending the action, held proper, where only such damages were claimed as she was entitled to recover.—Missouri Pac. Ry. Co. v. Leib, 129 P. 569.

## INFERIOR COURTS.

See Courts, § 42.

## INFLUENCE.

See Wills, §§ 155-166, 384.

## INFORMATION.

See Indictment and Information.

## INHERITANCE TAX.

See Taxation, §§ 860, 867.

## INJUNCTION.

See Action, § 38; Appeal and Error, §§ 100, 954; Constitutional Law, §§ 70, 312; Courts, § 12; Eminent Domain, §§ 274, 275, 276, 279; Highways, § 159; Intoxicating Liquors, §§ 258, 279; Judgment, §§ 228, 719; Jury, §§ 14, 21; Mines and Minerals, § 38; Municipal Corporations, §§ 671, 697, 1000; Nuisance, § 72; Physicians and Surgeons, § 11; Statutes, § 64; Telegraphs and Telephones, § 34.

## I. NATURE AND GROUNDS IN GENERAL.

### (A) Nature and Form of Remedy.

§ 7 (Wash.) A court of equity is not without jurisdiction to declare that a city council had no power to enter into a certain contract, which would call for the levy of special assessments, and to issue an injunction, though the statute provides for objections and hearings before the council.—Gantenbein v. City of Pasco, 129 P. 374.

### (B) Grounds of Relief.

§ 16 (Colo.) The assessor for the city and county of Denver will be restrained from making a horizontal reduction of the total assessment, where he has no authority, under the statutes, to do so; Rev. St. 1908, § 5636, authorizing the State Board of Equalization to require a county assessor to assess according to the statutes not affording a statutory remedy in such case.—City and County of Denver v. Pitcher, 129 P. 1015.

§ 18 (Cal.App.) As regards right to injunction, where the injury is irreparable and the damages of such a character that it is impossible to estimate them, it is immaterial whether defendants are solvent.—Zierath v. McCann, 129 P. 808.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (B) Property, Conveyances, and Incumbrances.

§ 35 (Cal.App.) Plaintiff being in peaceable possession, as occupant of a house, it is immaterial, as regards the right to injunction against obstruction of the way thereto, whether her lessor is the owner thereof and of the property over which is the way.—Zierath v. McCann, 129 P. 808.

§ 46 (Cal.App.) Because the character of the damages from the obstructing of the way to plaintiff's dwelling and the water pipes thereto makes it impossible to estimate them, injunction will lie.—Zierath v. McCann, 129 P. 808.



**(E) Public Officers and Boards and Municipalities.**

§ 74 (Colo.) The courts have power to prohibit the assessor of the city and county of Denver from making a horizontal reduction of an assessment after delivery of the abstract to the State Auditor; his legal duty to extend the levy upon the assessment and deliver the tax roll to the treasurer for collection being merely ministerial.—*City and County of Denver v. Pitcher*, 129 P. 1015.

If public officials exceed their authority under the law, and the resulting injury cannot be adequately prevented by proceedings at law, equity will enjoin the commission of such illegal act.—*Id.*

**III. ACTIONS FOR INJUNCTIONS.**

§ 118 (Okla.) A petition to restrain defendants from disconnecting complainant's gas supply furnished under an alleged contract, because of complainant's refusal to pay a claim for gas alleged to be excessive, held to show absence of an adequate remedy at law without an express allegation thereof.—*Galbreath Gas Co. v. Lindsey*, 129 P. 45.

§ 122 (Okla.) Under Comp. Laws 1909, § 5757, a petition for an injunction, verified on information and belief only, is insufficient.—*Galbreath Gas Co. v. Lindsey*, 129 P. 45.

**V. PERMANENT INJUNCTION AND OTHER RELIEF.**

§ 195 (Or.) In a suit to compel the removal of an obstruction from a street which is removed after the institution of the suit, a court of equity will retain its jurisdiction to determine the question of damages.—*Bernard v. Wilamette Box & Lumber Co.*, 129 P. 1039.

**VI. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT.**

§ 212 (Kan.) In an action to enforce the liability of an officer for failure to perform a duty, that such performance has been enjoined by a court is not a defense, where the claimant was not a party to the proceeding, or where the ground of injunction was the officer's failure to proceed in a proper manner.—*Hupe v. Sommer*, 129 P. 136.

**VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.**

§ 235 (Cal.App.) Where plaintiff applied for a temporary injunction, and the judge ordered a temporary injunction on plaintiff giving a bond, and the bond was given and filed, and thereafter, on order to show cause, the injunction was dissolved, the sureties held liable to defendant.—*Lippitt & Lippitt v. Smallman*, 129 P. 956.

**INNKEEPERS.**

§ 10 (Wash.) A hotel guest injured on a dark stairway held not guilty of contributory negligence in using the stairway in the absence of an affirmative showing of carelessness on her part.—*Ritter v. Norman*, 129 P. 103.

**IN PAIS.**

See *Eatoppel*, §§ 55-110.

**INSANE PERSONS.**

See *Mandamus*, § 2; *Mines and Minerals*, § 104; *States*, § 126.

**IV. CUSTODY AND SUPPORT.**

§ 55 (Cal.App.) The duty of a county treasurer to pay money to the state treasurer under Pol. Code, § 2192, providing for the commitment of imbecile persons, and requiring the county treasurer of each county to pay to the state treasurer the amounts due the state by reason of commitments, is dependent on his having money

applicable to a payment.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

§ 58 (Cal.App.) Pol. Code, § 2197, authorizing the State Commission in Lunacy to sue in a county for maintenance of imbecile persons in the state home, does not authorize an action against the county treasurer therefor.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

**INSOLVENCY.**

See *Banks and Banking*, § 73; *Corporations*, §§ 240, 538-557, 605; *Receivers*.

**INSPECTION.**

See *Corporations*, § 181; *Master and Servant*, § 129.

**INSTALLMENTS.**

See *Sales*, § 477.

**INSTRUCTIONS.**

To jury, see *Criminal Law*, §§ 673, 763, 764-841, 922, 1056, 1172; *Homicide*, §§ 300-309, 340; *Trial*, §§ 191-296.

**INSURANCE.**

See *Evidence*, § 252.

**I. CONTROL AND REGULATION IN GENERAL.**

§ 8 (Or.) Under L. O. L. § 4610, relative to investment of insurance companies' capital, loans on real estate, not double in value the amount of the loan, may be counted as assets or valid loans to the amount of one-half of the value of the property.—*Union Pac. Life Ins. Co. v. Ferguson*, 129 P. 529.

**II. INSURANCE COMPANIES.****(A) Stock Companies.**

§ 33 (Or.) Under L. O. L. § 4610, requiring domestic insurance companies to have a paid-up unimpaired cash capital of \$100,000, a corporation is not entitled to do business where the par value of the stock sold is less than \$100,000, although it has been sold above par for more than that sum.—*Union Pac. Life Ins. Co. v. Ferguson*, 129 P. 529.

**V. THE CONTRACT IN GENERAL.****(A) Nature, Requisites, and Validity.**

§ 128 (Wash.) Failure of insured to make proof of loss did not bar recovery of damages for breach of the insurer's contract to issue a policy.—*Chenier v. Insurance Co. of North America*, 129 P. 905.

Failure of insured to sue within a year after the fire did not bar recovery of damages for breach of the insurer's contract to issue a policy.—*Id.*

§ 141 (Kan.) A bond indemnifying an employer against loss by fault of an employé is not invalid because not signed by the employé as provided by the bond, where it is delivered to the insured and premium collected.—*Fowler v. Title Guaranty & Surety Co.*, 129 P. 171.

**IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.****(C) Matters Relating to Person Insured.**

§ 290 (Ariz.) An applicant for insurance, who misrepresents his true age, imposes upon the company in such a material matter as to invalidate the policy.—*Logia Suprema de la Alianza Hispano-Americana v. De Aguirre*, 129 P. 503.

**(E) Nonpayment of Premiums or Assessments.**

§ 349 (Okl.) A provision in notes given for premium that if they were not paid at maturity the policy should be void, is valid, but a further provision that, if not so paid, the whole amount of the premium should be considered earned, is a penalty which cannot be enforced.—*Shawnee Mut. Fire Ins. Co. v. Cannedy*, 129 P. 865.

**XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

§ 372 (Okl.) A provision in notes given for premium that, if they were not paid at maturity, the policy should be void, may be waived.—*Shawnee Mut. Fire Ins. Co. v. Cannedy*, 129 P. 865.

§ 392 (Okl.) Where a company retains notes given for premium and endeavors to collect them in full, it waives the provision that the policy should be void if the notes were not paid at maturity.—*Shawnee Mut. Fire Ins. Co. v. Cannedy*, 129 P. 865.

**XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.****(E) Accident and Health Insurance.**

§ 524 (Okl.) "Total disability," within an accident policy, does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation; and it exists, though he may be able to perform a few occasional or trivial acts, if he is not able to do any substantial portion of his work.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

**XVIII. ACTIONS ON POLICIES.**

§ 634 (Okl.) The petition in an action on an accident policy *held* to sufficiently allege compliance with the terms of the policy so as to authorize the introduction of evidence thereunder.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

§ 645 (Okl.) Where the petition pleaded that affirmative proofs of loss of time had been furnished, evidence that plaintiff wrote to the company, claiming indemnity, and that it replied, denying all liability, was not within the issues.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

§ 646 (Kan.) Where an indemnity bond, containing a condition rendering it void, is delivered to insured and the premium is collected, waiver of the condition will be presumed rather than fraud on the part of the insurer.—*Fowler v. Title Guaranty & Surety Co.*, 129 P. 171.

§ 659 (Okl.) In an action on an accident policy, where total inability to work for 52 weeks was alleged, plaintiff's testimony as to continued pain and resulting operations, and that at the end of the period of indemnity his arm had not recovered so as to be of use, was competent.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

§ 665 (Okl.) Evidence that insured, within four or five days after an accident, wrote to the company as to his injury, and that on the nineteenth day after the injury the company inclosed blanks, making no claim that it had not received the notice within 15 days, as required by the policy, was sufficient to warrant a finding that notice had been given within that time.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

Evidence *held* to show that insured had furnished the insurer sufficient affirmative proofs of loss of time within 30 days after the termination of the period of its liability, as required by the policy.—*Id.*

§ 668 (Cal.App.) In an action on an accident policy, evidence *held* to present a question for the jury whether the death of the insured was occasioned through accident.—*McEwen v. Occidental Life Ins. Co.*, 129 P. 598.

**XIX. REINSURANCE.**

§ 684 (Cal.App.) Original insurer *held* not entitled under its policy and the policy of reinsurance, by adjusting a loss for which it was not liable, to subject the reinsurer to its share of such loss.—*Royal Ins. Co. of Liverpool, Eng., v. Caledonian Ins. Co. of Edinburgh, Scotland*, 129 P. 597.

§ 686 (Cal.App.) Answer by reinsurer alleging adjustment of loss by original insurer without notice to it *held* insufficient, where injury therefrom was not shown.—*Royal Ins. Co. of Liverpool, Eng., v. Caledonian Ins. Co. of Edinburgh, Scotland*, 129 P. 597.

**XX. MUTUAL BENEFIT INSURANCE.****(D) Forfeiture or Suspension.**

§ 755 (Kan.) Where a benefit association accepted payments of delinquent dues and assessments, leading insured to believe that he was still a member, and that payments would be accepted notwithstanding the delinquency, it was estopped to claim forfeiture of membership.—*Dobson v. Triple Tie Ben. Ass'n*, 129 P. 1173.

**(F) Actions for Benefits.**

§ 819 (Kan.) In an action against a benefit association, evidence *held* sufficient to show forfeiture of benefits by reason of nonpayment of dues.—*Dobson v. Triple Tie Ben. Ass'n*, 129 P. 1173.

**INTENT.**

See Bribery, § 2; Chattel Mortgages, § 34; Contempt, §§ 60, 61; Contracts, § 147; Criminal Law, § 371; Deeds, §§ 64, 93, 100; Embezzlement, § 5; Evidence, § 461; False Pretenses, § 42; Fraudulent Conveyances, §§ 155, 301; Statutes, §§ 181-188; Waters and Water Courses, §§ 32, 151; Wills, §§ 430, 487.

**INTEREST.**

See Attorney and Client, § 149; Bills and Notes, § 344; Guardian and Ward, § 54; Mortgages, §§ 199, 608½; Railroads, § 9; Taxation, § 824.

**INTERPRETATION.**

See Principal and Surety, § 59; Statutes, §§ 181-277; Taxation, §§ 772, 775; Vendor and Purchaser, §§ 64-78.

Of instructions to jury, see Trial, §§ 295, 296.

**INTERROGATORIES.**

See Trial, §§ 350-359.

**INTERSTATE COMMERCE.**

See Commerce, § 27.

**INTOXICATING LIQUORS.**

See Arrest, § 63; Attorney and Client, § 39; Constitutional Law, § 296; Criminal Law, §§ 37, 371, 430, 789, 1144; Evidence, § 84; False Imprisonment, §§ 27, 40; Indictment and Information, § 125; Jury, § 21; Municipal Corporations, § 605; Replevin, § 46; Statutes, § 114; Witnesses, §§ 102, 277.

**I. POWER TO CONTROL TRAFFIC.**

§ 11 (Cal.App.) Local Option Law April 4, 1911, which provides a state-wide scheme by which any incorporated city or town, or any part of a county not included in an incorporat-

ed city or town, may vote independently whether the sale of alcoholic liquors shall be licensed, is a "general law," within Const. art. 11, § 11, which provides that any county, city, or town may make and enforce such police and other regulations as are not in conflict with general laws.—*Ex parte Zany*, 129 P. 295.

Ordinance enacted for a county under Initiative and Referendum Act April 3, 1911, as amended by Act Jan. 2, 1912, held void as in conflict with Local Option Law April 4, 1911, a general law within Const. art. 11, § 11, providing that counties may make and enforce such police regulations as are not in conflict with general laws.—*Id.*

## II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 14 (Wash.) Provision of Rem. & Bal. Code, § 6313, making superior court's decision in local option contests final, is valid.—*State v. Superior Court*, Cowlitz County, 129 P. 900.

§ 19 (Okla. Cr. App.) Sess. Laws 1911, c. 70, § 4, relating to possession of intoxicating liquors having been held unconstitutional, a conviction thereunder cannot be sustained.—*Flowers v. State*, 129 P. 81.

§ 21 (Okla. Cr. App.) The provisions of the prohibition enforcement act, defining public nuisances and prescribing punishment as for contempt for a violation of any injunction in such proceeding, are constitutional, under Bill of Rights, § 25, authorizing the Legislature to pass laws defining contempts and regulating proceedings relating thereto.—*Brunson v. State*, 129 P. 1110.

## III. LOCAL OPTION.

§ 33 (Or.) Under L. O. L. § 4926, providing that the sheriff shall "briefly" record his compliance with such section in posting notices of local option elections, a sheriff's return, alleging receipt of notices, their contents, and posting the same in due time at five public places in each precinct, was sufficient, though it did not state the particular point in each precinct at which each notice was posted.—*State v. Bilyeu*, 129 P. 768.

## VI. OFFENSES.

§ 139 (Okla. Cr. App.) In a prosecution for illegal possession of liquor for the purpose of violating the liquor law, it is not necessary to prove that the defendant actually owned the liquors; proof that he was in possession, with intent to sell, would sustain a conviction.—*Metcalf v. State*, 129 P. 675.

## VIII. CRIMINAL PROSECUTIONS.

§ 202 (Okla. Cr. App.) An information for having unlawful possession of intoxicating liquors with intent to sell the same should specifically charge such intent but a charge of intent to violate the law is sufficient.—*Flowers v. State*, 129 P. 81.

§ 223 (Cal. App.) Under Pen. Code, § 955, relating to allegations of the time when an offense was committed, held that under an indictment for a violation of the local option law, effective November, 1911, filed May 25, 1912, alleging an offense committed "on or about May 19, 1912," the state might show an offense committed at any time within the one-year period of limitations subsequent to the day that the law became effective.—*People v. Hill*, 129 P. 475.

§ 224 (Okla. Cr. App.) Evidence of payment by defendant of the internal revenue tax as a retail liquor dealer shifts the burden of proof to him.—*Hargrove v. State*, 129 P. 74.

§ 226 (Okla. Cr. App.) Where, in a prosecution for having intoxicating liquor in possession for sale, the motive of an officer in making a seizure of the liquor was not in issue, evidence of the information which he had received and on

which he acted was inadmissible.—*McRae v. State*, 129 P. 71.

§ 226 (Or.) Testimony that a mug in evidence and claimed to have been used by defendant in dealing out whisky was similar to those commonly used in dealing out soft drinks held properly excluded.—*State v. Bilyeu*, 129 P. 768.

§ 233 (Okla. Cr. App.) A certified copy of the record of the United States internal revenue collector, showing the payment of a special revenue tax as a retail liquor dealer, is admissible.—*Hargrove v. State*, 129 P. 74, following *Billingsley v. Same*, 113 P. 241, 4 Okla. Cr. 597.

§ 236 (Okla. Cr. App.) Evidence, though circumstantial, held to sustain a conviction of illegal sale of liquors.—*Hargrove v. State*, 129 P. 74.

§ 239 (Cal. App.) Under an indictment for selling and furnishing liquor, an instruction that it was unlawful to sell, furnish, or "give away" any liquor was within the pleadings and issues, since, under the charge of "furnishing," a giving away might be proved.—*People v. Hill*, 129 P. 475.

## X. ABATEMENT AND INJUNCTION.

§ 258 (Colo. App.) Though a municipal corporation had, under its statutory authority, declared an incorporated club which sold intoxicating liquor to be a nuisance to be abated as any other nuisance, its officials were not authorized to destroy the property of the club.—*Houston v. Walton*, 129 P. 263.

§ 279 (Okla. Cr. App.) Sess. Laws 1911, c. 70, § 14, providing for the punishment as for contempt for violation of an injunction against maintaining a liquor nuisance, is authorized by the Bill of Rights, § 25, giving the Legislature power to define contempts and regulate the proceedings and punishment in matters of contempt, and does not violate Const. art. 7, § 12, giving the county court jurisdiction in misdemeanor cases.—*Nichols v. State*, 129 P. 673.

Where a contempt is committed out of the presence of the court or judge by violating an injunction against the maintenance of a liquor nuisance, the court cannot proceed to punish except by an accusation in writing under oath, specifically charging the facts constituting the violation.—*Id.*

## XII. RIGHTS OF PROPERTY AND CONTRACTS.

§ 325 (Colo. App.) Intoxicating liquor, even though in a district in which it could not lawfully be sold, is property, and is not a nuisance per se which may be abated by its destruction.—*Houston v. Walton*, 129 P. 263.

Where plaintiff procured intoxicating liquors for unlawful sale, and defendants without right destroyed them, plaintiff may maintain an action for damages for their destruction.—*Id.*

§ 327 (Wash.) For a bank to loan its money on the security of a brewing company to a retail liquor dealer with which to pay his license, or, for such purpose, to loan in its name to the retailer the money of the brewing company, is such participation in evading Laws 1908, c. 84, prohibiting the company from paying or becoming security for payment of a retail dealer's license, as to render the note unenforceable.—*Lewer v. Cornelius*, 129 P. 911.

§ 329 (Okla.) The courts will not aid in the collection of a debt incurred for the price of intoxicating liquors wrongfully shipped for sale into that portion of Oklahoma which was formerly the Indian Territory.—*Anheuser-Busch Brewing Ass'n v. Doss*, 129 P. 49.

## INTOXICATION.

See Criminal Law, §§ 53, 774.

## INVENTORY.

See Executors and Administrators, § 72.

**IRRIGATION.**

See Waters and Water Courses, §§ 24, 152, 225.

**JOINDER.**

See Indictment and Information, §§ 125, 132.

**JOINT TENANCY.**

See Tenancy in Common.

**JUDGES.**

See Appeal and Error, § 564; Courts; Criminal Law, § 656; Grand Jury, § 27; Justices of the Peace; Public Lands, § 39.

**JUDGMENT.**

See Abatement and Revival, § 72; Appeal and Error; Attachment, § 219; Chattel Mortgages, § 172; Constitutional Law, § 312; Contempt, § 63; Corporations, §§ 240, 538; Criminal Law, § 1183; Divorce, §§ 255, 256; Execution; Indians, § 27; Judicial Sales, § 31; Justices of the Peace, §§ 119, 127, 159; Mechanics' Liens, §§ 277, 291; Mortgages, §§ 411, 559; Quieting Title, § 49; Tenancy in Common.

**I. NATURE AND ESSENTIALS IN GENERAL.**

§ 1 (Okl.) A judgment is a final determination of the rights of the parties in an action, as provided by Comp. Laws 1909, § 5916.—*Davis v. Norton*, 129 P. 750.

§ 17 (Cal.App.) A substantial compliance with statutory provisions as to the form of the summons is mandatory, and without such compliance the court does not acquire jurisdiction to render a default judgment.—*Nellis v. Justices' Court of Los Angeles Tp.*, 129 P. 472.

§ 17 (Colo.App.) The initials being the same, the middle name in the suit and judgment being that by which the defendant was actually known, and the identity of "John F. Monson," patentee, with "J. Fred Munson," defendant in the suit, being established, a service by publication on "J. Fred Munson" was as good as to "John F. Monson," so that judgment in a suit so begun was binding on him.—*Webster v. Heg-inbotham*, 129 P. 569.

**IV. BY DEFAULT.****(A) Requisites and Validity.**

§ 106 (Cal.App.) Where an answer is stricken from the files by the court, and the time for answering has expired, and there is no answer on file, the clerk is warranted in entering a default.—*Rose v. Leland*, 129 P. 599.

§ 107 (Cal.App.) The clerk of the superior court in entering a default acts ministerially, and he may not enter a default when his authority so to do depends on the determination of the sufficiency as to the substance or form of an answer filed in time.—*Rose v. Leland*, 129 P. 599.

**(B) Opening or Setting Aside Default.**

§ 159 (Mont.) An affidavit that defendant defaulted by reason of his devotion to important business, and by matters of public interest, but which does not state the nature of the business or the matters of public interest, was insufficient to support an order setting aside the default.—*Lovell v. Willis*, 129 P. 1052.

**VI. ON TRIAL OF ISSUES.****(A) Rendition, Form, and Requisites in General.**

§ 212 (Kan.) A district court is without authority in vacation to render judgment in a case tried in term time and taken under advisement.—*Nason v. Patten*, 129 P. 138.

§ 228 (Wash.) Decree, in an action to enjoin defendants' use of plaintiff's land for an irrigation ditch and awarding defendants the right to condemn a ditch right of way over plaintiff's land for such purposes, held not objectionable for uncertainty, as providing for relief in the alternative.—*White v. Stout*, 129 P. 917.

**(B) Parties.**

§ 239 (Colo.) In an action against several carriers for loss of a trunk, plaintiff may recover against a part of the defendants; and he need not elect and dismiss his action against defendants whose liability is debatable.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

**VII. ENTRY, RECORD, AND DOCKETING.**

§ 270 (Cal.App.) The entry of a judgment within Code Civ. Proc. §§ 664, 668, requiring the entry of judgments, consists in the recording of the judgment in the judgment book, which the clerk of the court must keep.—*Wilson v. Durkee*, 129 P. 617.

§ 292 (Okl.) A transcript of a judgment of a county court filed with the clerk of the district court of another county renders it a judgment of the latter court only for enforcement, and does not take control of the judgment from the court rendering it.—*Hudson v. Ely*, 129 P. 11.

**IX. OPENING OR VACATING.**

§ 354 (Kan.) A judgment rendered in vacation upon a trial and submission at the preceding term should be set aside, and a judgment should be rendered at the next term.—*Nason v. Patten*, 129 P. 138.

§ 385 (Okl.) Code Civ. Proc. § 432 (St. 1893, § 4310), as amended by Comp. Laws 1909, § 5941, considered in connection with Comp. Laws 1909, § 540, giving to judgment creditors the right to have transcripts of judgments filed in counties other than wherein rendered, does not give to the district court of the latter counties jurisdiction to vacate the judgment, where regular on its face and within the jurisdiction of the court rendering it.—*Hudson v. Ely*, 129 P. 11.

**XI. COLLATERAL ATTACK.****(B) Grounds.**

§ 490 (Colo.App.) A decree quieting title, based on substituted service, was void and open to collateral attack where the affidavit for publication failed to state the post office address of the defendant or that the same was unknown to affiant.—*Empire Ranch & Cattle Co. v. Gibson*, 129 P. 520.

§ 495 (Colo.App.) In ejectment in the district court, a decree of the county court quieting title in defendant having been rejected as evidence solely on the ground that it was not accompanied by the judgment roll, it was improper for the district court to declare such decree void; it being regular on its face.—*Empire Ranch & Cattle Co. v. Coleman*, 129 P. 522.

§ 497 (Colo.App.) The district court has power to hold a county court judgment void on collateral attack, when it affirmatively appears from the judgment roll that the judgment was void for want of jurisdiction.—*Empire Ranch & Cattle Co. v. Coleman*, 129 P. 522.

**XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.****(A) Judgments Operative as Bar.**

§ 570 (Kan.) Where a suit to enforce a tax lien on certain land was dismissed without prejudice, such suit did not preclude relief to the lienor in a subsequent proceeding by the owner to quiet title.—*Davidson v. Timmons*, 129 P. 133.

#### XIV. CONCLUSIVENESS OF ADJUDICATION.

##### (A) Judgments Conclusive in General.

§ 650 (Utah) Under Comp. Laws 1907, § 3490, providing that an action is pending till finally determined on appeal or the time to appeal has expired, a judgment is not final before expiration of the time for appeal, and hence is not admissible to prove a material issue in another case.—Vance v. Heath, 129 P. 365.

##### (B) Persons Concluded.

§ 698 (Wash.) A judgment against part of the makers of a joint and several note in an action by a transferee is not conclusive in a subsequent action against another maker for contribution that the transferee was a holder in due course.—Peterson v. Nichols, 129 P. 373.

##### (C) Matters Concluded.

§ 714 (Colo.) Adjudication in mandamus by county superintendent of schools to compel a delivery of salary warrants *held* not res judicata in a subsequent action, after termination of the former office and election as superintendent of schools for a city and county under its charter.—Lawson v. Meyer, 129 P. 197.

§ 714 (Kan.) Where one who has received money contends that it was given him under an express contract for services performed, but is defeated as to that contention in an action against him to recover the money, he is not thereby precluded from maintaining an action for the reasonable value of the services.—Clifton v. Meuser, 129 P. 159.

§ 719 (Mont.) In an action by individual appropriators of water rights to enjoin a city from taking water permanently out of the watershed of a stream for municipal purposes, *held*, that plaintiffs' rights were concluded by a judgment in a former action in which they had been parties defendant and cross-complainants against the city.—Lokowich v. City of Helena, 129 P. 1063.

§ 725 (Cal.) Judgment in certiorari proceeding annulling order of board of supervisors declaring a bridge a free public highway *held* not an adjudication that it was not a free public highway, in view of Code Civ. Proc. § 1911.—Gardella v. Amador County, 129 P. 993.

§ 725 (Mont.) A decree stands an absolute finality, not merely as to the conclusions expressed, but as to everything directly or impliedly involved in reaching them.—Lokowich v. City of Helena, 129 P. 1063.

§ 744 (Okla.) Where, in a suit to quiet title, certain contracts were adjudged void, it was error, in ejectment brought by defendant in the former suit against the plaintiff therein, to admit evidence of the making of the contracts.—Gosnell v. Prince, 129 P. 27.

#### XV. LIEN.

§ 753 (Okla.) Act March 7, 1893, regulating liens of judgments in probate courts, found in the addenda to St. 1893, p. 1191, was repealed by substitution by Civil Procedure Act, § 432 (St. 1893, § 4310) adopted by the same legislative assembly, and by subsequent amendments thereof.—Hudson v. Ely, 129 P. 11.

#### XVII. FOREIGN JUDGMENTS.

§ 818 (Cal.App.) The judgment of another state presented in the courts of this state can be controverted on the question of jurisdiction by extraneous evidence.—Fox v. Mick, 129 P. 972.

§ 818 (Kan.) A contention that a foreign judgment is void for want of jurisdiction of the subject-matter which turns on the construction of a statute of the foreign state where the judgment was rendered is not maintainable, where the judgment has been affirmed by the court of last resort of that state.—McLain v. Parker, 129 P. 1140.

§ 823 (Kan.) Where, on the death of the plaintiff in an action on a foreign judgment, the action is properly revived in the name of the personal representative, a recovery will not be prevented by a failure to revive the foreign judgment.—McLain v. Parker, 129 P. 1140.

#### XXI. ACTIONS ON JUDGMENTS.

##### (B) Foreign Judgments.

§ 929 (Kan.) An action may be maintained on a foreign decree adjudging the unconditional payment of money by defendant, notwithstanding, as a preliminary, the judgment plaintiff is required to deposit certain debts with the clerk to be delivered to the judgment debtor on the payment of the money.—McLain v. Parker, 129 P. 1140.

§ 944 (Cal.App.) A certificate by the clerk of court of a sister state, stating that, on an inspection of the records of the court, the clerk finds an original record of judgment, a copy of which is set out, shows in effect the entry of judgment within Code Civ. Proc. §§ 664, 668, providing for the entry of judgments in the judgment book, and supports a judgment on the foreign judgment.—Wilson v. Durkee, 129 P. 617.

§ 944 (Cal.App.) In an action to enforce a deficiency judgment of another state, evidence *held* to warrant a finding that the signatures to the acceptance of service of the summons in the action in which the judgment was given by the defendants residing in another state were obtained by fraud, and that the foreign court has no jurisdiction over the parties to render a personal judgment against them.—Fox v. Mick, 129 P. 972.

§ 944 (Kan.) In order to recover on a foreign judgment of a court of general jurisdiction, it is not ordinarily necessary to introduce copies of any part of the record, except that showing the rendition of the judgment.—McLain v. Parker, 129 P. 1140.

#### XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 951 (Colo.App.) County court decree *held* properly excluded as evidence in district court, when unaccompanied by judgment roll showing service.—Empire Ranch & Cattle Co. v. Gibson, 129 P. 520.

Decree and judgment roll offered in evidence *held* properly excluded where the judgment roll showed no personal service and the affidavit for publication was fatally defective.—Id.

§ 951 (Colo.App.) A judgment, upon which defendant relied as an estoppel and to establish title in himself, was not admissible when unaccompanied by the judgment roll.—Empire Ranch & Cattle Co. v. Coleman, 129 P. 522.

#### JUDICIAL NOTICE.

See Evidence, §§ 10-34.

#### JUDICIAL SALES.

See Divorce, §§ 255, 256; Execution, §§ 455, 472; Executors and Administrators, § 348; Homestead, § 187; Mortgages, §§ 374, 494, 543.

§ 31 (Wash.) An irregularity rendering a judgment void does not require the court to refuse to confirm a judicial sale, which in itself is regular.—Scott v. Guiberson, 129 P. 886.

#### JURISDICTION.

See Appeal and Error, §§ 14, 47, 51; Beneficial Associations, § 12; Certiorari, § 28; Courts; Criminal Law, §§ 84-101, 276; Divorce, § 91; Executors and Administrators, § 194; Guardian and Ward, § 177; Homestead, § 150; Injunction, § 7; Judgment, §§ 17, 385, 497, 818, 944; Jury, § 33; Justices of the Peace, § 32;

Mines and Minerals, §§ 38, 41; Mortgages, § 484; Public Lands, § 103; Quo Warranto; Stipulations; Wills, § 215.

## JURY.

See Appeal and Error, § 1045; Contempt, § 9; Criminal Law, §§ 742-764, 854-868, 1166-1167; New Trial, § 56; Trial, §§ 139-178, 191-206.

### II. RIGHT TO TRIAL BY JURY.

§ 14 (Okla.) Under express provisions of Comp. Laws 1909, §§ 5785, 5786, all issues of fact, in actions to recover money or specific property, must be tried by a jury, unless waived or a reference is ordered; while all other issues are triable by the court, subject to its power to submit issues to a jury or direct a reference.—*Wattah-noh-zhe v. Moore*, 129 P. 877.

§ 14 (Wash.) In an action to enjoin defendants' use of plaintiff's land for an irrigation ditch, equitable rules apply, and, whether plaintiff demands a jury trial or not, it is within the discretion of the trial court to grant it.—*White v. Stout*, 129 P. 917.

In an action of ejectment, the plaintiff has a right to a jury trial.—*Id.*

§ 21 (Okla. Cr. App.) A person accused of contempt committed out of the presence of the court or judge is entitled to a trial by an impartial jury, as guaranteed by Const. art. 2, § 20.—*Nichols v. State*, 129 P. 673.

On the trial of persons charged with contempt in violating an injunction granted under Sess. Laws 1911, c. 70, § 14, against the maintenance of a liquor nuisance, the right to trial by a jury is secured by the Bill of Rights, § 25.—*Id.*

§ 24 (Okla. Cr. App.) In all cases of conviction by a jury, if defendant requests it, the court must submit the question of punishment to the jury.—*McSpadden v. State*, 129 P. 72.

§ 31 (Cal. App.) An affidavit by defendant's attorney that he saw a juror asleep during the taking of testimony, and before he could inform the court a recess was ordered, and that he did not know how long the juror was asleep, was not sufficient to show that the juror's condition was such that he failed to hear any question or answer, so as to deprive defendant of the right to trial by jury.—*People v. Roselle*, 129 P. 477.

§ 32 (Okla.) In an action brought prior to statehood, but tried since statehood, a unanimous verdict of the jury is required.—*Gosnell v. Prince*, 129 P. 27.

§ 33 (Cal. App.) Pen. Code, § 785, providing that when bigamy or incest is committed in one county, and accused is apprehended in another, the jurisdiction is in either county, is not invalid as in derogation of the right to trial by jury.—*Ex parte MacDonald*, 129 P. 957.

A statute, guaranteeing to accused the right to trial by jury in the place by law designated as the place for trial, confers on him the right contemplated by the Constitution, under which the right to trial by jury shall remain inviolate.—*Id.*

§ 33 (Wash.) The summoning of a jury for service in a police court "from the body of your city" violated Const. art. 1, § 22, guaranteeing a trial by an impartial jury in the county of the venue.—*State v. Milroy*, 129 P. 384.

§ 34 (Colo.) It is for the jury to determine the weight of the evidence and the credibility of the witnesses, so that, where there was evidence tending to reduce the killing to manslaughter, to withdraw that issue from the jury is an infringement of the right to a jury trial given by the Constitution and laws of the state.—*Henwood v. State*, 129 P. 1010.

### IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 70 (Colo.) The statutory method of summoning jurors is not exclusive; the court being authorized to select a jury on an open venire directed to the sheriff.—*Gankyo Mitsunaga v. People*, 129 P. 241.

### V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 99 (Kan.) Where the fact that a bank burglary had been committed was notorious and unquestioned, opinions of jurors that the bank had been broken into and robbed did not disqualify them in the trial of one charged with the crime.—*State v. Hoerr*, 129 P. 153.

That a person has read newspaper reports of a burglary and heard general talk about it does not disqualify him if he has no settled conviction on a material disputed fact and is free from prejudice, bias, or interest.—*Id.*

§ 103 (Cal. App.) Where the answers of jurors disclosed a state of mind closely bordering on prejudice against defendant, yet all asserted that they could try him fairly, the denial of defendant's challenges for cause was within the discretion of the trial judge.—*People v. Hill*, 129 P. 475.

§ 103 (Okla. Cr. App.) A mere impression as to the guilt or innocence of defendant, which a juror can disregard in arriving at a verdict, does not disqualify him.—*Jones v. State*, 129 P. 446.

§ 110 (Mont.) Denial of plaintiff's peremptory challenge of juror called after she had waived all her remaining challenges held proper under procedure prescribed for selection of jury by Rev. Codes, § 6740.—*O'Malley v. O'Malley*, 129 P. 501.

§ 131 (Cal. App.) Where defendant was permitted to ascertain any bias or prejudice in the minds of the jurors, the court need not permit an unduly protracted examination to enable defendant to decide on his peremptory challenges.—*People v. Hill*, 129 P. 475.

## JUSTICES OF THE PEACE.

### III. CIVIL JURISDICTION AND AUTHORITY.

§ 32 (Okla.) Statutes conferring jurisdiction on justices of the peace are to be strictly construed and not to be extended by implication beyond their express terms.—*Hocker v. Carroll*, 129 P. 56.

### IV. PROCEDURE IN CIVIL CASES.

§ 80 (Cal. App.) Under Code Civ. Proc. § 102, as added by St. 1911, p. 442, the clerk of the justices' court of Los Angeles township cannot issue a summons unless, after the action is commenced, the presiding justice makes a written order directing him to do so, especially in view of section 1003 defining an order.—*Nellis v. Justices' Court of Los Angeles Tp.*, 129 P. 472.

Under Code Civ. Proc. § 100, as added by St. 1911, p. 442, the summons in the justices' court of Los Angeles township must name the justice before whom it is returnable, and, if it is merely made returnable before the court, it is insufficient.—*Id.*

§ 119 (Wash.) Under Rem. & Bal. Code, § 1766, justice court judgment on service by publication is only a judgment in rem against property attached before it is rendered.—*Clifford v. Pateros Transfer Co.*, 129 P. 369.

§ 127 (Okla.) Judgment having been rendered by a justice against two defendants, and a motion by one of them to vacate having been sustained under Comp. Laws 1909, § 6380, and a notice thereof served on plaintiff, signed by

both defendants, the judgment would be deemed vacated as to both, unless the contrary plainly appeared.—*Davis v. Norton*, 129 P. 750.

## V. REVIEW OF PROCEEDINGS.

### (A) Appeal and Error.

§ 159 (Mont.) Under Rev. Codes, § 7124, relating to the justification of sureties on an appeal undertaking, *held*, that plaintiff by accepting defendant's sureties more than five days after excepting to the sufficiency thereof had waived his right to object thereto.—*Bush v. Baker*, 129 P. 550.

When an appeal undertaking has been given, accompanied by the formal affidavits required by the statutes (Rev. Codes, § 7195), the right to appeal is made effectual, subject only to the adverse party's personal right to require a justification of the sureties.—*Id.*

Since the adverse party's privilege to require justification of the sureties on an appeal undertaking is personal, he may waive it entirely, either by failure to file an exception, or by withdrawing his exception.—*Id.*

§ 159 (Okl.) An appeal will not lie from a justice's to the county court on an affidavit in forma pauperis, and without the bond required by statute.—*Graham v. Sparian*, 129 P. 738.

§ 159 (Okl.) After notice of the vacation of the justice's judgment for plaintiff, the judgment was reinstated, and an appeal was taken to the county court. It was error to dismiss the appeal because the bond was not filed within 10 days from the rendition of the original judgment; it having been filed within 10 days from the order of reinstatement.—*Davis v. Norton*, 129 P. 750.

§ 164 (Mont.) Under Rev. Codes, § 7123, which commands a justice of the peace to transmit the papers to the clerk of the district court within 10 days after appeal has been perfected, if the fees have been paid, an appellant who is not at fault may compel the performance of this duty; and the court in flagrant cases may fine a justice for dereliction.—*Bush v. Baker*, 129 P. 550.

Rule of district court requiring the filing of transcript within ten days from the date of perfecting appeal *held* to apply only to cases in which appellant fails to pay the justice's fees, and in which he neglects to file the papers within prescribed time, and to have no application after filing, so that a dismissal then depends upon the facts appearing on the hearing of motion.—*Id.*

The filing of a note of issue after transfer of the papers from the justice's to the district court, if done by plaintiff, amounts to a waiver of defendant's laches in filing the papers, and, if done by defendant, amounts to notice that he will proceed at once with the trial, so that the plaintiff's silence thereafter implies consent to trial on the merits.—*Id.*

§ 164 (Or.) Under L. O. L. §§ 2457, 2460, 2463, as to appeal from a justice, the 30 days following the allowance of the appeal from a justice, within which appellant must file the transcript in the circuit court, commence to run only from his making his order of allowance after waiting the five days allowed appellee for excepting to the sureties.—*Eareckson v. Chandler*, 129 P. 491.

§ 166 (Mont.) Under Rev. Codes, § 7127, authorizing the district court to dismiss an appeal for failure to prosecute, or for unnecessary delay in bringing it to a hearing, *held* that where defendant's counsel was ill, and overlooked the time for filing, and where plaintiff, after filing, allowed the case to stand, and showed no prejudice thereby, plaintiff was not entitled to a dismissal.—*Bush v. Baker*, 129 P. 550.

§ 171 (Okl.) Under Const. art. 7, § 14, a case appealed to the county court from a justice of the peace is triable de novo.—*Davis v. Norton*, 129 P. 750.

## KNOWLEDGE.

See Assignments, § 68; Bills and Notes, §§ 318, 338, 360; Contracts, § 322; Forgery, §§ 16, 44; Limitation of Actions, § 45.

## LACHES.

See Corporations, § 82; Justices of the Peace, § 164.

## LANDLORD AND TENANT.

See Action, § 53; Appeal and Error, § 889; Corporations, §§ 409, 425; Frauds, Statute of, §§ 123, 143; Guardian and Ward, §§ 44, 54; Injunction, § 35; Mines and Minerals, § 66; Vendor and Purchaser, §§ 116, 196, 231.

## II. LEASES AND AGREEMENTS IN GENERAL.

### (A) Requisites and Validity.

§ 22 (Wash.) Under Rem. & Bal. Code, § 258, requiring the complaint to contain a concise statement of the facts constituting the cause of action, a judgment for damages for breach of a contract to lease cannot be supported upon a complaint seeking merely to recover installments of rent.—*Oldfield v. Angeles Brewing & Malting Co.*, 129 P. 1098.

## III. LANDLORD'S TITLE AND REVERSION.

### (B) Estoppel of Tenant.

§ 63 (Kan.) Where a patentee of land put a creditor in possession to hold until his return from another state, and the land was sold for taxes, and the grantee in the tax deed leased it for one year to the creditor in possession, the lessee, who afterwards procured a conveyance from the patentee, was estopped to deny the title of his lessor.—*Whittle v. Hughes*, 129 P. 1172.

## IV. TERMS FOR YEARS.

### (B) Assignment, Subletting, and Mortgage.

§ 76 (Wash.) Lessor who as a witness did not repudiate his agent's act in accepting rent from a sublessee, and said he was willing for the court to decide which party was his tenant, *held* estopped to allege that the sublease was void for want of consideration, although the original lease contained a covenant against subletting.—*D'Ambrosio v. Nardone*, 129 P. 1092.

§ 79 (Cal.) A purchaser of a lease authorizing subleasing and the acquisition of an additional term for the subtenants is put on inquiry by notorious possession of persons holding under the lessee, as to the terms on which the lessee had surrendered the land to them.—*Standard Oil Co. v. Slye*, 129 P. 589.

### (C) Extensions, Renewals, and Options to Purchase or Sell.

§ 83 (Cal.) A covenant of a lease to renew it is one running with the land.—*Standard Oil Co. v. Slye*, 129 P. 589.

§ 85½ (Cal.) One by purchasing the interest of a lessee, and accepting rent from claimants under a lease made by such vendor, placed itself in privity of estate with them, so as to be bound by a covenant in their lease for renewal running with the land, though it also purchased the land.—*Standard Oil Co. v. Slye*, 129 P. 589.

## LAND OFFICE.

See Public Lands, §§ 103, 108.

## LANDS.

See Public Lands.

## LANGUAGE.

See Contracts, §§ 154, 162.

**LARCENY.**

See Courts, § 42; Criminal Law, §§ 84, 893; Indictment and Information, § 110; Limitation of Actions, § 45; Statutes, § 120.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 14 (Wash.) Where prosecuting witness was induced to bet on a game of skill, which he had no chance of winning, and which defendants did not intend to permit him to win, and they decamped with the money, they were guilty of grand larceny under Rem. & Bal. Code, § 2601, subd. 2, relating to larceny by trick, device, or bunco game.—State v. Ferrato, 129 P. 898.

Any trick, artifice, or cunning calculated to win confidence and to deceive, whether it be by conversation, conduct, or suggestion, is a "bunco game" within Rem. & Bal. Code, § 2601, subd. 2, relating to larceny by means of a bunco game.—Id.

**II. PROSECUTION AND PUNISHMENT.****(B) Evidence.**

§ 55 (Okl.Cr.App.) Evidence held sufficient to support conviction of larceny.—Wainscott v. State, 129 P. 655.

**LAW OF THE CASE.**

See Appeal and Error, § 1195.

**LEADING QUESTIONS.**

See Criminal Law, § 1153; Witnesses, § 240.

**LEASE.**

See Landlord and Tenant.

**LETTERS.**

See Evidence, § 318; Witnesses, § 257.

**LEVY.**

See Taxation, § 301.

**LEWDNESS.**

See Indictment and Information, §§ 87, 159.

§ 5 (Cal.App.) An indictment charging that accused committed a lewd act on the body of a female child under the age of 14 years by placing her hand on his private parts with felonious intent to arouse her sexual desires sufficiently charged the offense denounced by Pen. Code, § 288, punishing lewdness as to the body of a child.—People v. Anthony, 129 P. 968.

**LIBEL AND SLANDER.****I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.**

§ 19 (Okl.) Words used in the communication alleged to be slanderous are to be taken in their most natural and obvious sense.—Hubbard v. Cowling, 129 P. 714.

**II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.**

§ 34 (Okl.) A "privileged communication" is one made in good faith on any subject-matter in which the party communicating has an interest or in reference to which he has, or honestly believes he has, a duty, containing matter which, without the occasion would be defamatory and actionable.—Hubbard v. Cowling, 129 P. 714.

§ 41 (Okl.) A "conditionally privileged publication" is one made on an occasion which furnishes a prima facie legal excuse for making it, and which is privileged, unless some addi-

tional fact is shown which so alters the character of the occasion as to prevent it furnishing legal excuse.—Hubbard v. Cowling, 129 P. 714.

**IV. ACTIONS.****(C) Evidence.**

§ 101 (Okl.) On proof that an alleged slanderous publication was privileged, the burden devolves on plaintiff to show express malice.—Hubbard v. Cowling, 129 P. 714.

**(E) Trial, Judgment, and Review.**

§ 123 (Okl.) Where there is no dispute as to the circumstances under which a publication was made, the question whether the occasion was privileged is for the court, but, if the facts giving the publication a privileged character are established by evidence, the question is for the jury under an instruction as to what facts constitute privilege.—Hubbard v. Cowling, 129 P. 714.

**LICENSES.**

See Intoxicating Liquors, § 327; Physicians and Surgeons, §§ 6, 11.

**LIENS.**

See Agriculture, §§ 11, 15; Appeal and Error, §§ 70, 78; Chattel Mortgages, §§ 138, 156, 159; Judgment, § 753; Mechanics' Liens; Mortgages, § 256; Public Lands, § 135; Railroads, §§ 159, 171; Taxation, §§ 824, 827; Vendor and Purchaser, §§ 265-294.

**LIFE ESTATES.**

§ 15 (Colo.) In determining whether there had been an increase in the property belonging to an estate to which life tenants were entitled under the terms of a will, the whole estate should be considered in solido.—Tuckerman v. Currier, 129 P. 210.

**LIFE INSURANCE.**

See Insurance.

**LIMITATION OF ACTIONS.**

See Adverse Possession; Ejectment, § 24; Evidence, § 80.

**I. STATUTES OF LIMITATION.****(A) Nature, Validity, and Construction in General.**

§ 1 (Okl.) Statutes of limitations are statutes of repose, the object of which is to prevent fraudulent and stale actions from springing up after a great lapse of time.—Adams v. Coon, 129 P. 851.

§ 2 (Cal.) Under Code Civ. Proc. § 361, providing that actions on debts contracted in another state shall be barred here within the time that they would be barred in that state, a suit to foreclose mortgage given to secure Nebraska debt is barred here when barred in Nebraska.—Van Buskirk v. Kuhns, 129 P. 587.

**(B) Limitations Applicable to Particular Actions.**

§ 32 (Kan.) Where the complaint alleges the conversion of personality in 1902, the action therefor in 1910 is barred, though there is a prayer for an accounting.—Blackwell v. Blackwell, 129 P. 173.

§ 39 (Colo.) Rev. St. 1908, § 4073, providing that bills of relief in cases not herein provided for shall be filed within five years after the cause of action accrues, does not apply to actions affecting realty, such as one to quiet title.—Empire Ranch & Cattle Co. v. Zehr, 129 P. 828.



## II. COMPUTATION OF PERIOD OF LIMITATION.

### (A) Accrual of Right of Action or Defense.

§ 45 (Okl.) Limitations as to lost personality in the hands of a thief begin to run from the wrongful taking, and not from the time of knowledge thereof, providing there was no fraud or concealment.—*Adams v. Coon*, 129 P. 851.

§ 46 (Cal.) Limitations will not commence to run against a promise to pay "when able" until the debtor is able to pay.—*Van Buskirk v. Kuhns*, 129 P. 587.

§ 63 (Okl.) Under Comp. Laws 1909, § 5635, a proper defense, set-off, or counterclaim is not barred by limitations until the claim of plaintiff is also barred.—*Advance Thresher Co. v. Doak*, 129 P. 736.

### (B) Performance of Condition, Demand, and Notice.

§ 66 (Cal.) Under a contract of sale of corporate stock, that at any time after 6 months, on 90 days' notice, the seller would repurchase the stock at the price paid, but that the purchaser need not sell said stock at such price, the statute did not commence to run until a demand for repurchase had been made.—*Vickrey v. Maier*, 129 P. 273, 276.

### (C) Absence, Nonresidence, and Concealment of Person or Property.

§ 84 (Kan.) Where a resident of Oklahoma bought goods in Kansas in January, 1907, and resided in Oklahoma until the action was barred there, and the account was assigned to a Kansas bank, which sued in Kansas in 1911, as defendant was at no time a resident of Kansas, the action was not barred by Code Civ. Proc. §§ 20, 21 (Gen. St. 1909, §§ 5613, 5614), relating to limitation of actions between nonresidents.—*Stock Exchange Bank v. Wykes*, 129 P. 1131.

### (F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 95 (Idaho) An action against corporate directors to recover illegal dividends paid in January, 1908, where such payment was not discovered until March, 1911, by the corporate creditor, was not barred by limitations, when begun in February, 1912.—*Stoltz v. Scott*, 129 P. 340.

§ 96 (Kan.) While the lapse of time will bar equitable relief against a mistake in describing land conveyed, limitations will not run till the discovery of the mistake, or the time at which, by reasonable diligence, it might have been discovered.—*Jackson-Walker Coal & Material Co. v. Miller*, 129 P. 1170.

For the purpose of determining the time when limitations commenced to run against an action to correct a mistake in a deed, the record of the deed does not impart notice of the mistake.—*Id.*

### (H) Commencement of Action or Other Proceeding.

§ 125 (Kan.) A mere order of revivor is sufficient to prevent the running of limitations.—*McLain v. Parker*, 129 P. 1140.

## V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 182 (Colo.App.) The defense of limitations must be pleaded.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 245.

§ 195 (Cal.) In an action on a promise to pay "when able," the burden was on defendant, in order to establish his plea of limitations, to prove an ability to pay the debt.—*Van Buskirk v. Kuhns*, 129 P. 587.

§ 197 (Kan.) Allegation that limitations have been prevented by the absence of a person from the state for a specified time is not necessarily

established by evidence of his nonresidence.—*Dixon v. Windscheffel*, 129 P. 938.

## LIMITATION OF LIABILITY.

See Carriers, § 405; Municipal Corporations, §§ 863, 864.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIS PENDENS.

See Names, § 16.

## LIVERY STABLE KEEPERS.

See Chattel Mortgages, §§ 138, 156.

## LIVE STOCK.

See Carriers, §§ 215-229; Railroads, §§ 411, 441.

## LOANS.

See Insurance, § 8; Principal and Agent, § 194.

## LOCAL LAWS.

See Statutes, §§ 72-96.

## LOCAL OPTION.

See Intoxicating Liquors.

## LODES.

See Mines and Minerals, §§ 31, 38, 41.

## LOGS AND LOGGING.

See Master and Servant, § 278.

## LOST INSTRUMENTS.

See Elections, § 259; Evidence, §§ 178, 186.

## LUNATICS.

See Insane Persons.

## MALICE.

See Banks and Banking, § 143; Libel and Slander, § 101.

## MALPRACTICE.

See Physicians and Surgeons, § 18.

## MANDAMUS.

See Courts, §§ 12, 29; Judgment, § 714.

## I. NATURE AND GROUNDS IN GENERAL.

§ 2 (Cal.App.) Pol. Code, § 2193, as amended in 1911 (St. 1911, p. 86), authorizing the State Commission in Lunacy to compel by mandate a county treasurer to pay the state treasurer the amount due the state for commitments of imbecile persons, has no retroactive effect, and does not affect pending litigation.—*State Commission in Lunacy v. Welch*, 129 P. 974, 975.

§ 7 (Cal.App.) Right to mandamus is largely within the discretion of the court.—*People v. Murphy*, 129 P. 603; *Devlin v. Donnelly*, Id. 607; *Same v. Wright*, Id. 610.

§ 10 (Cal.App.) Mandamus will only be allowed to secure or protect a clear legal right, and never when its enforcement will work an injustice or accomplish a wrong.—*People v. Murphy*, 129 P. 603.

§ 10 (Cal.App.) A writ of mandamus is only granted to secure or protect a clear legal right.—*Devlin v. Donnelly*, 129 P. 607; *Same v. Wright*, Id. 610.

§ 19 (Nev.) A proceeding in mandamus against a county officer does not abate upon the expira-

tion of his term of office; but, the duty being a public one, his successor may be substituted.—*Stone v. Bell*, 129 P. 458.

## II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 74 (Cal.App.) Mandamus is the proper remedy to require a county board of canvassers to canvass election returns as required by statute.—*People v. Butler*, 129 P. 600.

§ 74 (Cal.App.) Where election officers in casting up the returns, instead of marking a tally after each candidate as the ballots were read, as required by Pol. Code, § 1258, inserted the number of votes opposite the name of a particular candidate, a defeated candidate was not entitled to mandamus to compel the board of supervisors to canvass such returns, as though no ballots were voted for such candidate.—*Devlin v. Donnelly*, 129 P. 607; *Same v. Wright*, Id. 610.

§ 79 (Kan.) Under Gen. St. 1909, §§ 7833, 7836, authorizing the text-book commission to adopt text-books, including a primary reading chart, and prohibiting a school board to purchase school apparatus unless the contract was first submitted to the school board commission, a school district board will not be compelled by mandamus to install a primary reading chart in a district school and pay the price fixed by the text-book commission, though it has adopted the chart for use in the public schools.—*Pendry v. Edgar*, 129 P. 936.

§ 79 (Kan.) Mandamus will lie to compel a county superintendent of public instruction to indorse unexpired teacher's certificates issued in other counties, as required by Gen. St. 1909, § 7495.—*Johnson v. Connelly*, 129 P. 1192.

§ 102 (Idaho) Laws 1911, p. 226, § 101, having appropriated \$25,000 per year continuously to pay salaries for officers and subordinates of the National Guard, being in operation January 6, 1913, plaintiff, having been appointed assistant adjutant general, and having performed services of the office, was entitled by mandamus to compel the state auditor to draw a warrant on the treasury for his salary for that month.—*Jeffreys v. Huston*, 129 P. 1065.

(C) Acts and Proceedings of Private Corporations and Individuals.

§ 129 (Cal.) The right of inspection of corporate records and business when given by statute, may be enforced by mandamus, but where the right depends on the common law, the issuance of the writ is discretionary, and applicant must show good cause.—*Hobbs v. Tom Reed Gold Mining Co.*, 129 P. 781.

## III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 154 (Cal.App.) A petition for a writ of mandate to compel a county treasurer to pay money from the public funds must allege that there is money in the county treasury, or in the custody of the treasurer, with which to pay the demand.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

## MANSLAUGHTER.

See Homicide.

## MARGINS.

See Bills and Notes, § 360.

## MARK.

See Elections, §§ 180, 186, 194.

## MARKET VALUE.

See Eminent Domain, § 131; Evidence, §§ 113, 474, 524.

## MARRIAGE.

See Breach of Marriage Promise; Divorce; Husband and Wife.

§ 3 (Colo.App.) Under Rev. St. 1908, § 4165, which provides that marriages valid by the law of the place where contracted shall be valid in this state, a valid marriage in New Mexico of parties domiciled in this state, who married there to avoid a prohibitory decree in force here, is valid in this state.—*Griswold v. Griswold*, 129 P. 560.

Rev. St. 1908, § 2122, prohibiting parties to a decree of divorce from remarrying within a year, *held* not to repeal section 4165, declaring that marriages valid where contracted shall be valid here.—*Id.*

§ 22 (Mont.) A "mutual and public assumption of the marital relation," within Rev. Codes, § 3807, defining common-law marriage, means a course of conduct on the part of both man and wife toward each other and toward the world so that people generally take them to be married, and cohabitation is indispensable thereto.—*O'Malley v. O'Malley*, 129 P. 501.

"Cohabitation," as applied to common-law marriage, means to live or dwell together, to have the same habitation.—*Id.*

Where husband and wife after their divorce, maintained separate abiding places, the fact that for two years after the divorce they occasionally stayed at the same house, and that the former husband contributed to the wife's support, and spoke of her as his wife, did not constitute such cohabitation as created a common-law marriage as defined by Rev. Codes, § 3607.—*Id.*

§ 40 (Okla.) Where a man and woman had been living as husband and wife for many years, and at the time of their marriage the former wife was still living, in absence of evidence to the contrary, it will be presumed that there had been a lawful separation between the husband and the former wife.—*Coachman v. Sims*, 129 P. 845.

§ 50 (Wash.) In an action for death, evidence *held* prima facie proof to show that decedent was married and left a widow and children.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

## MASTER AND SERVANT.

See Appeal and Error, § 1002; Commerce, § 27; Constitutional Law, § 205; Death, §§ 9, 14; Ejectment, § 35; Evidence, §§ 207, 513; Insurance, § 141; Mines and Minerals, §§ 112, 114, 117; Railroads, § 159; Specific Performance, § 14; Statutes, §§ 72, 117; Trial, § 296.

## II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 80 (Mont.) In an action for compensation for services rendered under a contract for the cultivation of beets, evidence *held* sufficient to take the case to the jury on the theory of waiver of defects or acceptance of plaintiff's work.—*Lackman v. Simpson*, 129 P. 325.

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 89 (Mont.) When a servant, of his own accord, steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters, and is not liable for any

injury received.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

In an action for wrongful death, *held*, that as deceased, at the time of his death, was engaged in rescuing the property of his master he was acting within the scope of his authority.—*Id.*

**(B) Tools, Machinery, Appliances, and Places for Work.**

§ 101, 102 (Cal.) While an employer is not obliged to furnish his employé with the latest improvements in machinery, tools, or appliances, it is his duty to use proper care to furnish him with suitable machinery, tools, and appliances.—*Lonnergan v. Stansbury*, 129 P. 770.

§ 101, 102 (Okla.) It is the master's duty to provide his servant with a reasonably safe place to work, and with reasonably safe appliances, considering the nature of the work and the hazards ordinarily arising therefrom.—*Frederick Cotton Oil & Mfg. Co. v. Traver*, 129 P. 747.

§ 103 (Wash.) The master's duty to exercise reasonable care to furnish a safe place of work and reasonably safe appliances is nondelegable.—*Benson v. English Lumber Co.*, 129 P. 403.

§ 116 (Kan.) Where a floor in a packing house is made of asphalt so as to be kept in a sanitary condition, the furnishing in such department of ladders not equipped with spikes, which would injure the floor, is not negligence.—*Tramel v. Armour Packing Co.*, 129 P. 1174.

§ 117 (Kan.) A packing house company using an elevator to convey truck loads of meat, and employes handling the trucks, from one floor to another owes a duty to furnish an elevator reasonably safe for such use.—*Root v. Oudahy Packing Co.*, 129 P. 147.

§ 121 (Or.) Where the crossing of a shafting was incident to the work in which an employé was engaged, it was the employer's duty to guard the shaft so as to protect the employé so far as practicable.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 129 (Okla.) Where a shaft on an engine was broken, so that an inspection would have discovered the break, and the engine broke down on the road, the failure to inspect was the proximate cause of the injury incurred by the fireman in attempting to repair, though it was his duty to repair while on the road in cases of emergency.—*Chicago, R. I. & P. Ry. Co. v. Moore*, 129 P. 67.

**(D) Warning and Instructing Servant.**

§ 153 (Wyo.) That plaintiff had previously worked one summer as a miner in another coal mine, and had been previously employed about defendant's mine as a car driver, did not relieve defendant, having knowledge of his inexperience of the duty to warn him when he changed his occupation from car driving to mining.—*Carney Coal Co. v. Benedict*, 129 P. 1024.

§ 158 (Wyo.) Where plaintiff, an inexperienced miner, had discovered the loosening of a block of coal, which subsequently fell and injured him, and had unsuccessfully attempted to break it down with a bar, defendant's failure to inform plaintiff that loose material could be discovered by tamping was not the proximate cause of the injury.—*Carney Coal Co. v. Benedict*, 129 P. 1024.

**(E) Fellow Servants.**

§ 179 (Utah) The Legislature has power to modify the fellow servant rule or to abolish it altogether.—*Vota v. Ohio Copper Co.*, 129 P. 349.

§ 181 (Utah) Under Comp. Laws 1907, § 1345, defining fellow servants, a mucker in a mine, directed to assist in the unloading of certain timbers by means of a hoisting engine,

*held* not a fellow servant of the engineer.—*Vota v. Ohio Copper Co.*, 129 P. 349.

§ 185 (Wash.) The assurance to an employé, by another employé having charge of an appliance, that it was all right could be relied upon as the assurance of the master.—*Benson v. English Lumber Co.*, 129 P. 403.

§ 190 (Wash.) Negligence of defendant's foreman in permitting a brick to fall from the top of a tower and kill decedent, another servant working below, *held* not the negligence of a fellow servant.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

**(F) Risks Assumed by Servant.**

§ 203 (Kan.) "Assumption of risk" arises, in the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, when the risk of ordinary dangers of the occupation into which he is about to enter are known, or are so plainly observable that he may be assumed to know them, and he continued in the employ without objection.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 203 (Okla.) A servant assumes the ordinary risks incident to his employment and concerning which he knows or may by reasonable care know to exist in the absence of agreement to the contrary, but he does not assume risks created by the master's negligence, nor such as are latent, or are only discovered at the time of the injury.—*Frederick Cotton Oil & Mfg. Co. v. Traver*, 129 P. 747.

§ 204 (Kan.) Assumption of risk is a good defense to an action under federal Employers' Liability Act, except when the carrier's default consists in a violation of some statute enacted for the safety of employes, and such default has contributed to the injury or death of the employé in question.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 204 (Or.) Assumed risk is not a defense in an action under the factory act.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 217 (Wash.) Master *held* not liable for injuries to experienced employé from the swinging of a log because yet attached by its roots, while he was assisting in dragging same with a team, where his opportunities of knowing that the log was attached were equal to or better than those of the master.—*Hanson v. Shipley*, 129 P. 377.

§ 217 (Wash.) An employé did not assume the risk of inherent defects in an appliance unless he knew of such defects.—*Benson v. English Lumber Co.*, 129 P. 403.

§ 219 (Wyo.) Risk of injury to a coal miner by the fall of coal which had been so loosened by blasting that a three-inch crack appeared in the vein, and which they attempted to loosen with a bar, *held* obvious, and assumed as a matter of law.—*Carney Coal Co. v. Benedict*, 129 P. 1024.

§ 222 (Wash.) A servant, taking his position at the base of a tower at direction of his foreman and killed by a brick negligently dropped by the foreman, did not assume the risk.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 226 (Wash.) If the master was negligent in furnishing reasonably safe appliances, he could not rely on any negligence of a fellow servant with respect to that duty to escape liability for resulting injuries.—*Benson v. English Lumber Co.*, 129 P. 403.

**(G) Contributory Negligence of Servant.**

§ 227 (Kan.) "Contributory negligence" of a servant is the omission to use those precautions for his own safety which ordinary prudence requires.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 235 (Kan.) That spikes are attached to ladders furnished for use in other departments of a packing house, having soft floors, does not warrant an employé in assuming that a ladder

in a department where the floor is of asphalt is similarly equipped.—*Tramel v. Armour Packing Co.*, 129 P. 1174.

§ 235 (Kan.) An employé cannot recover for injuries caused by the darkness of the place where he is at work where he, knowing the location of an electric light switch, omitted to turn the lights on.—*Jolliff v. Kansas City Western Ry. Co.*, 129 P. 1178.

§ 239 (Kan.) A skilled mechanic, using a ladder in a way he knows is dangerous, unless it is equipped with spikes, cannot recover for injuries received by the absence thereof.—*Tramel v. Armour Packing Co.*, 129 P. 1174.

§ 246 (Mont.) While a servant engaged in rescuing his master's property may be acting within the scope of his employment, he does not thereby secure immunity from the charge of contributory negligence.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

§ 247 (Wash.) If a servant's contributory negligence was only a remote cause or condition of the accident, and the master's negligence was the proximate cause, he is liable.—*Benson v. English Lumber Co.*, 129 P. 403.

#### (H) Actions.

§ 261 (Mont.) Complaint alleging that deceased, while employed by defendant, came in contact with a live wire negligently placed by defendant, by reason whereof he was electrocuted, held not to affirmatively show that the proximate cause was the act of deceased, and not required to negative his contributory negligence.—*Hollenback v. Stone & Webster Engineering Corporation*, 129 P. 1058.

§ 265 (Kan.) A sudden fall of a friction elevator, resulting in injury to an employé in the course of its ordinary use, warrants an inference of negligence, but, as between the employer and employé, does not raise a presumption of actionable negligence on the part of the master.—*Root v. Cudahy Packing Co.*, 129 P. 147.

§ 270 (Okla.) In an action for death of a servant, alleged to have resulted from defendant's failure to provide safe appliances, evidence of alterations, repairs, and precautions made after the accident to avoid a recurrence was inadmissible.—*Sloan v. Warrenburg*, 129 P. 720.

§ 270 (Or.) Evidence of the placing of guards on machinery after an employé was injured is not admissible to show negligence.—*Love v. Chambers Lumber Co.*, 129 P. 492.

In a factory employé's action for injuries from an alleged unguarded machine, in which it was an issue whether it was practicable to have guarded it, evidence that after the accident it was guarded was admissible to show the practicability of guarding the machinery.—*Id.*

§ 273 (Wyo.) Where a coal miner was injured by a fall of certain material which had been loosened by a prior blast, he was properly permitted to state his belief as to whether he was working in a safe place just prior to the injury on the issue of assumed risk.—*Carney Coal Co. v. Benedict*, 129 P. 1024.

§ 276 (Kan.) That a railroad employé may recover for injuries under the federal Employer's Liability Act, it must appear that at the time of the injury defendant railroad was engaged in interstate commerce, that plaintiff was employed in such commerce in the sense that at the time of the injury plaintiff had a substantial connection therewith.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 278 (Kan.) Evidence, in a servant's action for injuries alleged to have occurred through the negligence of the master in not providing a reasonably safe place to work, held sufficient to sustain a judgment for plaintiff.—*Carroll v. Kansas Buff Brick & Mfg. Co.*, 129 P. 196.

§ 278 (Wash.) In an action for death of a servant by being struck by a brick which fell from the top of a tower, evidence that the foreman was tossing the bricks from one position to another onto the tower warranted a finding that negligence of the foreman caused the brick to fall.—*Koloff v. Chicago, M. & P. S. Ry. Co.*, 129 P. 398.

§ 278 (Wash.) In an action for death by the breaking of a hook used in hauling logs, evidence held to sustain a finding that the hook furnished was not reasonably suitable because made of inferior steel or by a defect in its casting.—*Benson v. English Lumber Co.*, 129 P. 403.

§ 278 (Wash.) Where, in an action for injuries to a railroad employé by being jerked from the top of a car, there was no evidence that the jerk was a violent one, caused by backing other cars against the one on which plaintiff was working, as alleged, plaintiff could not recover.—*Pearson v. Northern Pac. Ry. Co.*, 129 P. 573.

§ 278 (Wash.) Evidence, in an action for personal injuries from a gas explosion in a coal mine, held not to raise the issue of negligence in not providing sufficient air for ventilation.—*Dollar v. Northwestern Improvement Co.*, 129 P. 578.

§ 285 (Cal.) Whether the negligence of an employer in failing to equip a wagon with a brake, and in providing nothing more than a loose board for a seat, as a result of which the driver was precipitated into the bed of the wagon when the team ran away, and was thrown out when the wagon struck the curb, was the proximate cause of the injuries received was a question for the jury.—*Lonnergan v. Stansbury*, 129 P. 770.

§ 286 (Cal.) Whether an employer was negligent in failing to equip a wagon with a brake, and in providing a loose board for a seat, as a result of which the driver was precipitated into the wagon box on the team's running away, and was thrown from the wagon when it struck the curb, was a question for the jury.—*Lonnergan v. Stansbury*, 129 P. 770.

§ 286 (Kan.) In an action for injuries to a servant by the fall of a friction elevator, evidence of defendant's actionable negligence held insufficient to warrant submission of such question to the jury.—*Root v. Cudahy Packing Co.*, 129 P. 147.

§ 286 (Okla.) Where the negligence complained of is failure to furnish sufficient assistants to enable plaintiff to perform his work, the question is for the jury where there is any evidence that defendant failed to perform such duty, and that such failure produced the injury, and could have been reasonably anticipated.—*Chicago, R. I. & P. Ry. Co. v. Ashlock*, 129 P. 726.

§ 286 (Utah) Evidence held to require submission of the question of negligence to the jury.—*Vota v. Ohio Copper Co.*, 129 P. 349.

§ 288 (Cal.) Whether the driver of a team assumed the risk of injury from the failure of the employer to equip the wagon for hauling bricks with a brake, on using the wagon after being told by the foreman that a brake was not required, and that the driver would use the wagon but one day, was a question for the jury.—*Lonnergan v. Stansbury*, 129 P. 770.

§ 288 (Utah) Plaintiff, an inexperienced servant, did not assume the risk as a matter of law of the negligence of defendant's engineer, in charge of a hoist, in drawing a timber against the drum, instead of lowering it according to signal.—*Vota v. Ohio Copper Co.*, 129 P. 349.

§ 288 (Wash.) Evidence in a longshoreman's action for injuries by a conveyor chute upsetting and striking him in the face because the particular chute had narrow ends, contrary to that usually used, held to make it a jury ques-

tion whether the danger from such cause was so obvious as to make plaintiff assume the risk therefrom.—*Elanius v. Rothschild*, 129 P. 1091.

§ 289 (Okl.) Evidence held to present a question for the jury whether the employé was guilty of contributory negligence in attempting to do his work without calling an assistant, who was available.—*Chicago, R. I. & P. Ry. Co. v. Hill*, 129 P. 13.

§ 289 (Utah) Evidence held to require submission of the question of contributory negligence to the jury.—*Vota v. Ohio Copper Co.*, 129 P. 349.

§ 289 (Wash.) Whether decedent's negligence was the proximate cause of his death by the breaking of a hook while assisting in hauling logs held a jury question.—*Benson v. English Lumber Co.*, 129 P. 403.

In an action for a servant's death by the breaking of a hook while hauling logs, the question of contributory negligence held for the jury.—*Id.*

§ 293 (Or.) A requested instruction that, if the shafting with which an employé came in contact was so located as to preclude anticipation of danger therefrom by the employer, its failure to guard the shafting was not negligence, was properly refused, as making the employer's anticipation of danger the measure of its liability, irrespective of its due care.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 296 (Okl.) Contributory negligence being a question of fact for the jury under Const. art. 23, § 6, the court on request should charge that one who has negligently contributed to his own injury cannot recover.—*Frederick Cotton Oil & Mfg. Co. v. Traver*, 129 P. 747.

§ 297 (Kan.) Where, in an action for injuries to a servant, it is necessary to show that certain electric lights were out because in bad condition, and not because they were not turned on, a finding that there was no evidence to show why they were not burning is fatal to a recovery.—*Jolliff v. Kansas City Western Ry. Co.*, 129 P. 1178.

§ 297 (Wash.) Finding that employer retained part of the dues collected from employes for hospital fees held not materially hostile to the general verdict against the employer for negligent treatment of plaintiff at the hospital where recovery was based on the theory of a special contract between the employer and employé, and that the hospital was the employer's agent.—*Klodek v. May Creek Logging Co.*, 129 P. 99.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (A) Acts or Omissions of Servant.

§ 304 (Wash.) Contractor held liable for injury to employé of another from negligence of defendant's employes in permitting a rock to roll into an excavation where plaintiff was working with contractor's actual or constructive notice.—*Gasof v. Standard Ice Co.*, 129 P. 101.

##### (B) Work of Independent Contractor.

§ 315 (Wash.) Where plaintiff was injured solely by the negligence of the servants of an independent, street-grading contractor in permitting a hidden rock plowed up by them to roll in upon him, and where the excavation in the street in which he was working under his employer's directions was of itself reasonably safe, his employer was not liable.—*Gasof v. Standard Ice Co.*, 129 P. 101.

##### (C) Actions.

§ 330 (Wash.) Evidence of permit to plaintiff's employer to make excavation in street held material on the issue of notice to independent, street-grading contractor of plaintiff's presence in an excavation where he was injured through the negligence of the contractor's

employes.—*Gasof v. Standard Ice Co.*, 129 P. 101.

#### MEASURE OF DAMAGES.

See Damages, §§ 100-123.

#### MECHANICS' LIENS.

See Mines and Minerals, §§ 112, 114, 117; Railroads, § 188.

##### I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 3 (Idaho) Rev. Codes, § 5111, providing for liens for labor or material furnished for any building for any county, city, town, or school district, etc., was not repealed by act March 13, 1900 (Sess. Laws 1900, p. 165), providing that where any person contracts with the state, county, city, etc., for the construction, or repair of a public work, he shall give bond for the use of laborers, materialmen, etc.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

§ 5 (Cal.) The mechanics' lien law is remedial and should be liberally construed.—*McClung v. Paradise Gold Mining Co.*, 129 P. 774.

§ 18 (Kan.) A purchaser of vacant lots under an oral contract to pay part cash and the balance when deed was delivered, he to erect a house on the lots, who took possession before making the cash payment, and contracted for lumber and materials for the house, acquired the equitable title to which a lien for the labor and material attached.—*E. W. Smith Lumber Co. v. Arnold*, 129 P. 178.

##### II. RIGHT TO LIEN.

###### (A) Nature of Improvement.

§ 23 (Idaho) The purpose of Rev. Codes, §§ 5110, 5111, creating a right to mechanics' liens, is to compensate the person who furnishes labor or material to be used in the construction or repair of a building, irrespective of the value which the labor or material adds to the real estate.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

§ 33 (Idaho) Where labor and material were furnished in the construction of an intake pipe in a river as an extension to a city's waterworks system, a lien therefor was properly attached to the waterworks system, though the intake pipe was never completed or actually attached thereto.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

Where it was necessary to construct a cofferdam to lay a new intake pipe appurtenant to a city's waterworks, persons furnishing labor and material for the dam were entitled to a lien on the waterworks system therefor, although the dam, and material included therein, would not be a part of the completed work, and would not be of any use to the city when the work was completed.—*Id.*

###### (B) Services Rendered and Materials Furnished.

§ 45 (Idaho) A mechanics' lien cannot be had for tools and appliances which are the property of contractors or laborers, and not necessarily consumed in the specific work.—*Ninnesman v. City of Lewiston*, 129 P. 1073.

§ 47 (Idaho) A mechanics' lien will be allowed for material furnished and actually used in the construction of a building or other structure, though such use is not in the main structure itself, but in work necessarily incident to the carrying on of the principal work and performance of the contract.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

§ 52 (Idaho) To entitle a claimant to a mechanics' lien, labor must be performed or materials furnished in the construction or repair of a building or other work; the right not being dependent on the actual enhanced value of

the property on which the labor was performed, or for which the materials were furnished.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

**(E) Subcontractors, and Contractors' Workmen and Materialmen.**

§ 99 (Wash.) The leaving of duplicate statements of the material furnished with a contractor and other persons on the premises was not a compliance with Rem. & Bal. Code, § 1133, requiring a materialman to mail or deliver to the owner a duplicate statement of all materials furnished a contractor.—*Johnson v. Heirgood*, 129 P. 909.

That the owner was present when the first load of material was delivered, and refused to accept a statement, but pointed out another as the party to accept it, did not constitute a waiver of the notice provided for by Rem. & Bal. Code, § 1133, as a prerequisite to a materialman's lien.—*Id.*

That the owner had actual notice of the delivery of materials did not dispense with the necessity of sending him a statement provided for by Rem. & Bal. Code, § 1133, as a prerequisite to a materialman's lien.—*Id.*

§ 111 (Ariz.) Under Civ. Code 1901, par. 2898, materialmen and those furnishing services may perfect their demands into a lien at any time after they have ceased to labor and furnish material, whether or not the original contractor has completed the structure, providing it is done not later than 60 days after its completion.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

§ 115 (Kan.) An owner who has partially paid a contractor of a building should not be subjected to a judgment for a claimed balance until the subcontractors have had their claims and liens finally adjudicated under Gen. St. 1909, § 6249 (Code Civ. Proc. § 654).—*Lofsted v. Bohman*, 129 P. 1168.

**III. PROCEEDINGS TO PERFECT.**

§ 132 (Colo.) Rev. St. 1908, § 4033, requiring lien statements to be filed after the last labor is performed, and within a month after completion of the improvement, etc., does not require claimants to wait until the property is completed before filing a lien.—*State Bank of Chicago v. Plummer*, 129 P. 819.

§ 132 (Okla.) Where a list of materials under a written contract between a contractor and subcontractor was furnished by the latter and thereafter the contractor ordered an additional list inadvertently omitted from the first contract, a statement of claim for lien filed within the required time after the last materials were furnished was sufficient, under Comp. Laws 1909, § 6153, as to the materials furnished under the first contract.—*Joplin Sash & Door Works v. Oklahoma Presbyterian College for Girls*, 129 P. 40.

Where material is furnished for a house or any of its parts, though ordered at different times, if the several parts are so connected as to show that the parties contemplated that the whole should form but one matter of settlement, the whole will be considered as a single contract.—*Id.*

§ 136 (Idaho) Description of property on which it was sought to impose a lien for labor and materials furnished, as the pumping plant and waterworks system of the city of L., located on the south bank of C. river, about 1½ miles above the junction with the S. river, was sufficient for identification.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

**IV. OPERATION AND EFFECT.**

**(A) Amount and Extent of Lien.**

§ 173 (Colo.) Under Rev. St. 1908, § 4030, making mechanics' liens relate back to the com-

mencement of work under a contract between an owner and the first contractor, and giving priority over every other subsequent incumbrance, mechanics' liens in favor of the companies doing the work would relate to the time of the commencement of the work, through their superintendents.—*State Bank of Chicago v. Plummer*, 129 P. 819.

**VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.**

**(A) Waiver of Right to Lien.**

§ 207 (Ariz.) While a materialman or laborer could personally waive his right to a lien on an improvement, the contractor cannot waive it for him in his contract with the owner.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

**(C) Extinguishment, Release, or Payment.**

§ 231 (Idaho) That labor and materials furnished for the alteration and repair of a city's waterworks system, used to further construction work in a river, were carried away by a flood, without the fault of the claimant, did not deprive him of the right to a lien therefor.—*Chamberlain v. City of Lewiston*, 129 P. 1069.

**VII. ENFORCEMENT.**

§ 263 (Colo.) In an action by a subcontractor or materialman to foreclose a lien, the original contractor must be made a party, as the claim must be adjudicated against him in favor of the subcontractor of materialman.—*State Bank of Chicago v. Plummer*, 129 P. 819.

§ 271 (Colo.) As a rule, no bill of particulars is necessary in actions to foreclose mechanics' liens, where the work was agreed to be done for a fixed price.—*State Bank of Chicago v. Plummer*, 129 P. 819.

Defendant, in proceedings to enforce a mechanics' lien for services performed under an agreement to pay plaintiff a certain amount a month "and his expenses," and for services rendered "and material furnished," could require a bill of particulars giving the details as to the items quoted.—*Id.*

If a bill of particulars was properly ordered as to the items of labor and materials in mechanics' lien proceedings, it is immaterial whether it be secured under Rev. Code 1908, § 66, authorizing a bill of particulars when a pleading is too general, or section 69, requiring a further account when the one delivered to the adverse party is too general.—*Id.*

§ 277 (Colo.) Where the complaint in mechanics' lien proceedings did not allege or rely on any default judgment by the materialman against the owners, a defendant claiming under a mortgage could show, notwithstanding such default judgment, that a part of the indebtedness of the owners had been paid before such judgment was entered.—*State Bank of Chicago v. Plummer*, 129 P. 819.

§ 281 (Wash.) Evidence held to sustain a finding that the material for which a lien was claimed was sold to the contractor as an independent contractor, and not as agent of the owner.—*Johnson v. Heirgood*, 129 P. 909.

§ 291 (Colo.) In materialmen's actions to enforce liens as against a prior mortgagee's claim of lien, default judgments in their favor against the owners were admissible to show that their claims had been established as against the owners.—*State Bank of Chicago v. Plummer*, 129 P. 819.

The owners were estopped from denying the validity of default judgments against them by materialmen, in an action brought by a materialman to enforce a mechanic's lien against the owners and a mortgagee of the property.—*Id.*

## MEDICINES.

See Druggists, § 3.

## MILITIA.

See Mandamus, § 102; States, § 132.

## MINES AND MINERALS.

See Appeal and Error, §§ 954, 1153; Courts, § 12; Eminent Domain, § 152; Evidence, §§ 80, 207, 265, 274; Frauds, Statute of, §§ 46, 51, 138, 139; Highways, § 80; Master and Servant, §§ 153, 158, 181, 219, 273.

### I. PUBLIC MINERAL LANDS.

#### (B) Location and Acquisition of Claims.

§ 9 (Nev.) Land legally segregated from occupancy or appropriation may be conveyed by the United States government as a mining claim.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

Where a claim to land legally segregated from occupancy or appropriation is conveyed, the government has no further right to patent a claim located wholly within its boundaries.—Id.

§ 27 (Nev.) The location of a mining claim, based upon a discovery of mineral within the limits of a valid existing claim, was void.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

§ 31 (Nev.) Where a mining claim containing the apex of a cross lode, lying entirely within the surface boundary of a prior claim or group owned by the same party, is held invalid, the side lines of the prior claim constitute the end lines in determining the extralateral rights on the cross vein, across which, as they extend vertically downward, the lode cannot be followed.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

§ 38 (Cal.) In an action for damages for trespass and for an injunction against further trespasses on plaintiff's quartz claim, evidence held to sustain findings that the ore in question was taken from an overlap of a placer claim located by defendant, and that plaintiff had made no discovery at the time of locating his quartz claim.—Olaime v. McGraw, 129 P. 460.

§ 38 (Idaho) An injunction pendente lite should usually be granted where plaintiff mining company claims that its vein, apexing in its mining claim, extends on its dip underneath the surface boundaries of another claim, unless it appears that there is no reasonable ground for assertion of title in plaintiff.—Stewart Mining Co. v. Ontario Mining Co., 129 P. 932.

In a suit to enjoin the working of plaintiff's mining claim by defendant owning an adjoining claim, it is within the discretion of the court to substitute an indemnifying bond in lieu of an injunction.—Id.

§ 38 (Nev.) Where the location certificate of a junior mining claim recited that the claim was wholly within the boundaries of another claim, such certificate was sufficiently ambiguous or conflicting to cast upon the subsequent locator the burden of showing that the prior claim was invalid.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

In determining the priority of mining claims, the declarations contained in the record, by which the subsequent patent was obtained, were admissible in the absence of proof that the record did not state the truth.—Id.

In an equitable action to quiet title to a lode or vein involving questions of extralateral rights not involved in the proceedings for patent, defendant, who filed no adverse thereto, is not estopped from questioning the validity of the location of the claim under which plaintiff seeks to enforce such extralateral rights as against him.—Id.

In an equitable action to determine rights to

mining claims, the invalidity of plaintiff's patent may be pleaded as a defense and tried upon the same principles as an original bill in equity.—Id.

In an equitable action to quiet title to a lode or vein, where the Land Department did not determine the question of priority of claims in the same group, but made a double grant of the conflicting area appearing upon the face of the latter patent, the district court had jurisdiction to determine such priority.—Id.

#### (C) Patents.

§ 41 (Nev.) The Land Department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

§ 43 (Nev.) A patent to a mining claim relates back to the original location.—Las Vegas & T. R. Co. v. Summerfield, 129 P. 303.

§ 44 (Nev.) A patent of a mining claim issued by the Land Department after proper adjudication is conclusive as to the matters presented for adjudication and as to all persons parties thereto, and hence, where the owner of a claim did not file an adverse, the issuance of a subsequent patent is conclusive as to the rights of the parties to the surface ground included in the application therefor.—Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 129 P. 308.

## II. TITLE, CONVEYANCES, AND CONTRACTS.

#### (B) Conveyances in General.

§ 55 (Nev.) Grantees of a portion of the surface of a mining claim are entitled to possession, under the rule that equity will control the patent title in favor of the party holding the equitable title.—Las Vegas & T. R. Co. v. Summerfield, 129 P. 303.

Reference to a mining claim in a contract for the sale of a portion of the surface as a placer instead of a lode claim was immaterial where the property was otherwise sufficiently described.—Id.

#### (C) Leases, Licenses, and Contracts.

§ 58 (Nev.) An assignment of a one-third interest in a mining lease held a sufficient consideration for an agreement to bear one-third the expense of development.—Girton v. Daniels, 129 P. 555.

§ 66 (Nev.) Under the common form of lease of undeveloped lode mining property, the lessee, after doing development work and discovering that further expenditure would be useless, may abandon the lease.—Girton v. Daniels, 129 P. 555.

## III. OPERATION OF MINES, QUARRIES, AND WELLS.

#### (B) Mining Partnerships and Companies.

§ 104 (Cal.) A stockholder of a mining corporation has a right to inspect the company's mines.—Hobbs v. Tom Reed Gold Mining Co., 129 P. 781.

#### (C) Rights and Liabilities Incident to Working.

§ 112 (Cal.) An option to purchase mining stock, which authorized the purchaser to go upon the corporation's claims, repair the flume, etc., was notice to the corporate officers that such purchaser intended to do the work stated in the contract, as affecting the right of laborers working under him to a lien.—McClung v. Paradise Gold Mining Co., 129 P. 774.

One in charge of a mine, with the owner's consent, under a contract permitting him to do work with a view to developing and purchasing it, and controlling the operations in part for

the owner's benefit, is the owner's statutory agent for employing labor.—Id.

The construction of a flume to bring water to a mine for working it was development work within Code Civ. Proc. § 1183.—Id.

An assignment of all claims due from a certain person for labor performed upon mining property, together with the claim of lien "heretofore filed by" assignors, and recorded as stated, took effect only after the filing of the lien, though the liens were in fact executed and verified when the assignment was executed, and hence the lien was not invalid as having been filed by an assignee.—Id.

§ 114 (Cal.) Code Civ. Proc. § 1187, requiring the filing of a laborer's claim for a lien for mining work, does not require a statement of the character of the labor, so that a claim reciting the performance of the work at a sum per day, under employment by the owner's agent, authorized proof that the work was development work or by the subtractive process for which a lien is given by section 1183.—McClung v. Paradise Gold Mining Co., 129 P. 774.

The physical act of filing the paper constituting a lien for mining labor may be done by claimant's agent.—Id.

§ 117 (Cal.) In an action to enforce a laborer's lien, evidence held to show that the person who employed plaintiff was the owner's statutory agent for employing labor.—McClung v. Paradise Gold Mining Co., 129 P. 774.

One who acted as the agent of a claimant for filing a lien for mining labor could enforce the lien as assignee thereof, after it was perfected by filing.—Id.

## MINORS.

See Infants.

## MISJOINDER.

See Action, §§ 38, 45.

## MISREPRESENTATION.

See Vendor and Purchaser, § 36.

## MISTAKE.

See Evidence, §§ 433, 434; Limitation of Actions, § 96; Reformation of Instruments.

## MITIGATION.

See Damages, § 62.

## MODIFICATION.

See Appeal and Error, § 1153; Divorce, § 303.

## MONEY LENT.

See Contracts, § 213; Guardian and Ward, § 56.

## MONEY PAID.

§ 8 (Cal.App.) Complaint alleging the purchase of a defective motor car from defendant, and that defendant authorized plaintiff to purchase material and employ labor, which amounted to a certain sum which defendant agreed to pay plaintiff, sufficiently alleged a cause of action against defendant for the sum so expended.—Bakersfield & V. R. Co. v. Fairbanks, Morse & Co., 129 P. 610.

## MONEY RECEIVED.

§ 8 (Cal.) Where the agent of two corporations received plaintiff's money for stock in one of them, but improperly paid it to the other one, the corporation so receiving it was liable to plaintiff on an implied promise to repay it, although it received it without notice of the

terms under which its agent received it.—Gray v. Ellis, 129 P. 791.

§ 8 (Cal.App.) Both at common law and under the Code, money paid through fraudulent misrepresentations may be recovered on the common count for money had and received.—Winkler v. Jerrue, 129 P. 804.

§ 12 (Cal.) Where plaintiff paid for stock in one corporation, and was offered that of another, the fact that they had the same value and the property of each corporation was the same in character and value was not a defense to a suit to recover the money paid.—Gray v. Ellis, 129 P. 791.

§ 17 (Cal.) Complaint alleging payment of money to agent for stock in one corporation and diversion of the money to another corporation held to state a cause of action on an implied promise to repay the money against both the agent and the corporation receiving it.—Gray v. Ellis, 129 P. 791.

## MONUMENTS.

See Boundaries, § 42.

## MORTGAGES.

See Appeal and Error, §§ 189, 1050; Chattel Mortgages; Estoppel, § 110; Limitation of Actions, § 2; Mechanics' Liens, §§ 277, 291; Quietening Title, §§ 19, 21.

### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 38 (Wash.) Evidence held to sustain a finding that a warranty deed, absolute in form, was in fact executed as additional security.—Scandinavian American State Bank v. Downs, 129 P. 894.

### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 199 (Kan.) A mortgagee in possession is chargeable with the reasonable rental value of the use and occupation of the premises.—Walter v. Calhoun, 129 P. 1176.

Where there has been no application of the rents directed by the mortgage, interest should be computed on the debt without annual rests, and, where the mortgagee in possession is entitled to interest on the debt, he is chargeable with interest on the rents.—Id.

A mortgagee in possession is entitled to compensation for collecting the rents, in absence of evidence of negligence or want of care in handling the property.—Id.

### V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 226 (Kan.) Where the grantee of land by absolute deed as security transfers it to a bona fide purchaser, the measure of damages in favor of the grantor is the value of the land when the tender of payment and demand for reconveyance was refused, less the amount of the debt secured by the deed.—Clark v. Morris, 129 P. 1195.

§ 256 (Cal.App.) Assignee of mortgage who made no inquiry of the mortgagor has a lien only for the amount actually advanced to the mortgagor by the mortgagee.—Mentry v. Broadway Bank & Trust Co., 129 P. 470.

### VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 277 (Ok.) Mere purchase of an equity of redemption in mortgaged land does not make the purchaser liable personally for the mortgage debt.—Van Eman v. Mosing, 129 P. 2.

No personal obligation rests on the purchaser of mortgaged land to pay the mortgage debt,



unless he assumes it by agreement or by retaining the amount from the price, or otherwise clearly makes the debt his own.—Id.

### IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 374 (Colo.App.) Where the notice of a trustee's sale recited that the trustee at the request of the owner of the promissory bond gave public notice, a copy of the advertisement being inserted in the deed, that instrument is not invalid on the ground that there was no recital that the legal holder of the notes requested a sale.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 245.

### X. FORECLOSURE BY ACTION.

#### (B) Right to Foreclose and Defenses.

§ 411 (Wash.) A personal judgment on mortgage notes is not res judicata, precluding a subsequent action to foreclose the mortgage lien to recover that part of the debt not paid by the personal judgment.—*Citizens' Nat. Bank of Seattle v. Abbott*, 129 P. 1085.

#### (C) Jurisdiction and Venue.

§ 422 (Wash.) Where separate mortgages are given upon land in separate counties, each securing a part of the mortgagor's debt, there must be separate foreclosures in the respective counties.—*Citizens' Nat. Bank of Seattle v. Abbott*, 129 P. 1085.

#### (D) Judgment or Decree and Execution.

§ 494 (Cal.App.) A decree foreclosing a mortgage and directing a sale of the premises need not direct, though it may properly do so, that the possession thereof shall be delivered to the purchaser at the sale; and neither the presence or absence of such a direction affects the jurisdiction of the court to put the purchaser in possession.—*Hibernia Savings & Loan Society v. Brittan*, 129 P. 797.

§ 497 (Wash.) Where lands in A. and K. counties were separately mortgaged, each mortgage securing half of an indebtedness, and the decree foreclosing the mortgage on the K. county land recited the other mortgage, and the amount due thereon, and adjudged that the K. county land be sold to satisfy the mortgage foreclosed, *held* that the decree did not preclude a subsequent foreclosure of the A. county mortgage.—*Citizens' Nat. Bank of Seattle v. Abbott*, 129 P. 1085.

#### (J) Sale.

§ 543 (Cal.App.) A provision in a mortgage foreclosure decree that the purchaser, on the production of his deed for the premises, shall be entitled to possession, and that if refused a writ of assistance shall issue without notice, does not give the purchaser the right to possession until the time for redemption is past.—*Hibernia Savings & Loan Society v. Brittan*, 129 P. 797.

A purchaser at a mortgage foreclosure sale does not acquire the right to the possession of the premises until the time for redemption has expired.—Id.

#### (K) Deficiency and Personal Liability.

§ 559 (Okla.) Where a purchaser of an equity of redemption of mortgaged land has not made the debt his own, a deficiency judgment cannot ordinarily be rendered against him in a suit on the debt, or to foreclose the mortgage.—*Van Eman v. Mosing*, 129 P. 2.

### XI. REDEMPTION.

§ 605 (Idaho) Evidence *held* to support a finding that plaintiff had made a legal tender of the amount necessary to effect a redemption of certain property from mortgage foreclosure.—*Kelley v. Clark*, 129 P. 921.

Where a valid tender of money necessary to redeem from a mortgage foreclosure sale is

made to a purchaser under Rev. Codes, § 4494, providing that such tender extinguishes the purchaser's interest, the purchaser on refusing the tender is remitted to his action at law for recovery of the money remaining due on the debt.—Id.

Under Rev. Codes, § 4494, providing that a tender of money to redeem from foreclosure is equivalent to payment if the purchaser refuses to accept a lawful tender, the tender discharges the lien, and the debtor is not required to keep the tender good.—Id.

Within Rev. Codes, § 4494, relating to redemptions, and providing that a tender is "equivalent to payment," the phrase "equivalent to payment," since "equivalent" is defined as equal in value, force, power, and effect.—Id.

§ 608½ (Kan.) Where a grantor seeks to declare a deed in effect a mortgage, he will not be credited with usurious interest which he claims was exacted from him.—*Walter v. Calhoun*, 129 P. 1176.

### MOTIONS.

See Criminal Law, § 696; Executors and Administrators, § 72; Pleading, §§ 347, 369; Venue, §§ 58, 63.

§ 23 (Cal.) Want of notice of motion is not waived by merely appearing and opposing its consideration because of the insufficient notice.—*Bohn v. Bohn*, 129 P. 981.

### MUCKERS.

See Master and Servant, § 181.

### MUNICIPAL CORPORATIONS.

See Bridges, § 37; Constitutional Law, §§ 241, 297; Counties; Courts, § 42; Dedication, § 65; Eminent Domain, §§ 28, 45, 106, 274, 275; Evidence, §§ 83, 113, 142; Injunction, §§ 7, 74; Intoxicating Liquors, §§ 11, 258; Judgment, § 719; Mechanics' Liens, §§ 3, 33, 231; Negligence, § 6; Railroads, §§ 49, 98; Schools and School Districts; Statutes, § 120; Street Railroads; Telegraphs and Telephones, § 33; Towns; Waters and Water Courses, §§ 179, 203.

### I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

#### (A) Incorporation and Incidents of Existence.

§ 18 (Or.) County court's finding that port had been duly and legally organized and incorporated as a municipal corporation *held* conclusive as to every fact necessary to make a valid corporation including the location of its boundaries, and hence the inclusion of land could not thereafter be contested by quo warranto.—*State v. Port of Bay City*, 129 P. 496.

#### (B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 23 (Or.) Under L. O. L. § 6115, concerning organization of ports, land near the summit of the dividing ridge between two drainage basins may properly be included in the corporation covering the drainage basin toward which its general trend or inclination is, even though rivulets thereon flow in the other direction.—*State v. Port of Bay City*, 129 P. 496.

§ 34 (Or.) Const. art. 11, § 2, as amended (Laws 1911, p. 10), granting to the voters of municipalities the power to enact and amend their charters, did not authorize a city to annex territory without approval of the voters in the annexed district, and hence a vote from which it could not be determined that the voters of such territory had approved annexation was invalid.—*Landess v. City of Cottage Grove*, 129 P. 537.

Under the constitutional provision for local

self-government, the people of a district have a right to express themselves upon the question of their annexation to a municipality.—Id.

## II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 63 (Kan.) The power of a city to open a street through a railway embankment obstructing it, leaving the railway tracks upon a viaduct, is not a judicial question; and the courts can interfere only because of some constitutional impediment or lack of legislative authority, or because the conduct of the city is so arbitrary and subversive of private rights as to indicate an abuse of power.—City of Emporia v. Atchison, T. & S. F. Ry. Co., 129 P. 161.

## III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 78 (Kan.) The mayor and council of cities of the second class have no authority to contract for telephone rates for public service for a term of years, after the state by direct legislation or through a commission or other lawfully delegated authority has acted on the subject.—City of Emporia v. Emporia Telephone Co., 129 P. 187.

## IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

### (A) Meetings, Rules, and Proceedings in General.

§ 80 (Okla.) Under Laws 1910-11, c. 136, and the acts of which the same is an amendment, two councilmen are provided for each ward in all cities of the first class.—State v. Perkins, 129 P. 730.

## V. OFFICERS, AGENTS, AND EMPLOYÉS.

### (A) Municipal Officers in General.

§ 149 (Okla.) Where no election is held at the time fixed by law, a city councilman, appointed to fill an unexpired term, holds until his successor is elected and qualified.—State v. Perkins, 129 P. 730.

§ 162 (Cal.App.) The percentage allowed to a city treasurer, under Municipal Corporation Act, § 878, is to be computed on the amount paid out by him from that which has been received.—City of Sierra Madre v. Lehmer, 129 P. 287.

## VII. CONTRACTS IN GENERAL.

§ 231 (Wash.) Where councilmen were landowners under a reclamation project outside a city, and with other landowners subscribed to a contract between the company and the city, and thereby obtained six more acre inches of water free, such contract, which was entered into by such council, was void under Rem. & Bal. Code, § 7702.—Gantenbein v. City of Pasco, 129 P. 374.

§ 241 (Wash.) A contract by a city cannot be objected to on the ground that it was not let to the lowest bidder, in the absence of a showing of fraud.—Gantenbein v. City of Pasco, 129 P. 374.

## IX. PUBLIC IMPROVEMENTS.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

§ 293 (Cal.) A resolution of intention to extend a street over tide lands to the western boundary line of state tide lands was not fatally defective because a landowner could not tell from the resolution alone whether his land was affected.—West Berkeley Land Co. v. City of Berkeley, 129 P. 281.

§ 294 (Cal.) Where the extension of a street over tide lands was contemplated, the posting of notices anchored on floats out in the water,

so that they appeared between two and three feet above the surface, was proper.—West Berkeley Land Co. v. City of Berkeley, 129 P. 281.

Where notices of proceedings to extend a street over tide lands were anchored in the water, it would not be presumed that they did not remain during the period contemplated for posting.—Id.

### (C) Contracts.

§ 347 (Wash.) A materialman's letters, which merely notified the treasurer of a library board of a bill for material furnished the contractor and requested prompt settlement, held not a sufficient notice, within Rem. & Bal. Code, § 1161, requiring written notice of claim to be filed with the board, acting for a municipality, to fix liability on contractor's bond.—Robinson Mfg. Co. v. Bradley, 129 P. 382.

Actual notice to sureties that a materialman's bill for material furnished a public library building contractor was unpaid held insufficient to comply with Rem. & Bal. Code, § 1161, requiring written notice to the municipal board of the material furnished and the amount due, and of an intention to look to the bond for reimbursement.—Id.

§ 358 (Wash.) Decision of board of public works and city engineer that a street improvement was properly performed under the contract held conclusive on all interested parties.—Hutchinson v. City of Spokane, 129 P. 892.

§ 365 (Or.) Where a city council accepts a street improvement, its decision that the improvement complies with the contract is, in the absence of fraud, conclusive on the property owners.—Hendry v. City of Salem, 129 P. 531.

### (D) Damages.

§ 402 (Or.) On appeal to circuit court from Portland city council's action in adopting viewer's report of damages from street opening, damages held to be determined as of the date of the date of the city council's action.—City of Portland v. Tigard, 129 P. 755.

### (E) Assessments for Benefits, and Special Taxes.

§ 445 (Or.) Where the proceedings for making a street improvement were regular, and the city council had jurisdiction to order the improvement and to enter into the contract, mere irregularities in the method of carrying on the work did not release the property owners from the obligation of paying their assessments.—Hendry v. City of Salem, 129 P. 531.

§ 450 (Cal.) An assessment district, described as bounded by a specified street, held sufficient though it appeared that the owner, after making a dedicatory plat of the street, and after it had been accepted, attempted to revoke the dedication.—West Berkeley Land Co. v. City of Berkeley, 129 P. 281.

§ 487 (Cal.) Residents of an assessment district, but who were not owners of land sought to be condemned for the extension of streets over tide land, could not object to the method of posting notices.—West Berkeley Land Co. v. City of Berkeley, 129 P. 281.

§ 513 (Or.) Property owners held not entitled to relief against special assessment for street improvement because their property was described as the property of other persons in the notices of the improvement, where other plaintiffs were joined who had no such ground for relief.—Hendry v. City of Salem, 129 P. 531.

## X. POLICE POWER AND REGULATIONS.

### (A) Delegation, Extent, and Exercise of Power.

§ 605 (Colo.App.) Under Rev. St. 1908, § 6525, par. 45, conferring upon municipal corporations the authority to declare what shall be

a nuisance and to abate it, declaration by a municipal ordinance that an incorporated club which sells intoxicating liquor contrary to law is a nuisance is conclusive.—*Houston v. Walton*, 129 P. 263.

## **XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**

### **(A) Streets and Other Public Ways.**

§ 671 (Or.) An abutting owner suffers special damages from the obstruction of a street immediately in front of his premises, and may maintain a suit in equity for its removal.—*Bernard v. Willamette Box & Lumber Co.*, 129 P. 1039.

In a suit by an abutting owner to compel removal of obstruction from street or highway, that the place is a street or highway need be proved only by a preponderance of the evidence.—*Id.*

The owner of a lot abutting on a street is entitled to a mandatory injunction for the removal of an elevated roadway in the street obstructing ingress to and egress from his lot.—*Id.*

§ 697 (Or.) A state or a municipal corporation may maintain a suit for a mandatory injunction to compel the removal of obstructions from public streets independent of statute.—*Bernard v. Willamette Box & Lumber Co.*, 129 P. 1039.

§ 705 (Wash.) A person riding a bicycle or some other vehicle or standing or moving is entitled to the protection of an ordinance making it unlawful for an automobile to cross over any crossing or sidewalk at a speed greater than four miles an hour when any person is upon the same.—*Ludwigs v. Dumas*, 129 P. 903.

§ 706 (Wash.) Whether one injured by being struck by defendant's automobile while crossing a street on a bicycle should have seen defendant and avoided the automobile held a jury question.—*Ludwigs v. Dumas*, 129 P. 903.

Whether defendant in such case should have seen plaintiff, and avoided striking him, held a jury question.—*Id.*

## **XII. TORTS.**

### **(D) Defects or Obstructions in Sewers, Drains, and Water Courses.**

§ 835 (Okla.) Where a city in grading streets diverted surface water, and negligently failed to provide sufficient sewer outlets for it, causing the same to back up and overflow abutting premises which were above the established grade, the city was liable to the abutting owner for the damages sustained.—*City of Ardmore v. Orr*, 129 P. 867.

§ 845 (Okla.) Where a city in improving streets diverted surface water, so that the sewers provided were insufficient, and it overflowed and damaged abutting property, the defect being remedial, it was error to authorize the jury to consider as an element of plaintiffs' damages, loss of future rents, and depreciation in value.—*City of Ardmore v. Orr*, 129 P. 867.

## **XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**

### **(A) Power to Incur Indebtedness and Expenditures.**

§ 863 (Idaho) The word "liability," as used in Const. art. 8, § 3, limiting the liability of cities, means the state of being bound or obligated in law or justice to do, pay, or make good something.—*Feil v. City of Cœur d'Alene*, 129 P. 643.

§ 864 (Idaho) Where a city, already indebted to the limit prescribed by Const. art. 8, § 3, passed an ordinance for the issuance of \$180,000 of water bonds, and agreed to maintain rates to pay the expenses of the works, 6 per cent. on the bonds and the principal in 20 years, such bonds constituted a liability of the

city, and were invalid under such section.—*Feil v. City of Cœur d'Alene*, 129 P. 643.

Though a city, under Const. art. 8, § 3, may anticipate both income and revenue, and incur debts or liabilities to be subsequently discharged out of the income and revenue for the current year, it has no right to hypothecate income or revenue for a special purpose for 20 years in advance.—*Id.*

§ 864 (Wash.) The debt limit for cities contained in Const. art. 8, § 6, does not apply to mandatory obligations under the Constitution and laws, or to those necessary to the city's corporate existence.—*Patterson v. City of Edmonds*, 129 P. 895.

Expenditures by a city held to relate rather to its welfare than to the maintenance of its corporate existence, and hence the creation of indebtedness in excess of the constitutional limit was not justified.—*Id.*

The creation of indebtedness in excess of the constitutional debt limit held justified on the ground of necessity provided the expenditures were reduced to a bare necessity, without which the city government could not be carried on.—*Id.*

An indebtedness may be created by a city in excess of the constitutional debt limit for the expense of holding city elections, for the salaries of necessary municipal officers, and for supplies necessary to carry on the city government.—*Id.*

### **(E) Rights and Remedies of Taxpayers.**

§ 1000 (Wash.) In an action to restrain the issuance and delivery of municipal bonds, the court had no power to "approve and confirm" the action of the municipal authorities in issuing and selling the bonds.—*Patterson v. City of Edmonds*, 129 P. 895.

## **MURDER.**

See Homicide.

## **MUTUAL BENEFIT INSURANCE.**

See Insurance, §§ 755, 819.

## **MUTUAL COMBAT.**

See Homicide, § 114.

## **NAMES.**

See Adoption, § 20; Judgment, § 17.

§ 16 (Colo.App.) The names "Monson" (pronounced as if spelled "Munson") and "Munson," are idem sonantia, and the variance is immaterial; not having a tendency to mislead.—*Webster v. Heginbotham*, 129 P. 569.

A lis pendens or notice of suit against "J. Fred Munson," duly recorded, containing a description of the land in suit, and complying in all respects with the statutory provisions, was constructive notice of the suit to a subsequent purchaser from "John F. Monson."—*Id.*

## **NECESSARIES.**

See Infants, § 50.

## **NEGLIGENCE.**

See Assignments, § 24; Carriers, §§ 247, 280-333, 405; Constitutional Law, § 205; Death, §§ 9, 14, 99; Electricity, §§ 14-19; Evidence, § 119; Highways, §§ 172-213; Innkeepers; Master and Servant, §§ 89-330; Mortgages, § 199; Municipal Corporations, §§ 703, 706, 835; New Trial, § 108; Physicians and Surgeons, § 18; Railroads, §§ 214-482; Street Railroads, §§ 84, 98, 100, 103, 117; Trial, § 296.

## **I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**

### **(A) Personal Conduct in General.**

§ 6 (Or.) A contractor neglecting to provide temporary floor as required by Laws 1911, p.

16, § 1, and a city ordinance, *held* liable for injury to a plumber from falling brick.—*Morgan v. Bross*, 129 P. 118.

A contractor could not escape liability for his neglect in failing to construct a temporary floor, as required by Laws 1911, p. 16, § 1, and the city ordinance, by showing that a carpenter had agreed to construct such floor.—*Id.*

The violation of a city ordinance requiring the laying of temporary floors in buildings under construction is negligence *per se*.—*Id.*

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 32 (Utah) A gas company maintaining an office for the payment of gas bills *held* only bound to exercise ordinary care to provide a reasonably safe place for customers.—*Quinn v. Utah Gas & Coke Co.*, 129 P. 362.

### III. CONTRIBUTORY NEGLIGENCE.

(C) Imputed Negligence.

§ 93 (Kan.) A woman with a child in her lap, riding at night in a single-seated buggy drawn by a gentle horse, driven by her husband, not attempting to exercise any control over the vehicle or the driver, is not chargeable with her husband's negligence in failing to see an automobile approaching from the side on which the husband is sitting.—*Williams v. Withington*, 129 P. 1148.

§ 93 (Utah) Defendant's negligence, if any, in operating an automobile *held* not imputable to an invitee killed while riding in the tonneau.—*Lochhead v. Jensen*, 129 P. 347.

### IV. ACTIONS.

(B) Evidence.

§ 121 (Utah) Injury to the gown of a customer of defendant gas company by ink dripping from defendant's cashier's counter *held* not to raise a presumption of negligence, under the rule *res ipsa loquitur*.—*Quinn v. Utah Gas & Coke Co.*, 129 P. 362.

§ 122 (Wash.) The burden is on defendant to establish contributory negligence, though it may be established by plaintiff's evidence.—*Benson v. English Lumber Co.*, 129 P. 403.

§ 134 (Idaho) In an action for damages caused by fire negligently set by defendant, evidence *held* to sustain findings of the jury, and judgment for plaintiff.—*Calkins v. Blackwell Lumber Co.*, 129 P. 435.

In a civil suit, where negligence is the issue, it is sufficient if the evidence, whether direct or circumstantial, creates a preponderance of proof.—*Id.*

Circumstantial evidence is legal evidence; and if facts are shown by circumstantial evidence, and reasonable men may fairly differ on the question of negligence, the verdict and finding should not be set aside.—*Id.*

§ 134 (Utah) In an action for death of an invited guest riding in defendant's automobile, evidence *held* to require a finding that the machine was not running more than 15 or 18 miles an hour at the time of the accident.—*Lochhead v. Jensen*, 129 P. 347.

Under Laws 1909, c. 113, limiting automobile speed in the country to 15 to 18 miles per hour, evidence that defendant's machine was being driven at that speed when it skidded and turned over, resulting in death of an invitee, and that the road was rough, was insufficient to justify a finding of actionable negligence.—*Id.*

(C) Trial, Judgment, and Review.

§ 136 (Idaho) Contributory negligence is a matter of defense; and, where there is a conflict of evidence, the jury are the exclusive judges of its weight and preponderance, and may determine whether the defense has been made out.—*Staah v. Rocky Mountain Bell Telephone Co.*, 129 P. 1078.

§ 136 (Okla.) Const. art. 23, § 6, providing that the defense of contributory negligence or of assumption of risk shall in all cases be left to the jury, constitutes the jury the tribunal to determine these defenses.—*Chicago, R. I. & P. Ry. Co. v. Hill*, 129 P. 13.

§ 136 (Wash.) Where the undisputed facts lead the court to a firm conviction that but one determination can be reached in the minds of reasonable men, the duty rests upon it to find as to the question of contributory negligence.—*Armstrong v. Spokane & I. E. Ry. Co.*, 129 P. 379.

§ 136 (Wash.) If the evidence conflicts on contributory negligence, or, though undisputed, fair-minded men make different inferences therefrom, the question is for the jury.—*Benson v. English Lumber Co.*, 129 P. 403.

### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

### NEWLY DISCOVERED EVIDENCE.

See Criminal Law, § 954; New Trial, §§ 104, 108, 150.

### NEWSPAPERS.

See Contempt, §§ 9, 63.

### NEW TRIAL.

See Appeal and Error, §§ 301, 302, 430, 719, 854, 856, 864, 867, 933, 977, 979, 1015, 1177, 1212; Criminal Law, §§ 922, 954; Executors and Administrators, § 315; Stipulations.

### II. GROUNDS.

(C) Rulings and Instructions at Trial.

§ 41 (Kan.) An instruction which might be misleading, but which has become immaterial by reason of the findings of the jury, is not a ground for new trial.—*Kershaw v. Schafer*, 129 P. 1137.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 56 (Kan.) Statement of a juror to other jurors that he had heard a rumor that one party to the action had offered to compromise, treated by the jury as a rumor, is not sufficient ground for reversal.—*Madison v. Kansas City, M. & O. Ry. Co.*, 129 P. 1157.

(E) Irregularities or Defects in Verdict or Findings.

§ 60 (Kan.) Where findings of the jury are incapable of being harmonized, and some of them are inconsistent with the general verdict, a new trial should be granted.—*Wood v. Union Pac. R. Co.*, 129 P. 193.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 71 (Cal.App.) The judge is not bound by the verdict of the jury where there is a conflict in the evidence in granting a new trial.—*Briggs v. Hall*, 129 P. 288.

§ 71 (Cal.App.) Where there is a conflict in the evidence, it is within the discretion of the court to grant a new trial for insufficiency of the evidence.—*Shea-Bocqueraz Co. v. Hartman*, 129 P. 807.

§ 79 (Cal.App.) Where a trial judge, after weighing the evidence, concludes that he has decided erroneously, he should, on proper presentation of the matter, grant a new trial.—*McCann v. McCann*, 129 P. 965.

(G) Surprise, Accident, Inadvertence, or Mistake.

§ 88 (Wash.) That it was evident that the testimony of a certain person might be material to plaintiff, and that such witness was not pro-

duced by him, was not ground for a new trial by defendant.—*Scandinavian American State Bank v. Downs*, 129 P. 894.

#### (H) Newly Discovered Evidence.

§ 104 (Okla.) In a suit on account for \$25 per week for services, where plaintiff recovered the full amount, newly discovered evidence that plaintiff during his term of service had admitted that he was drawing \$20 per week was new evidence, and not cumulative.—*Goldie v. Corder*, 129 P. 3.

§ 108 (Wash.) Where the plaintiff was properly held guilty of contributory negligence, newly discovered evidence as to negligence of defendant was no ground for new trial.—*Armstrong v. Spokane & I. E. Ry. Co.*, 129 P. 379.

### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 123 (Cal.App.) The refusal to allow a party to amend after issue joined can only be reviewed on a motion for a new trial, the notice of intention for which sets forth as a ground that the court has "abused its discretion by which the party was prevented from having a fair trial," under Code Civ. Proc. § 657.—*Cook v. Suburban Realty Co.*, 129 P. 801.

§ 123 (Cal.App.) A notice of intention to move for a new trial should be regarded as filed on the date tendered and received by the clerk and marked "Filed," though the clerk erases and changes the filing mark.—*McCann v. McCann*, 129 P. 965.

§ 131 (Cal.App.) The placing of a statement, on motion for new trial, in the custody of the clerk, accompanied by a payment of the fee, constitutes a sufficient filing, within Code Civ. Proc. § 659, providing that when a statement is settled it shall be filed with the clerk.—*McCann v. McCann*, 129 P. 966.

The file mark indorsed by the clerk on the statement filed on motion for a new trial is mere prima facie proof of filing; and hence failure of the clerk to indorse thereon the word "Filed," with the date, will not invalidate the statement.—*Id.*

§ 150 (Cal.) An application for a new trial for newly discovered evidence is ineffective where it is not sustained by showing that the proposed evidence was not known to the applicant at the time of the trial.—*Olaine v. McGraw*, 129 P. 460.

### NOTES.

See Bills and Notes.

### NOTICE.

See Appeal and Error, §§ 415, 422, 430, 773, 854, 882, 936; Assignments, § 68; Banks and Banking, § 143; Bills and Notes, §§ 318, 332, 344, 360, 481, 525; Carriers, § 218; Criminal Law, § 1087; Electricity, § 16; Evidence, §§ 10-34, 83; Executors and Administrators, § 72; Exemptions, § 119; Frauds, Statute of, § 143; Fraudulent Conveyances, §§ 155, 277, 301; Highways, §§ 122, 125; Insurance, §§ 128, 665; Intoxicating Liquors, § 33; Justices of the Peace, §§ 159, 164; Limitation of Actions, §§ 66, 96; Master and Servant, §§ 304, 330; Mechanics' Liens, § 99; Mines and Minerals, § 112; Money Received, § 8; Mortgages, § 374; Motions, § 23; Municipal Corporations, §§ 294, 347, 487, 513; Names, § 16; New Trial, § 123; Officers, §§ 103, 119; Principal and Surety, § 123; Reference; Statutes, § 82; Vendor and Purchaser, §§ 223-231, 265, 281; Venue, § 63; Witnesses, § 220.

### NUISANCE.

See Intoxicating Liquors, §§ 21, 258, 279, 325; Municipal Corporations, § 605.

### II. PUBLIC NUISANCES.

#### (B) Rights and Remedies of Private Persons.

§ 72 (Or.) A private party can enjoin a public nuisance only where his detriment is irreparable, or not capable of compensation in damages, but this includes wrongs of a continuing character occasioning damages estimable only by conjecture, and not by any accurate standard.—*Bernard v. Willamette Box & Lumber Co.*, 129 P. 1039.

### NUNC PRO TUNC.

See Criminal Law, § 101.

### OBJECTIONS.

See Appeal and Error, §§ 189-237, 301; Indictment and Information, § 133; Trial, §§ 84, 284.

### OBLIGATION OF CONTRACTS.

See Constitutional Law, § 186.

### OBSTRUCTING JUSTICE.

See Contempt, § 3.

### OBSTRUCTIONS.

See Highways, §§ 68, 159, 213; Injunction, §§ 35, 46, 195; Municipal Corporations, §§ 671, 697.

### OFFER.

See Rewards.

### OFFICERS.

See Banks and Banking, § 73; Bribery, §§ 1, 2; Clerks of Courts; Colleges and Universities, § 8; Counties, §§ 46, 47; Courts, § 150½; Elections, § 319; Grand Jury, § 27; Injunction, §§ 16, 74, 212; Insane Persons; Municipal Corporations, §§ 149, 162; Receivers; Schools and School Districts, §§ 47, 130; States, §§ 49, 126, 130; Statutes, § 219; Towns, §§ 31, 61; Turnpikes and Toll Roads; United States Commissioners.

### I. APPOINTMENT, QUALIFICATION, AND TENURE.

#### (A) Offices, and Power to Appoint to and Remove from Office.

§ 1 (Colo.) Officers that are neither judicial nor legislative necessarily belong to the executive department of government, and are "executive" or "administrative" officers; those terms being equivalent.—*Sheely v. People*, 129 P. 201.

§ 6 (Colo.) Railroad Commission Act 1910, amending and re-enacting Act 1907 (Laws 1907, p. 531), and providing that the railroad commissioners then in office should be the commissioners until expiration of their terms, held not invalid as creating an office, and designating the particular persons who should fill it.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 94 (Idaho) Where one accepts an office with compensation fixed by law, he has no legal claim for extra compensation, and a promise by the county board to pay him an extra fee is not binding, though he renders services and exercises a degree of diligence greater than could legally have been required.—*Robinson v. Huffaker*, 129 P. 334.

§ 103 (Or.) Persons dealing with state agents acting under a public law must take notice of the extent of their authority; a public officer having no apparent authority, as the agent for a private party has.—*State v. Des Chutes Land Co.*, 129 P. 764.

A contract by a public officer in excess of the

provisions of the statute authorizing the contract is void, so far as it departs from or exceeds the terms of the law.—Id.

§ 114 (Kan.) A public officer, in making a contract in that capacity, does not incur a personal liability unless an intention to that effect is clearly shown.—Hupe v. Sommer, 129 P. 136.

§ 116 (Kan.) A public officer who refuses to perform a duty, without which a just claim against the public cannot be paid, is personally liable to the claimant, but only to the extent of the actual loss occasioned.—Hupe v. Sommer, 129 P. 136.

§ 119 (Kan.) The measure of damages for refusal of a public officer to perform a duty, without which a just claim against the public cannot be paid, where the ultimate collection is not defeated, would ordinarily be the interest for the time payment has been delayed.—Hupe v. Sommer, 129 P. 136.

§ 119 (Okla.) An informer cannot maintain an action for damages under the first provision of Comp. Laws 1909, § 7413, against a public officer for malfeasance in office, the right being given to innocent persons suffering special damage, as distinguished from those injured generally in common with others.—McGuire v. Skelton, 129 P. 739.

Demand and notice required by Comp. Laws 1909, § 7414, before an action can be brought against an officer for official misconduct, must be served on the officers, and not on the county attorney.—Id.

## OPINION EVIDENCE.

See Evidence, §§ 471-558.

## OPINIONS.

See Courts, § 91; Grand Jury, § 15.

## OPIUM.

See Attorney and Client, § 39.

## OPTIONS.

See Brokers, § 18; Contracts, § 59; Specific Performance, §§ 28, 49, 51; Vendor and Purchaser, §§ 18, 57, 212.

## ORDERS.

See Appeal and Error; Courts, § 90.

## OWNERSHIP.

See Waters and Water Courses, § 33.

## PARDON.

See Criminal Law, § 1131.

## PARENT AND CHILD.

See Adoption; Criminal Law, §§ 1026, 1097; Death, §§ 31, 32, 42, 95, 99; Descent and Distribution, § 35; Divorce, §§ 289-311; Guardian and Ward; Habeas Corpus, §§ 85, 99; Husband and Wife, § 278; Infants.

§ 2 (Cal.App.) It does not follow from Civ. Code, § 246, subd. 2, and Code Civ. Proc. § 1750, that a child is of "tender years" within Civ. Code, § 246, until it is fourteen years of age, but sex and physical development are to be considered, and it cannot be said that as a matter of law a child 10 years old is a child of tender years.—Russell v. Russell, 129 P. 467.

§ 17 (Wash.) Where, though the custody of a minor child was awarded to the mother upon granting a divorce, no order for its support was made, it would be unjust to charge the father criminally under Rem. & Bal. Code, § 2444, for his failure to support the child.—State v. Coolidge, 129 P. 1068.

Where a divorced husband was ordered by the

court granting the divorce to pay a certain sum for the support of his minor child awarded to the wife, he could not be prosecuted for the child's nonsupport under Rem. & Bal. Code, § 2444, punishing every person who willfully neglects to provide for the support of his children under 16 years of age.—Id.

## PARI MATERIA.

See Statutes, § 225.

## PARKS.

See Dedication, §§ 53, 65.

## PAROL EVIDENCE.

See Evidence, §§ 384-461.

## PARTIES.

See Appeal and Error, §§ 415, 882, 1036; Carriers, § 313; Contracts, § 187; Criminal Law, § 59; Death, § 42; Eminent Domain, § 178; Executors and Administrators, § 423; Guardian and Ward, § 146; Infants, § 88; Judgment, § 239; Mechanics' Liens, § 263; Municipal Corporations, § 513; Partnership, § 322.

## I. PLAINTIFFS.

(A) Persons Who may or must Sue.

§ 7 (Wash.) Loan broker depositing client's money in his name as agent, and drawing checks against the deposits, which were paid on forged indorsements, held entitled to sue the bank as trustee of an express trust, under Rem. & Bal. Code, §§ 179, 180.—Goodfellow v. First Nat. Bank, 129 P. 90.

## PARTITION.

See Estoppel, § 68.

## II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 17 (Wash.) Under Rem. & Bal. Code, § 844, relating to partition, plaintiff, who should prove allegations that he had fully executed an option for the purchase of the property, without receiving a deed therefor, and that defendants had thereafter taken a quitclaim deed with notice of his rights, would be entitled to a decree quieting his title, as well as to a partition.—Crowley v. Byrne, 129 P. 113.

## PARTNERSHIP.

See Action, § 38; Banks and Banking, § 143; Evidence, § 208; Frauds, Statute of, §§ 56, 129; Reference; Specific Performance, § 14; Witnesses, § 275.

## I. THE RELATION.

(A) Creation and Requisites.

§ 1 (Cal.App.) An agreement whereby persons associate themselves together to conduct a certain business is a contract of partnership within Civ. Code, § 2395, defining partnerships.—Doudell v. Shoo, 129 P. 478.

§ 3 (Cal.App.) To constitute a partnership, it was not necessary that there be a joint ownership of the property used in carrying on the business.—Doudell v. Shoo, 129 P. 478.

§ 11 (Cal.App.) Under Civ. Code, § 2404, providing that an agreement to divide profits implies an agreement to divide losses, a contract may be a partnership agreement, though it provides merely for a division of the profits, and not of the losses.—Doudell v. Shoo, 129 P. 478.

§ 12 (Or.) Persons engaged in buying, selling, and improving real estate, sharing in the profits and losses, are partners.—Ball v. Danton, 129 P. 1032.

§ 20 (Cal.App.) Where two persons associate themselves together, and purchase real property for use in their business, and make part payments from the profits and rents, and it is agreed that the real property shall become a part of the copartnership assets, they are partners within Civ. Code, § 2395, defining partnerships, though one partner advances a considerable sum to make a payment on the real estate.—Doudell v. Shoo, 129 P. 478.

(B) As to Third Persons.

§ 34 (Wash.) Persons holding themselves out as partners, so as to induce others to deal with them, and give credit to them as such, are deemed partners as to such third persons, though not as between themselves.—Downie v. Savage, 129 P. 1096.

§ 35 (Wash.) That letters and supplies came to the sawmill camp in which defendant S. and his brother worked, addressed to "S. Brothers" to S.'s knowledge, did not constitute S. a partner by estoppel in the sawmill business.—Downie v. Savage, 129 P. 1096.

§ 37 (Wash.) To establish a partnership by estoppel with reference to third persons, the one sought to be found must do something which induces such third persons to rely on the existence of the relation to their detriment.—Downie v. Savage, 129 P. 1096.

Facts and acts existing and occurring after plaintiff's employment by an alleged firm could not be relied on to hold any members of the alleged firm as partners by estoppel, on the ground that such acts induced plaintiff to deal with the alleged partners as such.—Id.

(C) Evidence.

§ 56 (Wash.) Evidence in an action against defendants as copartners held to sustain a finding that one of defendants did not hold himself out to creditors as a partner, or expressly or impliedly assume such relation.—Downie v. Savage, 129 P. 1096.

#### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(C) Application of Assets to Liabilities.

§ 181 (Or.) Firm debts must be paid out of the firm property before any part thereof may be applied to the debts of individual partners, and a creditor of a partner has no right to any more of the firm property than the actual interest of the partner therein.—Ball v. Danton, 129 P. 1032.

§ 189 (Or.) A partner may settle the firm affairs by buying the interest of his copartner to escape litigation over a claim about to be brought against the latter, and the transfer may not be attacked as in fraud of creditors of the copartner.—Ball v. Danton, 129 P. 1032.

(D) Actions by or Against Firms or Partners.

§ 217 (Or.) Evidence held not to show that a conveyance by a debtor to a brother, in settlement of their rights as partners in a business, was in fraud of a creditor of the debtor.—Ball v. Danton, 129 P. 1032.

#### VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

§ 322 (Cal.App.) Person to whom supplemental complaint alleged real property belonging to partnership had been conveyed by defendant partner held properly joined as defendant in action for accounting.—Doudell v. Shoo, 129 P. 478.

§ 327 (Cal.App.) An averment in an action for a partnership accounting that under the partnership agreement real estate purchased "should be and become partnership assets" meant that it should become such upon its acquisition, and

not that it should become such only when fully paid for.—Doudell v. Shoo, 129 P. 478.

A complaint which alleged that the property used in the partnership business was to be paid for out of the profits of the business and rents from the real property, and that payments on the purchase price of land had been made from such rents and profits, sufficiently alleged that plaintiff was to have an interest in the property.—Id.

§ 342 (Cal.App.) Where, in an action for a partnership accounting, the principal issue was whether there was a copartnership agreement, and, if there was, whether the partners had entered upon the execution of its terms, the question of the duration of the partnership was not involved and the court's finding thereon was immaterial.—Doudell v. Shoo, 129 P. 478.

#### PARTY WALLS.

§ 10 (Okla.) Evidence held to sustain a finding that plaintiff, a contractor, agreed to pay for party walls on one of the buildings to be erected by him not adjoining defendant's building but for the cost of which he was liable.—Gross Const. Co. v. Hales, 129 P. 23.

#### PASSENGERS.

See Carriers, §§ 238-408.

#### PATENTS.

See Mines and Minerals, §§ 9, 38, 41-44; Public Lands, § 103.

#### X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Licenses and Contracts.

§ 215 (Cal.App.) A contract which required defendant to transfer to a corporation all his patent rights, and sell plaintiff one-fourth of the capital stock, in consideration of a certain sum, did not contemplate that plaintiff take any interest in the patent, except through his stock, and defendant could, because owning a majority of the stock, sell the patent rights through the corporation.—Butterfield v. Harris, 129 P. 614.

In determining plaintiff's interest in patent rights conveyed to a corporation by defendant under an agreement to transfer one-fourth of the stock to plaintiff, and that an indebtedness of defendant should be paid to him by the corporation, it should be considered as a charge on the stock, especially where the corporation had no assets other than the patents.—Id.

#### PAUPERS.

See Justices of the Peace, § 159.

#### PAYMENT.

See Account Stated, § 18; Adverse Possession, §§ 93, 110; Appeal and Error, § 1058; Attorney and Client, § 149; Banks and Banking, §§ 143, 148; Contracts, § 322; Frauds, Statute of, § 95; Mortgages, § 605; New Trial, § 131; Vendor and Purchaser, §§ 187, 334; Work and Labor, § 30.

#### III. OPERATION AND EFFECT.

§ 52 (Mont.) A voluntary payment by a third person, without request or duty to make it, extinguished the claim, so that the creditor has no claim which he can afterwards assign.—Penwell v. Flickenger, 129 P. 323.

Where plaintiff, merely because he had induced a company to buy an automobile of defendants and pay for it, and they had not delivered it, bought for the company another automobile from another, for less money, and paid it the difference, this constituted a payment of their debt as regards any further right of the company.—Id.

#### IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 63 (Mont.) Plaintiff suing on an assignment of a claim, and having the burden of sustaining his action, the fact of the extinguishment of the claim by payment before assignment, when shown by the evidence, availed defendant without being pleaded.—*Penwell v. Flickenger*, 129 P. 323.

§ 65 (Wyo.) Where a buyer of goods agreed to pay the seller's indebtedness to a certain creditor, and admitted by his answer in an action by the seller for breach of the agreement that plaintiff was indebted to that creditor, and alleged payment, he had the burden of proving payment.—*Chapman v. Carrothers*, 129 P. 434.

§ 70 (Wash.) In action on a note, more than 20 years overdue, against the decedent's estate, evidence of financial condition of decedent and payments made more than the amount of the note was admissible as tending to show payment.—*McAllister v. Chambers*, 129 P. 85.

§ 73 (Wyo.) Evidence in an action for a breach of a contract by a buyer of goods to pay and discharge certain liabilities of the seller to third parties, defended on the ground of payment, *held* sufficient to sustain a judgment for plaintiff.—*Chapman v. Carrothers*, 129 P. 434.

#### PENALTIES.

See Insurance, § 349.

#### PENDENCY OF ACTION.

See Abatement and Revival, § 17.

#### PERFORMANCE.

See Contracts, §§ 278-322.

#### PERJURY.

#### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 11 (Okl.Cr.App.) It is sufficient if the evidence is material to any proper matter of inquiry, and is calculated to bolster the testimony of a witness on some material point, or to support the credibility of such witness.—*Metcalf v. State*, 129 P. 675.

#### II. PROSECUTION AND PUNISHMENT.

§ 34 (Okl.Cr.App.) In a prosecution for perjury, the falsity of defendant's evidence may be established by circumstantial evidence sworn to by at least one credible witness and supported by corroborating evidence, and such as to exclude every other reasonable hypothesis than that of guilt.—*Metcalf v. State*, 129 P. 675.

#### PERSONAL INJURIES.

See Abatement and Revival, § 54; Assignments, § 24; Carriers, §§ 247, 280-333; Damages, §§ 33, 130, 158; Electricity, §§ 14-19; Highways, §§ 172-213; Husband and Wife, § 209; Innkeepers; Master and Servant, §§ 89-330; Municipal Corporations, §§ 705, 706.

#### PERSONAL LIABILITY.

See Officers, § 116.

#### PETITION.

See Pleading; Schools and School Districts, § 97; Wills, § 277.

#### PHYSICAL EXAMINATION.

See Witnesses, § 268.

#### PHYSICIANS AND SURGEONS.

See Evidence, §§ 506, 553, 558.

§ 6 (Okl.Cr.App.) A person who has been regularly licensed to practice medicine, but has failed to record his certificate in the county where he resides, cannot be convicted under Comp. Laws 1909, § 4256, for practicing without a license, but may be prosecuted under section 4252 for failure to record his license.—*Wilson v. State*, 129 P. 82.

A certificate to practice medicine, properly authenticated, is admissible in evidence on behalf of one charged with practicing without authority, and is a complete defense to a prosecution under Comp. Laws 1909, § 4256.—*Id.*

§ 11 (Kan.) Where the State Board of Dental Examiners revokes a dentist's license for alleged misconduct, a finding, in an action to enjoin the enforcement of the order, that the members of the board acted honestly requires a judgment sustaining their decision, notwithstanding a further finding that their action was oppressive.—*Richardson v. Simpson*, 129 P. 1128.

The making of a promise, without intent to perform, may amount to a false statement as to an existing condition within Gen. St. 1909, § 7991, authorizing the revocation of a dentist's license where he has obtained money by false representations.—*Id.*

In Gen. St. 1909, § 7991, authorizing the revocation of a dentist's license for specific offenses, the additional phrase, "or for any other dishonorable conduct," is not void for indefiniteness.—*Id.*

The enforcement of the order of the Board of Dental Examiners revoking a dentist's license will not be enjoined for any informalities in the complaint made, or in the conduct of the investigation, where he is advised of the nature of the accusation and given a fair opportunity to prepare and present his defense.—*Id.*

§ 18 (Wash.) Testimony of competent witness as to whether treatment given plaintiff by physician was the usual and customary treatment should have been admitted, in an action for malpractice.—*Klodek v. May Creek Logging Co.*, 129 P. 99.

In an action for improper treatment of a knee, the admission in evidence of a newspaper advertisement describing defendant's specialty as "Eye and Nose" was not error.—*Id.*

§ 18 (Wash.) In action for malpractice, evidence *held* to make a question for the jury as to defendant's failure to exercise the diligence required.—*Taylor v. Kidd*, 129 P. 406.

A physician or surgeon is liable only for the injury and suffering caused by his unskillful or negligent treatment, and not for that caused by the original injury.—*Id.*

#### PIPE LINES.

See Eminent Domain, § 28.

#### PLATS.

See Appeal and Error, § 907.

#### PLEA.

See Criminal Law, §§ 276, 1088.

#### PLEADING.

See Abatement and Revival, §§ 17, 77; Action, §§ 38-57; Adverse Possession, § 110; Agriculture, § 15; Appeal and Error, §§ 91, 193, 864, 867, 927, 1039, 1170, 1212; Bills and Notes, §§ 332, 481; Bonds, § 128; Brokers, § 82; Clerks of Courts, § 66; Contempt, §§ 58, 61; Contracts, § 138; Corporations, §§ 557, 625; Courts, § 40; Damages, § 158; Divorce, §§ 91, 104; Estoppel, §§ 3, 110; Evidence, § 208; Executors and Administrators, §§ 194, 222; Fraud, § 50; Fraudulent Conveyances, § 269; Gifts, § 78; Highways, § 68; Indictment and Information; Injunc-



tion, §§ 118, 122; Insurance, §§ 634, 645, 686; Judgment, §§ 106, 107; Landlord and Tenant, § 22; Limitation of Actions, §§ 32, 182; Mandamus, § 154; Master and Servant, § 261; Mechanics' Liens, §§ 271, 277; Mines and Minerals, § 38; Money Paid, § 8; Money Received, § 17; Partnership, § 327; Payment, § 63; Physicians and Surgeons, § 11; Principal and Agent, § 189; Quieting Title, § 34; Railroads, § 188; Replevin, § 69; Trial, § 251; Trover and Conversion, § 32.

### I. FORM AND ALLEGATIONS IN GENERAL.

§ 1 (Or.) In equity as at law, the office of a pleading is to inform defendant of plaintiff's cause of suit or defendant's grounds of defense.—*Ball v. Danton*, 129 P. 1032.

§ 8 (Ariz.) An allegation that a debt "was due and owing" was a legal conclusion and an unsatisfactory plea of nonpayment.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

§ 8 (Cal.App.) Statement of complaint in action for accounting that parties "entered into a parol contract of copartnership" was not objectionable as a mere legal conclusion.—*Doudell v. Shoo*, 129 P. 478.

§ 8 (Mont.) In action for breach of warranty, an allegation that real estate in another state was subject to a tax or assessment duly assessed and confirmed, which was "a lien and incumbrance by law," is but a mere legal conclusion, and any statute of that state allowing levy of such taxes or assessments to be liens or incumbrances should be set forth.—*Ridpath v. Heller*, 129 P. 1054.

### III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

#### (A) Defenses in General.

§ 85 (Or.) Where an answer tendered could have been prepared in an hour, and no reasonable excuse was shown for delay of several weeks in its preparation and service, an order requiring bond for any judgment plaintiff might recover as a condition for permitting an answer out of time was "just" within L. O. L. § 103, providing that the court may allow an answer out of time upon such terms as may be just.—*Kosher v. Stuart*, 129 P. 491.

§ 93 (Colo.) Separate defenses need not be consistent with each other.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

#### (C) Traverses or Denials and Admissions.

§ 129 (Cal.App.) Facts alleged in a verified complaint, and not denied by the answer, are deemed admitted.—*Rose v. Leland*, 129 P. 599.

§ 129 (Colo.) An answer admitting that some one, to defendant unknown, delivered to it a trunk at 1673 Broadway, but as to whether plaintiff was the owner defendant had no sufficient information upon which to base a belief, did not admit the receipt of plaintiff's trunk at 1673 Broadway, but left that matter in issue.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

### IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 176 (Kan.) Under Code Civ. Proc. § 134 (Gen. St. 1909, § 5727), the fact that a denial in the reply was pregnant with one or more admissions was immaterial, where the referee compelled the parties to resort to their proof as if the reply were of good character.—*Danielson v. Scott*, 129 P. 1190.

### V. DEMURRER OR EXCEPTION.

§ 192 (Cal.App.) Mere uncertainties and ambiguities in a complaint are not ground of de-

murrer.—*Olcovich v. Grand Trunk Ry. Co. of Canada*, 129 P. 290.

§ 194 (Okla.) A demurrer to an answer, in that the second clause of the first paragraph was not responsive to an allegation in the petition, that the third clause was evasive, and that another paragraph stated conclusions of law, and was not responsive to the allegations of the petition, was insufficient.—*Galbreath Gas Co. v. Lindsey*, 129 P. 45.

### VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Or.) L. O. L. § 102, allowing amendment of pleadings before submission of cause, does not give power to allow an amendment after final decree.—*Holton v. Holton*, 129 P. 532.

§ 245 (Colo.) Where the complaint, alleged defendant's agreement to carry a trunk to a certain place, which place, if changed, would not state a new cause of action or prejudice defendant, such allegation after failure of proof, might be eliminated by amendment prior to a new trial.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

§ 248 (Colo.) Where the cause of action originally alleged was to foreclose a mechanic's lien upon property against which defendant claimed a prior lien, an amendment covering certain items which were included in plaintiff's lien statement, but leaving the total amount, for which a lien was sought, less than under the original complaint, did not state a new cause of action.—*State Bank of Chicago v. Plummer*, 129 P. 819.

§ 248 (Colo.App.) Under Mills' Ann. Code, § 75 (Code Civ. Proc. § 81), authorizing amendments, it was permissible, in an action for injuries from the obstruction of a highway, to permit the complaint to be amended by adding to the allegation that the highway was wrongfully and negligently obstructed the words, "wantonly, willfully, recklessly, intentionally"; such amendment not introducing a new cause of action.—*Missouri Pac. Ry. Co. v. Atkinson*, 129 P. 566.

§ 248 (Or.) The allowing of the insertion of an allegation of the residence of the plaintiff into the complaint in a divorce case was "substantially to change the cause of suit," under L. O. L. § 102, since it changed a void proceeding to something efficacious.—*Holton v. Holton*, 129 P. 532.

§ 250 (Kan.) In an action against a prior guardian and his sureties, plaintiff praying for the amount of the bond, he was entitled to amend to conform to evidence supporting a finding for a larger sum found to be due.—*Charles v. Witt*, 129 P. 140.

§ 258 (Cal.App.) Where the answer virtually admitted the allegation of the complaint as to plaintiff's ownership of the land, and such admission stands until the trial before application for leave to amend by denying any knowledge or information sufficient to enable defendant to answer thereto, the court's denial of leave to so amend was no abuse of discretion.—*Cook v. Suburban Realty Co.*, 129 P. 801.

§ 267 (Okla.) Where a cross-petition alleged that by written contract plaintiff was to pay for certain party walls, it was not error to permit an amendment at the trial alleging that the plaintiff agreed to pay for the party walls, but that by mutual mistake the written contract did not express the real agreement, and praying for its reformation.—*Gross Const. Co. v. Hales*, 129 P. 28.

Where a cross-petition alleged that by written contract plaintiff agreed to pay for party walls, an amendment, alleging that plaintiff agreed to pay for the party walls, but that by mistake the written contract did not express the real agreement, did not change substantially, the claim or defense.—*Id.*

§ 277 (Mont.) In absence of supplemental pleadings, all issues are to be determined as of the date of the commencement of the action.—*Rairden v. Hedrick*, 129 P. 498.

### X. FILING, SERVICE, AND WITHDRAWAL.

§ 333 (Or.) Under L. O. L. § 913, subd. 5, authorizing the circuit court to make reasonable and needful rules, a rule requiring service of a pleading before filing the same is not unreasonable, and a pleading filed in violation of the rule is properly stricken.—*Kosher v. Stuart*, 129 P. 491.

### XI. MOTIONS.

§ 347 (Ok.) Where plaintiff alleged shipment under a definite verbal contract, and defendant answered by general denial and by pleading a written contract which it alleged was the only one between the parties, the overruling of defendant's motion for judgment on the pleadings because the reply, containing a general denial of new matter, was unverified, was not error.—*Atchison, T. & S. F. Ry. Co. v. Robinson*, 129 P. 20.

§ 347 (Ok.) Where plaintiff alleged shipment of race horses under a definite verbal contract, and defendant answered by general denial and by pleading a written contract which it alleged was the only one between the parties, the overruling of defendant's motion for judgment on the pleadings, because the reply containing a general denial of new matter was unverified, was not error.—*Atchison, T. & S. F. Ry. Co. v. Moore*, 129 P. 24.

§ 369 (Wash.) Complaint which alleged the death of plaintiff's decedent from defendant's failure to provide protecting timbers in a chute, and failure to provide a proper ventilating system, held to state but one cause of action, and not to require plaintiff to elect between two negligent acts.—*Davies v. Rose-Marshall Coal Co.*, 129 P. 98.

### XII. ISSUES, PROOF, AND VARIANCE.

§ 378 (Colo.) Where the first defense was a general denial, plaintiff had the burden of proving all the material allegations of his complaint, though other defenses in the answer were incomplete.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

§ 387 (Colo.App.) The proof must correspond with, and be restricted to, the pleadings.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

§ 388 (Kan.) Under Code Civ. Proc. § 134 (Gen. St. 1909, § 5727) declaring a variance immaterial unless misleading a party to his prejudice, a reply speaking in the name of a firm, and proof that one of the partners owned all the property and effects which were delivered to the defendant, are not in fatal variance.—*Danielson v. Scott*, 129 P. 1190.

### XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 407 (Utah) Where a complaint stated a cause of action and was sufficient to admit evidence of a written agreement without formal allegation thereof, any defect therein was waived by failure to object by special demurrer.—*Child v. Gillis Const. Co.*, 129 P. 356.

§ 408 (Wash.) An objection to a complaint for insufficiency may be taken at any stage of the proceedings.—*Ward v. Magaha*, 129 P. 395.

§ 422 (Ok.) Defective verification of a petition on which a restraining order was granted ex parte was waived where defendant answered to the merits without objecting to the petition.—*Galbreath Gas Co. v. Lindsey*, 129 P. 45.

§ 427 (Mont.) Where defendants pleaded plaintiff's breach, evidence of defendants' waiver of defects and acceptance will be given full con-

sideration where admitted without objection, though those affirmative defenses were not pleaded.—*Lackman v. Simpson*, 129 P. 325.

§ 433 (Ariz.) While an allegation that a debt "was due and owing" was a legal conclusion, the defect, as against a merely general demurrer, was cured by a judgment, where it does not appear that it was directly called to the attention of the court.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

Under Const. art. 6, § 22, an allegation that a debt "was due and owing," though an allegation of a conclusion, will be held cured by judgment, where the issue of indebtedness was tried out fully, and it does not appear that the court's attention was directly called to it, though there was a general demurrer.—Id.

### PLEDGES.

See Chattel Mortgages, § 159.

### POLICY.

See Insurance.

### PORTS.

See Municipal Corporations, §§ 18, 23.

### POSSESSION.

See Agriculture, § 11; Chattel Mortgages, §§ 159, 169; Forcible Entry and Detainer, §§ 9, 12; Fraudulent Conveyances, § 146; Game, §§ 3½, 7; Intoxicating Liquors, §§ 139, 226; Mines and Minerals, § 55; Mortgages, § 543.

### POSTNUPTIAL AGREEMENTS.

See Executors and Administrators, § 185.

### PRACTICE.

See Appeal and Error; Courts; Criminal Law; Trial, and other specific topics.

### PREFERENCES.

See Fraudulent Conveyances, § 115.

### PREJUDICE.

See Criminal Law, §§ 1163-1175; Homicide, § 340.

### PREMIUMS.

See Insurance, § 349.

### PRESCRIPTION.

See Adverse Possession; Highways, §§ 1, 6; Limitation of Actions.

### PRESUMPTIONS.

See Appeal and Error, §§ 907-936; Criminal Law, §§ 1141, 1144, 1163; Evidence, §§ 80, 83, 384; Highways, § 68; Statutes, § 212.

### PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, § 148; Brokers; Contribution; Corporations, §§ 330, 335, 409-425; Deeds, § 64; Easements, § 16; Embezzlement, § 5; Evidence, §§ 252, 253, 274, 317, 459; Gifts, § 78; Master and Servant, § 297; Mechanics' Liens, § 281; Landlord and Tenant, § 76; Mines and Minerals, §§ 112, 114, 117; Money Received, §§ 8, 17; Reformation of Instruments, § 23; Schools and School Districts, § 97; Witnesses, §§ 52, 56.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

§ 84 (Wash.) Principal held entitled to offset against agent's commission the amount which

he was damaged by the agent's purchasing wheat at a price, and on terms, and in part of a kind, not authorized by the principal.—*Sheeran v. Ford Grain Co.*, 129 P. 378.

Where an agent authorized to buy wheat of a certain kind purchased wheat of another kind without instructions, he was not entitled to any commission upon such purchase.—*Id.*

### III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) Powers of Agent.

§ 136 (Cal.) Agent of two corporations who received plaintiff's money for stock in one and diverted it to the other corporation held liable for its repayment to plaintiff.—*Gray v. Ellis*, 129 P. 791.

#### (B) Undisclosed Agency.

§ 143 (Utah) A contract, although in writing, if not under seal, when made in the name of the person signing it, may be sued upon by the one in whose behalf it was made.—*Child v. Gillis Const. Co.*, 129 P. 356.

Where an undisclosed principal can sue in his own name upon a contract made in the name of his agent, the defendant may set up any counterclaim or defense he may have against the agent, arising out of the contract, and which existed before he had notice of the rights of the undisclosed principal.—*Id.*

#### (C) Unauthorized and Wrongful Acts.

§ 158 (Okl.) Where loss is inflicted on one of two innocent parties by the fraud of a third party, the material question is which of the parties he was agent for, as his principal must bear the loss.—*Fish v. Bloodworth*, 129 P. 32.

#### (F) Actions.

§ 189 (Utah) Allegations, in an action on a written contract, that defendant entered upon plaintiff's land and removed gravel therefrom under the express agreement to pay for it at a certain rate, held sufficient to admit proof of the express agreement and that it was made with the plaintiff's agent for her benefit, though she was not mentioned therein.—*Child v. Gillis Const. Co.*, 129 P. 356.

§ 194 (Okl.) Where an agent procured a loan for his principal and sent a check for the proceeds to a third party, to the order of such party and the principal, and the check was paid to the third party and he absconded, instructions, in an action between principal and agent, making the case turn on whether the third party's authority from plaintiff to indorse the check was forged, were erroneous; the question of the agency of such party for the agent or principal being the controlling question.—*Fish v. Bloodworth*, 129 P. 32.

## PRINCIPAL AND SURETY.

See Appeal and Error, § 1212; Constitutional Law, § 296; Corporations, § 416; Executors and Administrators, § 533; Frauds, Statute of, § 143; Guaranty; Injunction, § 235; Justices of the Peace, § 159; Municipal Corporations, § 347; Recognizances.

### I. CREATION AND EXISTENCE OF RELATION.

#### (A) Between Individuals.

§ 10 (Utah) A building contractor's bond was enforceable though it mentioned the husband alone as obligee, while the building contract was signed by both husband and wife as owners, and though it incorrectly stated the contract price.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

It was not necessary that a building contractor's bond should mention both obligees where the land on which the house was to be erected was described in both contract and bond, and the date of the contract was given in both.—*Id.*

### II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (Cal.App.) A bond to secure the performance of a building contract attached thereto, which provided that it should be void if the contractors faithfully complied with the conditions of the contract, made the surety a party to the contract.—*Callan v. Empire State Surety Co.*, 129 P. 978.

A surety bond may incorporate by reference other contracts or written instruments, or be conditioned for the performance of agreements contained in such instruments, in which case the bonds and contracts should be construed together.—*Id.*

Under Civ. Code, § 2837, providing that, in interpreting suretyship contracts, the same rule should be observed as in other contracts, such a contract should be fairly construed to effectuate its object, not distorting the natural meaning of its language or raising unreasonable implications.—*Id.*

§ 82 (Cal.App.) Under a bond insuring performance of a building contract conditioned for compliance with the terms of the contract, the surety was liable for necessary excess cost to the owner of completing the building, on abandonment by the contractor after furnishing material and labor for which liens had been filed, as well as loss of rentals by failure to complete within the time fixed.—*Callan v. Empire State Surety Co.*, 129 P. 978.

### III. DISCHARGE OF SURETY.

§ 97 (Utah) The rule that any material alteration in the terms of the original contract releases the sureties applies only after the terms of the obligation are ascertained.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

§ 123 (Wash.) Actual notice of the principal's default to only three of the eight sureties on a bond is not binding on the other five.—*Robinson Mfg. Co. v. Bradley*, 129 P. 382.

§ 128 (Utah) A surety on the bond of a building contractor was not discharged by a supplemental agreement between the contractor and the owner, by which the contractor agreed to erect a retaining wall as compensation for defects in the performance of the building contract; the surety having consented to such supplementary contract.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

The surety on a building contractor's bond may consent to a modification of the building contract, or may ratify the modification as in the case of other contracts.—*Id.*

A surety, consenting to an agreement in compromise of a building contractor's breach and subsequently approving his repudiation of such agreement, held liable for the breach of the original contract.—*Id.*

### IV. REMEDIES OF CREDITORS.

§ 160 (Utah) Evidence of correspondence between owner and his attorney and president of bonding company held admissible upon issue whether bonding company had consented to modification of building contract.—*Christensen v. Hamilton Realty Co.*, 129 P. 412.

### PRIORITIES.

See Chattel Mortgages, §§ 138, 156; Mines and Minerals, § 38; Waters and Water Courses, § 33.

### PRIVILEGE.

See Process, § 119; Witnesses, §§ 298, 305.

### PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 34, 41, 101, 123; Witnesses, §§ 215-220.

**PROCESS.**

See Appeal and Error, § 78; Attachment, §§ 1, 219; Clerks of Courts, § 14; Contempt, § 40; Corporations, § 642; Injunction; Judgment, §§ 17, 490, 944, 951; Justices of the Peace, § 80; Taxation, § 708; Witnesses, § 2.

**I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.**

§ 1 (Cal.App.) A summons is the process whereby parties defendant are brought into court, so as to give the court jurisdiction of their persons.—*Nellis v. Justices' Court of Los Angeles Tp.*, 129 P. 472.

§ 24 (Or.) The copy of the summons served on defendant must be read in connection with the complaint attached thereto, in order to explain any apparent ambiguity in the summons; and failure of the summons to state the venue, and its statement that judgment would be taken on default, as prayed in the complaint, were defects cured by the complaint.—*First Nat. Bank v. Rusk*, 129 P. 121.

**II. SERVICE.****(A) Personal Service in General.**

§ 65 (Kan.) Where defendant's trip to Kansas City, Mo., where he was served with process, was not induced by any act of plaintiff, a mere statement by plaintiff's attorney that the contemplated action would be brought in Kansas did not show that the service in Missouri was fraudulent.—*McLain v. Parker*, 129 P. 1140.

**(C) Publication or Other Notice.**

§ 111 (Colo.App.) The provision of Civ. Code, § 45, permitting service by publication, is made from necessity, and the legal presumption that such publication has come to defendant's notice is not open to collateral attack.—*Webster v. Heginbotham*, 129 P. 569.

The code provision that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, applies to a proceeding in which the court takes jurisdiction upon service by publication.—*Id.*

**(D) Privileges and Exemptions.**

§ 119 (Nev.) A nonresident who voluntarily brought suit within the state was not, while attending on such suit, immune from being served with summons; *Rev. Laws*, § 5445, exempting persons from civil arrest while in attendance upon court, not applying.—*Tiedemann v. Tiedemann*, 129 P. 313.

**PROFITS.**

See Receivers.

**PROHIBITION.**

See Intoxicating Liquors.

**PROMISSORY NOTES.**

See Bills and Notes.

**PROOF.**

Of loss, see Insurance, §§ 128, 665.

**PROPERTY.**

See Intoxicating Liquors, § 325.

**PROVINCE OF COURT AND JURY.**

See Criminal Law, §§ 742-764; Trial, §§ 191, 194.

**PROXIMATE CAUSE.**

See Master and Servant, §§ 158, 247, 285, 289.

**PUBLICATION.**

See Process, § 111.

**PUBLIC IMPROVEMENTS.**

See Municipal Corporations, §§ 293-513.

**PUBLIC LANDS.**

See Constitutional Law, § 33; Mines and Minerals, §§ 9-44.

Waters and Water Courses, §§ 8-33.

**II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.****(B) Entries, Sales, and Possessory Rights.**

§ 39 (Okl.) Devolution of title to lots on town sites in the Cheyenne and Arapahoe country reserved for county seats by the Secretary of the Interior is governed by U. S. Rev. St. §§ 2387, 2388 (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of Kansas, as modified by Act Cong. March 3, 1891.—*League v. Town of Taloga*, 129 P. 702.

The authority to reserve not to exceed one section of land in each county in the Cheyenne and Arapahoe country for county seat purposes, conferred by Act Cong. March 3, 1891, § 17, on the Secretary of the Interior, gave him power to set aside for municipal needs such lots in the town site as, in his judgment, were necessary.—*Id.*

§ 39 (Okl.) Where a town site is entered under Rev. St. §§ 2387, 2388 (U. S. Comp. St. 1901, pp. 1457, 1458), and the town-site laws of Kansas put in force in Oklahoma by Act March 3, 1891, c. 543, § 17, 26 Stat. 1023, the probate judge takes title in trust; and where a lot is continuously in the occupancy of a prior settler he is not deprived of his right by award of the town-site commissioners and a subsequent deed by the judge to another.—*Walter Realty Co. v. Jones*, 129 P. 840.

Findings of town-site commissioners appointed by the probate judge are only advisory; and the court may, on a proper showing, re-examine the questions.—*Id.*

**(I) Proceedings in Land Office.**

§ 103 (Cal.) After a patent has issued conveying public land, no further departmental interference is legally possible, the jurisdiction of the Secretary of the Interior being limited to a request that proceedings be instituted to annul the patent.—*Southern Pac. R. Co. v. Jackson Oil Co.*, 129 P. 276.

§ 108 (Cal.) A determination by the Interior Department, approved by the Secretary, that a patent to certain public land to plaintiff railroad company was based on the supplement to an indemnity list, and not on the original selection, and covered the land in controversy, held conclusive on the courts.—*Southern Pac. R. Co. v. Jackson Oil Co.*, 129 P. 276.

**(M) Conveyances, Contracts, and Exemptions.**

§ 135 (Or.) Under Acts Cong. Aug. 18, 1894, and June 11, 1896, and Laws 1901, p. 378 (B. & C. Comp. § 3283 et seq.) §§ 2, 4, 6, and 10, the state land board, in contracting for the reclamation of desert lands, could not prevent the contractor from alienating its contractor's liens or possessory interest; and hence provisions forbidding purchase of water rights and release of liens or settlement upon the lands was void, especially in view of the act of February 24, 1909 (L. O. L. § 3860 et seq.) § 12.—*State v. Des Chutes Land Co.*, 129 P. 764.

**PUBLIC NUISANCE.**

See Nuisance, § 72.

**PUBLIC SCHOOLS.**

See Schools and School Districts.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

**PUBLIC TRIAL.**

See Criminal Law, § 635.

**PUNISHMENT.**

See Contempt, §§ 30-67; Criminal Law, §§ 1183, 1206, 1213; Jury, § 24; Sodomy.

**PUPILS.**

See Schools and School Districts, § 151.

**PURGING.**

See Contempt, § 58.

**QUALIFICATIONS.**

See Elections, § 84.

**QUANTUM MERUIT.**

See Work and Labor.

**QUESTIONS OF LAW AND FACT.**

See Criminal Law, §§ 742-764; Trial, §§ 139, 143.

**QUIETING TITLE.**

See Deeds, § 193; Estoppel, § 68; Evidence, § 274; Judgment, §§ 490, 495, 570, 744; Limitation of Actions, § 39; Mines and Minerals, § 38; Stipulations; Waters and Water Courses, § 152; Witnesses, § 159.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 7 (Idaho) Where plaintiff made a valid tender to the purchaser under mortgage foreclosure within the time required to redeem and the tender was refused, plaintiff was entitled to have his title in the land quieted as against the purchaser's interest.—Kelley v. Clark, 129 P. 921.

§ 14 (Idaho) Where plaintiff made a valid tender to redeem from foreclosure within the time required, but defendant refused the tender which was thereupon withdrawn, and within two days thereafter defendant offered to accept the same, complainant in a suit to quiet title was only entitled to a decree on condition of paying the amount required to redeem under the rule that "he who seeks equity must do equity."—Kelley v. Clark, 129 P. 921.

§ 19 (Cal.App.) A tender of the amount due on the mortgage is not a condition precedent to an action by the mortgagor against the mortgagee to determine the amount and extent of the lien under Code Civ. Proc. § 738, relative to actions to determine adverse claims.—Mentry v. Broadway Bank & Trust Co., 129 P. 470.

§ 21 (Cal.App.) An action under Code Civ. Proc. § 738, may be brought by an owner against a mortgagee to determine the amount and extent of the mortgage lien; a mortgage being an adverse claim within the statute.—Mentry v. Broadway Bank & Trust Co., 129 P. 470.

**II. PROCEEDINGS AND RELIEF.**

§ 27 (Colo.App.) The statutory action to quiet title is an action quasi in rem.—Webster v. Hegbotham, 129 P. 569.

§ 34 (Wash.) Complaint in action to quiet title and for partition held to state a cause of action under Rem. & Bal. Code, § 785, providing a cause of action for removing a cloud from title.—Crowley v. Byrne, 129 P. 113.

§ 49 (Wash.) In an action to quiet title, or in an action to remove a cloud on title brought under Rem. & Bal. Code, § 785, held, that decree quieting title might be had notwithstanding absolute invalidity of the claim or estate moved against.—Crowley v. Byrne, 129 P. 113.

**QUO WARRANTO.****II. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 34 (Nev.) The court has jurisdiction to allow a writ of quo warranto on the relation of a defeated candidate for a state office to contest the election.—State v. Baker, 129 P. 452.

§ 57 (Nev.) Under Comp. Laws, §§ 3279, 3280, the court, in quo warranto to contest an election, has authority to appoint a commissioner to count the undisputed ballots and report the actual ballots in dispute.—State v. Baker, 129 P. 452.

**RAILROADS.**

See Carriers; Commerce, § 27; Constitutional Law, §§ 62, 241, 297; Eminent Domain, §§ 2, 106, 276; Master and Servant, §§ 276, 278; Municipal Corporations, § 63; Officers, § 6; Street Railroads; Trial, § 251.

**I. CONTROL AND REGULATION IN GENERAL.**

§ 6 (Colo.) Railroad Commission Act 1910, being essentially remedial, should be liberally construed to accomplish its object.—Colorado & S. Ry. Co. v. State R. Commission of Colorado, 129 P. 506.

§ 9 (Colo.) Burden held to be on railroad company to show that resumption of traffic over an abandoned portion of its line, as directed by the Railroad Commission, would subject it to a loss.—Colorado & S. Ry. Co. v. State R. Commission of Colorado, 129 P. 506.

In determining whether resumption of traffic over an abandoned portion of a railroad, as directed by the Railroad Commission, would subject the company to a loss, interest on bonds and investments, which could not be materially different whether the road was operated or not, should not be taken into account.—Id.

**IV. LOCATION OF ROAD, TERMINI, AND STATIONS.**

§ 49 (Wash.) Under the substantially direct provisions of Laws 1911, c. 117, § 13, a railroad company could, with the city's consent, maintain a commercial side track for the exclusive use of a private shipper.—De Kay v. North Yakima & V. Ry. Co., 129 P. 574.

**VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.**

§ 98 (Kan.) The power of a city to open a street through a railway embankment obstructing it, leaving the railway tracks upon a viaduct, is not a judicial question; and the courts can interfere only because of some constitutional impediment or lack of legislative authority, or because the conduct of the city is so arbitrary and subversive of private rights as to indicate an abuse of power.—City of Emporia v. Atchison, T. & S. F. Ry. Co., 129 P. 161.

In such case the fact that the opening of another street would accommodate the interests of a street railway, and the alleged existence of a sewer in the embankment, are not valid objections to the ordinance.—Id.

§ 113 (Wash.) Railway company which, in constructing its railway, took down the fences across its right of way, permitting cattle to wander over its right of way onto adjoining land, held liable for the damages sustained.—Hubert v. Connell Northern Ry. Co., 129 P. 105.

## VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

### (A) Nature and Extent of Liabilities.

§ 159 (Colo.) Where plaintiff was employed as superintendent in the construction of a tunnel at an agreed price per month and his expenses, the expenses incurred in construction were a part of his compensation, so as to be the subject of a laborer's lien.—*State Bank of Chicago v. Plummer*, 129 P. 819.

§ 171 (Colo.) Where a railroad tunnel was to be constructed as one structure when plaintiff commenced work thereon as superintendent, and contracted by separate contracts to construct several parts of such tunnel, the work under each contract is not a separate structure, but a lien may be had upon the entire tunnel for each contract, under Rev. St. 1908, § 4027.—*State Bank of Chicago v. Plummer*, 129 P. 819.

### (B) Foreclosure of Liens and Mortgages.

§ 188 (Ariz.) In an action to enforce a mechanic's lien on a railroad, allegations that teams were furnished the contractor "for the purpose of constructing the line of railroad, and that such teams were employed for the purpose, and did construct the said line," were sufficient to show that the teams were actually used in the work.—*Arizona Eastern R. Co. v. Globe Hardware Co.*, 129 P. 1104.

## IX. OPERATION.

### (A) Duty to Operate.

§ 214 (Colo.) Railway corporations are organized for public purposes, and have been granted valuable franchises and privileges, and primarily owe duties to the public of a higher nature than that of earning large dividends for their shareholders.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

In the absence of a statute limiting its power, a railway company is vested with a wide discretion in operating its line of road, but this discretion is not absolute, and must be exercised with due regard to the public welfare.—*Id.*

A railroad company, by accepting from the state its franchise, rights, and privileges, becomes bound to operate the road when constructed in the manner and for the purpose contemplated by its charter.—*Id.*

### (B) Statutory, Municipal, and Official Regulations.

§ 223 (Colo.) Neither Const. art. 15, § 3, nor Mills' Ann. St. § 602, constituted a surrender by the state of its power to reasonably control the operation of railroad trains within its jurisdiction.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

§ 227 (Colo.) Under Railroad Commission Act 1910, §§ 2, 12, 25, 27, Railroad Commission held to have power to direct a railroad company to resume traffic over an abandoned portion of its line, and direct what freight trains shall be operated thereover, where such abandonment causes great inconvenience to the public.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

Railroad Commission Act 1910, §§ 2, 3, 5, 12, held to authorize the Railroad Commission to direct the running of passenger trains over an abandoned portion of a railroad, although the act does not expressly authorize it to direct the running of passenger trains.—*Id.*

A railroad company, operating a number of lines as one system, is not absolutely excused from operating a particular portion of its line merely because such operation will result in a loss, where the operation of its whole system produces a profit, and, where it has abandoned operation of a part of its line, it may be compelled by the Railroad Commission to resume such operation.—*Id.*

### (H) Injuries to Animals on or near Tracks.

§ 411 (Kan.) Cattle guard act, being intended to protect the owner of improved or fenced land against the depredations of domestic animals, did not impose liability on a railroad company for killing plaintiff's horses which passed from his premises across a highway over a cattle guard and onto the railroad right of way; the guard being located where the railroad entered the fenced land.—*Wood v. Union Pac. R. Co.*, 129 P. 193.

§ 415 (Okla.) In an action for killing stock on a track, it is error to instruct that the employees on the train must keep a lookout to discover animals on the track in such cases; it being the duty of the employees to exercise ordinary care to avoid injury after discovery.—*St. Louis & S. F. R. Co. v. Hardesty*, 129 P. 739.

§ 441 (Okla.) In the absence of proof that the place where animals were killed by a train was exempt from the law prohibiting their running at large, it will be presumed that they were so prohibited.—*St. Louis & S. F. R. Co. v. Hardesty*, 129 P. 739.

### (I) Fires.

§ 481 (Mont.) While the injury to grass roots from a fire caused by the negligent operation of a locomotive is one to the freehold, and the measure of damages is the difference in the value of the land, yet evidence of the time necessary for the meadow to regain its former stand of grass is admissible.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

Evidence of the value of a crop of grass lost by reason of such fire is admissible, though the injury be one to the freehold.—*Id.*

§ 482 (Mont.) In an action against a railroad company for fire caused by its negligent operation of a locomotive, evidence held to support a verdict for plaintiff.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

## RAPE.

See Criminal Law, §§ 800, 1172; Indictment and Information, § 189.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 15 (Kan.) Attempt to commit rape is not a degree of the crime of rape, but is a separate offense.—*State v. Guthridge*, 129 P. 1143.

## II. PROSECUTION AND PUNISHMENT.

### (C) Trial and Review.

§ 59 (Kan.) In a prosecution for rape, under Crimes Act, § 31, it was not necessary for the court to charge as to the offense defined in Crimes Act, § 41, which includes the offense of assault with intent to commit rape.—*State v. Guthridge*, 129 P. 1143.

## RATE.

See Constitutional Law, § 70; Telegraphs and Telephones, §§ 33, 34; Waters and Water Courses, § 203.

## RATIFICATION.

See Brokers, § 43; Corporations, § 425; Executors and Administrators, § 222.

## REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Partition; Quieting Title.

## RECEIPTS.

See Evidence, § 408.

## RECEIVERS.

See Action, § 38; Appeal and Error, § 69; Corporations, §§ 557, 605, 625.

### I. NATURE AND GROUNDS OF RECEIVERSHIP.

(B) Grounds of Appointment of Receiver.

§ 19 (Okla.) Under Comp. Laws 1909, § 5772, where the rents and profits of land in litigation are being removed, a receiver should be appointed without reference to the probable insolvency of the party against whom the proceedings are brought.—*Hughes v. Garrelts*, 129 P. 43.

## RECEPTION OF EVIDENCE

See Trial, §§ 59-89.

## RECOGNIZANCES.

§ 1 (Kan.) There is no distinction in Kansas between a "recognizance," and a "bond," but the words are used interchangeably; a "recognizance" being an acknowledgment of record of a pre-existing debt owing by the cognizors to the state as principal.—*State v. Price*, 129 P. 940.

## RECORDS.

See Adoption, § 17; Adverse Possession, §§ 82, 93; Appeal and Error, §§ 248, 520-690, 854, 928, 1003, 1010; Banks and Banking, § 73; Chattel Mortgages, §§ 97, 156; Costs, § 256; Criminal Law, §§ 430, 1087-1104, 1130, 1144; Dedication, § 53; Estoppel, § 3; Evidence, §§ 158, 178; Executors and Administrators, § 388; Grand Jury, § 27; Indians, § 27; Intoxicating Liquors, §§ 33, 233; Judgment, § 944; Limitation of Actions, § 96; Mines and Minerals, § 38; Names, § 16; Vendor and Purchaser, § 231.

## RECOUNT.

See Elections, § 299.

## REDEMPTION.

See Mortgages, §§ 277, 543, 559, 605, 608½; Taxation, §§ 697, 708.

## REFERENCE.

See Appeal and Error, § 220; Jury, § 14.

### II. REFEREES AND PROCEEDINGS.

§ 55 (Cal.App.) Where defendants had actual notice that the referee must take testimony, and, by the exercise of a little diligence, could have ascertained the time and place at which such testimony was to be taken, notice to them of such time and place was not essential.—*Doudell v. Shoo*, 129 P. 478.

§ 61 (Cal.App.) Where the failure of defendant or his attorneys in an action for a partnership accounting to attend the hearing before the referee was due to their own negligence, they could not complain that the hearing was held in their absence.—*Doudell v. Shoo*, 129 P. 478.

## REFORMATION OF INSTRUMENTS.

### I. RIGHT OF ACTION AND DEFENSES.

§ 17 (Wash.) Parties having attempted to put in writing an agreement actually entered into, but failed because of mistake of themselves or of the scrivener, the instrument may be reformed to express the true agreement.—*Silbon v. Pacific Brewing & Malting Co.*, 129 P. 581.

§ 18 (Okla.) Where, by a mistake as to the effect of the language used, a writing does not truly express the contract, equity will relieve.—*Gross Const. Co. v. Hales*, 129 P. 28.

§ 23 (Wash.) A party is not estopped to have an instrument reformed for mistake because, when it was presented to its agent for execution, he was somewhat negligent in failing to discover that it did not express the true agreement.—*Silbon v. Pacific Brewing & Malting Co.*, 129 P. 581.

### II. PROCEEDINGS AND RELIEF.

§ 31 (Wash.) Reformation of an instrument for mistake may be had in any proceeding or action in a court having equitable jurisdiction, where a party to the agreement seeks to take advantage of the mistake.—*Silbon v. Pacific Brewing & Malting Co.*, 129 P. 581.

## REFRESHING MEMORY.

See Witnesses, §§ 257, 258.

## REHEARING.

See Appeal and Error, §§ 832, 833; Criminal Law, § 1153; Habeas Corpus, § 90.

## REINSTATEMENT.

See Justices of the Peace, § 159.

## REINSURANCE.

See Insurance, §§ 684, 686.

## RELEASE.

See Easements, § 28; Executors and Administrators, § 185; Guardian and Ward, § 177; Municipal Corporations, § 445.

## REMOVAL.

See Executors and Administrators, § 35; Municipal Corporations, §§ 671, 697.

## RENDITION.

See Judgment, § 212.

## RENEWAL.

See Bills and Notes, § 430; Chattel Mortgages, § 97; Landlord and Tenant, §§ 83, 85½.

## RENT.

See Receivers.

## REPEAL.

See Statutes, §§ 158-167.

## REPLEVIN.

See Chattel Mortgages, §§ 38, 40, 172; Venue, § 32.

### III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

§ 25 (Okla.) Though under Comp. Laws 1909, § 5687, plaintiff seeking immediate possession of personalty must make the statutory affidavit and bond and procure an order of delivery, the right to maintain the action and to a trial of the main issue is not dependent upon such proceeding.—*Scott v. Smith*, 129 P. 49.

§ 46 (Colo.App.) Where the owner of intoxicating liquor which had been confiscated by the city retook it in replevin, the owner's rights were those of a bailee, who might be required to return the property to the city; and consequently, in case of destruction the owner as bailee might recover its value.—*Houston v. Walton*, 129 P. 263.

### IV. PLEADING AND EVIDENCE.

§ 69 (Okla.) Where, in replevin, the answer contains a general denial, the title of plaintiff is put in issue, and the answer states a defense.—*Bancroft-Whitney Co. v. Mayfield*, 129 P. 702.

**REPLICATION.**

See Pleading, § 176.

**REPLY.**

See Pleading, § 176.

**REPORT.**

See Appeal and Error, § 220; Counties, § 47.

**REPRESENTATIONS.**

See Exchange of Property, § 8; Fraud, §§ 11, 25.

**REQUESTS.**

For instructions to jury, see Criminal Law, §§ 825, 829; Trial, §§ 255-260.

**RESCISSION.**

See Exchange of Property, § 8; Vendor and Purchaser, §§ 102, 116, 119.

**RES GESTÆ.**

See Criminal Law, § 365; Evidence, §§ 119, 1252.

**RESIDENCE.**

See Divorce, § 91; Domicile; Venue, § 32.

**RES IPSA LOQUITUR.**

See Carriers, § 316; Negligence, § 121.

**RES JUDICATA.**

See Judgment, § 714; Mortgages, § 411.

**RESTITUTION.**

See Execution, § 455.

**RESTRICTIONS.**

See Indians, § 27.

**RESULTING TRUSTS.**

See Trusts, § 63½.

**RETROSPECTIVE LAWS.**

See Constitutional Law, § 186; Statutes, § 267.

**RETURN.**

See Elections, §§ 250-254, 259, 261.

**REVENUE.**

See Taxation.

**REVERSIONS.**

See Dedication, § 65; Wills, § 605.

**REVIEW.**

See Appeal and Error; Certiorari.

**REVIVOR.**

See Abatement and Revival, §§ 72, 77; Limitation of Actions, § 125.

**REWARDS.**

§ 11 (Kan.) Where a suspected felon is arrested without a warrant by a deputy sheriff of a county other than the one wherein the arrest is made, he is not debarred from recovering a reward therefor because he is such officer.—*Marsh v. Wells Fargo & Co. Express*, 129 P. 168.

§ 15 (Kan.) In an action to recover reward for arrest of a criminal, evidence held to show

substantial compliance with the terms thereof.—*Marsh v. Wells Fargo & Co. Express*, 129 P. 168.

**RISKS.**

See Master and Servant, §§ 203-226, 273, 288; Negligence, § 136; Sales, §§ 199, 200, 201.

**ROADS.**

See Highways.

**ROBBERY.**

See Criminal Law, §§ 763, 764; Homicide, § 308; Statutes, § 165.

**ROLLS.**

See Indians, § 18.

**RULES OF COURT.**

See Stipulations.

**SALARY.**

See Schools and School Districts, §§ 47, 145.

**SALES.**

See Assignments, §§ 18, 19, 68; Brokers, § 94; Chattel Mortgages, §§ 34, 38, 40; Contracts, §§ 59, 279; Corporations, §§ 222, 259, 335; Counties, § 204; Damages, § 62; Druggists, § 3; Elections of Remedies, § 3; Evidence, §§ 265, 408, 441; Frauds, Statute of, §§ 83, 95, 139; Indians, § 15; Intoxicating Liquors; Judicial Sales; Limitation of Actions, §§ 66, 84; Mines and Minerals, § 112; Money Paid, § 8; Municipal Corporations, § 1000; Payment, §§ 65, 73; Schools and School Districts, § 84; Set-Off and Counterclaim; Taxation, §§ 679, 697, 708, 761; Vendor and Purchaser; Waters and Water Courses, § 203; Witnesses, § 102.

**IV. PERFORMANCE OF CONTRACT.****(C) Delivery and Acceptance of Goods.**

§ 156 (Mont.) No particular formal ceremony is necessary to a delivery of property sold; any act having the effect of transferring dominion, coupled with intent to change ownership, being a "delivery."—*Rairden v. Hedrick*, 129 P. 498.

§ 166 (Wash.) Where a breeder of cattle sold four bull calves for exportation and sale in Japan, and agreed to furnish certificates of registration, his failure to furnish such certificates was a breach of the contract.—*Yamaoka v. Kloeber*, 129 P. 387.

§ 182 (Mont.) Whether the delivery of horses sold to a railway company at a particular station and the designation of the buyer as consignor and consignee in the bill of lading constituted a delivery to the buyer depended on the intention of the parties and was a question of fact for the jury.—*Rairden v. Hedrick*, 129 P. 498.

**V. OPERATION AND EFFECT.****(A) Transfer of Title as Between Parties.**

§ 199 (Kan.) A provision of a sale contract that the seller shall pay storage, interest, and insurance charges up to January 1, 1910, did not indicate that the title was not to pass, and the buyer assumed the risk until that date.—*Stewart v. Henningsen Produce Co.*, 129 P. 181.

§ 200 (Kan.) Where contract for the sale of whites and yolks of eggs provided for delivery at the buyer's option, seller to pay all charges up to January 1st for storage, insurance, and interest, and the quantity was completed and stored in good condition October 12, 1909, the



risk of any loss from deterioration from that date attached to the buyer.—*Stewart v. Henningsen Produce Co.*, 129 P. 181.

§ 201 (Kan.) Where goods contracted for are an entire quantity and there is nothing to indicate a contrary intention, the risk of loss attaches to the buyer only when the goods are all complete and ready for delivery.—*Stewart v. Henningsen Produce Co.*, 129 P. 181.

§ 214 (Kan.) A contract for the sale of goods to be produced by the seller will be prima facie construed to intend that the title is to vest in the buyer, and the right to the price accrues to the seller as soon as the contract can relate to specific ascertained goods.—*Stewart v. Henningsen Produce Co.*, 129 P. 181.

## VII. REMEDIES OF SELLER.

### (E) Actions for Price or Value.

§ 340 (Colo.) If a purchaser wrongfully refused to accept an article when tendered, such as a soda fountain, manufactured to his order after a special design, the seller may elect to hold the property for the purchaser and recover the contract price.—*Bond v. Bourk*, 129 P. 223.

§§ 343, 344 (Colo.) Though a contract for the sale of a chattel, such as a soda fountain, provided that title should not pass until the fountain was set up and accepted, upon tender of delivery and refusal, the seller may sue for the agreed price.—*Bond v. Bourk*, 129 P. 223.

## VIII. REMEDIES OF BUYER.

### (C) Actions for Breach of Contract.

§ 417 (Cal.App.) In an action for damages for breach of contract for the sale of beans, evidence held to show that the sale was conditional on the seller being able to procure beans at the agreed price.—*Channel Commercial Co. v. Hourihan*, 129 P. 947.

§ 418 (Wash.) An award of the difference between the value of animals with and without registration certificates which the seller agreed to furnish held not unreasonable, but, though large, to have been reasonably within the contemplation of the parties.—*Yamaoka v. Kloeber*, 129 P. 387.

## IX. CONDITIONAL SALES.

§ 477 (Cal.App.) Where a contract for sale upon installments provided that the title should not pass until full payment, the condition was for the sole benefit of the seller, who might waive it.—*George J. Birkel Co. v. Nast*, 129 P. 945.

## SATISFACTION.

See Payment.

## SCHOOLS AND SCHOOL DISTRICTS.

See Colleges and Universities; Judgment, § 714; Mandamus, § 79; Mechanics' Liens, § 3; Statutes, §§ 73, 95, 96, 122; Taxation, § 40.

## II. PUBLIC SCHOOLS.

### (B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 21 (Cal.) A city school district is a corporation or a quasi municipal corporation whose identity is not merged in that of the city, though its territorial limits are coterminous with those of the city.—*Wood v. Calaveras County*, 129 P. 283.

§ 22 (Cal.) Pol. Code, old section 1671, subd. 11, and Pol. Code 1909, § 1724, held valid curative acts which cured all defects in the prior organization of a union high school district.—*Wood v. Calaveras County*, 129 P. 283.

§ 28 (Cal.) High school district organized and in process of operation held a de facto district, the existence of which could not be attacked collaterally.—*Wood v. Calaveras County*, 129 P. 283.

§ 30 (Cal.) The fact that a school district is called a county high school district furnishes no reason why it should not contain less territory than a county.—*Wood v. Calaveras County*, 129 P. 283.

§ 42 (Cal.) Under Pol. Code, § 1670, subd. 20, and section 1671, it is not essential to the legal formation of a union high school district in a county having a county high school district that the latter be dissolved prior to the formation of the union district.—*Wood v. Calaveras County*, 129 P. 283.

### (C) Government, Officers, and District Meetings.

§ 47 (Colo.) Superintendent of schools for a city and county elected after the adoption of Const. art. 20, terminating her term as county superintendent, and who was required to discharge the duties of county superintendents of schools under the state laws, held not a superintendent under the state law and not entitled to salary as such.—*Lawson v. Meyer*, 129 P. 197.

### (D) District Property, Contracts, and Liabilities.

§ 65 (Wash.) A school district can purchase land on which to erect a gymnasium and construct a playground for children of the district.—*Sorenson v. Christiansen*, 129 P. 577.

§ 84 (Kan.) A contract between the school text-book commission and the author of a primary reading chart to supply the needs of the state therefor did not compel a school district board to purchase one of the charts for a district school, under Gen. St. 1909, § 7836, relating to the purchase of charts, maps, and other school apparatus.—*Pendry v. Edgar*, 129 P. 936.

### (E) District Debt, Securities, and Taxation.

§ 91 (Nev.) Act March 18, 1911 (St. 1911, c. 80) § 1, Rev. Laws, § 3617, imposing a tax of 6 cents on the \$100 for the general school fund, was impliedly repealed by Act March 20, 1911 (St. 1911, c. 133) § 135, Rev. Laws, § 3374, imposing a tax of 10 cents on the \$100 for school purposes; the statutes being irreconcilably in conflict.—*State v. Esser*, 129 P. 557.

§ 95 (Kan.) In an action by the assignee of a school order, assigned as part of the consideration of a sale of land, against the assignor, evidence held sufficient to establish the invalidity of the order for want of power in the school board to purchase the article ordered.—*Kaill v. Bell*, 129 P. 1135.

§ 97 (Kan.) Under Laws 1911, c. 257, authorizing an excess issue of school district bonds for schoolhouses on petition to the school fund commissioners, such petition has served its purpose when it has been presented to the board, and the prayer thereof granted.—*Cowles v. School Dist. No. 88, Shawnee County*, 129 P. 176.

Electors are not entitled to withdraw from the petition after it has been presented to the state board of school fund commissioners, and final favorable action taken thereon.—*Id.*

Signatures of voters may be legally attached to the petition by an agent of the petitioner.—*Id.*

Where the petition was for permission to levy the full excess school building bonds permitted by such statute, and allowed, substantially in the language of the statute, the proceedings were not invalid because not sufficiently definite as to the amount of bonds desired to be voted.—*Id.*

§ 106 (Cal.) That plaintiff had previously paid a county high school tax erroneously assessed against his property within the union high school district did not estop him from thereafter objecting to the validity of a county high school tax.—*Wood v. Calaveras County*, 129 P. 283.

**(G) Teachers.**

§ 130 (Kan.) Gen. St. 1909, § 7495, providing that county superintendents of public instruction may indorse unexpired teacher's certificates, issued in other counties, *held* to create an imperative duty to indorse the same.—*Johnson v. Connelly*, 129 P. 1192.

§ 145 (Cal.App.) In an action, for salary as a teacher against a school district, evidence *held* to warrant a finding that there was no contract of employment.—*Dougherty v. Clarke*, 129 P. 290.

**(H) Pupils, and Conduct and Discipline of Schools.**

§ 154 (Cal.) The term "district," as used in Pol. Code, § 1670, subd. 25, relating to admission to high schools of pupils residing in another district construed in connection with section 1671 prior to amendment in 1909 relating to high schools, *held* to apply to territory served by county as well as by union high schools.—*Wood v. Calaveras County*, 129 P. 283.

**SECONDARY EVIDENCE.**

See Evidence, §§ 158-186.

**SECRETARY OF THE INTERIOR.**

See Public Lands, § 103.

**SEDUCTION.**

See Breach of Marriage Promise, § 28.

**SELF-DEFENSE.**

See Homicide, §§ 39, '60, 114, 116, 300.

**SELF-EXECUTING.**

See Constitutional Law, §§ 29, 33.

**SELF-SERVING DECLARATIONS.**

See Evidence, § 274.

**SEPARATE ESTATE.**

See Husband and Wife, § 149.

**SEPARATION.**

See Executors and Administrators, §§ 185, 188, 194; Husband and Wife, §§ 278-281; Marriage, § 40.

**SERVICE.**

See Pleading, § 333; Process, §§ 65-119.

**SET-OFF AND COUNTERCLAIM.**

See Appeal and Error, § 51; Limitation of Actions, § 63; Principal and Agent, § 84.

**II. SUBJECT-MATTER.**

§ 41 (Kan.) Where a purchaser of merchandise from a firm agreed to pay certain notes and account owed by the firm, and gave his note to the partners, who owned all the property, and in suit thereon counterclaimed on the notes and account which had been assigned to him, the plaintiff is entitled to the benefit of the promise to the firm to pay such notes and account.—*Danielson v. Scott*, 129 P. 1190.

§ 50 (Wash.) Under Rem. & Bal. Code, § 191, permitting a debtor to plead in defense of an action by an assignee a counterclaim held against the original owner, section 265, defining a counterclaim, construed with the substantially direct provision of section 266, where, at the time of the assignment to plaintiff of an executory contract to sell jellies to defendant, nothing was due under the contract assigned, defendant could not counterclaim against the assignee when sued for the price for a claim against the assignor,

though matured at the time of the assignment.—*King v. West Coast Grocery Co.*, 129 P. 1081.

**SETTING ASIDE.**

See Judgment, §§ 159, 354.

**SETTLEMENT.**

See Executors and Administrators, §§ 23, 533; Guardian and Ward, § 163; Partnership, §§ 322-342; Payment.

**SHADE TREES.**

See Eminent Domain, §§ 82, 274.

**SHERIFFS AND CONSTABLES.**

See Rewards.

**SIDE TRACKS.**

See Railroads, § 49.

**SIGNATURES.**

See Banks and Banking, § 143; Criminal Law, § 1084; Elections, § 254; Insurance, § 141; Judgment, § 944; Schools and School Districts, § 97.

**SODOMY.**

§ 8 (Idaho) Under Rev. St. 1887, § 6810, the minimum punishment of one found guilty of crime against nature is imprisonment in the penitentiary for not less than five years, and the length of imprisonment in excess thereof is in the discretion of the court.—*Ex parte Miller*, 129 P. 1075.

As Rev. St. 1887, § 6810, prescribes the punishment for crime against nature, section 6312, providing punishment for felonies where a different punishment is not prescribed, has no application.—*Id.*

**SPECIAL LAWS.**

See Statutes, §§ 72-96.

**SPECIFICATION OF ERRORS.**

See Appeal and Error, § 781.

**SPECIFIC PERFORMANCE.**

See Appeal and Error, §§ 70, 78; Divorce, § 255; Stipulations.

**I. NATURE AND GROUNDS OF REMEDY IN GENERAL.**

§ 5 (Utah) The inadequacy of the legal remedy to enforce a contract for the sale of land is assumed, as a matter of law, making specific performance proper in every case in absence of legal objection.—*Cummings v. Nielson*, 129 P. 619.

§ 14 (Colo.) Where partners in a mercantile business employed a third person to carry on the business for a time necessary to pay firm debts and to make advances for that purpose, and the partners thereafter contracted to exchange the stock of merchandise for plaintiff's real estate, plaintiff, in the absence of proof of the completion of the third person's contract of employment, could not compel specific performance of the contract of exchange.—*Hill v. Lofgren-Harris Mercantile Co.*, 129 P. 208.

**II. CONTRACTS ENFORCEABLE.**

§ 25 (Cal.) To warrant specific performance of a contract to will property, the contract must

be definite and certain, and also just and fair.—*Baumann v. Kusian*, 129 P. 986.

§ 28 (Utah) A contract for the exchange of water for irrigation *held* to extend until terminated by the mutual consent of both parties, and hence complainant was entitled to specific performance.—*Mathews v. Berrett*, 129 P. 419.

§ 28 (Utah) Contract giving plaintiffs an option to purchase defendant's interest in an estate named *held* not so uncertain as to time for performance as to prevent specific performance.—*Cummings v. Nielson*, 129 P. 619.

§ 29 (Utah) Contract giving plaintiffs an option to purchase defendant's interest in an estate *held* not so uncertain as to description as to prevent specific performance.—*Cummings v. Nielson*, 129 P. 619.

§ 30 (Utah) Contract giving plaintiffs an option to purchase defendant's interest in an estate at a price as low as any other bona fide offer was not so uncertain as to price as to prevent specific performance.—*Cummings v. Nielson*, 129 P. 619.

§ 49 (Cal.) That plaintiffs agreed to remain with deceased for an unspecified time, conducting themselves as dutiful children and rendering dutiful services, which was no more than they owed in return for the care taken of them, *held* not to show such consideration for decedent's contract to will them her property as to warrant enforcing such contract.—*Baumann v. Kusian*, 129 P. 986.

§ 49 (Utah) Specific performance of an option *held* not to be resisted as requiring the sale at an inadequate price.—*Cummings v. Nielson*, 129 P. 619.

§ 51 (Utah) Specific performance of an option *held* not to be resisted as inequitable as containing no time limit.—*Cummings v. Nielson*, 129 P. 619.

### III. GOOD FAITH AND DILIGENCE.

§ 97 (Utah) Since, under an agreement by defendants to give plaintiffs the refusal to purchase land at a price as low as any other bona fide offer for it, no tender could be made until defendants informed plaintiffs that the land was for sale, or that they had an offer, if defendants sold the land without giving plaintiffs the refusal, a tender by plaintiffs was not essential to suing for specific performance.—*Cummings v. Nielson*, 129 P. 619.

### IV. PROCEEDINGS AND RELIEF.

§ 121 (Utah) In a suit for specific performance of a contract for the exchange of certain irrigation water, evidence *held* to require findings that complainant was the owner of the water exchanged, and was able, ready, and willing to perform the conditions on her part.—*Mathews v. Berrett*, 129 P. 419.

### SPEED.

See Highways, § 177; Street Railroads, §§ 84, 117.

### SPEEDY TRIAL.

See Criminal Law, §§ 573-576.

### SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

### STATE AUDITOR.

See Constitutional Law, § 42.

### STATEMENT.

See Appeal and Error, § 302; Mechanics' Liens, §§ 99, 132.

## STATES.

See Banks and Banking, § 78; Courts, §§ 42, 208; Mandamus, §§ 2, 102; Railroads, § 223.

### II. GOVERNMENT AND OFFICERS.

§ 49 (Colo.) Whether or not a Lieutenant Governor is entitled to hold over where his successor dies before the commencement of his term, if he does hold over, he is at least Lieutenant Governor de facto, and his acts as Lieutenant Governor are valid.—*In re Lieutenant Governorship*, 129 P. 811.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§ 114 (Colo.) The General Assembly has power to make an appropriation to protect the rights of the state in its natural streams and the waters thereof, and the interest of its citizens acquired thereunder.—*Stockman v. Leddy*, 129 P. 220.

§ 126 (Cal.App.) The money required to be paid to the state treasurer by each county treasurer by Pol. Code, §§ 2192, 2193, providing for the commitment of imbecile persons and for the payment by each county of the amounts due the state, goes to the general fund, and the State Commission in Lunacy has no control over the same, except such as is expressly given by statute.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

§ 130 (Idaho) Const. art. 7, § 13, providing that no money shall be drawn from the treasury except under appropriations made by law, limits the power of any state officer to paying money out of the state treasury except on specific appropriations made by law.—*Jeffreys v. Huston*, 129 P. 1065.

§ 132 (Idaho) The Legislature having provided a continuing appropriation of salaries of officers and subordinates of the militia by Laws 1911, p. 202, passed a general appropriation law (Laws 1911, p. 319) covering a period from the first Monday in January, 1911, to the first Monday in January, 1913, appropriating for all expenses of the state militia, including salaries of officers and subordinates \$45,000. *Held*, that the later act did not repeal the former, but was a suspension thereof during the period covered by the later appropriation; the former being operative on the first Monday of January, 1913.—*Jeffreys v. Huston*, 129 P. 1065.

## STATUTES.

See Frauds, Statute of; Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 64 (Colo.) The clause of Code Civ. Proc. § 164, providing for the dismissal of a suit for injunction, without trial on the merits, on a finding that no emergency existed authorizing injunction without notice, *held* separable from the balance of the section, so that the invalidity of such clause would not invalidate the entire section.—*Cary v. Mine & Smelter Supply Co.*, 129 P. 230.

### II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 72 (Cal.) St. 1907, p. 119, amending Civ. Code, § 1970, and giving a right of action for damages against an employer in favor of an employé whose death is caused from negligence of a fellow servant, is not in violation of Const. art. 1, § 11, requiring general laws to have uniform operation.—*Pritchard v. Whitney Estate Co.*, 129 P. 989.

A law establishing rules of liability for neg-

ligence applying only to actions arising from the relation of master and servant does not violate Const. art. 1, § 11, requiring general laws to have uniform operation.—Id.

§ 73 (Cal.) Pol. Code, former section 1670, subd. 20, exempting property within union high school districts from taxation for the support of county high schools, does not violate Const. art. 1, § 11, requiring all laws of a general nature to be uniformly operative.—Wood v. Calaveras County, 129 P. 283.

§ 77 (Cal.App.) A statute operating on all of a class alike is not a special law prohibited by Const. art. 4, § 25, where there exists a natural reason, or some constitutional ground for the classification, but a statute creating a class not so founded is prohibited.—In re Becker's Estate, 129 P. 795.

§ 82 (Cal.App.) The amendment to Code Civ. Proc. § 1349, authorizing the issuance of letters testamentary, by St. 1907, p. 312, providing that the court must ascertain whether the estate is worth more or less than \$10,000, which determination is conclusive for the purpose of giving notice to creditors, is invalid as special legislation within Const. art. 4, § 25; it relating only to cases of testacy.—In re Becker's Estate, 129 P. 795.

§ 95 (Cal.) Pol. Code, former section 1670, subd. 20, exempting property within union high school districts from taxation for the support of county high schools, does not violate Const. art. 4, § 25, prohibiting local laws exempting property from taxation.—Wood v. Calaveras County, 129 P. 283.

§ 96 (Cal.) High school taxes are special taxes the assessment of which the Legislature may limit to the district to be served.—Wood v. Calaveras County, 129 P. 283.

### III. SUBJECTS AND TITLES OF ACTS.

§ 114 (Wash.) The words in the title of the act (Laws 1909, c. 84) "to prohibit any manufacturer or wholesale dealer in liquors from \* \* \* having any interest in any \* \* \* retail liquor store, or in any retail liquor license," are enough to include a clause prohibiting any such manufacturer or wholesaler from advancing money to pay, or becoming surety for the payment of, a retail dealer's liquor license.—Lewer v. Cornelius, 129 P. 911.

§ 117 (Cal.) St. 1907, p. 119, entitled "An act to amend section 1970 of the Civil Code relating to the responsibility of employers for injuries or death of employes," though declaring who may sue for such death, is not in violation of Const. art. 4, § 24, providing that every act shall embrace but one subject, expressed in its title.—Pritchard v. Whitney Estate Co., 129 P. 989.

§ 120 (Wash.) The title of Laws 1889-90, c. 7, entitled "An act providing for the organization \* \* \* and government of municipal corporations," section 92 of which (Rem. & Bal. Code, § 7656) established police courts of second class cities, was broad enough to include section 93 (Rem. & Bal. Code, § 7657), giving such courts jurisdiction of petit larceny committed within the city.—State v. Milroy, 129 P. 884.

§ 122 (Nev.) St. 1911, c. 133, entitled "An act concerning public schools," section 135 of which provided for a tax for the support of public schools, was not void for embracing a subject not included in the title, contrary to Const. art. 4, § 17; Rev. Laws, § 275.—State v. Esser, 129 P. 557.

### IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 142 (Colo.App.) A statute conflicting with the provisions of an earlier statute on the same

subject operates as an amendment to the former statute.—Griswold v. Griswold, 129 P. 560.

### V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 158 (Colo.App.) Repeals by implication are not favored.—Griswold v. Griswold, 129 P. 560.

§ 158 (Wash.) A repeal by implication will not be made where not required by the language of the statute.—King v. West Coast Grocery Co., 129 P. 1081.

§ 159 (Nev.) If two statutes are irreconcilably conflicting, the last enacted controls.—State v. Esser, 129 P. 557.

§ 161 (Colo.App.) A statute conflicting with the provisions of an earlier statute on the same subject operates to the extent of the conflict as a repeal of the former statute.—Griswold v. Griswold, 129 P. 560.

§ 161 (Idaho) Where a general appropriation bill does not specifically repeal a continuous appropriation for the same purpose, and both acts when considered together can be harmonized and applied, the later will not be held to repeal the former by implication.—Jeffreys v. Huston, 129 P. 1065.

§ 165 (Kan.) The enactment of the indeterminate sentence law did not repeal by implication the penalty, for the crime of robbery on a railway train, of 10 years or for life in the penitentiary provided by Sess. Laws 1901, c. 174, § 1.—Ex parte Murray, 129 P. 1144.

§ 167 (Okla.) A statute revising the whole subject-matter of former acts, and evidently intended as a substitute for them, though containing no express words to that effect, repeals the former acts.—Hudson v. Ely, 129 P. 11.

### VI. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 181 (Colo.) That possible interpretation should be given to a statute which will render it effective and effect the legislative intent, if such intent can be reasonably ascertained.—Colorado & S. Ry. Co. v. State R. Commission of Colorado, 129 P. 506.

§ 184 (Colo.App.) Generally, words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistent with the intention of leaving the existing policy intact.—Griswold v. Griswold, 129 P. 560.

§ 188 (Colo.) The legislative intent should be sought in the ordinary meaning of the words of the statutes, construed in view of the connection in which they are used, and of the evil to be remedied.—Sheely v. People, 129 P. 201.

§ 190 (Wash.) In the interpretation of statutes, words in common use are to be considered in their plain and ordinary signification; and, so long as the language used is unambiguous, a departure from such plain meaning is not justified by any consideration of consequences or public policy.—State v. Miller, 129 P. 1100.

§ 191 (Colo.App.) A statute in general terms, but susceptible of a reasonable application, will be restricted to a sense consistent with the general system of law.—Griswold v. Griswold, 129 P. 560.

§ 193 (Colo.) The meaning of a doubtful word may be determined by referring to the meaning of words associated with it in the statute referable to the same subject-matter.—Sheely v. People, 129 P. 201.

§ 194 (Colo.) Where a statute deals with a particular class, following which it uses general words, the class first mentioned is deemed the most comprehensive, and the general words are treated as referring to matters of the same kind within such class.—Sheely v. People, 129 P. 201.

§ 206 (Cal.App.) A statute should be so construed as to give an intelligent meaning to every part, and, if possible, so as to make it valid and effective, and Civ. Code, § 3541, is declaratory of this rule of construction.—*Ex parte Zany*, 129 P. 295.

§ 211 (Colo.) The title of an act, although not declaratory of the law, which must appear in the act itself, may be resorted to for the purpose of ascertaining the legislative intent.—*Colorado & S. Ry. Co. v. State R. Commission of Colorado*, 129 P. 506.

§ 212 (Colo.App.) After a statutory policy has long been established and is well defined, it will not be presumed to be departed from or abandoned.—*Griswold v. Griswold*, 129 P. 560.

In the absence of clear and conclusive words, a court will not presume that the Legislature intended to violate a fundamental principle of law or the law of nations.—*Id.*

§ 219 (Okla.) The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, and which has been long acquiesced in, is to be considered in interpretation of the same.—*League v. Town of Taloga*, 129 P. 702.

§ 225 (Nev.) Statutes which relate to the same subject-matter are in *pari materia* and should be construed together.—*State v. Esser*, 129 P. 557.

§ 225 (Wash.) Where statutes in *pari materia* do not conflict, they must be construed together, so as to effectuate the legislative purpose.—*King v. West Coast Grocery Co.*, 129 P. 1081.

§ 227 (Cal.App.) "Directory acts" are such as are not of the substance of the thing provided for.—*People v. Butler*, 129 P. 600.

In construing a statute, matters of substance are to be construed as mandatory.—*Id.*

(B) Particular Classes of Statutes.

§ 239 (Colo.App.) Statutes in derogation of common law are to be strictly construed.—*Griswold v. Griswold*, 129 P. 560.

§ 241 (Colo.) The giving to statutory words their full meaning in the connection in which they are used does not violate the rule requiring strict construction of a penal statute.—*Sheely v. People*, 129 P. 201.

§ 241 (Kan.) In construing a criminal statute, the courts should regard the evil to be remedied, for that which is not within the spirit thereof, though within the letter, is not in contemplation of the law.—*State v. Hanchette*, 129 P. 1184.

§ 241 (Wash.) Penal statutes should be strictly construed, so that no citizen shall be deprived of his liberty under statutes which are *malum prohibitum*.—*State v. Coolidge*, 129 P. 1088.

(D) Retroactive Operation.

§ 267 (Cal.App.) A statute will not be construed to have a retroactive effect, so as to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language thereof.—*State Commission in Lunacy v. Welch*, 129 P. 974, 977.

VII. PLEADING AND EVIDENCE.

§ 289 (Mont.) The written law of another state is proven under Const. U. S. art. 4, § 1, Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677), and Rev. Codes §§ 7906, 7907, by a printed copy thereof duly attested.—*Hidpath v. Heller*, 129 P. 1054.

STATUTES CONSTRUED

ENGLAND.

13 Ed. I, ch. 1, June 28,  
1285 .....1131

UNITED STATES.

CONSTITUTION.

Amend. 14..... 71  
Art. 4, § 1.....1054

STATUTES AT LARGE.

1875, March 3, ch. 137, 18  
Stat. 470. Amended by  
Act 1888, Aug. 13, ch.  
866, 25 Stat. 433 (U. S.  
Comp. St. 1901, p. 508) 290  
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**STAY.**

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**STIPULATIONS.**

§ 6 (Mont.) It is within the power of the district court to adopt a rule requiring agreements between parties to be made in open court and entered on the minutes, or to be made in writing.—*Bush v. Baker*, 129 P. 550.

There can be no specific performance of oral stipulations made in judicial proceedings.—*Id.*

The requirement of the rule of the district court that agreements between parties shall be made either in open court and entered on the minutes, or shall be in writing, is not jurisdictional.—*Id.*

§ 14 (Cal.App.) A defendant held to have no right to object to the incorporation, in a statement filed in support of a motion for new trial, of the evidence taken in the trial of another action, where the parties stipulated that such evidence should constitute the evidence in the present action, so far as the court deemed it pertinent.—*McCann v. McCann*, 129 P. 966.

Statement filed in support of a motion for a new trial in an action to quiet title held not objectionable because it also constituted the statement on a like motion in another case, where the parties had stipulated that the evidence in one should constitute the evidence in the other, so far as the court deemed it applicable.—*Id.*

§ 14 (Kan.) Admission in ejectment that a decree in a suit to quiet title to the same land had been rendered in favor of plaintiff in that suit against all parties claiming an interest therein was insufficient to bar the grantee in a tax deed, issued nine months after the decree; the admission referring to persons claiming an interest in the litigation and parties to the action.—*Hetzer v. Burbery*, 129 P. 1127.

§ 14 (Mont.) The purpose of a stipulation that, unless otherwise shown by the evidence, one inch of water an acre was deemed sufficient to irrigate any lands mentioned in the pleadings, was to relieve the parties from introducing evidence as to the ultimate fact, which, if material, bound the court, amounting to a special finding under Rev. Codes, § 6769.—*Spaulding v. Stone*, 129 P. 327.

**STOCK.**

See Corporations, §§ 67-118, 330, 542.

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See Corporations, §§ 67, 174-259, 610.

**STREET RAILROADS.**

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**II. REGULATION AND OPERATION.**

§ 84 (Wash.) For a street railroad to exceed the lawful speed limit is negligence per se.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

§ 85 (Wash.) Neither Rem. & Bal. Code, § 5569, providing that automobiles shall turn to the right in passing vehicles and persons moving in the same direction, nor the city ordinance, requiring slow moving vehicles to keep close to the right curb, relates to the use of a street as between street cars and other vehicles.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

§ 98 (Wash.) A person standing too close to a track and struck by a car running at night on the wrong side of a street which was being paved, according to a custom known to her, held guilty of contributory negligence.—*Armstrong v. Spokane & I. E. Ry. Co.*, 129 P. 379.

§ 100 (Wash.) The fact that plaintiff, whose wagon was struck by a street car, was intoxicated was no legal excuse for his failure to clear the track.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

§ 103 (Wash.) It is the duty of a motorman who sees a traveler's position on the track in time to avoid a collision to stop his car, regardless of the traveler's own negligence.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

§ 117 (Wash.) On evidence, held that the question of negligence in running a street car at an excessive speed was for the jury.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

It is not negligence per se to drive upon a street railroad track.—*Id.*

On evidence, held that the question of plaintiff's contributory negligence was for the jury.—*Id.*

On evidence, held that the questions whether plaintiff was prevented from getting off the track after seeing a street car because of a passing automobile or the skidding of his wagon wheels, and whether his failure was due to his own intoxication, were for the jury.—*Id.*

On evidence, held that it was for the jury to say whether the motorman should not have had his car under control as to be able to stop it before hitting plaintiff's wagon.—*Id.*

On evidence, held that the question whether a motorman's failure to stop his car before a collision because of its excessive speed was the proximate cause of the injury was for the jury.—*Id.*

**STREETS.**

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**STRIKING OUT.**

See Trial, § 89.

**SUBLETTING.**

See Landlord and Tenant, §§ 76, 79.

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See Clerks of Courts, § 14.

**SUBSCRIPTIONS.**

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**SUMMONS.**

See Process.

**SUPERSEDEAS.**

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See Turnpikes and Toll Roads.

**SUPPLEMENTAL PLEADING.**

See Pleading, § 277.

**SUPPORT.**

See Criminal Law, §§ 1097, 1218; Husband and Wife, §§ 303, 304; Parent and Child, § 17.

**SUPREME COURTS.**

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## SURPLUSAGE.

See Indictment and Information, § 110.

## TAXATION.

See Adverse Possession, §§ 82, 93, 110; Ejectment, § 24; Evidence, § 83; Highways, §§ 122, 125; Injunction, §§ 16, 74; Intoxicating Liquors, § 224; Judgment, § 570; Landlord and Tenant, § 63; Schools and School Districts, §§ 91, 106; Statutes, §§ 73, 95, 96, 122.

### II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 40 (Nev.) St. 1911, c. 133, § 135, Rev. Laws, § 3374, imposing a tax on all taxable property for school purposes, and requiring the county commissioners to add such amount to the other taxes, could take effect during the fiscal year 1911 without violating the constitutional requirement of uniformity, though it resulted in two different levies during the same year.—State v. Esser, 129 P. 557.

### V. LEVY AND ASSESSMENT.

#### (A) Levy and Apportionment.

§ 301 (Kan.) Under Sp. Sess. Laws 1908, c. 78, making it unlawful to levy a county tax which would produce a sum in excess of 2 per cent. more than that which would have been produced by the levy of the maximum rate in 1907, that assessors of a county in 1907 used a valuation before the same was raised by the state board of equalization did not prevent them in 1908 from making a levy to produce a sum not in excess of 2 per cent. more than they might have raised in 1907 on the increased valuation of the state board.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Harper County, 129 P. 1165.

#### (C) Mode of Assessment in General.

§ 349 (Wash.) Where a leasehold interest in land is subject to an indebtedness exceeding its value, it cannot be assessed for taxation at its value if there was no indebtedness, but its value is to be measured both by its burdens and its benefits.—Metropolitan Bldg. Co. v. King County, 129 P. 883.

#### (E) Assessment Rolls or Books.

§ 438 (Colo.) The assessor of the city and county of Denver has no authority, under the statutes and constitutional provisions applicable, to make a horizontal reduction in the total assessed valuation of county taxes, after he has delivered the abstract of assessment to the State Auditor.—City and County of Denver v. Pitcher, 129 P. 1015.

The county assessor cannot alter the completed tax roll, in the absence of express statutory authority.—Id.

### IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 679 (Colo.App.) Before land sold for taxes can be legally bid in by the county, it must be continually offered from day to day until the sale is concluded.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

### X. REDEMPTION FROM TAX SALE.

§ 697 (Kan.) A grantee in possession under a junior tax deed, having sued to redeem from the holder of a senior tax deed within five years after taking possession, held an owner within the statute authorizing "any owner, his agent or attorney, to redeem land sold for taxes."—Bancher v. Proctor, 129 P. 526.

§ 708 (Wash.) On foreclosure sale brought by a county on delinquent certificates issued to it, the summons is sufficient if it sufficiently describes the property, notwithstanding a mistake

in the owner's name.—Patterson v. Toler, 129 P. 107.

### XI. TAX TITLES.

#### (A) Title and Rights of Purchaser at Tax Sale.

§ 736 (Kan.) Where the holder of a junior tax deed took possession and proved entry and actual possession within two years from the date of the record of his deed, proof of antecedent authority on the part of the party taking possession of the property for him was unnecessary.—Bancher v. Proctor, 129 P. 526.

#### (B) Tax Deeds.

§ 757 (Colo.App.) It must affirmatively appear by the recitals of the tax deed that every preliminary step was regularly taken.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

§ 761 (Colo.App.) A tax deed is invalid where it shows that the assignment of the tax certificate was made more than three years after its date.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

A recital in a correction tax deed that the treasurer passed the property from "time to time" until the last day of the sale, when it was struck off to the county, was insufficient, as it failed to show that the first and the last day of the sale were not one and the same day.—Id.

§ 761 (Colo.App.) A tax deed showing that several noncontiguous tracts of land were sold en masse for a gross sum, or that the certificate of sale issued to the county was assigned by the county clerk more than three years after the date of issuance, and failing to show that the lands were offered from day to day until the last day of the sale, is void on its face.—Empire Ranch & Cattle Co. v. Gibson, 129 P. 520.

§ 761 (Colo.App.) A tax deed, showing that several noncontiguous tracts were sold en masse for a gross sum and were struck off to the county on the first day of the sale, was void on its face.—Empire Ranch & Cattle Co. v. Howell, 129 P. 521.

§ 761 (Colo.App.) A tax deed, showing a sale of several noncontiguous tracts of land en masse for a gross sum and assignment of certificate by county clerk more than three years after its issuance, and failing to show that the land was offered from day to day until the last day before being stricken off to the county was void on its face.—Empire Ranch & Cattle Co. v. Coleman, 129 P. 522.

§ 762 (Colo.App.) A mere recital in the tax deed that the purchaser had deposited with the treasurer the taxes assessed on the property subsequent to the date of the sale, without stating the amount of such taxes, was insufficient.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

§ 766 (Colo.App.) A purported acknowledgment of the execution of a tax deed held insufficient, where it failed to comply with Mills' Ann. St. § 3901, requiring the certificate to recite that the instrument was acknowledged by the treasurer to be his voluntary act and deed.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

§ 772 (Colo.App.) Where a correction tax deed recites an assignment of the certificate of sale by the county, and the two deeds are offered in evidence, they will be construed together.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

§ 775 (Colo.App.) In construing a correction deed and original deed together, where the original deed recites an assignment of the certificate of sale by the county, it will be presumed that the assignment was in fact made by the clerk.—Empire Ranch & Cattle Co. v. Howell, 129 P. 245.

#### (C) Actions to Confirm or Try Title.

§ 796 (Kan.) A tax deed, void on its face, under which possession had never been taken,

does not give the holder sufficient standing to assail in ejectment a later tax deed of a party in possession valid on its face, but voidable for antecedent irregularities.—*Hetzer v. Buryberry*, 129 P. 1127.

§ 813 (Colo.App.) In view of Rev. St. 1908, § 5733, providing that where lands sold for taxes are recovered taxes paid after the sale shall be paid by the persons recovering, the invalidity of tax deeds may be ascertained, though excluded by the trial court from the evidence.—*Empire Ranch & Cattle Co. v. Howell*, 129 P. 245. In ejectment to determine the validity of tax titles, it was error to decree a cancellation of deeds not put in issue by the pleadings, or to cancel deeds in so far as they affected lands not involved in the suit.—*Id.*

**(D) Rights and Remedies of Purchaser of Invalid Title.**

§ 824 (Kan.) Where purchaser of land for taxes is entitled to enforce a tax lien, he is entitled to interest at 12 per cent. as provided by Gen. St. 1909, § 9495.—*Davidson v. Timmons*, 129 P. 133.

§ 827 (Kan.) Where, in a suit to quiet title, defendant pleads a tax lien and asks protection thereof, the court may grant him affirmative relief by providing for the enforcement of the tax lien found to exist.—*Davidson v. Timmons*, 129 P. 133.

Where, pending mortgage foreclosure proceedings, L. paid taxes on the land under which he obtained possession and was ousted on the foreclosure proceedings being declared void, he was entitled, in a suit to quiet title, to have his tax lien adjudicated and enforced.—*Id.*

Where L. purchased land for taxes in 1880, pending mortgage foreclosure proceedings, obtained possession in 1883, which he held until June 3, 1903, when he was dispossessed on the foreclosure proceedings being declared void, and in April, 1910, the owner brought suit to quiet title, L. was not barred by laches to assert validity of his tax lien.—*Id.*

**XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.**

§ 860 (Kan.) Where a statute is open to either construction, one preventing an inheritance tax on the same property in two jurisdictions should be favored over one having the contrary effect.—*State v. Davis*, 129 P. 1197.

§ 867 (Kan.) The provision of Gen. St. 1909, § 9266, that an inheritance tax on property in the state owned by a nonresident at his death shall not be exacted where a similar tax has been paid in the state of decedent's residence, provided the laws of that state contain a like exemption, applies where no such tax would be imposed on similar property there situated, owned by a resident of Kansas at his death.—*State v. Davis*, 129 P. 1197.

Gen. St. 1909, § 9266, providing that, if an inheritance tax is collected on property in the state owned by a nonresident at his death in another state, it will not be exacted here provided a "like exemption" is made by the laws of the other state, exempts corporate stock in the state owned by one who died in New York, where the New York laws provide that on the death of a nonresident owning property in that state an inheritance tax shall not be collected on intangible property, including corporate stock.—*Id.*

**XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.**

§ 915 (Kan.) Under Laws 1901, c. 122, and Laws 1911, c. 328, counties are not relieved, on making the certificate that the sum stated is the proper proportion of state taxes remaining uncollected on compromise tax sales, from lia-

bility to the state for the unrealized portion of the taxes due.—*Board of Com'rs of Kearny County v. Davis*, 129 P. 942.

**TAXATION OF COSTS.**

See Costs, §§ 146, 184.

**TEACHERS.**

See Schools and School Districts, §§ 130, 145.

**TELEGRAPHS AND TELEPHONES.**

See Constitutional Law, § 70; Municipal Corporations, § 78.

**II. REGULATION AND OPERATION.**

§ 33 (Kan.) A telephone company could not plead that an old ordinance prescribing rates for telephone service acquiesced in was ultra vires the municipal corporation, while retaining, using, and enjoying the privileges and franchises granted thereby.—*City of Emporia v. Emporia Telephone Co.*, 129 P. 187.

Where telephone rates were fixed by an ordinance of a second class city passed in 1900, and agreed to by an assignee of the privileges granted in 1905 as a condition of the municipal consent to transfer, such rates would apply after the state by direct legislation had placed the fixing of rates in the hands of a commission until action was taken by the state or by its authority.—*Id.*

§ 34 (Colo.) A telephone company, having established a zone of service for many years, cannot change the character of that service upon establishing a new zone, where to do so would discriminate between patrons similarly situated, though residing in different geographical divisions.—*Colorado Telephone Co. v. Wilmore*, 129 P. 204.

The court, in an action to enjoin a telephone company from discriminating between patrons similarly situated by changing the character of service furnished plaintiffs, has no authority to prescribe the particular exchange to which plaintiffs shall be connected.—*Id.*

Where a telephone company cannot legally refuse to furnish plaintiffs the same grade of service at the same price as to other patrons similarly situated, an injunction to prevent it from removing plaintiffs' telephone instruments, or forcibly requiring plaintiffs to connect with another exchange, which would be less convenient and more expensive, will issue.—*Id.*

**TENANCY IN COMMON.**

**III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.**

§ 55 (Kan.) Where the holder of a tax deed obtained a judgment quieting his title as against the heirs of the holder of the original title, which was afterwards set aside at the instance of two of the heirs, the judgment was conclusive as against the others, and the tax title claimant became a tenant in common with those that sued.—*Bancher v. Proctor*, 129 P. 526.

**TENDER.**

See Chattel Mortgages, § 237; Corporations, § 118; Mortgages, §§ 226, 605; Quieting Title, §§ 7, 19; Specific Performance, § 87; Vendor and Purchaser, §§ 116, 170.

§ 1 (Idaho) Tender is an unconditional offer by the debtor to the creditor of the amount of his debt.—*Kelley v. Clark*, 129 P. 921.

**TERRITORIES.**

See Indians, § 3.

## TESTAMENTARY CAPACITY.

See Wills, §§ 47, 55.

## THEFT.

See Larceny.

## THEORY.

See Appeal and Error, § 171.

## THREATS.

See Criminal Law, § 351; Homicide, § 300.

## TIDE LANDS.

See Eminent Domain, § 45; Municipal Corporations, §§ 293, 294, 487.

## TIME.

See Appeal and Error, §§ 356, 390, 564, 773, 883; Contempt, § 67; Criminal Law, §§ 576, 578; Divorce, §§ 158, 320; Elections, § 250; Executors and Administrators, §§ 19, 29; Frauds, Statute of, §§ 46, 51, 129, 143; Indictment and Information, §§ 87, 159; Insurance, §§ 128, 665; Intoxicating Liquors, § 223; Judgment, §§ 106, 107; Justices of the Peace, §§ 159, 164, 166; Limitation of Actions, §§ 1, 2, 45, 95, 96; Mechanics' Liens, §§ 111, 132, 173; Mortgages, § 543; Specific Performance, §§ 28, 51; Vendor and Purchaser, § 78; Wills, §§ 277, 384.

## TITLE.

See Bills and Notes, §§ 339, 363, 481; Ejectment, §§ 9, 12, 13, 95; Election of Remedies, § 8; Indians, § 15; Mechanics' Liens, § 18; Mines and Minerals, § 55; Quietting Title; Sales, §§ 199-214, 477; Statutes, §§ 114-122, 211; Taxation, §§ 736-827; Trusts, § 1; Vendor and Purchaser, §§ 119, 128, 144, 189, 231, 339.

## TOKEN.

See False Pretenses, §§ 6, 43.

## TOLL ROADS.

See Turnpikes and Toll Roads.

## TOLLS.

See Bridges, §§ 15, 26.

## TORTS.

See Assignments, § 24; Executors and Administrators, § 431; False Imprisonment; Fraud; Libel and Slander; Master and Servant, §§ 89-330; Municipal Corporations, §§ 835, 845; Negligence; Nuisance; Trover and Conversion.

## TOWNS.

See Appeal and Error, § 907; Counties; Courts, § 150½; Mechanics' Liens, § 3.

### II. GOVERNMENT AND OFFICERS.

§ 31 (Kan.) Where a township trustee in entering into a contract promises to make payment immediately upon the completion of the work, he incurs no personal liability, in the absence of fraud, although Gen. St. 1909, §§ 2968-2981, provides that the contractor shall receive his pay from another source and after some delay.—Hupe v. Sommer, 129 P. 186.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 61 (Okla.) Where township officers are guilty of misconduct in wrongfully paying out money belonging to the town, a resident taxpayer may recover double the amount so wrongfully paid

out, and double the value of property transferred, and not the damages specified in Comp. Laws 1909, § 7413.—McGuire v. Skelton, 129 P. 739.

## TRANSCRIPTS.

See Appeal and Error, § 690; Criminal Law, § 1104; Judgment, §§ 292, 385.

## TREES.

See Eminent Domain, §§ 82, 274.

## TRESPASS.

See Electricity, § 15; Eminent Domain, § 279; Mines and Minerals, § 38.

## TRIAL.

See Appeal and Error, §§ 216, 542, 864, 882, 970, 974, 977, 987-1024, 1046-1048, 1061-1071, 1170; Breach of Marriage Promise, § 35; Bridges, § 46; Brokers, § 88; Carriers, §§ 247, 321; Chattel Mortgages, § 40; Contempt, § 61; Contracts, § 176; Costs; Criminal Law, §§ 404, 554, 556, 558, 573, 575, 576, 627-893, 1056, 1090, 1144, 1159, 1160, 1166½, 1183; Damages, §§ 208, 215; Equity, § 377; Evidence, § 506; False Imprisonment, § 40; Highways, § 218; Homicide, §§ 271-309; Insurance, § 668; Intoxicating Liquors, § 239; Jury; Libel and Slander, § 123; Master and Servant, §§ 80, 285-297; Municipal Corporations, § 706; Negligence, § 136; New Trial; Partnership, § 342; Principal and Agent, § 194; Railroads, § 415; Rape, § 59; Reference; Sales, § 182; Stipulations; Street Railroads, § 117; Venue; Work and Labor, § 30.

### I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 5 (Okla.) Under Comp. Laws 1909, § 5834, providing when actions are triable, and section 5832 that witnesses shall not be subpoenaed while the case stands on issues of law, when a nonfrivolous demurrer has been overruled, the case is not triable on issues of fact until 10 days after the filing of the answer.—City of Ardmore v. Orr, 129 P. 867.

### III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 31 (Mont.) The office of an exception is to reserve a question upon matter arising in the record for future consideration, either of the trial court or of the court of review, and upon which the exceptant claims some right.—Bush v. Baker, 129 P. 550.

### IV. RECEPTION OF EVIDENCE.

(B) Order of Proof, Rebuttal, and Reopening Case.

§ 59 (Ariz.) The order in which evidence is offered, received, or excluded, is in the discretion of the trial court.—Logia Suprema de la Alianza Hispano-Americana v. De Aguirre, 129 P. 503.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 84 (Okla.) In an action on an accident policy, a general objection to the admission of testimony as to a claim by the insured and response denying all liability was not sufficient to raise the point that such evidence was not within the issues.—Continental Casualty Co. v. Wynne, 129 P. 16.

§ 89 (Or.) When a witness answers a question before an attorney can object, the proper practice is to move to strike out the answer.—Sorenson v. Smith, 129 P. 757.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 121 (Cal.) Where the findings in a former action between the parties are admitted in evidence, counsel may refer to the matters covered by them.—*Gjurich v. Fieg*, 129 P. 464.

## VI. TAKING CASE OR QUESTION FROM JURY.

### (A) Questions of Law or of Fact in General.

§ 139 (Cal.App.) To justify a trial judge in taking the issues of fact from the jury, the evidence must be such that plaintiff's case finds no substantial support in it.—*McEwen v. Occidental Life Ins. Co.*, 129 P. 598.

§ 143 (Ok.) Where issues of fact are presented by the pleadings and supported by conflicting evidence, the case is for the jury.—*Adams v. Coon*, 129 P. 851.

§ 143 (Wyo.) Where there is a substantial conflict in the evidence, it is improper for the court to direct a verdict.—*Weaver v. Richardson*, 129 P. 829.

### (C) Dismissal or Nonsuit.

§ 165 (Mont.) On motion for nonsuit, the trial court must view the evidence in the light most favorable to plaintiff.—*Lackman v. Simpson*, 129 P. 325.

### (D) Direction of Verdict.

§ 178 (Wash.) In considering defendant's motion for a directed verdict, the court must accept as true all competent evidence adduced supporting the complaint.—*O'Brien v. Washington Water Power Co.*, 129 P. 391.

## VII. INSTRUCTIONS TO JURY.

### (A) Province of Court and Jury in General.

§ 191 (Kan.) It is improper for an instruction to assume as proven a fact in dispute.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 191 (Wash.) An instruction as to the carrier's duty to keep the car standing still held not to be construed as assuming that the car was standing still, in view of further instructions as to contributory negligence in getting off a moving car.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

§ 194 (Colo.) Where the evidence as to whether a trunk, admitted to have been received by defendant carrier, was plaintiff's trunk was conflicting, an instruction that defendant admitted that it received plaintiff's trunk was error.—*Denver Omnibus & Cab Co. v. Gast*, 129 P. 233.

§ 194 (Wash.) Instruction that jury could consider the fact that plaintiff's employer had permit from the city to make excavation, in determining whether a street-grading contractor should have known of plaintiff's presence, held not objectionable as telling the jury that the permit was evidence of notice to contractor that plaintiff was working in the excavation.—*Gasol v. Standard Ice Co.*, 129 P. 101.

### (B) Necessity and Subject-Matter.

§ 202 (Ok.) "Instructions" are directions in reference to the law of the case, enabling the jury to better understand their duty and to prevent them from arriving at a wrong conclusion.—*Hanson v. Kent & Purdy Paint Co.*, 129 P. 7.

§ 203 (Wash.) The court may frame its instructions, upon its own motion, or at counsel's suggestion, to cover the issues as actually made at trial.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

### (C) Form, Requisites, and Sufficiency.

§ 228 (Ok.) Instructions covering 20 pages of the record, where the issues are few and simple,

are objectionable as being too long and vague, and an instruction should be plain, simple, concise, unambiguous, and consistent.—*Hanson v. Kent & Purdy Paint Co.*, 129 P. 7.

§ 243 (Cal.App.) Where the court instructed that defendant carrier must furnish such a light at its depot as an ordinarily careful person would have furnished under the circumstances, the fact that in other places the charge required said plaintiff to furnish "sufficient light" and "proper light" held not to give the jury a double standard of defendant's duty.—*Teale v. Southern Pac. Co.*, 129 P. 949.

### (D) Applicability to Pleadings and Evidence.

§ 251 (Colo.App.) Where the court tried an action for injuries from the obstruction of a highway upon the theory that the complaint presented a cause of action to which a defense of contributory negligence would lie, and also that it stated a cause to which such defense would not lie, it was error to take such defense from the jury, or to fail to properly submit it.—*Missouri Pac. Ry. Co. v. Atkinson*, 129 P. 566.

§ 251 (Mont.) In an action against a railroad company for negligent fire, an instruction denying a recovery which was not claimed held properly refused.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

§ 251 (Utah) Where the only allegation of negligence was defendant's operation of an automobile at a dangerous speed, instructions authorizing a recovery for negligent or careless operation or driving, or failure to keep a lookout for obstructions or dangers, were erroneous as beyond the issues.—*Lochhead v. Jensen*, 129 P. 347.

§ 252 (Ok.) An instruction that, even though the insured, while he claimed to be totally and continuously disabled, performed some trivial services, that would not prevent him from recovering for all of the time, and that the test is not whether plaintiff performed any services of any character, but whether he was able to perform services of any sort or character, held justified by the evidence.—*Continental Casualty Co. v. Wynne*, 129 P. 16.

### (E) Requests or Prayers.

§ 255 (Wash.) Appellant should request instructions adapted to his view of the case as raised by the evidence.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

§ 256 (Kan.) In an instruction, in an action for breach of marriage promise, that the jury may take into account the plaintiff's seduction, the omission to define seduction is not error, in the absence of a request therefor.—*Dalrymple v. Green*, 129 P. 1145.

§ 256 (Wash.) An instruction that the jury should consider physical and mental suffering of a wife, and what loss the husband had or would sustain by reason of her inability to perform the duties of a wife, held correct, in absence of a request for a more specific instruction.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

§ 259 (Ok.) Where a special instruction is requested, counsel must submit the desired instruction in writing, properly numbered and signed, and request that it be given, in default of which it is not error to omit to instruct of the court's motion on a given proposition.—*Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834.

§ 260 (Cal.App.) Where the principle declared in a rejected instruction was in substance given in the court's charge, its refusal was not prejudicial.—*Teale v. Southern Pac. Co.*, 129 P. 949.

§ 260 (Colo.App.) In an action for injuries, the refusal of an instruction held not erroneous

in view of the instructions given.—*Denver City Tramway Co. v. Gawley*, 129 P. 258.

§ 260 (Kan.) The refusal of an instruction as to the master's duty to furnish a safe place to work was proper, where the court by another instruction defined such duty.—*Carroll v. Kansas Buff Brick & Mfg. Co.*, 129 P. 196.

§ 260 (Or.) A requested instruction in a factory employe's injury action that if plaintiff was injured while performing his duties in a dangerous manner, instead of a safe manner provided by defendant, he could not recover, held sufficiently covered by an instruction that, if defendant provided a safe passageway and instructed plaintiff to follow it, but he chose a different and more dangerous route, he could not recover.—*Love v. Chambers Lumber Co.*, 129 P. 492.

§ 260 (Or.) Refusal of requested instructions held not error, where adequate instructions were given, and the requested instructions would not have affected the verdict.—*Bell v. Paquet*, 129 P. 757.

§ 260 (Wash.) Requested instructions were properly refused, where so far as correct, they were embodied in the instructions given by the court.—*Zolawenski v. City of Aberdeen*, 129 P. 1090.

§ 260 (Wash.) Requested instructions covered by those given are properly refused.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

#### (F) Objections and Exceptions.

§ 273 (Wash.) Exceptions to instructions because given orally must be taken at the time notwithstanding the statutory provision that exceptions to instructions may be taken at any time before the motion for a new trial.—*Taylor v. Kidd*, 129 P. 406.

§ 284 (Wash.) The giving of instructions orally, instead of in writing, is waived by failure to object at the time.—*Taylor v. Kidd*, 129 P. 406.

#### (G) Construction and Operation.

§ 295 (Wash.) Instructions must be read as a whole.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

§ 296 (Cal.) Giving of instruction relative to master's duty as to machinery and appliances, which was merely defective because it did not contain a full exposition of the law, held not erroneous in view of the other instructions given.—*Lonnergan v. Stansbury*, 129 P. 770.

An instruction authorizing recovery of damages "reasonably probable" to result in the future, while not in strict conformity to Civ. Code, § 3283, authorizing an award of damages resulting after the commencement of the action which are "certain to result," was not erroneous where the correct rule was announced in other instructions.—*Id.*

§ 296 (Kan.) Where the court charged that plaintiff was guilty of contributory negligence, defendant was not prejudiced by another instruction that the burden of proving contributory negligence was on it.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 296 (Wash.) An instruction that the jury might include every expense which may happen in the future, by reason of the injuries received, held not error in connection with another instruction to limit the award to results reasonably probable and established by fair preponderance of the evidence.—*McIlwaine v. Tacoma Ry. & Power Co.*, 129 P. 1093.

### IX. VERDICT.

#### (A) General Verdict.

§ 340 (Kan.) Where the evidence did not show that plaintiff had received any permanent injuries, the amount of damages awarded by the verdict for permanent injuries should be

deducted therefrom.—*Williams v. Withington*, 129 P. 1148.

§ 340 (Kan.) An item of damage allowed for an injury, neither proved nor found, should be deducted from the amount of the verdict.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

#### (B) Special Interrogatories and Findings.

§ 350 (Kan.) While the court must submit proper questions to the jury to show the chief ultimate facts, questions requiring the jurors to distinguish between elements of injury, technical and metaphysical, are improper.—*Williams v. Withington*, 129 P. 1148.

§ 350 (Kan.) Under Code Civ. Proc. § 294 (Gen. St. 1909, § 5888), providing that the court may direct the jury to find on particular questions of fact, the jury is not authorized to invade the domain of medical or metaphysical science in an attempt to distinguish between constituent elements of physical injuries.—*Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151.

§ 350 (Kan.) A court is not warranted in submitting questions which require the itemizing of the ultimate facts or call for mere evidentiary matters on which such facts were based.—*Madison v. Kansas City, M. & O. Ry. Co.*, 129 P. 1157.

§ 356 (Kan.) Where the jury returned evasive and equivocal answers to special interrogatories, the court should have required them to be made more definite and certain.—*Stewart v. Henningsen Produce Co.*, 129 P. 181.

§ 359 (Idaho) Under Rev. Codes, § 4397, in an action for money only, or specific real property, the jury may render a general or special verdict, and a special finding controls a general verdict inconsistent therewith, and judgment must be entered in accordance with the special finding.—*Calkins v. Blackwell Lumber Co.*, 129 P. 435.

### X. TRIAL BY COURT.

#### (A) Hearing and Determination of Cause.

§ 367 (Cal.App.) Under Code Civ. Proc. § 631 et seq., relating to trials by the court, a party is not entitled to argue a case as a matter of right, though, if there is any room for argument, it is better practice to permit it.—*Center v. Kelton*, 129 P. 960.

#### (B) Findings of Fact and Conclusions of Law.

§ 389 (Or.) Failure of court, in action for recovery of land, to make findings of fact was not reversible error, where the parties agreed that the court might prepare a verdict and have the record made as if the trial was by a jury.—*Collis v. Cone*, 129 P. 753.

§ 396 (Utah) Where, in an action to enjoin defendant city from cutting shade trees on a lot surrounded by a picket fence, the actual location of the south boundary line of the block in which the lot was situated was in issue, a finding that the south boundary line of the lot was marked by plaintiff's picket fence did not conform to the issues.—*Glaouque v. Salt Lake City*, 129 P. 429.

§ 397 (Cal.App.) Where there was no issue relative to estoppel raised by the pleadings, a finding relative thereto was unnecessary.—*Mentry v. Broadway Bank & Trust Co.*, 129 P. 470.

### TRIAL DE NOVO.

See Justices of the Peace, § 171.

### TROVER AND CONVERSION.

See Carriers, § 127; Chattel Mortgages, § 169; Limitation of Actions, § 321; Witnesses, § 220.

**II. ACTIONS.****(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.**

§ 32 (Kan.) An allegation that personal property was by a defendant converted to his own use indicates a right to recover damages for such conversion, and not a right to an accounting.—*Blackwell v. Blackwell*, 129 P. 173.

**(D) Damages.**

§ 49 (Cal.App.) In an action for conversion of corporate stock, the measure of damages is the market value of the stock, with interest and incidental damages incurred in the pursuit of the property; and the defendant is not estopped to deny that the shares were not worth their par value.—*Myers v. Chittyna Exploration Co.*, 129 P. 469.

**TRUST DEEDS.**

See Mortgages.

**TRUSTEES.**

See Trusts, §§ 156, 169.

**TRUSTS.**

See Appeal and Error, § 69; Dedication, § 53; Easements, § 16; Ejectment, § 12; Indians, § 15; Parties; Wills, § 728.

**I. CREATION, EXISTENCE, AND VALIDITY.****(A) Express Trusts.**

§ 1 (Kan.) A trust in real estate implies a holding of the legal title by one for the benefit of another, who holds the equitable title.—*Blackwell v. Blackwell*, 129 P. 173.

§ 1 (Wash.) "Express trusts" are presumably created by the free and deliberate act of the parties, are in accordance with equity, and, by the terms of their creation, are permanent in their operation.—*Arnold v. Hall*, 129 P. 914.

§ 30½ (Wash.) On facts stated, *held*, that on plaintiff's conveyance of land to his mother, without valuable consideration, there was an express trust to reconvey as a gift or legacy.—*Arnold v. Hall*, 129 P. 914.

§ 43 (Wash.) Under Rem. & Bal. Code, § 8745, providing that all conveyances of real estate and all contracts creating or evidencing any incumbrance upon real estate shall be by deed, an express trust in lands cannot be established by parol.—*Arnold v. Hall*, 129 P. 914.

**(B) Resulting Trusts.**

§ 63¾ (Cal.App.) Where property is held by one person for the benefit of another, equity will in a proper case impose a trust thereon, and award to the several parties the interest to which they are entitled.—*Butterfield v. Harris*, 129 P. 614.

**(C) Constructive Trusts.**

§ 91 (Wash.) "Implied trusts" have not the element of permanency and rightfulness, so far as relates to the intention of the responsible party, and freedom of action may be altogether lacking; the essential idea of an implied trust involving antagonism between the cestui que trust and the trustee, even where the trust does not arise out of fraud.—*Arnold v. Hall*, 129 P. 914.

§ 96 (Kan.) An absolute conveyance cannot be defeated by mere verbal promise to reconvey; and when the circumstances fail to show an intent by the grantor to retain equitable title no trust arises by implication of law.—*Blackwell v. Blackwell*, 129 P. 173.

§ 96 (Wash.) Equity will not raise a constructive trust upon breach of an express contract to

reconvey real property.—*Arnold v. Hall*, 129 P. 914.

§ 109 (Wash.) An implied trust in real property may be established by parol.—*Arnold v. Hall*, 129 P. 914.

The rule that it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol refers to such fraud as inheres in the original transaction.—*Id.*

**III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.**

§ 156 (Colo.) Will construed, and *held*, that the testator intended to impose certain trust duties on his executors who were to continue to serve as such until final distribution of the estate, and not as designating the executors personally as trustees of the trust created in the will.—*Tuckerman v. Currier*, 129 P. 210.

Where one is expressly named as executor and trustee, the revocation of his appointment as executor will not necessarily terminate his appointment as trustee, but otherwise, if he is named as executor and trust duties are attached by the will to his duties as executor.—*Id.*

The executors and their successors as such may hold and administer testamentary trusts, either ex officio or by virtue of their office.—*Id.*

Where a testator indicated that his executors should act as such until the will was fully executed, it would not be presumed that they became trustees as to the further administration of the estate after the full performance of their ordinary duties as executors.—*Id.*

§ 169 (Colo.) A testator, having imposed trust duties on his executors, was authorized to provide a plan for the selection of their successors.—*Tuckerman v. Currier*, 129 P. 210.

**IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.**

§ 182 (Kan.) Under a contract between joint purchasers of merchandise, store furniture, and fixtures to apply the net proceeds from sales from the stock and all other goods put into the stock toward the payment of notes for the price, and appointing a trustee to receive the moneys coming from the sales, the trustee is not vested with the right of possession of the property or given a lien thereon.—*Ellis v. Woodruff*, 129 P. 1193.

**TURNPIKES AND TOLL ROADS.****I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 9 (Cal.) The only power to grant franchises to take tolls on a free public highway is that conferred on boards of supervisors under certain circumstances by Pol. Code, § 4041, subd. 33.—*Gardella v. Amador County*, 129 P. 993.

**UNDISCLOSED AGENCY.**

See Principal and Agent, § 143.

**UNDUE INFLUENCE.**

See Wills, §§ 155-166, 384.

**UNITED STATES.**

See Courts, § 489; Indians; Patents; Public Lands.

**II. PROPERTY, CONTRACTS, AND LIABILITIES.**

§ 67 (Idaho) Where defendant surety company on the bond of contractors for irrigation work of the government on nonperformance by the contractors took over the work, together with the contractors' plant and property, and a sum paid

by the government on the contract, assuming the contractors' indebtedness, it was liable to plaintiff for supplies and material previously furnished to the contractors.—*Beymer v. Monarch*, 129 P. 919.

## UNITED STATES COMMISSIONERS.

See Exemptions, § 119.

§ 5 (Okla.) Under Manuf. Dig. §§ 4016-4018 (Ind. T. Ann. St. 1899, §§ 2696-2698), providing for election of justices of the peace, and Act March 1, 1895, § 4, a United States commissioner in Indian Territory was not authorized to sit as justice of the peace outside his township or district.—*Hocker v. Carroll*, 129 P. 56.

## USE AND OCCUPATION.

See Mortgages, § 190.

## USURY.

See Mortgages, § 608½.

## UTTERING.

See Forgery, §§ 16, 44.

## VACATION.

See Judgment, §§ 212, 354, 385; Justices of the Peace, § 127.

## VALUE.

See Bailment, § 31; Carriers, § 229; Eminent Domain, § 181; Evidence, §§ 113, 142, 474, 524, 543; Fraud, § 11.

## VARIANCE.

See Pleading, §§ 387, 388.

## VENDOR AND PURCHASER.

See Brokers; Estoppel, § 93; Fraud, § 58; Frauds, Statute of, § 56; Guaranty, § 24; Guardian and Ward, § 174; Husband and Wife, § 149; Mines and Minerals, § 55; Mortgages, § 277; Sales; Schools and School Districts, § 65; Specific Performance; Taxation, §§ 679, 697, 708.

### I. REQUISITES AND VALIDITY OF CONTRACT.

§ 18 (Utah) The parties to an option agreement for the sale and purchase of land, by signing and delivering the agreement, thereby accepted its provisions and conditions.—*Cummings v. Nielson*, 129 P. 619.

§ 36 (Cal.App.) False statements by a vendor as to the value of similar property in the vicinity made to induce vendee to purchase in connection with vendor's procuring another to make a sham offer for the property at an exorbitant value in plaintiff's presence held such fraudulent misrepresentations as to entitle vendee to rescind and recover the purchase price.—*Winkler v. Jerrue*, 129 P. 804.

### II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 54 (Wash.) The holder of an option to purchase real property, who has fully executed the contract by payment of the purchase price, although receiving no deed therefor, becomes vested with the equitable title to the land, such title relating back to the date of the option.—*Crowley v. Byrne*, 129 P. 113.

§ 57 (Utah) Where an option contract to purchase land is silent as to the time when the purchaser must exercise the option, the law implies that it shall be exercised within a reasonable time.—*Cummings v. Nielson*, 129 P. 619.

§ 75 (Cal.App.) Under Civ. Code, § 1637, providing that, if an act be in its nature capable of being done instantly, it must be immediately performed upon the thing to be done being exactly ascertained, where a contract to convey specified no time for making deferred payments, they were to be deemed payable upon delivery of the deed.—*Winkler v. Jerrue*, 129 P. 804.

§ 78 (Kan.) Where time is not of the essence of a contract to convey land, but is made essential by performance or tender of one party and a demand on the other, a reasonable time must be given for compliance with the demand.—*Nason v. Patten*, 129 P. 138.

§ 78 (Or.) Time was of the essence of an offer to sell land to a certain purchaser, providing he accepted the proposal within a time stated.—*Sorenson v. Smith*, 129 P. 757.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (B) Rescission by Vendor.

§ 102 (Cal.) Where a vendee is in default as to payment, and the vendor is in default because he cannot give a perfect title on account of the existence of a highway over the land, the demanding of possession by the vendor and the surrendering thereof by the vendee amount to rescission of the contract.—*Prentice v. Erskine*, 129 P. 585.

#### (C) Rescission by Purchaser.

§ 116 (Cal.App.) Under Civ. Code, § 1501, providing that objections to the mode of an offer of performance are waived by a creditor if not made when he had the opportunity to make them, a vendor by not demanding rent from the vendee upon rescission by the latter held to have waived a tender of rent as a condition precedent to rescission.—*Winkler v. Jerrue*, 129 P. 804.

§ 119 (Cal.) Where there is a defect in the vendor's title arising out of the existence of a highway, the vendee can rescind, even before the time fixed for conveyance, as the vendor cannot cure the defect.—*Prentice v. Erskine*, 129 P. 585.

### IV. PERFORMANCE OF CONTRACT.

#### (A) Title and Estate of Vendor.

§ 128 (Cal.App.) Every executory contract for the sale of land contains an implied condition that the vendor's title is good, and that he will transfer an unincumbered title.—*Winkler v. Jerrue*, 129 P. 804.

§ 144 (Cal.App.) Where a contract for the sale of land made time of the essence, a tender of the deed by vendor when an action was brought for his breach would not cure his default in refusing to execute a deed when the balance of the price was tendered by vendee.—*McManus v. Patch*, 129 P. 613.

§ 144 (Cal.App.) A vendor who was not required, under the terms of the contract, to convey until tendered the purchase money, had until then to acquire a good title such as he contracted to convey.—*Winkler v. Jerrue*, 129 P. 804.

#### (D) Payment of Purchase Money.

§ 170 (Cal.App.) In view of Civ. Code, § 1501, providing that objections to an offer of performance not made at the time are waived, any informality in the tender of the purchase price by a vendee was waived where no objection was taken at the time by vendor as to the form or sufficiency of the tender.—*McManus v. Patch*, 129 P. 613.

§ 187 (Cal.) Where a vendor of land under a time contract takes back possession, he waives his right to further payments.—*Prentice v. Erskine*, 129 P. 585.

## V. RIGHTS AND LIABILITIES OF PARTIES.

### (A) As to Each Other.

§ 189 (Idaho) In an action to foreclose a vendor's lien on real estate, a grantee cannot be heard to maintain that the conveyance under which his grantor claimed was a mortgage and not a deed, and that it did not pass title.—*Smith v. Schultz*, 129 P. 640.

§ 196 (Okla.) Where a written contract for the sale of property reserves its use and possession to the vendor until the price is paid, in the absence of stipulation or subsequent agreement the vendee is not entitled to the rents until he has fulfilled his contract.—*Tucker v. McLaughlin-Farrar Co.*, 129 P. 5.

### (B) As to Third Persons in General.

§ 212 (Wash.) The holder of an option to purchase real property, who has fully executed the contract by payment of the purchase price, although receiving no deed therefor becomes vested with the equitable title to the land as against the vendor and his grantees with notice; such title relating back to the date of the option.—*Crowley v. Byrne*, 129 P. 113.

### (C) Bona Fide Purchasers.

§ 228 (Wash.) The holder of an option contract for the purchase of real property has such an interest in the land as will protect him against subsequent purchasers from the vendor with notice thereof.—*Crowley v. Byrne*, 129 P. 113.

§ 229 (Or.) A stockholder of a corporation in purchasing land from it held not charged with notice of fraud perpetrated by the corporation's president in acquiring title.—*Clark v. Latourette*, 129 P. 1043.

§ 229 (Wash.) Where a deed was ambiguous as to whether it conveyed the whole or only a one-half interest in two lots, a subsequent purchaser from the grantor's administrator was not bound to take notice of the grantee's payment of the taxes on the whole tract as bearing on the proper construction.—*Golden v. Pilchuck Tribe No. 42, Improved Order of Redmen*, 129 P. 93.

The payment of taxes on the whole tract of land by one of two joint owners is not notice to strangers that the one paying the taxes claims title to the whole, nor that the co-owner is acquiescing in such claim.—*Id.*

§ 230 (Wash.) As against a subsequent purchaser from a grantor, extrinsic circumstances can be considered in determining the meaning of ambiguous language in a deed only in so far as he was bound to take notice thereof at the time of his purchase.—*Golden v. Pilchuck Tribe No. 42, Improved Order of Redmen*, 129 P. 93.

In conveyance by grantor of "his one-half undivided interest" in four lots and two other lots, the quoted words could not be construed as limited in their application to the four lots, although the grantor owned the whole of the other two lots, and hence a subsequent purchaser was not chargeable with notice that such was the intent and meaning of the parties to the conveyance.—*Id.*

§ 231 (Cal.) Record of a lease is not constructive notice, where title of the lessor is not recorded.—*Standard Oil Co. v. Slye*, 129 P. 589.

## VI. REMEDIES OF VENDOR.

### (A) Lien and Recovery of Land.

§ 265 (Idaho) Where the purchaser of real estate is notified that the land has not been paid for in full, he is chargeable with notice that the vendor of his vendor has a lien for the balance of his price.—*Smith v. Schultz*, 129 P. 640.

That a purchaser of land has paid a mortgage assumed as part of the price does not entitle

him, on foreclosure of the lien of the vendor of his vendor, to reimbursement of the amount so paid before satisfaction of the lien.—*Id.*

§ 266 (Idaho) Where a vendor takes notes for the price executed by the vendee and his wife, the signature of the wife does not constitute such security as will amount to a waiver of the vendor's lien under Rev. Codes, § 3442.—*Smith v. Schultz*, 129 P. 640.

§ 281 (Idaho) Evidence held to support findings and judgment that the purchaser of real estate had notice of the existence of a vendor's lien on the property.—*Smith v. Schultz*, 129 P. 640.

§ 294 (Idaho) In the absence of either statutory or contract provision for attorney's fees, the vendor of land is not entitled on the foreclosure of his lien to recover such fee.—*Smith v. Schultz*, 129 P. 640.

## VII. REMEDIES OF PURCHASER.

### (A) Recovery of Purchase Money Paid.

§ 334 (Cal.App.) Where the vendee tendered the balance of the price within the prescribed time, and demanded a deed upon the vendor's failure to convey, the vendee may, upon promptly rescinding demand repayment of the part of the price paid.—*McManus v. Patch*, 129 P. 613.

§ 334 (Cal.App.) Notice by a vendor to a vendee in default, informing him that his rights under the contract were at an end, held a forfeiture, and not a rescission, and hence does not require the vendor to return any part of the price paid.—*List v. Moore*, 129 P. 962.

§ 334 (Kan.) While, as a general rule, a purchaser, who, without fault of the vendor, has failed to fulfill the contract, cannot recover an advance payment, this rule does not prevail where the contract has been abandoned or rescinded by consent of the party not in default.—*Nason v. Patten*, 129 P. 138.

§ 335 (Cal.App.) The right of a vendor to retain part of the purchase price paid, after the vendee's default, is independent of any express clause in the contract for forfeiture or retention of the purchase money as liquidated damages.—*List v. Moore*, 129 P. 962.

It is only where the vendor after the vendee's default agrees to a mutual rescission that the vendee is entitled to a return of the purchase money paid.—*Id.*

§ 339 (Cal.App.) Where vendor does not have title; or his title is defective, at the time fixed for conveyance, the purchaser may treat the contract as rescinded, and recover the purchase price paid without offering to prove performance on his part.—*McManus v. Patch*, 129 P. 613.

§ 339 (Cal.App.) An offer by the vendee to restore everything of value received under a contract for the purchase of land and a tender of possession made the rescission of the contract complete, so as to entitle the vendee to sue to recover the purchase price paid thereunder.—*Winkler v. Jerrue*, 129 P. 804.

## VENIRE.

See Jury, § 70.

## VENUE.

See Appeal and Error, § 882; Contempt, § 45; Criminal Law, § 100; Mortgages, § 422.

## II. DOMICILE OR RESIDENCE OF PARTIES.

§ 32 (Cal.) Right to have action in claim and delivery tried in county where defendant resides, under Code Civ. Proc. § 395, held waived unless properly asserted.—*Bohn v. Bohn*, 129 P. 981.



### III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 58 (Cal.) Motion for change of venue under Code Civ. Proc. § 397, *held* necessary, notwithstanding provisions of section 396, requiring an affidavit of merits and a written demand for change.—*Bohn v. Bohn*, 129 P. 981.

§ 63 (Cal.) A motion to change the place of trial of an action in claim and delivery to the county where defendant resided at the commencement of the action must be on notice to the adverse party.—*Bohn v. Bohn*, 129 P. 981.

Motion for change of venue, not stating when it would be brought on for hearing, *held* insufficient as notice of motion under Code Civ. Proc. § 1010.—*Id.*

### VERDICT.

See Criminal Law, §§ 893, 1160; Pleading, § 438; Trial, §§ 143, 178, 340-359.

### VESTED RIGHTS.

See Constitutional Law, § 186.

### VIEW.

See Eminent Domain, § 220.

### WAIVER.

See Appeal and Error, § 1078; Contempt, § 63; Contracts, §§ 305, 322; Criminal Law, §§ 101, 575, 576, 868, 1026, 1178; Election of Remedies, § 3; Executors and Administrators, §§ 19, 185, 222; Insurance, §§ 372, 392, 646; Jury, § 14; Justices of the Peace, §§ 159, 164; Master and Servant, § 80; Mechanics' Liens, §§ 99, 207; Motions, § 23; Pleading, §§ 407-422; Sales, § 477; Vendor and Purchaser, §§ 170, 187, 266; Venue, § 32; Waters and Water Courses, § 152; Witnesses, §§ 219, 305.

### WALLS.

See Party Walls.

### WAR.

See Appeal and Error, § 1024.

### WARNING.

See Master and Servant, §§ 153, 158.

### WARRANT.

See Arrest, § 63; Constitutional Law, § 42; Criminal Law, § 218.

### WASTE.

See Action, § 45; Executors and Administrators, § 35.

### WATERS AND WATER COURSES.

See Constitutional Law, § 33; Contracts, § 123; Eminent Domain, §§ 28, 29, 74, 279; Estoppel, § 3; Judgment, §§ 228, 719; Jury, § 14; Mechanics' Liens, §§ 33, 231; Municipal Corporations, §§ 231, 835, 845, 864; Specific Performance, §§ 28, 121; States, § 114; Stipulations.

### I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

§ 3 (Colo.) The waters of the natural streams in the state are, as declared in Const. art. 16, § 5, the property of the state; and its right to their distribution and control within its borders is free from interference by any other sovereignty.—*Stockman v. Leddy*, 129 P. 220.

§ 19 (Colo.App.) A senior appropriator, though entitled to a large flow of water to irrigate a small area lying so close to the stream that the water will return, cannot as against junior

appropriators divert that same amount of water at another point to irrigate lands lying so far from the stream that it cannot return.—*Larimer County Canal No. 2 Irrigating Co. v. Poudre Valley Reservoir Co.*, 129 P. 248.

§ 24 (Colo.App.) Where a judgment is rendered fixing the amount of water appropriators may divert, the amount of diversion is to be construed with the land to be irrigated, and though an appropriator is decreed the right to take a large flow of water, he cannot take more than is reasonably necessary to irrigate his land.—*Larimer County Canal No. 2 Irrigating Co. v. Poudre Valley Reservoir Co.*, 129 P. 248.

§ 32 (Colo.App.) To constitute abandonment of water rights, both act and intention must be shown.—*Central Trust Co. v. Culver*, 129 P. 253.

§ 33 (Colo.App.) In proceedings to change the place of diversion of water, evidence *held* sufficient to establish petitioner's ownership of the water sought to be changed.—*Larimer County Canal No. 2 Irrigating Co. v. Poudre Valley Reservoir Co.*, 129 P. 248.

While, in a proceeding for a change of the point of diversion of water already appropriated, there can be no order granting an enlarged use, yet the amount of water which may be appropriated may be determined; the parties not being required to seek relief in subsequent actions.—*Id.*

§ 33 (Colo.App.) The question of abandonment of a water right is one of fact to be determined by the judge or jury.—*Central Trust Co. v. Culver*, 129 P. 253.

The burden of proving an abandonment of a water right is on the one asserting it.—*Id.*

Under the issue of abandonment of water rights, if there be sufficient evidence tending to establish nonuser subsequent to a decree declaring that there was no abandonment, evidence thereof and of similar acts of the owner prior to the decree, is admissible to show intent thereafter in not using what was awarded by the decree.—*Id.*

In statutory proceedings for the adjudication of priorities and appropriations of water, the district court can only determine priorities of the several ditches and amount of water awarded thereto, but not the ownership or property rights in the ditches.—*Id.*

### VI. APPROPRIATION AND PRESCRIPTION.

§ 130 (Mont.) Defendants are entitled to the exclusive use for any purpose of a new supply of water developed or collected from lands forming no part of the source of the flow into the brook to which another is entitled; the burden being on defendants to show that the supply developed was new, and its amount.—*Spaulding v. Stone*, 129 P. 327.

§ 151 (Colo.) The abandonment of the right to divert and use the water of a stream may be effected by a plain declaration, or by inference from acts or omissions inconsistent with an intention to retain the right.—*Green Valley Ditch Co. v. Frantz*, 129 P. 1006.

An individual or corporation not asserting a water right, and not attempting to control or apply it to a beneficial use for 18 or 20 years, and allowing diversion and beneficial use by others, *held* in the absence of excuse, not entitled to thereafter claim a prior appropriation.—*Id.*

§ 152 (Colo.) On facts appearing in an action to quiet title to an irrigation ditch, with affirmative claim by defendants to an interest therein, *held*, that defendants' predecessors in interest had waived their prior appropriation without intention of resuming it, so as to constitute an abandonment.—*Green Valley Ditch Co. v. Frantz*, 129 P. 1006.

A decree for plaintiff, in an action to quiet title to an irrigation ditch and its appropriation therefrom, should be limited to the amount

therefore actually carried through the ditch and applied to a beneficial use, making the necessary allowance for seepage and evaporation.—*Id.*

§ 152 (Mont.) If an owner's original appropriation of water did not include a greater amount than that awarded him by the court without condition, he was only entitled to that amount, irrespective of whether his land required a greater or less amount per acre.—*Spaulding v. Stone*, 129 P. 327.

Evidence, in an action by a prior appropriator of the waters of a brook to have his prior right adjudged and to enjoin defendants' use thereof, *held* not to sustain a finding that defendants by constructing their ditch increased the natural flow of the brook.—*Id.*

A riparian owner entitled to the waters of a brook for irrigation by priority of appropriation need not make a demand upon defendants for the use of such waters; defendants not disputing his right.—*Id.*

§ 152 (Mont.) Under Rev. Codes, § 4842, forbidding a proprietor of water to change the point of diversion to the prejudice of other proprietors, any such change will not be presumed prejudicial, but the burden is on the party claiming prejudice thereby to show it.—*Lokowich v. City of Helena*, 129 P. 1063.

## VII. CONVEYANCES AND CONTRACTS.

§ 154 (Cal.) Under Civ. Code, § 1104, providing that a transfer passes all easements, and creates an easement in the other land of the grantor for such use thereof as the grantor used the same for the benefit of the land conveyed, the grantee of a part of land containing a drainage system applying to all of the land succeeded to the right to go on the other land to maintain a levee, etc., though such easements are not mentioned in section 801, enumerating servitudes.—*Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593.

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 179 (Kan.) In an action against a city overflowing lands by the construction of a canal, evidence *held* to sustain verdict for defendant.—*Adams v. City of Wichita*, 129 P. 1163.

## IX. PUBLIC WATER SUPPLY.

### (A) Domestic and Municipal Purposes.

§ 203 (Idaho) When a city acquires its own water system and engages in selling water to its inhabitants, it becomes subject to the same obligations as an individual, and to have the rates regulated in the manner prescribed by law.—*Feil v. City of Cœur d'Alene*, 129 P. 643.

A water rate, sufficiently high to pay running expenses, improvements, and repairs, 6 per cent. on the value of the plant, and the purchase price in 20 years, was unreasonable.—*Id.*

### (B) Irrigation and Other Agricultural Purposes.

§ 225 (Or.) Under L. O. L. § 6168, relating to the organization of irrigation districts, as amended by Sess. Laws 1911, p. 380, making the court's determination as to the petition and its publication conclusive, *held*, that an order of the county court, complete as to such matters, was *prima facie* sufficient to establish the facts stated.—*Board of Directors of Payette-Oregon Slope Irr. Dist. v. Peterson*, 129 P. 123.

## WAYS.

See Eminent Domain; Highways.

## WILLS.

See Appeal and Error, § 1056; Contracts, § 75; Descent and Distribution; Executors and Administrators; Indians, § 15; Life Estates, § 15; Specific Performance, §§ 25, 49; Statutes § 82.

## II. TESTAMENTARY CAPACITY.

§ 47 (Cal.) A will will not be set aside merely because the testator was a man of advanced years, whose sight was failing.—*In re Packer's Estate*, 129 P. 778.

§ 55 (Cal.) Testimony of eccentric acts by a testator *held* too trivial to show lack of testamentary capacity.—*In re Packer's Estate*, 129 P. 778.

Testimony tending to show that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, was insufficient to show want of testamentary capacity.—*Id.*

In an action to revoke the probate of a will, evidence *held* insufficient to show want of testamentary capacity.—*Id.*

## III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 58 (Cal.) An agreement to rear and educate, in a suitable manner, two children from an orphan's home, and to treat them in all respects as their own, *held* not an agreement to will property to the children.—*Baumann v. Kusian*, 129 P. 986.

§ 67 (Kan.) Where, before land of a widow could be occupied under an agreement for her maintenance and its conveyance at her death, she died, and the other party had for a few weeks cared for her and paid medical and funeral expenses, though he might recover from her estate for his services and expenses, his grantee is not entitled to the land.—*Glover v. Fillmore*, 129 P. 144.

## IV. REQUISITES AND VALIDITY.

### (A) Nature and Essentials of Testamentary Dispositions.

§ 82 (Cal.) A will cannot be set aside merely because its dispositions do not conform to the jurors' notions of justice or propriety.—*In re Packer's Estate*, 129 P. 778.

Will of testator whose wife was suffering from an incurable disease, and whose heirs were nephews and nieces, devising bulk of property to one nephew and a person which he had treated as a son, *held* neither unnatural nor unjust.—*Id.*

§ 88 (Kan.) An agreement by a widow to furnish land for joint use and occupancy for herself and another, she to have the use of her house and he to cultivate the land, pay the taxes, and maintain her, and upon her death the property to go to him, was executory and testamentary in character, vesting no present title.—*Glover v. Fillmore*, 129 P. 144.

### (F) Mistake, Undue Influence, and Fraud.

§ 155 (Cal.) To render a will invalid because of undue influence, it must have been executed by the testator under pressure which destroyed his free agency.—*In re Packer's Estate*, 129 P. 778.

§ 163 (Cal.) That a will makes provision for one occupying a fiduciary relation to the testator does not raise a presumption of undue influence, or throw the burden on him of disproving undue influence, unless he took some part in making the will.—*In re Packer's Estate*, 129 P. 778.

§ 166 (Cal.) Testimony that a person charged with undue influence was in the house shortly after the will had been executed was insufficient

to show that he was present when the will was made.—In re Packer's Estate, 129 P. 778.

## V. PROBATE, ESTABLISHMENT, AND ANNULLMENT.

### (A) Probate and Revocation in General.

§ 215 (Okl.) In a proceeding to probate a will, the court has no jurisdiction to construe the will, determine the rights of the parties or the validity of a devise therein.—Nesbit v. Gragg, 129 P. 705.

### (G) Petitions, Objections, and Pleadings.

§ 277 (Cal.) Under Code Civ. Proc. §§ 1306-1308, 1312, providing for the hearing of petitions for the probate of wills and the filing of contests, a contest initiated after the time originally appointed for the hearing, but before the hour to which it has been postponed and the will probated, is in time.—In re Mollenkopf's Estate, 129 P. 997.

Where the court at the time fixed for the hearing of the petition for the probate of a will took the testimony of witnesses for their convenience without prejudice to the rights of a contestant, and then adjourned the hearing to a subsequent hour, a contest filed before such hour was in time.—Id.

### (H) Hearing or Trial.

§ 309 (Okl.) In proceedings for the probate of a will under Mansf. Dig. Ark. § 6521 (Ind. T. Ann. St. 1899, § 3593), the only issue triable is the factum of the will or the question of devisavit vel non.—Nesbit v. Gragg, 129 P. 705.

### (K) Review.

§ 384 (Cal.) In a will contest, where there was no evidence showing an exercise of undue influence, the exclusion of testimony that those charged with exercising it entertained feelings of hostility toward the contestants, if erroneous, was harmless.—In re Packer's Estate, 129 P. 778.

§ 384 (Cal.) The disregard of a contest of a will before probate initiated in time is prejudicial to contestant, though he may institute a new contest within a year after probate.—In re Mollenkopf's Estate, 129 P. 997.

## VI. CONSTRUCTION.

### (A) General Rules.

§ 439 (Colo.) The intent of testator, derived primarily from the will itself, will be given effect if it is not contrary to some positive rule of law or against public policy.—Tuckerman v. Currier, 129 P. 210.

§ 487 (Utah) Intention of testatrix in providing for an equal division between son and daughter, except so far as sums had been or should be set off against their interests, held, in the light of parol evidence, to be that a sum given to the son and not repaid should be taken out of his share.—In re Pickard's Estate, 129 P. 353.

§ 488 (Utah) Will providing for equal distribution except so far as sums had been or should be set off against the interests of the legatees held, in view of the ambiguity, to justify parol evidence of an advancement to a son under an agreement for repayment or, if not repaid, that it should constitute an advancement.—In re Pickard's Estate, 129 P. 353.

### (E) Nature of Estates and Interests Created.

§ 605 (Kan.) Where testator created certain estates tail in his children and then devised the reversion to his children surviving him, share and share alike, one of the devisees dying subsequent to testator, without issue, took an undivided interest in the reversion expectant, which interest, on her death, passed to her husband.—Ewing v. Nesbitt, 129 P. 1131.

### (F) Vested or Contingent Estates and Interests.

§ 629 (Or.) A legacy or an interest created by devise should always be construed as vested rather than contingent.—Stevens v. Carroll, 129 P. 1044.

§ 630 (Or.) Where a testator devised his real property to his wife for life, directing that on her death a portion of the proceeds thereof should be paid to his daughter as a legacy, the interest of the daughter vested immediately upon the death of the testator.—Stevens v. Carroll, 129 P. 1044.

## VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

### (A) Nature of Title and Rights in General.

§ 728 (Colo.) Under a will giving the residue in trust to invest and distribute the total net income and "increment" to certain beneficiaries so as to avoid accumulation, the beneficiaries were entitled to the increment of the estate, if any, when considered in solido.—Tuckerman v. Currier, 129 P. 210.

### (C) Advancements, Ademption, Satisfaction, and Lapse.

§ 759 (Utah) Application of Comp. Laws 1907, §§ 2801, 2841, 2842, 2843, relative to advancements, held immaterial where the testatrix had provided for an equal distribution, except so far as sums had been or should be set off against the interest to which either of the legatees would be entitled.—In re Pickard's Estate, 129 P. 353.

Where testatrix provided for equal division between son and daughter, except so far as sums had been or should be set off against their interests, it was immaterial whether a sum advanced to the son was a loan or a gift by way of advancement, as in either case it would be deducted from his share.—Id.

## WITNESSES.

See Appeal and Error, § 1010; Costs, § 184; Criminal Law, §§ 507, 511, 662, 742, 743, 786; Evidence; Jury, § 34; Perjury.

## I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 2 (Okl. Cr. App.) A person accused of contempt committed out of the presence of the court or judge is entitled to have compulsory process for obtaining witnesses in his behalf, as guaranteed by Const. art. 2, § 20.—Nichols v. State, 129 P. 673.

## II. COMPETENCY.

### (A) Capacity and Qualifications in General.

§ 52 (Okl.) Under Comp. Laws 1909, § 5842, subd. 3, providing that husband and wife are incompetent to testify for or against each other, with certain exceptions the fact that defendant's wife was not married to him at the time the transaction occurred, in which she was not jointly interested and did not act as defendant's agent, did not qualify her.—Sands v. David Bradley & Co., 129 P. 732.

§ 56 (Okl.) Where a husband accompanies his wife to hear a conversation between her and a third person, he is not acting as her agent in such sense as to make him competent as a witness, where she is a party, within Comp. Laws 1909, § 5842, relating to the competency of husband and wife as witnesses for or against each other.—Fish v. Bloodworth, 129 P. 32.

### (B) Parties and Persons Interested in Event.

§ 102 (Kan.) That purchases of liquors were made by persons seeking to ascertain if the seller was engaged in the unlawful sale thereof does not render the testimony of such purchasers incompetent.—State v. Spiker, 129 P. 195.

(C) **Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 139 (Okl.) Under Comp. Laws 1909, § 5841, it is error to permit a witness to testify as to a conversation with deceased, where witness acquired title or cause of action immediately from such deceased.—*American Trust Co. v. Chitty*, 129 P. 51.

§ 159 (Kan.) In a suit by a husband to quiet title to property of his deceased wife against her children, both parties claiming to inherit from her, he is prohibited by Code Civ. Proc. § 320 (Gen. St. 1909, § 5914) from testifying to transactions and communications had personally with her.—*Dennis v. Perkins*, 129 P. 165.

(D) **Confidential Relations and Privileged Communications.**

§ 215 (Colo.) A statement, voluntarily made by accused to the chief of police at an interview brought about by a Methodist minister who had visited the accused, was not inadmissible as a privileged communication to a spiritual adviser, where it was not shown that accused was a Methodist, or that the minister was his spiritual adviser.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 219 (Or.) Plaintiff, having testified to her physical condition, waived her right to object to the competency of a physician who examined her to testify on the same subject as a witness for defendant, under L. O. L. §§ 733, 734, providing that a party offering himself as a witness thereby consents to the examination of his physician.—*Forrest v. Portland Ry., Light & Power Co.*, 129 P. 1048.

§ 220 (Okl.) In an action in conversion, where conspiracy is charged, it is not error to permit an attorney to testify that he had advised one of the defendants that an abstract of title showed defective title, for the purpose of showing notice of bad title; no objection being made that the conversation was privileged.—*American Trust Co. v. Chitty*, 129 P. 51.

### III. EXAMINATION.

(A) **Taking Testimony in General.**

§ 236 (Cal.App.) Where defendant testified that some things testified to by plaintiff occurred and some did not, his counsel should not have asked him the general question, "What part did and what part didn't?"—*Doudell v. Shoo*, 129 P. 478.

§ 240 (Cal.App.) The allowance of leading questions rests largely in the discretion of the trial court.—*People v. Anthony*, 129 P. 968.

§ 245 (Cal.App.) Where a question was asked and answered in a manner which indicated that no different answer could probably be given to the same question, it was not error to sustain an objection to a repetition of the question.—*Doudell v. Shoo*, 129 P. 478.

§ 257 (Cal.) Although adverse party under Code Civ. Proc. § 2047, may read to the jury letters used by witness to refresh recollection, the party calling him cannot, nor can he, examine the witness concerning their contents.—*In re Packer's Estate*, 129 P. 778.

§ 257 (Mont.) Under Rev. Codes, §§ 8060, 8061, a book of entries cannot itself be introduced; section 8020 providing for the use of such book to refresh the testimony of a witness, or permitting him to testify directly therefrom.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

§ 258 (Mont.) Under Rev. Codes, § 8020, providing for the refreshing of a witness' memory, or for testifying directly from writings, a witness cannot testify from a writing until it is qualified, and is shown to come within the purview of the statute.—*Marron v. Great Northern Ry. Co.*, 129 P. 1055.

(B) **Cross-Examination and Re-Examination.**

§ 268 (Okl.) In a personal injury case, the plaintiff, on cross-examination, should be required to answer the question whether he is willing to submit to a physical examination by reputable physicians, acting under the appointment of the court.—*Chicago, R. I. & P. Ry. Co. v. Hill*, 129 P. 13.

§ 269 (Colo.) In a prosecution for homicide of a wife, it was proper to refuse to permit questions asked of the husband, who was not connected with the killing, on cross-examination to show ill feeling between himself and his wife and an intent to kill her, not being germane to anything testified to in chief.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 269 (Kan.) On the cross-examination of defendant in a prosecution for burglary, evidence as to a note made by him several years previously, and his letter promising payment was not admissible, where nothing in his testimony in chief referred thereto.—*State v. Hoerr*, 129 P. 153.

§ 275 (Cal.) In an action for services rendered, where plaintiff on direct examination testified that he had worked for defendant under circumstances from which an obligation on her part to pay for such services could be implied, cross-examination as to his sexual relations with her was proper.—*Gjurich v. Fieg*, 129 P. 464.

§ 275 (Cal.App.) Where plaintiff testified, on the controverted issue as to whether certain property belonged to a partnership, that he paid the option money for same, defendant should be permitted to cross-examine him thereon.—*Doudell v. Shoo*, 129 P. 478.

§ 277 (Or.) Where a defendant, accused of violating the local option law, testified on direct examination that he was a farm laborer and wood chopper, it was not error to permit the state on cross-examination to elicit that he had several times been employed as a barkeeper.—*State v. Bilyeu*, 129 P. 768.

§ 277 (Wash.) In a prosecution for forgery, where accused denied that he knew of the spurious nature of the instrument, stating that he relied on the statements of a third person, cross-examination as to whether he and the third person had not passed other forged instruments was proper.—*State v. Peeples*, 129 P. 108.

(C) **Privilege of Witness.**

§ 298 (Okl.Cr.App.) The officers of an insolvent state bank cannot disobey, on the ground of the constitutional protection against self-crimination, the order to produce and deliver the books, records, and papers of the bank to the State Bank Commissioner.—*Burnett v. State*, 129 P. 1110.

The privilege against self-crimination afforded by a Bill of Rights, art. 2, § 21, does not protect the officers of an insolvent state bank in resisting production of its books, records, and papers, because such documents may tend to incriminate them.—*Id.*

§ 305 (Nev.) When accused waives his constitutional privileges not to testify, and becomes a witness for himself, he cannot testify to the part of a transaction favorable to himself, and claim his privilege as to the remainder.—*State v. Urie*, 129 P. 305.

### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(C) **Interest and Bias of Witness.**

§ 372 (Okl.Cr.App.) On cross-examination, it is competent to prove any facts showing bias, friendship, or relationship.—*Gilbert v. State*, 129 P. 671.

**(D) Inconsistent Statements by Witness.**

§ 379 (Kan.) Evidence of statements by a witness, offered in rebuttal of his testimony, is admissible.—*State v. Hoerr*, 129 P. 153.

§ 383 (Colo.) Prior statements of a witness as to matters immaterial to the issue cannot be introduced to impeach him.—*Gankyo Mitsunaga v. People*, 129 P. 241.

§ 388 (Cal.App.) Under the express provisions of Code Civ. Proc. § 2052, it could not be shown on cross-examination for impeachment that witness made statements in his testimony at a former trial at variance with his present testimony until the former statements had been related to him with the circumstances, and he had been asked whether he made same, or, if such statements were in writing, until shown to him.—*Doudell v. Shoo*, 129 P. 478.

§ 393 (Kan.) It is competent to contradict a witness by reading a statement from his deposition previously taken after properly calling his attention thereto.—*State v. Hoerr*, 129 P. 153.

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## WORK AND LABOR.

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§ 7 (Cal.) While ordinarily the law implies a promise to pay from the rendition and acceptance of services, the presumption may be rebutted by the existence of meretricious relations between the parties, which raises a presumption to the contrary.—*Gjurich v. Fieg*, 129 P. 464.

§ 27 (Cal.) In an action for work and labor, evidence of the sexual relations between defendant and plaintiff is admissible to rebut the presumption that compensation was intended, arising from the rendition of services.—*Gjurich v. Fieg*, 129 P. 464.

§ 28 (Cal.) In an action for work and services, evidence held sufficient to support a finding for defendant on the ground that no agreement to pay had ever been made.—*Gjurich v. Fieg*, 129 P. 464.

§ 30 (Cal.) In an action for work and labor, where it was contended that the services were rendered without an agreement for compensation, held that the instructions might illustrate relationships from which no agreement for compensation could be drawn.—*Gjurich v. Fieg*, 129 P. 464.

In an action for services, where defendant denied indebtedness and employment, instructions referring to the sexual relations of the parties were proper; such relations being material to that issue.—Id.

In an action for work and labor, where defendant contended that her sexual relations with plaintiff should be considered only in determining whether a claim for wages existed, instructions that sexual favors would not constitute a payment for services was properly refused.—Id.

## WRITS.

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